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SHOWDOWN AT THE OK CORRAL – WYOMING'S CHALLENGE TO U.S. SUPREMACY ON FEDERAL SPLIT ESTATE LANDS

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I. INTRODUCTION

A large portion of Wyoming's lands are "split estates."[1] That is, the minerals are owned by someone other than the surface owner. This split has long created conflicts between the mineral owner's right to develop the minerals and the surface owner's right to use the surface. To ease these conflicts and to foster development of important mineral resources, many states, including Wyoming, created the principle that the mineral estate is the dominant estate; thus, the mineral owner has the right to make reasonable use of the surface estate in order to develop the minerals.[2] Under this principle, the surface owner was not entitled to compensation for damage caused by the mineral development, absent a showing of negligence.[3] In addition to this state common law development, the federal government created mineral estate dominance by expressly reserving the right to enter the surface and remove minerals and specifically delineating liability for development of federal minerals under private surface.

A. Summary of the Stock Raising Homestead Act

In the early 1900s, Congress recognized there were lands remaining in the public domain that could be utilized for stock raising and grazing. However, Congress also understood that the true value of the land was not always in the surface but also in the valuable minerals below the surface.[4] Congress, therefore, created the Stock Raising Homestead Act of 1916 ("SRHA") whereby the United States kept the minerals but transferred surface ownership to individual homesteaders.[5]

Under the SRHA, each homesteader could gain ownership of 640 surface acres.[6] This was a much larger homestead than had been previously granted.[7] Many members in Congress opposed giving such a large grant and wished to reduce the total acreage.[8] In response, supporters emphasized that

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1. *Wyoming, Feds Differ Over Law on Split Estates*, BILLINGS GAZETTE, June 23, 2005, at 1B [hereinafter *Wyoming, Feds Differ Over Law on Split Estates*].
2. *See* Holbrook v. Cont'l Oil Co., 278 P.2d 798 (Wyo. 1955).
3. For a thorough analysis of rights and obligations associated with split estates, *see* Drake D. Hill & P. Jaye Rippley, *The Split Estate: Communication and Education Versus Legislation*, 4 WYO. L. REV. 585 (2004) [hereinafter Hill & Rippley].
4. Hill & Rippley, *supra* note 2, at 597.
5. *Id.*
6. *Id.*
7. *See, e.g.*, Homestead Act, 43 U.S.C. §§ 161-164 (repealed 1976).
8. Rosette Inc. v. United States, 277 F.3d 1222, 1227 (10th Cir. 2002).

the landowner was only receiving a limited right to use the land,[9] because the grant extended to the land itself only insofar as it was valuable for stock-raising purposes while the federal government retained all rights to remove the minerals.[10] Based on these principles, Congress passed the SRHA, allowing the valuable minerals to remain property of the United States but allowing homesteaders to use the surface to raise stock.[11]

The SRHA thus created a split estate situation where the federal government owned the minerals and private individuals own the surface. The SRHA allowed large amounts of surface land to pass from government ownership to private ownership in Wyoming. As a result, for the vast majority of split estate land in Wyoming the split traces to the SRHA: surface lands granted under the SRHA where the federal government owns the minerals make up ninety-two percent of all split estate lands in Wyoming.[12] The federal government owns the mineral rights on 11 million acres of the nearly 12 million acres of split estate lands in Wyoming.[13]

B. Summary of the Split Estates Act

Many surface owners perceive the legal relationship between the surface and mineral estates to unfairly favor the mineral owner.[14] With the recent boom in exploration and extraction of minerals, especially coal bed methane, these surface owners have become increasingly vocal.[15] As a result, the Wyoming Legislature passed the Split Estates Act ("Split Estates Act"), which became effective on July 1, 2005.[16]

This new legislation enacts a fundamental shift in the common law rights of the mineral estate owner by effectively eliminating the mineral developer's right to use the surface without compensating the surface owner. The Split Estates Act now entitles the surface owner to compensation for "loss of production and income, loss of land value and loss of value of improvements caused by oil and gas operations."[17]

The Split Estates Act also sets forth new requirements that must be completed before the mineral developer can access the surface.[18] Mineral developers must now enter a surface use agreement with each surface

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9. *Id.*
10. *See* S. Rep. No. 405, 81st Cong, 1st Sess. 3 (1949).
11. Stock Raising Homestead Act of 1916, 43 U.S.C. § 299 (2000).
12. *Wyoming, Feds Differ Over Law On Split Estates*, *supra* note 1, at 1B.
13. *Id.*
14. *Id.*
15. *Id.*
16. WYO. STAT. ANN. §§ 30-5-401 to -410 (2005).
17. WYO. STAT. ANN. § 30-5-405(a)(i).
18. *Id.* §§ 30-5-402 to -404.

owner.[19] If the parties cannot reach an agreement, the mineral owner may still access the mineral estate via the surface estate but it must first post a bond to cover damages and demonstrate that it provided the required notice and negotiated in good faith with the surface owner.[20]

To further complicate matters, the vast majority of split estate lands in Wyoming involve federally owned mineral estates.[21] The Split Estates Act does not expressly address whether it applies to the removal of these federal minerals, but the Wyoming Oil and Gas Conservation Commission ("WOGCC") has determined that the Split Estates Act applies to all minerals in Wyoming, including those owned by the federal government.[22]

