Land & Water Law Review

Volume 12 | Issue 1 Article 2

1977

Accommodation or Preemption - State and Federal Control of Private Coal Lands in Wyoming

Stephen D. Alfers

University of Wyoming
College of Law
LAND AND WATER
LAW REVIEW
VOLUME XII 1977 NUMBER 1

With the development of coal on federal lands, the author anticipates policy conflicts between state and federal interests. Using Wyoming as an example, the author analyzes the nature of the state's interests in terms of Wyoming's environmental and land use legislation. The author then turns to limitations upon the state's power to regulate federal coal lands. Finally, the author examines the utility of the Preemption Doctrine for resolving policy conflicts.

ACCOMMODATION OR PREEMPTION? STATE AND FEDERAL CONTROL OF PRIVATE COAL LANDS IN WYOMING*

*Stephen D. Alfers***

I. INTRODUCTION

In November of 1974 the Federal Energy Administration presented its Project Independence Blueprint, an implementation plan for the President's version of a national strategy to eliminate or reduce very substantially U.S. dependence on foreign oil by the year 1985. Experts now question whether true independence is either attainable[1] or desirable.[2] Nevertheless, political imperatives, both national and international, would appear to assure a substantial role for coal in an emerging national energy resources strategy. The

*The author wishes to express his gratitude to Messrs. Jack M. Merritts and Theodore E. Worcester of Dawson, Nagel, Sherman & Howard, who read the manuscript and made many helpful suggestions. The views presented are those of the author and he alone is responsible for any omissions or errors.

**Associate, Dawson, Nagel, Sherman & Howard, Denver, Colorado; B.A. 1968, University of Denver; M.A. 1973, University of Denver; J.D. 1976, University of Virginia; admitted to practice Colorado 1976; member of Colorado and Denver Bar Associations.

1. See FRANSSEN, TOWARD PROJECT INTERDEPENDENCE: ENERGY IN THE COMING DECADE vii. (1975) [hereinafter cited as FRANSSEN].
2. WILLRICH, ENERGY AND WORLD POLITICS (1975).

Franssen study concluded that a demand exists for substitutes for the increasingly unreliable supply of domestic petroleum.

> Hence energy consumption increases will have to be met increasingly by substitute sources such as coal and nuclear power, and by imports of crude oil and liquefied natural gas .... It will probably not be until the latter part of the century or early in the 21st century that solar energy, fusion power, and so forth will make a significant contribution to total energy output.[3]

Energy supply strategies are founded on an assumed energy mix of petroleum, including natural gas, coal, and nuclear power. Since any shortfall in projected production of coal or nuclear power must be met in increases in petroleum imports, it appears that coal with nuclear energy will be the focus of accelerated energy resource development for the remainder of the 20th century.

Just as political imperatives give rise to the demand for coal, economic imperatives translate that need into a demand for western coal. Until very recently, the cost of transporting western coal from Montana, North Dakota and Wyoming to remote markets relegated western coal to a small share of national coal production. However, broad-based national concern with deep mine safety and the impact of the shift to coal on air quality[4] has cut substantially into the comparative advantage previously enjoyed by Appalachian coal.[5]

Despite considerable immediate economic uncertainties about the future of coal development stemming from an ab-

3. FRANSSEN, *supra* note 1, at 15.
4. Much of the attraction of western coal has been related to its reputed low sulfur content, which makes it compatible with existing clean air standards. *For* a discussion doubting the reliability of that premise, *see* RIEBER, LOW SULFUR COAL: A REVISION OF RESOURCE AND SUPPLY ESTIMATES, (Center for Advance Computation Doc. No. 88) (1973), and McCormick, Facts About Coal in the United States, Environmental Policy Center, Washington, D.C. (1974).
5. *See* Hardesty, et al., *Symposium: New Values of Coal*, 76 W. VA. L. REV. 255 (1974); *Natural Resources Symposium*, 51 N.D.L. REV. 249 (1974); Leisenring, *Western Coal—The Sleeping Giant*, 19 ROCKY MT. MIN. L. INST. 1 (1974).

sence of any clear statement of national energy policy,[6] increases in coal production have come and very likely will continue to come from western coal mines. If national production is to increase from 1974 levels of 600 million tons per year to projected levels of 900 million tons per year by 1985,[7] production of western coal mines must double.

Resource Ownership Patterns in Western Coal Lands

Coal has always been the ugly stepsister in the federal mineral and public land laws. The mineral location system embodied in the General Mining Law of 1872 gave prospectors on the public lands minerals and surface necessary for their exploitation, upon discovery thereof in commercial quantities.[8] The objective of the location system was to accelerate exploration and development of the mineral wealth in the American west.[9]

On the other hand, in the early 19th century disposal of coal lands was effected under the surface entry laws beginning with the Preemption Act of 1841.[10] The Preemption Act excepted from entry those lands containing "known mines and salines." Until 1864, known coal lands with coal deposits in quantities not amounting to a "known mine" were subject to entry and purchase. The Congress codified that construction in 1864.[11] The Coal Lands Entry Act of 1873[12] controlled disposal of coal lands until 1920.

In contrast to the General Mining Law enacted one year before, the Coal Lands Entry Act of 1873 is regarded as a vestige of earlier policies of disposal by sale. The central

6. *See, e.g.*, Spore, *Economic Problems of Coal Surface Mining*, 2 ENVIR. AFF. 685 (1973).
7. The FEA in Project Independence Blueprint called for a doubling of coal production to 1.2 billion tons per year by 1985. Estimates now put maximum coal production in 1985 at 900 million tons per year. FRANSSEN, *supra* note 1, at 16-17
8. *For* a thorough discussion of interests in mineral lands from possessory interests of pedis possessio to title of patentees *see* Sherwood and Greer, *Mining Law in a Nuclear Age: The Wyoming Example*, 3 LAND & WATER L. REV. 1 (1968), and Sherwood and Greer, *Possessory Interests in Wyoming Mining Claims*, 4 LAND & WATER L. REV. 337 (1969).
9. AMERICAN LAW OF MINING, § 2.16.
10. 5 Stat. 453 (1841).
11. Act of July 1, 1864, 13 Stat. 343 (1864); amended Act of March 3, 1865, 13 Stat. 529 (1865).
12. 17 Stat. 607 (1873), 30 U.S.C. §§ 71-76 (1970).

objective of the Coal Lands Entry Act was to permit development of the critical energy resource of the age, while thwarting the growth of monopolies.[13]

The severed mineral pattern of ownership which exists today in western coal lands can be traced to early attempts at multiple use of the public lands. On the one hand the non-mineral entry laws[14] sought to encourage settlement of the public domain by making it available for agricultural purposes. On the other hand the Coal Lands Entry Act sought to encourage orderly development of Western coal. From the start the two policies fell somewhat short of a hand-in-glove fit. In *Colorado Coal & Iron Co. v. United States*,[15] the Supreme Court held that lands containing known coal mines were not subject to entry under the homestead laws. After the turn of the century a massive inventory of resources on public lands resulted in classification of much land as coal lands. *Diamond Coke & Coal Co. v. United States*[16] made clear what agricultural interests had for several years feared; the Court held that patents to lands containing coal deposits issued under the homestead laws were subject to annulment by the government if it could be shown that at the time the patents issued the lands contained known coal deposits which could be extracted at a profit. Established agricultural uses of entrymen appeared to be threatened by subsequent discovery of coal.

Congress resolved the dilemma by severing the coal from the entryman's estate. A 1909 Amendment to the Coal Lands Entry Act, surviving in Section 81 of Title 30 of the United States Code, provided that locators or entrymen and selectmen under the non-mineral entry laws could obtain new patents to lands determined to contain coal. However if the lands had been determined subsequently to be chiefly valuable for coal, the patents would contain a reservation to the United

13. AMERICAN LAW OF MINING, § 2.16.
14. *For* a complete treatment of statutes providing for patent of the surface subject to reservation of the minerals, *see* Twitty, *Law of Subjacent Support and the Right to Totally Destroy Surface in Mining Operations*, 6 ROCKY MT. MIN. L. INST. 497, 513 n.45 (1961).
15. 123 U.S. 307 (1887).
16. 233 U.S. 236 (1914).

States of the right to dispose of the coal under the Coal Lands Entry Act. Lands withdrawn or classified as coal lands and not otherwise reserved, except those in Alaska, were opened to entry under the non-mineral entry laws, providing that title to such lands would pass to the entrymen subject to federal coal reservations.[17] The Secretary of the Interior obtained power to dispose of coal so reserved in 1917.[18]

The development of the severed coal estate was occurring at a time when public lands disposal policy was undergoing a serious rethinking. Disposal policy shifted directions radically in 1920 away from a policy favoring exploitation of western mineral wealth to one favoring conservation. The Mineral Leasing Act of 1920,[19] withdrew from location under the General Mining Law or from entry and sale under the Coal Lands Entry Act, deposits of coal, phosphates, sodium, potassium, oil, oil shale, gas, native asphalt, bitumen and bituminous rock, and the lands containing them. Thus, title to surface obtained after 1920 was subject to disposal of the coal by lease by the Secretary of the Interior.[20]

Rights of the Surface Owner Against the Mineral Owner

For all its expediency and apparent contributions to the multiple use concept, the reservation of minerals raises serious legal obstacles to development of federal coal.[21] Mineral reservations create a complex of rights to the use of the surface underlain by coal owned outright by the federal government or leased under the Mineral Leasing Act. The clash of ranchers and mining interests is set in perhaps its most stark motif in the coal basins in the Northern Great Plains Regions of Montana, North Dakota, and Wyoming. There the strip mining interests are not seeking to use the surface,

17. 36 Stat. 583 (1910), 30 U.S.C. §§ 83-85 (1970); 37 Stat. 90 (1912), 30 U.S.C. § 77 (1970).
18. 39 Stat. 945 (1917), 30 U.S.C. § 88 (1970).
19. 41 Stat. 437 (1920), 30 U.S.C. § 181 *et. seq.* (1970).
20. *For* an interesting discussion of problems associated with commingled minerals subject to competing disposal laws, *see* Vlautin, *To Lease or to Locate*, 19 ROCKY MT. MIN. L. INST. 393, 406 (1974).
21. Perhaps the most thorough exposition of the problem in current literature is found in Mall, *Federal Mineral Reservations*, 10 LAND & WATER L. REV. 1 (1975); *see* also Brimmer, *The Ranchers Subservient Surface Estate*, 5 LAND & WATER L. REV. 49 (1970); Fleck, *Severed Mineral Interests*, 51 N.D.L. REV. 369 (1975).

but to use it exclusively for substantial periods of time. In some cases strip mining is tantamount to destruction.[22]

Courts commonly hold that the mineral estate is the dominant estate and the mineral owners enjoy an implied easement for ingress and egress in the use of surface reasonably necessary to the enjoyment of the mineral estate.[23] Few courts go so far as *Sun Oil Co. v Whitaker*,[24] which permitted the oil and gas owner to take without compensation groundwater for its secondary recovery operations. The majority of courts follow instead *Barker v. Mintz*[25] which held that the servient surface estate may not enjoin the mineral operator but that he is entitled to damages. Since much of western coal lands is patented under the Stock Raising Homestead Act, or SRHA, as a practical matter in many cases, the entryman's damages are limited by statute to the value of crops, improvements, and grazing value, and not market value of the land.[26]