Following that determination, WOGCC proposed rules requiring developers of federal minerals to comply with the Split Estates Act.[23] During the comment period on the rule, several production-industry representatives lodged objections regarding application of this state law to the removal of federal minerals.[24] These representatives asserted that the Split Estates Act cannot apply to federal minerals because it conflicts with applicable federal regulations.[25]

Most significantly, the Director of the Bureau of Land Management ("BLM"), Kathleen Clarke, submitted comments declaring that WOGCC's regulations could not be applied to federal minerals: "In light of the legal concerns posed by the application of W.S. § 30-5-401-410 to federal oil and gas, we believe that the statute and regulations implementing the statute are limited in application to state and private mineral estate."[26] In response to Ms. Clarke's letter, Wyoming Attorney General Pat Crank told Wyoming newspapers: "If the BLM wants to sue us, I think they should do so. I think we would ultimately be successful if they brought such a challenge."[27] Despite the submitted comments, the WOGCC, Governor Dave Freudenthal, and Attorney General Crank maintain that the Split Estates Act applies to federal minerals.[28]

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19. *Id.* § 30-5-402(c)(ii).
20. *Id.* § 30-5-402(c)(iv).
21. Dustin Bleizeffer, *State Stands Behind Split Estate Law*, CASPER STAR-TRIBUNE, July 20, 2005, at B1 [hereinafter Bleizeffer].
22. WYO. STAT. ANN. §§ 30-5-401 to -410 (2005); *Split-estate Law Worries Industry*, CASPER STAR-TRIBUNE, July 11, 2005, at B1 [hereinafter *Split-estate Law Worries Industry*].
23. *Split-estate Law Worries Industry*, *supra* note 22, at B1.
24. *Id.*
25. *Id.*
26. Letter from Kathleen Clarke, Director, United States Bureau of Land Management, to Don J. Likwartz, Wyoming Oil and Gas Supervisor (June 13, 2005) (on file with the Wyoming Oil and Gas Conservation Commission).
27. *Wyoming, Feds Differ Over Law On Split Estates*, *supra* note 1, at 1B.
28. Bleizeffer, *supra* note 21, at B1; *Wyoming, Feds Differ Over Law On Split Estates*, *supra* note 1, at 1B.

This article introduces the preemption problems raised if the Split Estates Act is applied to federal minerals, discusses the legal implications of the Act, and concludes that the Split Estates Act cannot properly apply to federal minerals.

II. PREEMPTION

The United States Constitution provides that federal laws preempt conflicting state laws: "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."[29] A federal law will preempt a conflicting state law "to the extent that state law actually conflicts with federal law."[30]

A. The federal government, not the state, has the primary power to regulate federally owned mineral

The United States Constitution gives the federal government "the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States . . . ."[31] Thus, the Constitution expressly gives the federal government the authority to create rules and regulations respecting federal property, such as federally owned minerals. There can be little doubt that the SRHA and the federal rules and regulations passed to implement it fall within the powers of the federal government.[32]

However, "the Property Clause alone does not withdraw federal land within a State from the jurisdiction of the State . . . . The Property Clause simply empowers Congress to exercise jurisdiction over federal land within a State if Congress so chooses."[33] States retain at least some power to regulate federal property and the removal of federal minerals but "[s]tate jurisdiction over federal lands does not extend to any matter that is not consistent with the full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights to them."[34]

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29. U.S. CONST. art. VI, cl. 2.
30. Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1240 (10th Cir. 2004).
31. U.S. CONST. art. IV, § 3, cl. 2.
32. *See* Kleppe v. New Mexico, 426 U.S. 529 (1976).
33. Wyoming v. United States, 279 F.3d 1214, 1226-27 (10th Cir. 2002) (citations omitted).
34. *Wyoming*, 279 F.3d at 1227 (citation omitted).

B. *Any state regulation that interferes with the full purpose and objectives of federal law will be preempted*

There are examples of state regulations that successfully coexist with federal regulations but when a state regulation conflicts with the full purposes and objectives of the federal law, that state regulation is preempted.[35]

In *Wyoming v. United States*, Wyoming argued that it had the inherent right to control, regulate, and manage wildlife within its borders.[36] Wyoming wanted to use this authority to vaccinate elk on the National Elk Refuge, but the federal government would not allow Wyoming to vaccinate these elk.[37] The State then brought a declaratory judgment action against the federal government.[38] The Tenth Circuit determined that jurisdiction over federal lands, as an enumerated power of the federal government, could not be usurped by the states: "If Congress so chooses, federal legislation, together with the policies and objectives encompassed therein, necessarily override and preempt conflicting state laws, policies, and objectives under the Constitution's Supremacy Clause."[39] Wyoming was not allowed to vaccinate the elk on the National Elk Refuge because the federal agency acted within the scope of its statutory authority; any state law to the contrary was preempted.[40] *Wyoming v. United States* demonstrates that even areas of traditional state domain will be preempted if state rules conflict with federal rules created under the Property Clause.