Powerful arguments can be raised asserting the surface owners' reasonable expectations, under technologies extant at the time their patents issued, that any mining would be deep mining perhaps resulting in subsidence but not strip mining resulting in permanent impairment to the value of the surface. One commentator has said, "it is clear Congress intended that the holder of the mineral estate should be able to destroy surface if required by his mining operation to do so."[27] Ferguson argues that the statutory remedy should be the entrymen's or surface patentee's exclusive remedy, pointing to long-standing policies favoring mineral development.[28] However, the right of the mineral owner to destroy

22. The rehabilitation potential of stripped western coal lands is a matter of controversy. *See, in general,* NATIONAL ACADEMY OF SCIENCES, REHABILITATION POTENTIAL OF WESTERN COAL LANDS (1974).
23. Twitty, *supra* note 14, at 501-502.
24. Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Texas 1972).
25. Barker v. Mintz, 73 Colo 262, 215 P. 534 (1923).
26. The two leading cases, which together throw a corral around the damages recoverable by the surface owner are Kinney Coastal Oil Co. v. Kiefer, 277 U.S. 488 (1928), and Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798 (1955).
27. Ferguson, *Severed Surface and Mineral Estates: The Right to Use or Destroy the Surface to Recover Minerals*, 19 ROCKY MT. MIN. L. INST. 411 (1974).
28. *Id.* at 429.

the surface is not nearly so clear to at least one student notewriter.[29] He argues that the SRHA was intended to modify the common law right of the mineral owner to the reasonable use of the surface by making the mineral estate strictly liable for stated limited damages to the surface. The notewriter would permit damages at common law in addition to those for crops, improvements, and grazing value.[30]

Wyoming is but one of the western states experiencing considerable coal mining activity. Its coal resources are extensive, and to a large extent underlie private lands patented under the various agricultural entry statutes, subject to federal coal reservations. The Wyoming legislature in the late 1960's moved to regulate surface mining activity, responding to demands for environmental protection and claims by agricultural interests that federal legislation has compensated inadequately surface owners subjected to mining of federal coal.

Motivated by national imperatives for relative energy independence consistent with environmental protection, the federal government has moved to regulate surface mining in the Western states, at least to the extent federal coal or federal lands are involved. Since the leasing moratorium in 1973, the Department of the Interior has been developing a policy for the progress of the coal industry in the Northern Great Plains. In the past year, the Secretary has promulgated regulations which cover coal leasing and coal mining operation and reclamation. Under the regulations the Secretary for the first time extends his regulatory powers to private lands underlain by federal coal. On August 4, 1976, the Congress, over an Administration veto, passed the Federal Coal Leasing Amendments Act of 1975, legislating its special concerns with royalties, monopoly and environmental protection.

29. Note, *Surface Damages from Strip Mining Under the Stock Raising Homestead Act*, 50 DEN. L.J. 369 (1973). *See* also Note, *Protection of Surface Owners of Federally Reserved Mineral Lands*, 2 UCLA-ALASKA L. REV. 171 (1973).

30. Note, *Surface Damages from Strip Mining Under the Stock Raising Homestead Act, supra* note 29, at 373.

Reconciling environmental concerns with their energy parameters very likely will continue to involve the states and the federal government, each pursuing its own mandate. The object of this article is to examine in light of the supremacy clause the power of the states to regulate under the police power the lands owned by its citizens within its boundaries but which are held subject to reservations to the United States of the underlying coal and other minerals.

Since Wyoming is a state with an abundance of federal coal and considerable land area held subject to the federal interest in the coal beneath it, the Wyoming experience seems an appropriate focus for a study of federalism and western coal. Part II of this article surveys the Wyoming approach to regulating surface mining. Part III considers the supremacy clause as a limit to state control of surface mining of federal coal. Part IV considers the preemption of Wyoming surface mining legislation in light of recent Supreme Court decisions.

II. STATE CONTROL OVER THE EXTRACTIVE INDUSTRIES

The Wyoming Department of Environmental Quality

Prior to analyzing the conflicting state and federal interests in the mining and reclamation of Wyoming coal lands, this article will examine the existing regulatory system found in Wyoming. The extent to which the present state system fulfills the requirements of an adequate scheme of regulation and evinces an abiding state interest in that area is illustrated by the following discussion of licensing procedures and land use planning. Whether federal preemption is justified depends, in large part, on the sufficiency of laws and practices now implemented in Wyoming under the State's police powers.

Surface mining is regulated directly by the State of Wyoming through its Department of Environmental Quality (DEQ) under the Open Cut Reclamation Act of 1969, and the Wyoming Environmental Quality Act (WEQ).[31] The

31. WYO. STAT. § 35-502.1 *et. seq.* (Supp. 1975).

legislation centralized administration of its statutory and administrative controls over environmental protection.

The WEQ Act tasks its day-to-day administration to the DEQ. The Director of DEQ is charged with enforcing the act and rules, regulations, orders, standards, permits, and licenses issued thereunder.[32] The Director assigns studies and investigations, administers funds, and represents the state in all matters relating to environmental protection. The Director has the power to issue, deny, suspend, or revoke mining permits and licenses.[33]

Under the Director, environmental regulation is effected through three divisions and their respective advisory boards: Air, Water, and Land Quality Divisions.[34] The Administrator of the Land Quality Division is charged with administering the WEQ Act with respect to mineral extraction. The Administrator supervises studies, investigations, surveys, and research projects assigned by the Director, and reports results to him and to the Land Quality Advisory Board. The Administrator receives applications for mining permits and mining licenses and, in turn, recommends their disposition to the Director.[35] The Administrator fixes the amount of the reclamation performance bond. Upon forfeiture of such a bond, the Administrator is tasked to carry out reclamation of abandonded lands. The Administrator may propose rules, regulations, and standards to the Director. The Administrator is the *ex officio* Executive Secretary of the Land Quality Advisory Board.[36]

The Advisory Board is composed of five members appointed by the Governor, one each to represent industry, agriculture, and the political subdivisions. Two members are to represent the "public interest."[37] The Advisory Board is to work closely with the Administrator "in the administra-

32. WYO. STAT. § 35-502.9(i) (Supp. 1975).
33. WYO. STAT. § 35.502.10(a)ii (Supp. 1975); WYO. STAT. § 35-502.22(iv) (Supp. 1975). *But see* WYO. STAT. § 35-502.24(h) which appears to give authority to grant issue, or deny mining permits to the Administrator.
34. WYO. STAT. § 25-502.5 (Supp. 1975); WYO. STAT. § 35-502.13(a) (Supp. 1975).
35. WYO. STAT. § 35-502.22(iv) (Supp. 1975).
36. WYO. STAT. § 25-502.10(i) (Supp. 1975).
37. WYO. STAT. § 35-502.13(a) (Supp. 1975).

tion and performance of all duties of the division."[38] The Board makes an annual report to the Governor. The Board has authority to recommend to the Environmental Quality Council, through the Administrator and the Director, rules, regulations, standards, plans, and programs for pollution abatement and prevention.

The Environmental Quality Council acts as an independent regulatory commission to promulgate, upon recommendation from the Director and Advisory Boards, all rules, regulations, orders, and standards necessary to the enforcement of WEQ.[39] The Council is the hearing examiner in cases contesting virtually any administrative action of the DEQ. The Council hears and decides contests to the grant, denial, suspension, revocation, renewal, or variance from any mining permit or license. The Council has the authority to designate areas "of a unique and irreplaceable, historical, archaeological, scenic or natural value."[40] The significance of that designation is that any irreparable harm to such an area will support, without more, a denial of a mining permit.[41] The legal arm of the council is the state Attorney General.[42]

The WEQ manages surface mining through a permit and licensing process which pits against one another the interests of the mineral owner, the surface owner, the mine operator, and the public. The statutory approach, in contrast with federal mining and land law discussed above, tilts the balance substantially in favor of the surface interests.

Under the WEQ the "mining permit is the certification that the tract of land described therein may be mined by an operator licensed to do so in conformance with an approved reclamation plan."[43] The permit may be transferred with approval of the Director or, if rejected by the Director, by

38. WYO. STAT. § 35-502.14(c) (Supp. 1975).
39. WYO. STAT. § 35-502.11-12 (Supp. 1975).
40. WYO. STAT. § 35-502.12(v) (Supp. 1975).
41. WYO. STAT. § 25-502.24(g)(iv) (Supp. 1975).
42. WYO. STAT. § 35-502.12(e) (Supp. 1975). The statute also allows independent counsel to be employed.
43. WYO. STAT. § 35-502.23 (Supp. 1975).

the Council.[44] An application for a mining permit is filed with the Administrator of Land Quality. The application must contain a general ecological, geographic, and geological description of the land. In addition, the application must contain a reclamation plan showing the extent of disturbance contemplated, proposed future uses, proposed future land contours, and proposed revegetation. The application must set out proposed technology for separating the topsoil from the subsoil and for preventing wind and water erosion of spoil piles and topsoil piles.[45]

The application must be accompanied by written consent of the surface owner, if other than the applicant.[46] In the absence of consent of the surface owner the applicant may request a hearing from the Council and seek an order in lieu of consent. The Council may not issue an order in lieu of consent if the surface owner can show *inter alia* that mining substantially prohibits his operations.[47]

In 1975 the Wyoming Legislature amended Section 35-502.24, introducing a new requirement for "home ranch" approval both to the commencement of surface mining operations and to the applicant's mining and reclamation plan.[48] The Legislature drew a distinction between surface mining dislocating surface owners actually residing on the land and that involving surface owned by absentees or "gentlemen farmers."[49] While applicants frustrated by a non-residential or non-agricultural surface landowners' refusal to consent may continue to seek from the Council orders in lieu of con-

44. WYO. STAT. § 35-502.25 (Supp. 1975). *See* WYO. STAT. § 35-502.12(c)(i) (Supp. 1975).
45. WYO. STAT. § 35-502.24(b)(viii) (Supp. 1975).
46. WYO. STAT. § 35-502.24(b)(xii) (Supp. 1975).
47. WYO. STAT. § 35-502.24(b)(xii)(c) (Supp. 1975).
48. WYO. STAT. § 35-502.24(b)(x)-(xii) (Supp. 1975) (originally enacted as ch. 198, § 2 [1975] Wyo. Sess. Laws 408-409).
49. The discriminatory effect upon those surface owners qualifying for a complete veto and those only having a partial veto was apparently accepted by the legislature and electorate alike. One legislator, however, did warn of future litigation as the law "amounted to 'giving one person [the residential or agricultural surface owner] the property of another [the mineral estate owner] without due process of law'". Wyoming State Tribune, March 13, 1975, at 1, col. 2.

sent,[50] the same applicant apparently has no such recourse, when the surface owner is a "residential or agricultural landowner."[51]

The applicant must arrange notice by publication in the locality of the mining site.[52] After a four-week notice period and an additional comment period, the Director upon recommendation by the Administrator may issue the mining permit. If during the notice and comment period, an application produces an objection by "any interested person,"[53] the application is removed to the Council for hearing and adjudication.[54] Judicial review is available in district court.[55]

If the Administrator denies the mining permit, the applicant is entitled to a hearing before the Council.[56] The standards in the act appear to give the Administrator and the Council broad discretion to deny a mining permit.[57]

If the permit issues, it covers the applicable tract through the reclamation stage to termination of the mining operation. The WEQ contains no "due diligence" criteria, but the mining permit may be revoked upon a showing that the permit holder willfully misstated or failed to disclose any fact which would have led to denial of permit.[58]

Before any mining can proceed, an operator must obtain a license to mine.[59] The application for the license must be filed with the Administrator by the mining operator. The ap-

50. WYO. STAT. § 35-302.24(b)(x) (Supp. 1975). Apparently, the conditions which the Council must find to issue an order in lieu of consent are those presently found under section 35-502.24(b)(xii) (A)-(D) of the Wyoming Statutes. Those conditions are identical to the ones that had to be found by the Council in the analogous pre-1975 amendment section, now basically codified as § 35-502.24(b)(x). *See* the Environmental Quality Act, ch. 250, § 1, art. 4 [1973] Wyo. Sess. Law 634 (amended by Wyo. Stat. § 35-502.24(b)(x)-(xii) (Supp. 1975).
51. *Compare* WYO. STAT. 35-502.24(b)(xi) (Supp. 1975) with WYO. STAT. § 35-502.24(b)(xii) (Supp. 1975)).
52. WYO. STAT. § 35.502.24(e) (Supp. 1975).
53. The statute contains no definition of "any interested person."
54. WYO. STAT. § 35.502.24(f) (Supp. 1975); Wyo. Stat. § 35-502.12(a)(iv) (Supp. 1975).
55. WYO. STAT. § 35-502.24.(f) (Supp. 1975).
56. WYO. STAT. § 35-502.12(a)(iv) (Supp. 1975).
57. WYO. STAT. § 35-502.24(g) (Supp. 1975).
58. WYO. STAT. § 35-502.26(a) (Supp. 1975).
59. WYO. STAT. § 35-502.27 (Supp. 1975).

plication must include a copy of the mining permit, written consent of the permit holder, and a mining and reclamation plan for the first year of operation.[60] A denial of a license may be reversed by the Council or in turn by the state courts.[61] From cost estimates provided by the mining operator, the Administrator fixes the amount of the performance bond. The bond is executed by the mine operator to secure compliance with the WEQ, mining permits, licenses, and reclamation plans issued under it.[62] When deemed necessary by the Land Quality Advisory Board, the minerals owner may be joined as a principal.[63] "Any violation of this Act" will support forfeiture proceedings brought by the Attorney General if recommended by the Director, with the Council's approval.[64]

The Division of Land Quality exercises oversight of the mining operations through an annual review. The review is triggered by the operator's annual report, which indicates the progress of mining and reclamation that year. It highlights any deviations from the license application and previous mining and reclamation plans. It must contain the mining and reclamation plan for the ensuing year, complete with cost estimates. After inspection of the site, the Administrator may approve the report and the Director determines the amount of the bond for the next year.[65]

The operator must disclose any fact coming to his attention, the disclosure of which would have resulted in denial of the mining permit, whether or not the fact may have existed at the time of the application.[66] The failure to disclose may result in revocation of the license. Further, the license may be suspended upon substantial violation of either the

60. WYO. STAT. § 35-502.27 (Supp. 1975).
61. WYO. STAT. § 35-502.12(c) (Supp. 1975); WYO. STAT. § 35-502.12(f) (Supp. 1975). The provision guarantees the license applicant judicial review as provided by the Wyoming Administrative Procedure Act.
62. The operator's statutory duties can be found at WYO. STAT. § 35-502.32 (Supp. 1975).
63. WYO. STAT. § 35-502.34(b) (Supp. 1975).
64. WYO. STAT. § 35-502.38(a) (Supp. 1975).
65. WYO. STAT. § 35-502.28(d) (Supp. 1975).
66. WYO. STAT. § 35-502.29(a)(i) (Supp. 1975).

WEQ or non-compliance with the terms of the permit or license.[67]

A prominent feature in the WEQ is its protection of the interest of the surface owner. First, the surface owner might veto the mining permit, if mining would substantially prohibit his operations.[68] Second, when the mining permittee is other than the surface owner, he must execute a bond or an undertaking to the state for the benefit of the surface owner to pay damages to the surface estate.[69] Third, damages recoverable include damage to crops, forage, improvements, and financial loss from disturbance of the surface.[70] The damages so recovered "shall be commensurate with the reasonable value of the surrounding land . . ."[71] The Administrator determines the amount of the bond or undertaking. Damages are recoverable as they accrue and must be paid annually or as agreed between the parties.[72] Further, holders of water rights are given a right of action for damages due to pollution of surface or groundwater.[73]

The second prominent feature is that the WEQ leaves open reclamation to uses other than that to which the land was put prior to mining.[74] While such latitude should be considered a significant concession to the industry,[75] the proposed new uses made possible by reclamation are subject to rather broad administrative discretion.

Third, WEQ attempts to steer clear of the taking issue, by inserting a Jekyll and Hyde provision: If a mineral owner is disappointed by denial, revocation, or suspension of right to exploit the mineral estate because an area has been des-

67. WYO. STAT. § 35-502.29(b) (Supp. 1975).
68. WYO. STAT. § 35-502.24(b)(xii)(c) (Supp. 1975).
69. WYO. STAT. § 35-502.33(a) (Supp. 1975).
70. WYO. STAT. § 35-502.33(a) (Supp. 1975).
71. WYO. STAT. § 35-502.33(a) (Supp. 1975).
72. WYO. STAT. § 35-502.33(a) (Supp. 1975).
73. WYO. STAT. § 35-502.33(b) (Supp. 1975).
74. WYO. STAT. § 35-502.21(a) (Supp. 1975).
75. Revegetation of land to sagebrush and prairie grasses, dependent on restoration of delicate soils, may not be possible within acceptable time frames. Legislation which would insist on strict restoration would likely render significant coal reserves inaccessible. *See, generally* NATIONAL ACADEMY OF SCIENCES, REHIBILITATION POTENTIAL OF WESTERN COAL LANDS, *supra* note 22.

ignated a unique area, the disappointed permittee or licensee may claim in district court that the state has taken property without compensation.[76] However, when the lands subject to regulation are private or state lands held under patents subject to federal mineral reservations, beneath the taking issue broods a second problem which complicates resolution of the first.

Providing compensation may not save state strip mining legislation held to be a taking of the mineral interests, even if the coal reserved to the United States subsequently has been disposed by lease or otherwise to private parties. In *Transwestern Pipeline Co. v. Kerr-McGee Corp.*,[77] TPC argued *inter alia* that it could invoke condemnation powers under Title 15 U.S.C. to deprive Kerr-McGee of its interest in potash deposits underlying its pipeline compressor station. The Court over a strong dissent by Judge Doyle held that TPC could not exercise eminent domain powers against the government. Since Kerr-McGee was a licensee of the government and since condemnation of the mineral interest would necessarily deprive the government of royalties, TPC's claim was a thinly veiled assault on the title of the sovereign.[78] The *Transwestern Pipeline* case suggests that if Wyoming's surface mining legislation, or orders, ordinances, rules, and regulations under it, were held to be a taking, then compensation would not save it, when the land involved was underlain by federal coal or coal under federal lease. Since much of the mineral wealth, coal in particular, is either owned outright by the United States or held under leases from the United States, there is some doubt that eminent domain could lie against those interests.

Finally, the WEQ puts great emphasis on private enforcement of its objectives. "Any interested person" raising an objection to a permit application removes the application to full blown hearing before the council.[79] Further, any aggrieved party under the WEQ may gain review of any

76. WYO. STAT. § 35-502.51 (Supp. 1975).
77. 492 F.2d 878 (10th Cir. 1974), *cert. dismissed*, 419 U.S. 1097 (1975).
78. *Id.* at 883.
79. WYO. STAT. § 35-502.24(f) (Supp. 1975).

final order or administration action in district court under the Wyoming Administrative Procedure Act.[80]

Land Use Planning in Wyoming

Land use planning is in its infancy in Wyoming. The report of the Wyoming Conservation and Land Use Study Commission (CLUSC) revealed that fewer than half of the cities in the state are involved in city planning and fewer still have any zoning ordinance.[81] In 10 of the 23 counties responding to its survey, zoning ordinances or master plans are in effect.[82] Campbell County, the cradle of Wyoming's surface coal mining industry, established a county Planning Commission in 1969.[83] Some of the unincorporated land is zoned. While no zoning ordinance is currently being devised, its master plan is in revision.[84] Only three counties have put into effect zoning or master plans countywide.[85]

Since statehood in 1890, agriculture has dominated the Wyoming economy. Wyoming's inhabitants have grown accustomed to its wide open spaces and its abundant natural beauty. Theirs has been an unhurried pace of life, placing few demands on the public sector.[86] But things are changing in Wyoming. The worldwide resource shortages of the 1970's are bringing intense pressure for economic development of Wyoming's abundant natural wealth. There is growing recognition that the state must find new paths to gain a measure of control over burgeoning industrial activity. The urgency of the problem as perceived by the Wyoming legislature is revealed in the Wyoming Community Development Authority Act:

80. WYO. STAT. § 35-502.51 (Supp. 1975).
81. *See* Table 1 of WYOMING CONSERVATION AND LAND USE STUDY COMMISSION, 1 STATEWIDE LAND USE PLANNING PROGRAM FOR WYOMING 10-12 (1974) [hereinafter cited as LAND USE STUDY].
82. Table 2, *Id.* at 13.
83. *Id.*
84. *Id.*
85. *Id.*
86. Indicative of the rugged individualism of its citizens is a footnote to Table 2 of the Land Use Study Commission's Report, explaining why no zoning ordinance was under consideration in Weston Count. "A hearing on zoning was held in 1964, but there was so much opposition that it was tabled, and a plan was never drawn up." *Id.* at 13.

> § 9-827. *Statement of legislative findings and purposes.* It is hereby declared that there exists in this state by reason of the location and expansion of mineral extractive industries and other industrial developments, an acute shortage of adequate municipal, educational, recreational, cultural and other community facilities, and public services and municipally owned utilities, which conditions threaten and adversely affect the health, safety, morals and welfare of the people of this state.[87]

Further there is a growing recognition that land use planning is the appropriate tool to manage the "mounting crisis":

> The considerable attention given to protecting the quality of our air and water has often failed to grasp the relationship of those qualities to the predominant land use patterns .... In some areas of our state the problems are already in evidence—unguided sprawl of mobile homes; roads, houses and other buildings being located on unstable lands and floodplains; highways located in areas periodically or seasonally subject to high winds; urban and industrial encroachment on lands more properly suited for agricultural or other uses.[88]

DEVELOPMENT OF LAND USE PLANNING IN WYOMING

From statehood in 1890, Wyoming State Legislature asserted its police power in what could be described as land use regulation. Until very recent times this regulation involved the use of public lands.[89] Limited zoning authority was delegated to incorporated cities and towns in 1923,[90] and board authority for land use planning in incorporated cities and towns came in 1961.[91] Counties obtained limited land use planning authority in 1955, when the legislature

87. WYO. STAT. § 9-827 (Supp. 1975).
88. LAND USE STUDY, *supra* note 68, at 1.
89. *See* Public Lands (Title 36), Water (Title 41), Townsites and Public lands (Title 15.1) and Eminent Domain (Title 1 ch. 27) of the Wyoming Statutes.
90. WYO. STAT. 15.1-83 *et. seq.* (1965).
91. WYO. STAT. §§ 15.1-71 to 15.1-82 (1965).

permitted establishment of sanitation districts in unincorporated areas.[92] The basic legislation delegating to the counties power to regulate the land use countywide was passed in 1959.[93]

The statute vests in a Board of County Commissioners authority

> In order to promote the public health, safety, morals and general welfare . . . to regulate and to restrict the . . . use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes in the unincorporated area of the county.[94]

Further, counties specifically were denied zoning authority over the mineral extractive industries. Section 18-289.1 continues

> It is provided, however, that . . . no zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any land subject thereto.[95]

A perceivable trend toward comprehensive land use control began in the late 1960's with the creation of the Interdepartmental Water Conference and the enabling of the Wyoming Water Planning Program in 1967, the Open Cut Mined Land Reclamation Act of 1969, and the Environmental Quality Act of 1973.