Similarly, in *Ventura County v. Gulf Oil Corp.*, the U.S. Department of the Interior leased national forest property, located within Ventura County, to a predecessor of Gulf Oil under the authority of the Mineral Lands Leasing Act.[41] Ventura County required Gulf Oil to obtain a special permit because of the county's zoning restrictions.[42] The Ninth Circuit determined the zoning and permit requirements were preempted by federal law: "The federal government has authorized a specific use of federal lands, and [the State] cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress."[43] "The states and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a congressionally approved use of federal

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35. *Id.*
36. Wyoming v. United States, 279 F.3d 1214, 1226-27 (10th Cir. 2002).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1227-35.
41. Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1082 (9th Cir. 1979), *aff'd*, 444 U.S. 1010 (1980).
42. *Ventura County*, 601 F.2d at 1082.
43. *Id.* at 1084.

lands . . . ."[44] The Ninth Circuit opinion was later affirmed by the U.S. Supreme Court without a written decision.[45]

A mere seven years later, the Supreme Court reached a seemingly different conclusion in *California Coastal Commission v. Granite Rock Co.*[46] Proponents of applying the Split Estates Act to federal minerals will undoubtedly rely on *Granite Rock* to support this regulation, but a close reading of *Granite Rock* reveals it is consistent with *Wyoming* and *Ventura County.*

In *Granite Rock*, Granite Rock had applied for and received a permit from the U.S. Forest Service to begin mining operations on federal lands, but California required Granite Rock to obtain an additional permit from the California Coastal Commission.[47] Granite Rock refused to even apply for a permit; instead, it sought a court declaration that the California regulations were preempted by the federal regulations.[48] In a 5-4 opinion, the court held that Granite Rock's challenge was too broad to support preemption:

> Granite Rock argued that any state permit requirement, whatever its conditions, was *per se* pre-empted by federal law.
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> . . . "[I]n view of the Property Clause, as well as common sense, federal authority must control . . . ." [but] state law is pre-empted only when it conflicts with the operations or objectives of federal law or when Congress "evidences an intent to occupy a given field. . . ."
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> . . . [W]e hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law.[49]

While *Granite Rock* allowed dual state and federal regulation to stand in theory, the principle espoused by the Supreme Court is the same as that set forth by *Ventura County* and *Wyoming v. United States.* That is, "federal legislation necessarily overrides conflicting state laws under the Supremacy Clause"[50] and any state law will be preempted "where the state

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44. *Id.* at 1086.
45. Ventura County v. Gulf Oil Corp., 444 U.S. 1010 (1980).
46. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).
47. *Id.* at 575.
48. *Id.* at 577.
49. *Id.* at 593-94 (citations omitted).
50. *Id.* at 580-81 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)).

law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[51]

C. The Stock Raising Homestead Act preempts the Split Estates Act

Importantly, *Granite Rock*, *Ventura County,* and similar cases do not specifically address preemption problems under the SRHA. The SRHA uniquely balances competing interests by ensuring that federal minerals get developed while still protecting the surface estate owner. The only SRHA-specific preemption case this author has located held that the local ordinances were preempted.[52] Therefore, while *Granite Rock*, *Ventura County*, and *Wyoming* are useful to appreciate the extent to which a state can govern and regulate the removal of federal minerals, analysis of whether the Split Estates Act is pre-empted will ultimately be determined by closely examining the SRHA and the regulatory provisions that have grown out of it.

In creating the SRHA, Congress delved into surprising detail regarding the relationship between the mineral lessee and the surface owner. The SRHA specifically sets forth under what circumstances a mineral lessee is allowed entry. Congress drafted the SRHA in order to be clear that the surface owner has the right to use the surface, subject to the paramount right of the United States to remove the minerals:

> Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same *under the laws of the United States, shall have the right at all times to enter upon the lands* entered or patented, as provided by this subchapter, for the purpose of prospecting for coal or other minerals therein, provided he shall not injure, damage or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting . . . .[53]

Congress has also set out the specific steps that must be taken to both allow entry and development of minerals and protect the surface owner. The SRHA states:

> Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so

51. *Id.* at 581 (quoting *Silkwood*, 464 U.S. at 248) (citation omitted).

52. Elliott v. Or. Int'l Mining Co., 654 P.2d 663, 667 (Or. Ct. App. 1982) (citation omitted) ("Thus, 'the entire thrust of the surface entry act is to provide means for access to these public minerals *which is not subject to denial.*'").