THE WORK OF THE LAND USE STUDY COMMISSION

In 1973, the Wyoming State Legislature established the Wyoming Conservation and Land Use Study Commission,

92. WYO. STAT. §§ 18-281 to 18-289 (1957).
93. WYO. STAT. §§ 18-289.1 to 18-289.9 (Supp. 1975).
94. WYO. STAT. § 18-289.1 (Supp. 1975).
95. WYO. STAT. § 18-289.1 (Supp. 1975). That is not to say that all power with respect to the extractive industries reposes in the state and not the counties. Section 1-743 of the Wyoming Statutes grants eminent domain powers to the counties. Furthermore, considerable control can be asserted through county government influence on the location, quality, and timing of essential utility services. *See* Schlauch, *Tripartite Federalism—The Emerging Role of Local Government as a Regulator of the Extractive Industries*, 20 ROCKY MT. MIN. L. INST. 359 (1975).

charged with designing a comprehensive "program of land use planning which would help to insure quality of life and order in growth and development in Wyoming."[96] The program recommended contained three themes. First, land use regulations should be implemented with coordination among federal, state, county, city, and special municipalities. Second, following the thrust of the various forms of federal land use legislation, much of the land use power reposes at the state and not the local level. Third, some modification of the market value system of real property taxation should be developed, because that system discourages agricultural uses and rehabilitation of exploited lands.

The commission proposed legislation which would set up an administrative agency to oversee statewide land use planning. It would have required governing bodies to adopt comprehensive land use plans "not inconsistent with federal or state guidelines or laws."[97] The proposals would amend Section 18-289.1 of the Wyoming Statutes providing for comprehensive planning with respect to the minerals industries.[98]

WYOMING LAND USE PLANNING ACT OF 1975

The Land Use Study Commission proposed four bills to implement its conclusions.[99] Three of the four have failed to pass the Legislature as of this writing. For the most part, these can be regarded as housekeeping legislation or cumulative to the Wyoming Land Use Planning Act of 1975 (hereafter referred to as "the 1975 Act").[100]

Much of the proposed legislation did pass in the 1975 Act.[101] The 1975 Act sets up a comprehensive planning mechanism. It requires all cities and counties to develop

96. LAND USE STUDY, *supra* note 68, at 3.
97. *See* ch. IV, art. III, § 1(a). *Id.* at A-17.
98. *Id.* at C-1 through 2.
99. *See* ch. IV. *Id.*
100. The proposed amendment to Section 18-289.1 would have given local governing bodies planning responsibility for mining. This authority would be subject to strict oversight at the state level under the 1975 Act to the extent such mining operations become "areas of critical or more than local concern." WYO. STAT. § 9-853(a)(ix) (Supp. 1975).
101. Wyoming Land Use Planning Act of 1975, WYO. STAT. §§ 9-849 to 9-862 (Supp. 1975).

land use plans consistent with statewide goals, policies, and guidelines set at the state level.[102] The act provides the local government Land Use Planning Grants out of the general fund.[103]

The heart of the 1975 Act is Section 9-852 which establishes a State Land Use Planning Commission with rulemaking authority. The act gives the commission power

> (ii) To adopt, modify, enforce or revise rules and regulations necessary for the implementation of the purposes and provisions of this act. . . .[104]

While the 1975 Act appears to lack any broad substantive mandate,[105] the commission is empowered to promulgate statewide land use planning goals "in accordance with the best interests of the state, counties, cities, towns and regions."[106] The statewide land use plan integrates local land use plans which meet its approval.[107]

The commission is empowered to establish its own developmental guidelines in the first instance for these areas identified to be of "critical or more than local concern" and to exercise greater oversight in the development of local land use plans in those areas.[108]

The legislature expressed a clear intent to exercise its police power free from federal interference. The commission was empowered

> (xii) To cooperate with federal agencies and with other states, provided that such cooperation is performed in such a manner as to assure that no federal

102. WYO. STAT. § 9-856 (Supp. 1975).
103. WYO. STAT. § 9-862(c) (Supp. 1975).
104. WYO. STAT. § 9-853(a)(ii) (Supp. 1975).
105. The preamble contains no statement of policy. The bill proposed by CLUSC contained an extensive statement of policy but it was excised from the version finally enacted. *See* ch. IV, LAND USE STUDY, at A-2 through 3.
106. WYO. STAT. § 9-853(a)(vi) (Supp. 1975).
107. WYO. STAT. § 9-853(a)(vii), 9-856 (Supp. 1975).
108. WYO. STAT. §9-853(a)(ix)-(x), (xiv) (Supp. 1975). "Areas of critical or more than local concern" are those "where uncontrolled or incompatible large scale development could result in damage to the environment, life or property, where the short or long term public interest is of more than local significance". WYO. STAT. § 9-850(b) (Supp. 1975).

> intervention or control shall take place in the initial or continuing state or local land use planning process . . . .[109]

In enacting that language, the legislature departed significantly from CLUSC recommendations to coordinate state and local land use plans with those of federal land management agencies. The provision parallel to Section 9-850(a)(xii) of the Wyoming Statutes in the bill proposed by CLUSC read as follows:

> The commission shall have the following powers and duties:
>
> (n) To cooperate and coordinate with federal agencies, other states and any interstate land use planning agency or body and enter into interstate agreements or compacts with adjacent states.[110]

The intent of the legislature to remain independent of federal involvement in its land use regulation is further evidenced by a second departure from the proposed legislation. In Article 1, Section 2, the proposed bill read as follows:

> 2. *Policy.* It is the finding of the legislature that the welfare of the people of Wyoming requires a more orderly development of the state's resources; various governmental levels must therefore actively engage in the [formulation of land use policy] . . . . In addition, since much of the land within the state is federally owned, policies governing the use of Wyoming's land resources would be beneficial where federal land use and management decisions could have significant impact on statewide or local environment and development.[111]

In the comments to the policy statement in the proposed bill the CLUSC argued:

> Proliferating transportation systems, largescale industrial and economic growth, conflicts in emerging patterns of land use, the fragmentation of gov-

109. WYO. STAT. § 9-850(a)(xii) (Supp. 1975).
110. *See* ch. IV art. I § 2(n), LAND USE STUDY at A-12.
111. *Id.*

> ernmental entities exercising land use planning powers, and the increased size, scale and impact of private actions have created a situation in which land use management decisions of *national, regional and statewide concern* are being made on the basis of expediency, tradition, and short-term economic considerations and other factors which are often unrelated to the real concerns of a sound land use policy .... *A state land use policy should be formulated upon an expression of the needs and interests of state, regional, and local governments as well as those of the federal government.*[112] [Emphasis Added]

The legislature would have none of the spirit of integration of national needs with its own concerns. Instead, the act contains a clear directive to the commission: it is to cooperate with the federal land management agencies, but it is not to permit "intervention" in the land use planning process. A clearer intent to exercise its police power would be hard to draft.

III. THE SUPREMACY CLAUSE: A LIMIT TO STATE CONTROL OVER SURFACE MINING OF FEDERAL COAL

State Police Power and the Public Lands: The Historical Setting

In determining authority to regulate the public lands, two competing principles emerge. First, article IV, section 3, clause 2, of the United States Constitution gives the Congress power to regulate, control, and dispose of the public lands.[113] This power may not be abrogated by the states.[114] Second, upon achieving statehood each state acquires sovereign powers over the public lands.[115]

An accommodation between these principles was reached in terms of the supremacy clause. In *Omaechevarria v.*

112. *Id.*
113. Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 21 (1952).
114. Transwestern Pipeline Co. v. Kerr-McGee Corp., *supra* note 77.
115. Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); Macomber v. Bose, 401 F.2d 545, 546 (9th Cir. 1968).

State of Idaho,[116] the Supreme Court denied a challenge to a state statute regulating the common use of national forest land by cattlemen and sheepmen. The Court through Mr. Justice Brandeis pointed to the absence of any right of any citizen to access to forest reserves. The cattlemen and sheepmen alike were no more than tenants at sufferance on the forest reserves. But the Court suggested that the supremacy clause might work a different result if the Idaho legislature had attempted to exercise federal plenary powers. The Court held that reasonable exercise of the police power "extends over the Federal public domain, at least, when there is no legislation by Congress on the subject."[117]

Despite the limiting facts of the *Greek's* case, the principle that states' police power extends to the public lands so far as it is consistent with acts of Congress gained wide acceptance. In *McKelvey v. United States*[118] the defendants, convicted of obstructing the access of sheepmen to open range, challenged the federal statute as an unconstitutional intrusion on the state police power. In rejecting the claim, the court gave its imprimatur to a rule of coexistence of sovereignty of the states and the United States on public lands.

> It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned [citations omitted]. . . . It also is settled that the States may prescribe police regulations applicable to public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments.[119]

In *Allen v. Bailey*,[120] the plaintiffs, cattlemen grazing their herds on the open range, brought suit against sheepmen

116. 246 U.S. 343 (1918) (the *Greek's* case).
117. *Id.* at 346.
118. 260 U.S. 353 (1922).
119. *Id.* at 359. In accord Hatahley v. United States, 220 F.2d 666 (10th Cir. 1955), *rev'd other grounds* 351 U.S. 173 (1956).
120. 91 Colo. 260, 14 P.2d 1087 (1932). The most recent enunciation of the rule is in State ex rel. Andrus v. Click, 554 P.2d 969 (Idaho 1976), which enforced Idaho's dredge mining permit and reclamation standards against unpatented mining claims on National Forest land.

under a state law granting power to state courts to apportion the use of the range between cattle and sheep interests. Four sheepmen appealed from the trial court's apportionment order, asserting their right to occupy and use the public land conferred by Section 1063 of Title 43 of the United States Code. The Court recognized the plenary power of Congress to control the public lands, and it recognized the federal possessory rights of the sheepmen as implied licensees of the United States. Nevertheless the Court upheld the statute, stating what it ascertained to be settled general law:

> Congress is vested by the constitution with the power to control and to make all needful rules and regulations with respect to the public domain, and the exercise of such power cannot be restricted by state legislation. But the states may also prescribe reasonable police regulations applicable to public land areas, in so far as such regulations do not conflict with congressional enactment or if the congress has not acted.[121]

The extent to which Congress must act under the supremacy clause to displace the police power was probed in *Texas Oil and Gas Corp. v. Phillips Petroleum Co.*[122] Oil and gas lessees on federal land sought to nullify state compulsory oil field unitization regulations. The parties conceded that under the rule of *State of Colorado v. Toll*,[123] compulsory unitization was within the police power and that the regulations were properly applicable to oil fields on federal lands, unless Congress has expressed an intent to exclude the states from the field. The issue was whether the Mineral Leasing Act of 1920 expressed that intent. The trial court found nothing in the act or the regulations thereunder which would exclude the states from regulating oil production on public lands.[124] The Court of Appeals agreed that the extant federal regulation governing oil production on public land could not be regarded as inconsistent with the state regulations. It held

121. *Id.* at 1091.
122. 406 F.2d 1303 (10th Cir.), *cert. denied* 396 U.S. 829 (1969).
123. 268 U.S. 228 (1925).
124. Texas Oil and Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366 (W.D. Okla. 1967).

further that no case for federal preemption existed, since the state regulations worked no impermissible interference with the interests of the United States.[125]

These cases suggest inquiry into two constitutional limits to the states' police power on the public lands. First, any state land use regulation aimed at controlling surface mining must pass muster under the fourteenth amendment as a reasonable exercise of the police power and not an unconstitutional taking. This taking question is beyond the reach of this article and has been treated exhaustively elsewhere.[126] Second, state regulation is precluded to the extent that the states delegated the power to regulate the subject matter to the United States and to the extent the legislation is preempted by acts of Congress.

The Preemption Doctrine

The preemption doctrine gives effect to the constitutional division of power between the federal government and the states. Its heritage runs to *Gibbons v. Ogden*[127] and *Cooley v. Board of Wardens.*[128] The preemption doctrine now —as always perhaps—serves as a fairly unprincipled vehicle for expressing the Supreme Court's notions of federalism. It has become the touchstone of the concept of "cooperative federalism" evolving in the Burger Court.[129]

The preemption doctrine permits courts to invalidate state legislation which stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[130] The preemption doctrine has been invoked when state legislation conflicts with federal legislation or when the state intrudes into a regulatory field determined to be the exclusive

125. Texas Oil and Gas Corp. v. Phillips Petroleum Co., *supra* note 122, at 1305-306.

126. *See* BOSSELMAN, COLLIES AND BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (A report Prepared for the Council on Environmental Quality) (1973).

127. 22 U.S. (9 Wheat.) 1 (1824).

128. 53 U.S. (12 How.) 299 (1851).

129. *See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

130. Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

province of the Congress. The Court has been less than consistent in putting content into the preemption doctrine as rendered by *Hines v. Davidowitz.*[131]

THE PREEMPTION DOCTRINE
THE PRE-BURGER COURT EVOLUTION

Before 1973, the preemption doctrine had evolved into a presumption of federal supremacy. In the 1941 case of *Hines* the Court departed from earlier cases which required clear congressional intent to clear the states from the regulatory field or actual conflict with federal legislation. Finding special preemptive capability in federal legislation emanating from national sovereign powers over foreign affairs, the Court held federal alien registration legislation to preempt similar state legislation despite the absence of conflict or express congressional intent to occupy the regulatory field. The *Hines* approach soon pervaded both the occupation and the conflict grounds for preemption. In *Rice v. Santa Fe Elevator Corp.*,[132] the requirement that Congress express its intent to displace the states from a regulatory field evaporated, signaling a solicitude for federal interests outside the field of foreign affairs. In *Rice*, the Court inferred such intent from the pervasiveness of the regulatory scheme, the dominance of the federal interests, and inconsistency of results under state regime with federal statutory objectives. In *Pennsylvania v. Nelson*,[133] the Court held a federal sedition law to preempt a Pennsylvania sedition statute on the ground that concurrent regulation by the two sovereignties created the mere risk of conflict. The balancing of state and federal interests had thus ossified into a broad-based presumption of federal supremacy.

---

131. Indeed, Hines in its 35 years has demonstrated a remarkable chameleon-like quality, at home with the Supreme Courts deference to federal supremacy (*see, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Zschernig v. Miller, 389 U.S. 429 (1968)), and with the Burger Court's deference to state interests (*see, e.g.*, Goldstein v. California, 412 U.S. 546 (1973); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)).

132. *Supra* note 131.

133. 350 U.S. 497 (1956).

COOPERATIVE FEDERALISM: BURGER COURT'S DEFERENCE TO STATE INTERESTS

Since *Hines* the Court had been suggesting that, if the Congress does not want to displace state regulation of the same subject matter, they should be clear about the intention. In the October term, 1972, the Supreme Court handed down a number of decisions calculated to recast the preemption doctrine in a form better suited to Burger Court concepts of federalism.[134] The Burger Court was suggesting a reversal of presumptions. The Court seemed to be saying that if Congress desires to displace State regulation of the same subject matter, they should be clear about that intention. Although these decisions did not involve public lands, they are instructive from an analytical standpoint for federal preemption in the field of surface coal mining.

In *Askew v. American Waterways Operators, Inc.*,[135] ship owners and operators, as well as owners and operators of oil terminal facilities located in Florida, brought suit to enjoin enforcement of the Florida Oil Spill Prevention and Pollution Control Act on the ground that the regulatory field had been preempted by federal legislation. The Florida Act held each owner or operator of a terminal facility and ship owners strictly liable for damage incurred by either the state or private persons as a result of oil spills. The federal act imposed on ship owners strict liability up to $14,000,000, and on owners of terminal facilities up to $8,000,000 for costs of the federal government in cleaning up oil spills. Mr. Justice Douglas for the Court examined the two acts. The federal act was not a comprehensive regulatory effort. The statutory language expressed no intent to preempt state legislation, but instead evidenced a plan of cooperation with the states.[136] The Court concluded that the state was within its

134. *See generally*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624. (1973); Goldstein v. California, *supra* note 131; Lake Carriers Assn. v. MacMullan, 416 U.S. 498 (1972); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973); United States v. Chandler, 410 U.S. 257 (1973).
135. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).
136. *Id.* at 329-30.

constitutional authority in creating a cause of action for either the state or private individuals to recoup their losses from oil spills.[137]

In *Goldstein v. California*, the Court examined concurrent regulation in the patents and copyright field. The petitioners in *Goldstein* were convicted under state law of piracy of musical recordings. They sought to set aside the conviction on the ground that the states had reserved no power to regulate under the copyright clause of the federal Constitution or in the alternative that if the states did reserve such power, the California regulatory scheme was preempted by federal copyright legislation. The Court held that the states reserved power to regulate in the field, since the grant in article 1, section 8, clause 8 of the Constitution did not grant the power exclusively to the United States nor expressly deny it to the states. Further, the Court declined to imply such exclusivity in the absence of a showing that concurrent regulation by both the federal and state governments would necessarily or inevitably lead to difficulty.[138]

Having determined that California had residual power to regulate in the copyright field, the Court next determined whether or not the state legislation should be invalidated under the supremacy clause. The object of the Court's inquiry was whether the state law stood as an obstacle to the execution of the full purposes and objectives of Congress. In the federal legislation, the Court could find no clear and unambiguous intent to exclude the states from the regulatory field. The Court could find no actual conflict and refused to preempt the state legislation on the occupation ground when Congress, the courts, federal agencies, and the states had consistently worked in a scheme of coexistence of federal copyright legislation and state trade regulation. The dissenters in *Goldstein* had trouble reconciling what appeared to them to be a clear conflict between the federal and state regulatory schemes. Mr. Justice Douglas, in a dissenting opinion in which Justices Blackmun and Brennan joined, wrote:

137. *Id.* at 344.
138. Goldstein v. California, *supra* note 131, at 554-55.

> California's law promotes monopoly; the federal policy promotes monopoly only when a copyright is issued and it fosters competition in all other instances. Moreover, federal law limits its monopoly to 28 years plus a like renewal period, while California extends her monopoly into perpetuity.[139]

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,[140] an account executive with Merrill Lynch, voluntarily terminated his employment and entered competitive employment contrary to the terms of his employment contract with Merrill Lynch. Ware brought an action in state court to recover his interest in the employees' profit-sharing plan, and Merrill Lynch sought to dismiss on the ground that his interest in the plan had been forfeited for violation of conditions of employment. Ware's employment with Merrill Lynch had been subject both to approval by the New York Stock Exchange and to a pledge by Ware to abide by Exchange rules requiring compulsory arbitration of disputes arising out of the termination of employment. California law regarded the dispute as one over wages, giving Ware a right of action despite private agreement to submit such disputes to arbitration.

The Supreme Court was thus presented the problem of attaching meaning under the supremacy clause to what appeared on its face, a clear, irreconcilable conflict between state law and valid rules of the New York Stock Exchange. The Court drew a distinction between rules which carry preemptive capability and those which do not:

> It is thus clear that the congressional aim in supervised self regulation is to insure fair dealing and to protect investors from harmful or unfair trading practices. To the extent that any exchange rule or practice contravenes this policy, or any authorized rule or regulation under the Act, the rule may be subject to appropriate federal regulatory supervision or action. Correspondingly, any rule or practice not germane to fair dealing or investor protection

139. *See* the dissenting opinion of Mr. Justice Douglas. *Id.* at 574
140. *Supra* note 134.

> would not appear to fall under the shadow of the federal umbrella; it is instead, subject to applicable state law.[141]

Since the compulsory arbitration rule was not at the heart of the regulatory scheme and since there appeared to be no compelling need for uniformity, the Court could not find sufficient interference with the federal regulatory scheme to justify overriding California's strong policy to protect wage earners from compulsory arbitration agreements.

In *New York State Department of Social Services v. Dublino*, the Court reversed a three-judge United States District Court for the Western District of New York, which held that the federal work incentive program (WIN) contained in the 1967 amendment to the Social Security Act preempted the New York work rules of the New York social welfare law. The Court observed that welfare is a field or regulation in which both states and the Federal government pursue powerful interests in a coordinated and complementary administrative fabric.[142] In such a context, the Court would impose a heavy burden of persuasion on those urging preemption.[143] The Court could perceive no necessary conflict as in *Rosado v. Wyman*[144] and *Townsend v. Swank*,[145] both cases in which state law defined "need" and "dependent child" for restricted entitlements under the AFDC program. In the absence of such conflict, the Court relying on *Schwartz v. Texas*,[146] looked for evidence showing a "clear manifestation of [congressional] intent" that "must exist before a federal statute is held to 'supercede the exercise' of state action."[147] In the absence of such "clear manifestation," the Court refused to infer a Congressional intent to occupy the field.

---

141. *Id.* at 130-131.
142. New York State Dep't of Social Services v. Dublino, *supra* note 134, at 412 *et. seq.*
143. *Id.* at 415-417.
144. 397 U.S. 397.
145. 404 U.S. 282 (1971).
146. 344 U.S. 199, 202-203 (1952).
147. New York State Department of Social Services v. Dublino, *supra* note 134, at 417.

In *City of Burbank v. Lockheed Air Terminal, Inc.*, as in *Dublino*, petitioners sought to invalidate state legislation in an area in which the Congress had legislated against a rich tradition of federal interest. However, the regulatory field in issue did not fit the pattern of cooperative federalism. First, the United States operates in its sovereign capacity over air space. Second, the Federal Aviation Administration enjoys broad discretion to implement it. Finally, the subject matter itself was peculiarly dependent upon uniform regulation.