53. Stock Raising Homestead Act of 1916, 43 U.S.C. § 299(a) (2000) (emphasis added).

> much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal or other minerals; *first, upon securing a written consent or waiver of the homestead entryman or patentee; second, upon payment of damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvement . . . .*[54]

Because Congress was so detailed and clear in the SRHA, the BLM regulations implementing the Act virtually mirror the language of the statute.[55]

The SRHA thereby gives specific rights to the owner of the surface and specific rights to the owner of the minerals to use the surface.[56] Under these "plainly expressed"[57] rights, the mineral owner has the right to reasonably use the surface and the surface owner is only entitled to damages for crops and tangible improvements.[58] Notably, the Tenth Circuit has declared that the SRHA bestows upon the surface owner only a "*limited right*" to use the surface.[59] Under federal law, "the right of entry by the lessee is beyond doubt, once it has given notice of entry and posted the requisite bond to protect the surface owner, for payment of damages for crops, tangible improvements, use of more of the surface than needed and negligence."[60] "Thus, 'the entire thrust of the surface entry act is to provide means for access to these public minerals *which is not subject to denial.*'"[61]

The legislative history surrounding the creation of the SRHA demonstrates that Congress intended to not only reserve mineral ownership to the federal government but also to reserve the right to govern the removal of those minerals then and in the future:

> This section also provides a method for the joint use of the surface of the land by the entryman of the surface thereof

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54. 43 U.S.C. § 299(a) (emphasis added).
55. 43 C.F.R. § 3814.1(c) (2005).
56. *Id.*
57. Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 504 (1928).
58. *Id.* at 505; Gilbertz v. United States, 808 F.2d 1374, 1379 (10th Cir. 1987).
59. *Gilbertz*, 808 F.2d at 1379.
60. Reno Livestock Corp. v. Sun Oil Co., 638 P.2d 147, 151 (Wyo. 1981).
61. Elliott v. Or. Int'l Mining Co., 654 P.2d 663, 667 (Or. Ct. App. 1982) (citation omitted).

> and the persons who shall acquire from the United States the right to prospect, enter, extract and remove all minerals that may underlie such lands, *this method to be under the direction of the Secretary of the Interior under such rules and regulations as he may prescribe.*[62]

A letter from the U.S. Department of the Interior quoted extensively in the House Reports states, "all minerals within the lands are reserved to the United States, together with the right of qualified persons to prospect upon, locate, and enter such deposits . . . . [T]he farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming."[63]

This legislative history strongly indicates that Congress intended to create a scheme whereby the homestead entryman gained only a right to use the surface of the property to raise livestock, but the federal government reserved the right to the minerals and the right to control the relationship between the surface owner and the mineral owner to effectuate the removal of federal minerals. Importantly, the language of the SRHA and the supporting legislative history demonstrate that the balancing of the relative rights of the surface owner and the mineral owner should remain within the power of the federal government.

1. The SRHA preempts the Split Estates Act by upsetting Congress' balance of competing interests

"The question of pre-emption is one of Congressional intent."[64] Interpretations of Congressional intent begin with "the purpose, structure, and legislative history of the entire statute."[65] Broadly stated, the task of the court is to determine how much of state law Congress intended to preempt by the passage of that statute.[66] The SRHA's delineation of rights between the surface owner and the mineral owner and the effect the Split Estates Act has on that delineation is the crucial piece of the preemption analysis.

As discussed above, Congress has given the surface owner some rights, allowing the mineral lessee the right to enter only after certain steps have been taken.[67] But the Split Estates Act gives the surface owner greater rights than federal law provides and imposes additional burdens on the removal of federal minerals. Where, as here, Congress or a federal agency

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62. H.R. Rep. No. 35, 64th Congress Sess. I at 5 (1916) (emphasis added).
63. *Id.*
64. Skull Valley Band of the Goshute Indians v. Nielson, 376 F.3d 1223, 1240 (10th Cir. 2004).
65. Wyoming v. United States, 279 F.3d 1214, 1230 (10th Cir. 2002).
66. *Id.*
67. *See generally* Stock Raising Homestead Act of 1916, 43 U.S.C. § 299(a) (2000).

created a balanced relationship between competing interests through statutory or regulatory treatment, any state law that would upset that balance is preempted.[68]

For example, in *Geier v. American Honda Motor Co.*,[69] the United States Department of Transportation ("DOT") had set up a regulatory scheme to encourage the gradual acceptance and placement of airbags and other restraints in motor vehicles.[70] This scheme was based on a balance between the competing interests of costs to put airbags in vehicles, public demand, and safety.[71] A plaintiff then brought a suit alleging negligence by Honda for failing to include an airbag in plaintiff's car.[72] The U.S. Supreme Court determined this tort action could not lie because the state law would alter the balance struck by the federal government, in favor of a state rule requiring immediate implementation of airbags.[73]

Under the SRHA, the rights and obligations of the surface owner and mineral owner are "plainly expressed."[74] Specifically, the mineral lessee has the right to reasonably use the surface subject only to liability for lost crops and damages to permanent improvements.[75] If the mineral lessee and the landowner cannot reach a surface use agreement, the mineral lessee must post a bond to cover its liability for potential lost crops and damages to permanent improvements.[76] Once this bond is in place, the "right of entry by the lessee is beyond doubt."[77] In contrast to these SRHA provisions, the Split Estates Act makes the operator liable for "damages sustained by the surface owner for loss of production and income, loss of land value and loss of value of improvements caused by oil and gas operations."[78] In addition, the mineral lessee is required to fulfill even more requirements: giving required notice, demonstrating it has negotiated in good faith with the surface