In *Burbank*, the owner and operator of the airport and an interstate air carrier brought suit in federal court for a declaratory judgment that a city curfew ordinance prohibiting takeoff by jet aircraft between the hours of 11:00 p.m. and 7:00 a.m. was invalid. The Court noted the trial court's finding that the Burbank curfew necessitated "bunching" of air traffic and resulted in increased congestion, noise, and inefficiencies in traffic management. As such, the noise ordinance was ". . . totally inconsistent with the objectives of the federal statutory and regulatory scheme."[148] The Court relied on *Rice v. Santa Fe Elevator Corp.*, inferring a Congressional intent to preempt the states from the pervasiveness of the federal regulatory scheme, the dominance of the federal interests, and the inconsistent objectives of the FAA and the City of Burbank.

In the October term, 1973, the Supreme Court continued to hand down preemption decisions.[149] The *Bicron* case is noteworthy because it suggests an emerging analytical pattern for Burger Court renderings of the preemption doctrine. In *Bicron*, employees of Harshaw Chemical Company, an unincorporated subsidiary of Kewanee Oil Company, terminated their employment and formed Bicron Corporation. They took with them an unpatented but patentable technology for synthesizing crystals used to detect ionizing radiation. Harshaw Chemical Company and Kewanee Oil Company

148. City of Burbank v. Lockheed Air Terminal, *supra* note 134, at 627-29.
149. Kewanee Oil Company v. Bicron Corp., 416 U.S. 470 (1974); Mahon v. Stowers, 416 U.S. 100 (1974); Old Dominion Branch No. 496, National Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974).

considered the technology to be a trade secret under Ohio law. Kewanee brought a diversity action in U.S. District Court for damages and an injunction for the misappropriation of the technology. Bicron defended on the strength of *Sears, Roebuck & Co. v. Stiffel,*[150] contending that the Ohio trade secret law blocked from the public domain new technology which under federal patent law belonged in the public domain. Bicron contended that the Ohio Trade Secrets law, in irreconcilable conflict with federal patent law, should be preempted. The District Court rejected the preemption defense and granted the injunction. The Court of Appeals reversed. The Supreme Court reversed the Court of Appeals, corrected its erroneous reading of the *Stiffel* case, and reinstated the injunction of the District Court.

Mr. Chief Justice Burger, writing for the Court, relied on *Goldstein v. California* for the proposition that the state retained some sovereignty in the trade secrets regulatory area. That left the supremacy clause as the remaining limit. Since federal legislation did not expressly clear the states from the regulatory field, the Court saw its job to determine whether "the scheme of protection developed by Ohio respecting trade secrets 'clashes with the objectives of the federal patent laws'."[151] A parallel analysis of the two regulatory schemes revealed a partial conflict. The Court viewed the objective of the patent laws to be one of tolerating limited monopoly over patentable inventions while encouraging free flow of technology into the public domain with respect to nonpatentables. The Ohio trade secrets law amounted to a grant of monopoly in perpetuity over trade secrets, without regard to their patentability under federal law. The Court conceded that applying state trade secret protection to unpatentable technologies would present a case of partial conflict, but "the extension of trade secret protection to clearly patentable inventions does not conflict with the patent policy of disclosure."[152] Despite the conceded partial conflict, the Court declined the opportunity to in-

150. *Supra* note 131.
151. Kewanee Oil Co. v. Bicron Corp., *supra* note 149 at 480 *quoting* Sears, Roebuck & Co. v. Stiffel, *supra* note 131, at 231.
152. Kewanee Oil Co. v. Bicron Corp., *supra* note 149, at 491.

voke partial preemption with respect to trade secret protection for technologies not clearly patentable because it would impose difficult administrative burdens on state courts tasked to determine federal patent law. Accordingly, the Court found "[n]either complete nor partial preemption of state trade secret law is justified."[153]

The decision of the Burger Court yields this learning. State legislation may be constitutionally repugnant when it has exercised a power granted exclusively to the United States. Such exclusivity may be implied, when concurrent legislation necessarily or inevitably would lead to difficulty. Further, state legislation may be preempted when and to the extent that it presents an obstacle to the full accomplishment of the purposes of Congress. State legislation becomes such an obstacle, first, when state legislation conflicts with federal legislation or federal regulations within the "federal umbrella"; and second, when to Congress may be attributed a "clear and manifest" intention to exclude the states from the regulatory field.

The Mineral Leasing Act of 1920 and Existing Interior Department Regulations

The power of Congress over the public lands ceases when in its entirety it is disposed of by patent.[154] The statutory structure suggests that issue of the patent works the terminus of the interest of the Secretary of the Interior in the land.[155] After the surface patent issues, the federal government retains the right to prospect for, mine, and remove the coal under the disposal provisions of the coal lands laws under Section 85 of Title 30 of the United States Code. Disposal of such coal is governed by the Mineral Leasing Act of 1920.[156] That act expressly provides that "[n]othing in this chapter shall be construed or held to affect the rights of the states or other local authority to exercise any rights which

153. *Id.* at 492.

154. Winona & St. Peter R.R. v. Barney, 113 U.S. 618 (1885).

155. *See* 43 U.S.C. § 329 (1970); *cf.* Reed v. Morton, 480 F.2d 634, *cert. den.*, 414 U.S. 1069 (1973).

156. 41 Stat. 437 (1920), 30 U.S.C. § 181 *et. seq.* (1970).

they might have . . ."[157] Those rights have been held to include the police power, unless its exercise is inconsistent with acts of Congress.[158]

The *Texas Oil and Gas Corp.* decision leaves open the argument that state surface mining legislation is protected under Section 189 of Title 30 of the United States Code only to the extent that federal residual powers to dispose of the reserved coal have not been exercised in such a manner as to manifest an interest to deal exclusively with the subject. Until the Secretary promulgated the 1976 coal resource management regulations,[159] federal coal lands disposal regulations expressed a fairly clear intent to leave to the states the land use regulation of coal lands privately owned but held subject to federal mineral reservations.

A broad statement of disposal policy, left intact by the new coal leasing and operating regulations, expresses an intent to encourage state and local land use regulations:

> § 1725.2 Disposal Policy. Public lands will be transferred out of federal ownership in the most efficient manner possible. This will be accomplished, where practicable, by the following procedures.
>
> (a) Encouragement and assistance will be expended to state, county, and local governments in master planning and zoning. They will be encouraged to utilize the best modern techniques for quality utilization, including preservation of natural beauty and open space values, and the prevention of uneconomic use and development of flood plains.[160]

Until the Secretary promulgated the 1976 regulations, Interior Department regulations which controlled the exploration, mining, and reclamation of coal lands were con-

157. 30 U.S.C. § 189 (1970).
158. Texas Oil and Gas Corp. v. Phillips Petroleum Co., 406 F.2d 1303 (10th Cir.), *cert. den.*, 396 U.S. 829 (1961).
159. On May 17, 1976, the Secretary noted adoption of the coal operating regulations proposed on September 5, 1976. 41 FED. REG. 20252 (1976). On June 1, 1976, the coal leasing regulations proposed on March 16, 1976, were promulgated in 41 FED. REG. 22051 (1976).
160. 43 C.F.R. § 1725.2 (1975).

sistent with the stated policy to leave land use regulation to the states, even when the surface involved had been patented to private use subject to federal mineral reservations. Part 23 of Subtitle A of Title 43 of the Code of Federal Regulations contained regulations of surface exploration, surface mining, and reclamation of mineral lands subject to the Mineral Leasing Act. The regulations expressly excluded from their purview private lands underlain by federal coal:

> (b) The regulations in this part do not cover . . . minerals underlying lands, the surface of which is not owned by the U.S. Government.[161]

Whether or not the Congress has the power to regulate private lands underlain by federal coal, it should be plain that Congress has not acted on it. Congress passed by an opportunity to exclude state control of surface mining of federal coal underlying private lands.[162] Congress failed to act with the knowledge of the coal leasing and operating regulations promulgated in May and June of 1976 by the Secretary of the Interior. This legislative silence would seem to fall short of the need for "clear and manifest" legislative intent to preempt state law. The crucial problem, thus, becomes whether the Secretary of the Interior by rulemaking has expressed an intention to preempt state law and whether that expression should have preemptive capability.

Interior Department Coal Lands Regulations

The administrative regimen has been thoroughly recast by coal lands management regulations promulgated by the Secretary of the Interior in the past few months. Two final rules by the Interior Department would make unmistakably clear federal intentions to regulate western coal lands, regardless of ownership of the surface overlying the federal coal.[163] They restate federal objectives, which suggest reevaluation of the compatibility of state objectives. They

161. 43 C.F.R. § 23.2(b) (1975).
162. 90 Stat. 1083 (1976).
163. Department of Interior, Coal Mining Operating Regulations, 41 FED. REG. 20252 (1976); Department of Interior, Competitive Coal Leasing, 41 FED. REG. 22051 (1976).

express a clear intention to move into a new regulatory field in a different way. In short, the proposed regulations raise more difficult questions of federal supremacy.

FEDERAL COAL MINING OPERATING REGULATIONS

By means of the rule adopted May 17, 1976, the Secretary of the Interior proposed to move into land use regulation of private lands overlying federal coal for the first time.[163] The rule would, first, amend Section 23(b) of Title 43 of the Code of Federal Regulations to exclude coal mining operations from the surface exploration, mining, and reclamation regulations of Part 23. That Part is now supplanted by Part 3040 of the Regulations, contained in the rule. It is worth noting that, by excluding coal mining from Part 23, the proposed rule would seem to exclude also the operation of the clear policy of deference to state land use regulation expressed in Part 23.[164]

Second, the May 17 final rulemaking expresses a clear intention to sweep all lands overlying federal coal into its coal exploration, mining, and reclamation regulations.

> (b) It is the policy of the Department to encourage the development of Federally owned coal, where such development is authorized, through a program that will provide for the protection, orderly development and conservation of Federal mineral and nonmineral resources in a manner that will avoid, minimize, or correct adverse impacts on society and the environment resulting from coal development . . . . Departmental policy regarding privately owned surface where the mineral estate is federally owned is that any mineral activity on the private surface should be conducted to result in protection of environmental values at least as stringent as would apply to Federally owned surface.[165]

The rule arrogates to the Director of the Bureau of

164. 40 FED. REG. 41123 (1975) (proposed rule); 41 FED. REG. 20252 (1976) (final rule).

165. Compare 41 FED. REG. at 20273 (1976) with 43 C.F.R. § 23.2(b) (1975).

Land Management (BLM) "in consultation with the GS [Geological Survey], and the surface owner if other than the United States . . ." the authority to incorporate into leases, permits, and licenses the performance standards of Part 3040.[166] The enforcement of the regulations is to be by BLM, United States Geological Survey, or other federal surface manager.[167] The interests of the surface owner are to be considered by the federal surface manager,[168] prior to the issuance of any coal lease, permit, or license:

> [T]he authorized officer will consult with and receive and consider recommendations from the mining Supervisor or the federal surface managing agency . . . or the surface owner, as to the terms and conditions required to achieve the purpose of this subpart.[169]

The rule makes clear that states have no role in decision-making concerning mining and reclamation of lands subject to proposed Part 3040. Rather, the policy is to arrogate to the federal land management agencies the power to balance state, local, and national energy and environmental values.[170] The Secretary's brand of federalism is revealed by the following excerpt:

> First, the relationship between federal and state jurisdiction to impose reclamation standards has arisen in the recently proposed legislation. On the one hand, it is clear that the states have a direct public policy interest in coal development within their geographic boundaries. In addition the historical development of coal resources has in many areas resulted in patterns of intermingled tracts if federal and private ownership with respect to

166. 41 FED. REG. 20253 (1976).
167. 41 FED. REG. 20253 (1976).
168. 41 FED. REG. 20253 (1976).
169. 41 FED. REG. 20253 (1976).
170. The proposed rule would leave open the possibility that state reclamation standards could be absorbed into permits and mining plans approved under Part 3040. 41 FED. REG. 20273 (1976), proposed 43 C.F.R. § 211.75. Adoption of state standards will be by rulemaking following agency review of state standards. *See* Advanced Notice of Proposed Rulemaking in 41 FED. REG. 27993 (1976).

which coordinated regulatory mechanism would be desirable.

> On the other hand it is also clear that federal coal resources belong not to one or more of the several states, but to the Nation as a whole. The federal interest in assuring the timely and orderly development of such resources must be implemented with that end in mind.[171]

THE ENERGY MINERALS ACTIVITY RECOMMENDATION SYSTEM

The May 17, 1975 rulemaking sought to balance the need for coal production and environmental protection at the operations phase of the coal industry. On March 16, 1976, the Department of the Interior proposed EMARS to serve similar interests at the resource disposal phase of the industry.[172] The June 1, 1976 rulemaking would revise 43 C.F.R. Part 3520 to reflect the adoption of EMARS.

EMARS is a system designed to produce a decision by BLM to recommend to the Secretary whether or not to issue a requested coal lease. Previously, federal regulations failed to assure consideration of the interests of the energy consumer, the resource owner, and the environment. The result was that virtually all competitive coal lease requests were granted. In addition, data revealed that federal coal leases yielded very little coal production. Accordingly in 1972 competitive coal leasing was halted with the Secretary's Moratorium, and work was begun at the department level to set some sort of policy. EMARS expresses the policy designed to "permit resumption of coal leasing, as the need arises, in a responsible way that protects the environment and the interests of both the general public who own the resource, and the energy consumers who will benefit by its use."[173]

EMARS synthesizes environmental, economic, and resource inputs from various federal land management agencies, the public at large, and the state governments. EMARS

171. 40 FED. REG. 41123 (1976).
172. Department of the Interior, Competitive Coal Leasing, 41 FED. REG. 11035 (1976) (proposed rulemaking), 41 FED. REG. 22051 (1976) (final rulemaking).
173. 41 FED. REG. 11035, 22051 (1976).

sets out to act on those inputs by attempting to select tracts for coal leasing in a manner which assures adequate coal production at least environmental cost. Unlike the coal mine operating regulations discussed above, which deny the states a role, EMARS contemplates substantial role for the state governments in decisionmaking. For purposes of this article it is useful to trace, if only briefly, the state participation in that process.

From the first stage of the process the state government is involved. Its participation begins with the right to nominate "areas of interest" and to participate in analysis of nominations from industry or the public.[174]

> [A]s part of EMARS, the regulations establish a call for information and nominations stage that is a major new vehicle enabling the public to inform the Department in advance of any actual decision to offer leases, where coal leasing is considered desirable and where it is not.[175]

The product of the nominations stage is a basic land use plan which collates the public and state inputs against the backdrop of the BLM Management Framework Plan, or MFP. The MFP is itself an area by area land use plan which

> . . . inventories not only minerals, but also other resource values such as agriculture, grazing, wildlife, recreation and water resources in specific areas. It also analyzes the compatibility and conflicts of the varying land uses and provides guidelines for activities planning.[176]

Tentative tract selection, environmental analysis, tract selection, leasing unit recommendations are all decisions

174. 41 FED. REG. 11037, Table I (1976). The final rulemaking eleminated the so-called "two-tier tract nomination procedure." However, the states will be asked to comment on tract nominations along with industry and the public in a general, single-tiered call for nominations. *See* 41 FED. REG. 22051 (1976).

175. 41 FED. REG. 11036 (1976).

176. 41 FED. REG. 11036 (1976).

made by the Secretary with consultation with the Governors of the states affected.

IV. BOTTOM LINE: PREEMPTION OF WYOMING SURFACE MINING LEGISLATION

Now that the federal government has moved dramatically to take charge of development of federal coal on public and private land, the critical question is whether the courts should accord the Secretary's effort preemptive capability. The guidance from the Burger Court decisions suggests that the answer to the question involves the resolution of three issues: Whether the states have power to legislate the subject matter; whether the state law conflicts with federal regulations and whether the Congress expressed a clear intent to occupy the field of regulating surface mining of federal coal.

Is State Regulation Repugnant to the Property Clause?

> Article IV, Section 3, of the U.S. Constitution provides: The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular States.

The text of the clause provides no basis for federal exclusivity. Furthermore, whether exclusive federal power may be inferred depends on a finding of "constitutional repugnancy." The court in *Goldstein v. California* stated:

> We must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise.[177]

There simply is no serious dispute that the states may regulate surface mining under the police power. The Su-

177. Goldstein v. California, *supra* note 131 at 554.

preme Court in *Omaechevarria v. State of Idaho*, and in *McKelvey v. United States*,[178] held to what it ascertained to be settled law that the states are free to prescribe police regulations over the public lands. Last term the Supreme Court in *Kleppe v. New Mexico*,[179] reiterated the principle in holding that states and the Congress share power to regulate wild animals on public lands. In light of long standing judicial construction and legislative and administrative regulation with reference to it, it is hard to justify at this date a finding that the exercise of the police power over public lands suffers from constitutional repugnancy.[180]

The remaining limit then is the supremacy clause. The Wyoming surface mining legislation is void under the supremacy clause, if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[181] The state scheme may be held to be such an obstacle if it clashes with federal law or if it intrudes into a field of regulation which the Congress has claimed to be its exclusive province.

Does the State Legislation Clash with Federal Regulations?

State legislation may be voided under the supremacy clause when the objectives of the state legislature are incompatible with the objectives of the federal scheme.

The Secretary of the Interior enjoys broad discretion to dispose of the public lands under the Mineral Leasing Act of 1920.[182] The Secretary has stated the objectives of the coal mining operating regulations as follows:

> (b) It is the policy of the department to encourage the development of federally owned coal where such development is authorized through a program that

178. *Supra* note 118.
179. ____ U.S. ____, 96 Sup. Ct. 2285 (1976).
180. *See* New York State Department of Social Services v. Dublino, *supra* note 134 at 421.
181. Hines v. Davidowitz, *supra* note 130. *See* also Kewanee Oil Company v. Bicron Corporation, *supra* note 149, at 479; Goldstein v. California, *supra* note 131.
182. 41 Stat. 437 (1920), 30 U.S.C. § 181 *et. seq.* (1970).

> will provide for the protection, orderly development and conservation of federal mineral and non-mineral resources in a manner that will avoid, minimize or correct adverse impacts on society and the environment resulting from coal development, without undue duplication or administrative delay by federal officers. It is also the policy of the department to issue leases, permits, and licenses for coal only where the reclamation of the affected lands to the standard set forth herein is attainable and assured and reclamation program will be undertaken as contemporaneously as practicable with operations. Departmental policy regarding privately owned surface where the mineral estate is federally owned is that any mineral activity on the private surface should be conducted in protection of environmental values which is at least as stringent as would apply to federally owned surface.[183]

The stated objectives of the Interior Department's coal leasing program (EMARS) are "the orderly and timely development of federally owned coal; appropriate use of the resources; effective environmental protection; and a fair market return to the public for resources sold."[184]

The stated objectives of the Wyoming Environmental Quality Act are declared to be:

> To enable the State to prevent, reduce and eliminate pollution; to preserve, and enhance the air, water and reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state control over its air, land and water and to secure cooperation from agencies of the state, agencies of other states, interstate agencies, and the federal government in carrying out these objectives.[185]

183. Department of the Interior, Coal Mining Operating Regulations, 41 FED. REG. 20252, 20253 (1976).

184. Department of the Interior, Competitive Coal Leasing, 41 FED. REG. 22051, 22053 (1976).

185. WYO. STAT. § 35-502.2 (Supp. 1975).

The objectives seem complimentary. Each sovereignty, the state pursuant to its police power and federal government pursuant to article I and IX of the Constitution, is pursuing a common goal: the orderly development of coal resources at least environmental cost. To be sure, there exists risk that the state's balance of the factors might work a result different from that of the Interior Department. In the Burger Court, that risk has been an insufficient basis for preemption. In *City of Burbank v. Lockheed Air Terminal, Inc.*,[186] it was not a mere risk that the respective statutory objectives would be applied inconsistently. Rather, in *Burbank* the objectives themselves were found to be totally inconsistent. The objectives of the ordinance was a somnolent constituency. The objectives of the Federal Aviation Administration was efficient air traffic management. It is also true that the stated federal objectives are specifically directed toward the development of coal resources, while the state objectives are more generally directed toward orderly development of its air, land, and water resources. However, the Court in *Kewanee Oil Company v. Bicron Corporation*,[187] had no quarrel with the broadly stated policies of general application which supported the Ohio Trade Secret Law.[188]

Even if the statutory objectives are complimentary, there may be, nevertheless, conflict arising from the interaction of the two regulatory systems. On private land held subject to federal coal reservations, reside Wyoming's most vocal constituency. There exists an undeniably legitimate state interest in legislating with respect to private lands, and Wyoming has compiled a substantial legislative record in pursuit of it. By extending its regulation at both the leasing and the operating stages of the coal mining industry to private lands underlain by federal coal, the Interior Department has introduced a quantum leap in the risk of conflict between federal and state regulatory schemes.