68. *See, e.g.*, Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 884-86 (2000); Int'l Paper v. Ouellette, 479 U.S. 481 (1987) (The Clean Water Act will preempt the application of laws of one state to discharge in another state. Congress instituted a policy that requires the Environmental Protection Agency and the source state to create discharge limits and any limits by a state other than the source state would upset that balance.); Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986) (Congress' implementation of rules that allow markets to set prices without federal regulations will preempt state regulation that hinders the ability of the markets to set prices); Michigan Canners & Freezers Ass'n Inc. v. Agric. Mktg & Bargaining Bd., 467 U.S. 461 (1984); Palmer v. Liggett Group, 825 F.2d 620 (1st Cir. 1987).
69. *Geier*, 529 U.S. at 868.
70. *Id.* at 884-86.
71. *Id.*
72. *Id.*
73. *Id.* at 888.
74. *See* Kinney-Coastal Oil Co. v. Keiffer, 277 U.S. 488 (1928).
75. Stock Raising Homestead Act of 1916, 43 U.S.C. § 299(a) (2000).
76. *Id.*
77. Reno Livestock Corp. v. Sun Oil Co., 638 P.2d 147, 151 (Wyo. 1981).
78. WYO. STAT. ANN. § 30-5-405 (2005).

owner, filing a bond with the WOGCC, and filing additional notice with the WOGCC.[79] These new requirements impose a much higher burden on the mineral lessees and give the surface owners more rights than they had when the federal government gave them the land under the SRHA.

The application of the Split Estates Act to federal minerals governed by the SRHA alters the balance assigned by Congress to the competing interests. As a result, the Split Estates Act serves as an obstacle to the "accomplishment and execution of the full purpose and objectives of Congress"[80] because, "[w]hile Congress expected that homesteaders would use the SRHA lands for stock-raising and raising crops, it sought to ensure that valuable subsurface resources would remain subject to disposition by the United States."[81] In the SRHA, Congress established the rights of the surface owner and the rights of the mineral lessee by balancing the competing interests of concurrent surface and mineral development.[82] The State has altered this balance by taking rights of the mineral lessee and giving them to the surface owner.

It is beyond the scope of this article to analyze specifically what state regulations could be allowed and what state regulations must yield to federal regulation. However, Wyoming would be well served to take the lessons from *Wyoming v. United States*[83] into account when applying the Split Estate Act. Courts have been very protective of a federal agency's right to control federal property under the Property Clause.[84] Wyoming could go a long way to avoid litigation that would ultimately invalidate the Split Estate Act by working with the federal government to avoid the most obvious conflicts between the state and federal regulatory schemes. For example, under both the SRHA and the Split Estate Act, the mineral producer is required to post a bond with the appropriate administrative body. That means that a mineral producer is required to post two bonds with two separate agencies to protect a single landowner from the same surface damage. This double bonding and the associated delay of production would be avoided if the federal and state agencies could work together to provide a single bonding requirement or at a minimum credit bonds posted with the federal agency towards state requirements. This is just one example. Several other preemption problems could be solved, and perhaps avoid preemption litigation altogether, if Wyoming can learn from its past experiences and work with the federal agencies in charge of administering federal property

79. WYO. STAT. ANN. § 30-5-402 to -403.
80. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).
81. Watt v. Western Nuclear, Inc., 462 U.S. 36, 47 (1983).
82. *Id.*
83. Wyoming v. United States, 279 F.3d 1214, 1226-27 (10th Cir. 2002).
84. *See id.*

under the Property Clause of the U.S. Constitution. Without such cooperation and changes, the SRHA likely preempts the Split Estates Act.[85]

2. The BLM's opposition to the Split Estates Act will be important evidence that the SRHA preempts the Split Estates Act

In her comments to the WOGCC, Director Clarke declared:

> In the SRHA, Congress delineated the relative rights and burdens it was imposing on the private surface owner and the federal mineral estate owner. The recent Wyoming statute and the proposed regulations would impose additional financial requirements that would burden the federal mineral estate, e.g., liability for loss of production and income, liability for loss of land value, and duplicative bonding requirements to both the United States and to the Wyoming OGCC. *See,* W.S. 30-5-404 and 405. The statute and regulations could also impose potential delays in approval of operations on federal leases.[86]

By submitting these comments, Director Clarke has firmly stated the BLM's official disapproval of applying the Split Estates Act to federal minerals. The fact that the BLM has formally taken a position will play a role in whether the courts find preemption.[87] In preemption opinions, courts have considered the opinion of the agency charged with executing the statute.

In *Geier*, discussed above, the court stated:

> We place some weight upon the DOT's interpretation of FMVSS 208's objectives and its conclusion, as set forth in the Government's brief, that a tort suit such as this one would "stand as an obstacle to the accomplishment and execution" of those objectives. Congress has delegated to the DOT authority to implement the statute; the subject matter is technical; and the relevant history and background complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirement.[88]

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85. *See, e.g., Geier* v. American Honda Motor Co., Inc., 529 U.S. 861, 884-86 (2000).

86. Letter from Kathleen Clarke, Director, United States Bureau of Land Management, to Don J. Likwartz, Wyoming Oil and Gas Supervisor (June 13, 2005) (on file with the Wyoming Oil and Gas Conservation Commission).

87. *Geier*, 529 U.S. at 883.

88. *Id.* (citations omitted).

As Congress delegated highway safety concerns to the DOT, Congress delegated authority to implement the SRHA to the BLM. The extraction of federal minerals is a complex subject matter with a complex and extensive background, like the highway safety concerns in *Geier*. Therefore, the federal government's official position, delivered by Director Clarke of the BLM, will be critical in this case and the BLM's arguments for preemption will go a long way in determining the outcome.

3. The SRHA preempts the Split Estates Act because only the federal government has authority to control rights and interests obtained in the transfer of federal property

The Split Estates Act is also preempted because a state cannot alter or change an interest in federal property. While states may act to reasonably regulate federal property, they "may not tax the lands themselves, or invest others with any right whatever in them."[89] "Whenever the question in any Court, state or federal, is, whether a title to land which had once been property of the United States has passed, that question must be resolved by the laws of the United States."[90] While a state can have some power over federal property, "[s]tate jurisdiction over federal lands 'does not extend to any matter that is not consistent with the full power in the United States to protect its lands, to control their use *and to prescribe in what manner others may acquire rights to them*.'"[91]

Before the SRHA's implementation, the federal government owned both the surface and the minerals of this land. As the owner of both the surface and the minerals, the federal government could provide for any type of rights or limitations associated with the disposal of the surface estate as it deemed appropriate. The SRHA prescribes that when homesteaders took the surface, the ownership they received was limited.[92] Congress set forth the rights and obligations associated with this land upon the disposition of this federal property and specifically reserved the right to enter the lands to remove the minerals subject only to payments for the loss of crops and damage to permanent improvements.[93] Thus, under the SRHA, the federal government reserved an easement across the SRHA lands. The terms of the reserved easement are expressly set forth in the SRHA—that the federal government could use the easement subject only to payments for lost crops and damage to permanent improvements. Under the Split Estates Act, in order to use the easement reserved, the federal government, acting through its les-

89. Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917).
90. Wilcox v. Jackson, 38 U.S. 498, 517 (1839).
91. Wyoming v. United States, 279 F.3d 1214, 1227 (10th Cir. 2002) (citation omitted) (emphasis added).
92. *See* Stock Raising Homestead Act of 1916, 43 U.S.C. § 299(a) (2000).
93. *Id.*

sees, must pay "loss of production and income, loss of land value and loss of value of improvements caused by oil and gas operations."[94]

The Split Estates Act, therefore, changes the terms of the grant of federal property. The Split Estates Act takes some of the plainly expressed rights reserved by the federal government and bestows them on the surface owner.[95] Put another way, it gives surface owners rights in federal property that did not exist when they received ownership from the federal government. State law cannot "prescribe in what manner others may acquire rights" in federal property.[96] Since the State does not have authority to bestow federal property to individuals, the Split Estate Law is not valid.

4. The SRHA's "savings clause" does not defeat the arguments for preemption

The State will undoubtedly refer to the "savings clause" of the SRHA as evidence that Congress did not intend this SRHA to preempt concurrent state regulation. The savings clause of the SRHA provides:

> Nothing in this subchapter shall be construed as affecting any reclamation, bonding, inspection, enforcement, air or water quality standard or requirement of any State law or regulation which may be applicable to mineral activities on lands subject to this subchapter to the extent that such law or regulation is not inconsistent with this title.[97]

This passage does seem to show that Congress contemplated some state regulation over these minerals. However, these types of savings clauses have been extensively examined and do not preclude preemption analysis under a conflict preemption theory: "The Supreme Court has 'repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'"[98]

In *Geier*, the pertinent federal law included a savings clause that stated, "'compliance with' a federal safety standard 'does not exempt any person from any liability under common law.'"[99] Despite this savings clause, the U.S. Supreme Court determined that a tort action that conflicted with federal law would be preempted: "the saving clause foresees—it does

94. WYO. STAT. ANN. § 30-5-405(a)(i) (2005).
95. *Id.* § 30-5-401 et seq.
96. Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917).
97. 43 U.S.C. § 299(i)(1) (2000).
98. *Wyoming*, 279 F.3d at 1234 (quoting *Geier*, 529 U.S. at 868).
99. *Geier*, 529 U.S. 861, 868 (2000) (quoting 15 U.S.C. § 1397(k) (1988)).

not foreclose—the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts."[100]

Similarly, in *Wyoming*, the pertinent federal statute had a savings clause that stated, "Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under state law or regulations in any area within the system."[101] Despite this very broad language, the Tenth Circuit found

> Congress intended ordinary principles of conflict preemption to apply in cases such as this. That is to say federal management and regulation of federal wildlife refuges preempts state management and regulation of such refuges to the extent to two actually conflict, or where state management and regulation stand as an obstacle to the accomplishment of the full purposes and objectives of the federal government.[102]

Similar to *Geier* and *Wyoming*, the savings clause in the SRHA foresees possible conflicts and expressly removes any state law from protection if the state law is inconsistent with the full objectives and purposes of the SRHA. Despite the SRHA's savings clause, any state law that conflicts with the full purpose and objectives of federal law will be preempted.

This does not mean that the savings clauses found in various federal statutes are without meaning. Courts have consistently found that these clauses show intent to let some state regulation proceed.[103] Based on the savings clause in the SRHA, it seems that there is some room for a state to regulate the removal of federal minerals and there is a possibility that the state can impose conditions under the Split Estate Law that will not be preempted. However, while there is some room for state regulation, any regulation that conflicts with federal law will be preempted under the foregoing analysis. As the WOGCC moves forward with specific application of its rules, any rule or application of a rule that conflicts with the full purpose and objectives of federal law will be preempted.[104]

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100. *Id.* at 870.
101. 16 U.S.C. § 668dd(m) (1976).
102. *Wyoming*, 279 F.3d at 1234.
103. *See id.*
104. *See Geier*, 529 U.S. at 884-86.

5. Other states' surface damage acts have no bearing on this analysis

Supporters of the Split Estates Act point to similar acts in other states as evidence that such laws can coexist with federal regulation without a preemption challenge.[105] These supporters claim that the acts have been in place for as long as twenty years without a federal preemption challenge. Such comparisons are not persuasive as related to Wyoming's Split Estates Act.

This logic is faulty because it is based on the false premise that the absence of a legal determination supports the argument that there is no preemption. There are a host of pragmatic reasons why this issue has not been litigated in these states, several of which are discussed below. The bottom line, however, is that a simple lack of litigation in no way indicates that a law is valid.[106]

While it is impossible to know exactly why the federal government or lessees of federal minerals have not challenged these statutes under a preemption theory, there are several practical reasons that perhaps explain why this issue has not been litigated in other states. First, it is critical to understand that the surface damages acts of other states are different from the Split Estates Act passed in Wyoming. For example, the surface damage acts in Montana,[107] South Dakota,[108] and North Dakota[109] require the mineral lessee to pay for damages and lost production, but these acts do not limit the entry rights of the mineral lessee.[110] These acts do not require mineral lessees to post a bond or otherwise comply with state administrative requirements before they are allowed to enter the land.[111] While the preemption analysis above indicates that these acts would be preempted if challenged, these acts impose a much lower burden on mineral lessees than is imposed by Wyoming's Split Estates Act.

Another important reason that other state statutes have not been challenged may be the relatively low level of federal mineral production in these states. In contrast, nearly half of all federal onshore mineral revenues comes from Wyoming: according to the preliminary reported royalties for

105. Montana—MONT. CODE. ANN. § 82-10-501 et seq. (2005); North Dakota—N.D. CENT. CODE § 38-11.1-01 et seq. (2005); South Dakota—S.D. CODIFIED LAWS § 45-5-14 (Michie 2005); Oklahoma—OKLA. STAT. tit. 52, § 318.1 et seq. (2005).
106. United Food & Commercial Workers Union, Local 1564 of N.M. v. Albertson's Inc., 207 F.3d 1193, 1199-1200 (10th Cir. 2000).
107. MONT. CODE. ANN. § 82-10-501 et seq.
108. S.D. CODIFIED LAWS § 45-5-14.
109. N.D. CENT. CODE §38-11.1-01 et seq.
110. *See* MONT. CODE. ANN. § 82-10-501 et seq.; N.D. CENT. CODE §38-11.1-01 et seq.; S.D. CODIFIED LAWS § 45-5-14.
111. *Id.*

2001-2004, Wyoming produces 45.9% of federal onshore royalties, followed by New Mexico at 32.15%.[112] No other state percentages even enter the double-digits.[113] Montana, South Dakota, and North Dakota have a *combined* contribution of only 3.8%.[114] While these numbers do not necessarily indicate the production levels from SRHA lands, they are a strong indication of the amount of federal mineral activity in each state. A surface damage act in a state with low levels of production may persist simply because the amount of production in that state is minimal when compared to the nationwide production levels. First, there is a decreased chance of significant conflict in a state with a lower level of production. If a conflict were to arise, mineral operators in these low-production states would be less likely to spend the time and resources to litigate the preemption question when the amount of production is too small to justify the expense of a lawsuit. In contrast, operators in Wyoming deal regularly with situations of privately owned surface and federally owned minerals.

There are no cases from these jurisdictions that directly address the preemption problem created by an act's governance of federally owned minerals. However, *Duncan Energy v. United States Forest Service* addressed the reverse situation (federally-owned surface and privately-owned minerals) and concluded that North Dakota's split estate act was preempted by federal law.[115] Duncan Energy argued it could access federally owned surface because it had complied with North Dakota's access requirements, but the Eighth Circuit determined the North Dakota law was preempted by the applicable federal law.[116]

For the reasons outlined above, the lack of case law on other states' split estate statutes in no way indicates whether Wyoming's Split Estates Act is preempted by federal law. Wyoming is not the first to attempt to impose further requirements upon mineral lessees in a split estate context, but it may well be the first to cause such a preemption suit.

III. THE SPLIT ESTATES ACT DENIES FEDERAL LESSEES A FEDERAL RIGHT IN VIOLATION OF 42 U.S.C. § 1983

In addition to the pre-emption problems, mineral developers who hold federal leases can maintain a cause of action against he state under 42 U.S.C. § 1983. 42 U.S.C. § 1983 provides a vehicle for recovery for denial of a federal right guaranteed by the U.S. Constitution or federal statute. The statute provides:

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112. *See* Summary of Federal Onshore Reported Royalties and Other Revenues by State: Fiscal Years 2001 through 2004 (on file with Federal Minerals Management Service).
113. *Id.*
114. *Id.*
115. Duncan Energy v. United States Forest Service, 50 F.3d 584 (8th Cir. 1995).
116. *Id.* at 591.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .[117]

The text of 42 U.S.C. § 1983 itself states who can bring such an action: "any citizen of the United States or other person within the jurisdiction thereof." This includes individuals, corporations, and others.[118] The corporations and individuals given the right to extract federal minerals will have the proper capacity and standing to assert that right through the conduit of § 1983.

42 U.S.C. § 1983 does not create a claim; it merely provides the mechanism to allow a suit based on a violation of an existing federal right. Most frequently, an existing right is found in the Constitution; however, federal statutes that grant rights may also be used as the basis for a § 1983 suit: "A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed enforcement of the statute in the enactment itself.'"[119]

A statute creates enforceable rights within the meaning of § 1983 if the provision in question was intended to benefit the plaintiff.[120] "If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit . . . or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce."[121]

In *Wilder v. Virginia Hospital Association*, an amendment to the Medicaid Act provided for "reasonable and adequate" reimbursement rates for health care providers.[122] The Court found that this amendment created an enforceable right under § 1983 because the amendment was intended to benefit the health care providers, represented a binding obligation on the

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117. 42 U.S.C. § 1983 (2000).

118. Discovery House, Inc. v. Consol. City of Indianapolis, 319 F.3d 277, 282 (7th Cir. 2003); *see generally* Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004).

119. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting Wright v. Roanoke Redevelopment and House. Auth., 479 U.S. 418, 423 (1987) (alteration in original)); *see also* Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203, 1211 (10th Cir. 2000).

120. *Wilder*, 496 U.S. at 509; *see also Falvo*, 268 F.3d at 1211.

121. *Wilder*, 496 U.S. at 509 (citations and quotations omitted); *see also Falvo*, 268 F.3d at 1211.

122. *Wilder*, 496 U.S. at 501-02.

State, and was not relied upon by the health care providers to pursue overly vague or amorphous interests.[123] Even though the standard created by the statute was "reasonable and adequate" rather than a more definite standard, the law at issue in *Wilder* was held to be enforceable under § 1983 since it was intended to provide particular and well-defined benefits to the plaintiffs.[124]

Similarly, in *Falvo*, the Tenth Circuit determined that the Family Education Rights and Privacy Act ("FERPA") was enforceable under § 1983.[125] FERPA stated that its purpose was to protect parents' and students' right to privacy by "'limiting the transferability of records without consent.'"[126] The court determined that FERPA defined a sufficiently precise requirement to create a right which was binding and neither vague nor amorphous.[127] Though the plaintiffs were ultimately unsuccessful in their suit because certain defendants had qualified immunity, the court held that the § 1983 claim itself was valid.[128]

The SRHA provides a right to federal mineral lessees that is even more clearly defined than those in *Wilder* and *Falvo*:

> Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, *shall have the right at all times to enter upon the lands entered or patented*, as provided by this subchapter.[129]

That statement, which even refers to the privilege as a "right," is clear evidence that the statute was intended to create an enforceable right, privilege, or immunity. As discussed previously, courts have been very clear that the mineral lessee has a *right* to enter once the statutory prerequisites have been accomplished.[130] Also, Congress has not created a remedial scheme within the SRHA to address a problem such as this conflict between the Split Estates Act and the rights granted by the SRHA so Congress has not foreclosured § 1983 rights under the SRHA.

It is clear that Congress gave mineral lessees a right to enter once certain conditions have been met. Because the federal mineral lessees enjoy

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123. *Id.* at 509-10, 512.
124. *Id.*
125. *Falvo*, 268 F.3d at 1211-13.
126. *Id.* at 1211 (quoting 120 CONG. REC. 39862 (Dec. 13, 1974)).
127. *Id.*
128. *Id.* at 1219.
129. 43 U.S.C. § 299(a) (1986) (emphasis added).
130. *See* Kinney-Coastal Oil Co. v. Keiffer, 277 U.S. 488 (1928); Gilbertz v. United States, 808 F.2d 1374 (10th Cir. 1987); Reno Livestock Corp. v. Sun Oil Co., 638 P.2d 147 (Wyo. 1981).

a federal right, any abrogation of that right is actionable under § 1983. Because the Split Estates Law limits or removes the federal right, it is actionable under § 1983.

IV. CONCLUSION

While the Split Estates Act may have been well intentioned, the Wyoming Legislature and the WOGCC have overstepped their bounds by applying the Split Estates Act's provisions to SRHA lands. The applicable federal law indicates that the Wyoming Split Estates Act is preempted by the SRHA and deprives the mineral lessees of SRHA rights under 42 U.S.C. § 1983. Many of the problems addressed in this article could be ameliorated, and perhaps litigation avoided, if Wyoming will work with the federal government in the state's application of the Split Estates Act to federal minerals.