Both the state and the federal regulatory schemes involve the granting, the enforcement, and possible revocation

186. *Supra* note 134.
187. *Supra* note 149.
188. *Id.* at 482.

of mining permits and licenses. There exists a possibility that the director of the Department of Environmental Quality could thwart both EMARS and the coal mining operating regulations by denying a federal permittee a mining permit or license under state law. The director of the D.E.Q. may deny a mining permit for any one of the following reasons:

> (i) the application is incomplete; (ii) the applicant has not properly paid the required fee; (iii) any part of the proposed operation, reclamation program or the proposed future use is contrary to the law or policy of this state or the United States; (iv) the proposed mining operation would irreparably harm, destroy or materially impair any area that has been designated by the council to be of a unique and irreplaceable, historical, archeological, scenic or natural value; (v) if the proposed mining operation will cause pollution of any water in violation of the laws of this state or of the federal government; (vi) if the applicant has had any other permit or license issued hereunder revoked or any bond posted to comply within this act forfeited; (vii) the proposed operation constitutes a public nuisance or endangers the public health and safety; (viii) the affected land lies with 3,000 feet of any existing occupied dwelling, home, public building, school, church, community or institutional buildings, park or cemetery, unless the land owner's consent has been obtained. The provisions of this subsection shall not apply to operations conducted under an approved permit issued by the State Land Commissioner in compliance with the open-cut Mine Land Reclamation Act of 1969; (ix) the operator is unable to produce the bonds required; (x) if written objections are filed by an interested person under subsection (f) of this section. (xi) if information in the application or information obtained through director's investigation shows that the reclamation cannot be accomplished consistent with the purposes and provisions of this act; (xii) if the applicant has been and continues to be in violation of the provisions of this act; (xiii) no permit shall be denied on the basis that the applicant has been in actual violation of the provisions

> of this act if the violation has been corrected or discontinued.[189]

A second area of potential conflict exists with regard to the contents of mining permits and licenses issued under state law and those under the federal regulations. The critical component in the mining permit under state law is the reclamation plan.[190] It is the stated policy of the Secretary of the Interior that privately owned surface subject to federal coal reservations should be environmental protection "at least as stringent as would apply to federally owned surface."[191] However, the federal regulations leave open the possibility that stricter reclamation standards under state law may not be adopted or incorporated into licenses and mining plans under federal law. The Secretary has some discretion in the matter if, following review of state reclamation standards,

> The Secretary determines that the requirements of the laws and regulations of any such state afford general protection of environmental quality and values at least as stringent as would occur under exclusive application of this part, he shall be rulemaking direct that the requirements of such state laws and regulations thereafter be applied as conditions upon the approval of any proposed exploration or mining plan, unless (1) the Secretary determines that such application of the requirements of such laws and regulations would unreasonably and substantially prevent the mining of federal coal in such state, and (2) the Secretary determines that it is in the overriding national interest that such coal be produced without such application of such requirements. In any such determination of overriding national interest, the Secretary will consult in advance of such determination with the governor of the state involved.[192]

A third area of possible conflict, in extreme cases closer to actual conflict, is the state's reallignment of the rights of

189. WYO. STAT. § 35-502.24(g) (Supp. 1975).
190. *See* WYO. STAT. § 35-502.24(b) (Supp. 1975).
191. 41 FED. REG. 20252, 20253 (1976).
192. 41 FED. REG. 20252, 20273 (1976).

the surface owner against the mineral owner. First, the surface owner, upon a showing that mining would substantially prohibit his operations, or an obstinate "resident or agricultural landowner" might veto the mining permit under state law. The state law does entitle the surface owner to damage "commensurate with the reasonable value of the surrounding land. . . ."[193] In addition, the damages under the bonding provisions are recoverable annually as they accrue.[194] The state law would appear to reverse the balance struck by settled rules of *Barker v. Mintz*,[195] *Kinney Coastal Oil Co. v. Kiefer*;[196] and *Holbrook v. Continental Oil Company*.[197] Under Sections 35-502.12 and 35-502.33 of Wyoming Statutes, the surface owner can in effect enjoin mining operations upon a showing of substantial prohibition of his own operations, and his damages are not limited to damages to crops, forage, and improvements. However, after *Askew v. American Waterways Operators, Inc.*[198] these provisions of the Wyoming Statutes appear less likely to be construed as conflicts than justifiable reordering of remedies.[199]

In anticipation of controversies which might arise over permits, mining licenses, reclamation bonds, and reclamation standards, it is difficult to find an immediate and actual conflict.

The meaning that should attach to these potential conflicts is not yet clear. The Burger Court has not had occasion to consider squarely the continued viability of the potential conflict ground of *Pennsylvania v. Nelson*.[200] *Askew v. American Waterways Operators, Inc.*, appears to suggest a departure from the potential conflict standard. While recognizing that state and private claims for cleanup of oil spills might exceed the limits in the federal act, the court refused to preempt absent a clear and actual conflict, observ-

193. WYO. STAT. § 35-502.33 (Supp. 1975).
194. WYO. STAT. § 35-502.33 (Supp. 1975).
195. *Supra* note 25.
196. 277 U.S. 48 (1928).
197. 73 Wyo. 321, 278 P.2d 798 (1955).
198. *Supra* note 135.
199. *Id.* at 341.
200. 350 U.S. 497 (1956). *See*, in general, the textual discussion accompanying footnote 134.

ing "[B]ut it will be time to resolve any such conflict between federal and state regimes when it arises."[201]

This analysis leaves aside the argument that the state statutory remedies are so burdensome to federal lessees and licensees who, without notice of the state law, relied on reasonable expectations of the dominance of the mineral estate that they amount to an impairment of the contract between the federal government and the licensees and permittees. Such impairments may be abrogated under familiar rules of conflicts of laws.[202]

Has the Congress Expressed an Intent to Occupy the Field?

The preemption doctrine may be invoked to invalidate state legislation when the Congress has set aside a regulatory field as its own exclusive province.[203] The Mineral Leasing Act of 1920 contains the mandate to the Secretary of the Interior to dispose of leasable minerals in the public domain. That act provides that "[n]othing in this Chapter shall be construed or held to affect the rights of the States or any other local authority to exercise any rights which they might have. . . ."[204] In addition, the Secretary's statements of disposal policy express a similar solicitude for states' interests.[205] Neither EMARS nor the coal mine operating regulations contain any language which can be fairly construed as the "clear and unmistakable intent" to exclude the states from the regulatory field required to measure up to the standards for express intent to preempt the states.[206]

Taken alone, the statute may be fairly construed to express an intent not to preempt the states. Without more, such a construction would be enough to support non-preemption.[207] When an agency promulgates regulations which au-

201. Askew v. American Waterways Operators, Inc., *supra* note 135, at 336.
202. United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580 (1973).
203. City of Burbank v. Lockheed Air Terminal, Inc., *supra* note 134; Rice v. Santa Fe Elevator Co., *supra* note 131.
204. 30 U.S.C. § 189 (1970).
205. *See* text accompanying footnote 160.
206. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, *supra* note 134, at 139.
207. Wheeler v. Barrera, 417 U.S. 402 (1974).

thorize a federal intrusion into a regulatory field hitherto occupied by the states, federal courts, to be consistent with the emerging "cooperative federalism," should be reluctant to invoke the preemption doctrine.[208]

Under a construction most favorable to preemption, at the least, the signals are ambiguous. Therefore, if preemption will be invoked to invalidate Wyoming's surface mining regulations, a congressional intent to occupy the field must be inferred from the regulated subject matter.[209]

In *New York State Dept. of Social Services v. Dublino*, because the state interest in providing work incentives as a condition to entitlement under the A.F.D.C. program was substantial and because the federal scheme contemplated a complementary administration by the federal and state agencies, the Court imposed a stiffer burden on those challenging the state legislation. The evidence showed that the New York Work Rules excluded persons eligible for assistance under the federal standards.[210] Yet the Court found that evidence insufficient.

> In sum our attention has been directed to no relevant argument which supports, except in the most peripheral way, the view that Congress intended, either expressly or impliedly, to preempt state work programs. Far more would be required to show the "clear manifestation of [congressional] intention" which must exist before a federal statute is held "to supersede the exercise of state action."[211]

In *Dublino*, the Court was not explicit as to what combination of facts would trigger the revived strict intent standard. The *Dublino* Court thought important a pattern of cooperative administration. The stated policies of both the Department of the Interior and the State of Wyoming call for cooperation between federal and state governments. The

208. Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971).
209. *Cf.* Florida Lime and Avocado Growers, Inc. v. Paul, *supra* note 206; City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).
210. *See* New York State Dept of Social Services v. Dublino, *supra* note 134, at 423-424 (dissenting opinion of Mr. Justice Marshall).
211. *Id.* at 417.

EMARS machinery and, less clearly the coal mine operating regulations, contemplate an interlacing of administrative machinery. EMARS and the operating regulations represent a novel effort by the Interior Department to enter a regulatory field up to now left to the states. The Secretary's mandate under the Mineral Leasing Act of 1920 calls for solicitude for state and local interests. Even granting that the Secretary is within his authority by intruding upon the state's surface mining regulations, and that the Secretary's regulations are not so far afield as to fall outside "the shadow of the federal umbrella,"[212] the importance of the state interest and its "squatter's rights" would justify raising *Dublino's* strict intent standard before sweeping away an ongoing state regulatory program.

The Bottom Line

If Wyoming surface mining legislation is to be preempted, it must be on the ground that clear manifestation of congressional intent to occupy the field can be inferred from the pervasivness of the federal scheme, repugnance to the federal objectives, or from the overriding preeminence of the federal interests.[213]

The starting point must be with a presumption in favor of constitutionality of the state's exercise of the police power. In *Rice* the Court began:

> We start with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of congress.[214]

Preemption may be invoked when the state policies may produce a result inconsistent with the federal objectives. In *Burbank*, the curfew ordinance worked a result exhibiting more than the possibility of inconsistency with the objectives of the federal regulatory scheme. In *Burbank* the incon-

212. *See* Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, *supra* note 134, at 130-131.
213. *See* City of Burbank v. Lockheed Air Terminal, Inc. *supra* note 134; Rice v. Santa Fe Elevator Corp., *supra* note 131.
214. *Id.* at 230.

sistency was total. There is, of course, obvious risk that the Wyoming regulatory system might work results inconsistent with those of the Interior Department. Without more, that risk has been insufficient to invoke preemption. In *Goldstein, Kewanee, Dublino,* and even in *Burbank,* state regulations producing results inconsistent with the federal solution were insufficient to support the inference that Congress intended to exclude the states from the regulatory field.

Preemption may be inferred from the pervasiveness of the federal regulatory scheme. The federal historical stake in air traffic regulation and in labor relations so prominent in *Burbank* and in the labor cases,[215] cuts against preemption of state control over surface mining. The states have long applied the police power to both the public domain and to private lands held subject to federal mineral reservations. To be sure the high degree of concern for the environmental impact of surface mining is one shared by the federal government and the state. However the distinction between surface mining controls and the subject matter of *Burbank, Austin,* and *Wisconsin Employment Relations Commission* is too obvious to belabor, since it is the Interior Department belatedly entering a field of regulation already occupied by the state.

Pervasiveness of the regulatory scheme can be inferred from the subject matter itself. In *Burbank* the Court pointed out that aircraft and noise are inseparable.

> The Federal Aviation Act requires a delicate balance between safety and efficiency [citation omitted] and the protection of persons on the ground. [Citation omitted.] Any regulations adopted by the administrator to control noise pollution must be consistent with the highest degree of safety. [Citation omitted.] The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.[216]

215. Old Dominion Branch Number 496, National Ass'n of Letter Carriers, AFL-CIO v. Austin, *supra* note 149; Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission, ____ U.S. ____, 96 S. Ct. 2548 (1976).

216. City of Burbank v. Lockheed Air Terminal, Inc., *supra* note 134 at 639.

The orderly development of federal coal resources involves the same sort of trade-offs. The task of the Department of the Interior is to optimize its mutually exclusive objectives to protect, develop, and conserve resources in a manner minimizing adverse environmental impact and undue administrative delay.[217]

The federal regulatory scheme may be construed to be sufficiently pervasive to support preemption, if it appears that the federal scheme is so comprehensive that it does not admit to supplementary regulations by the states.[218] The Wyoming Environmental Quality Act regulates surface mining through a permit and license system. It calls for annual reports by the mine operator and continuous supervision of the terms of the mining licenses and permits. The WEQ provides extensive surface owner protection by affording him statutory damage remedies and a mechanism for recovering surface damage on a periodic basis. Where the surface owner can show substantial prohibition to his own operations, or when he meets the statutory definition of a "resident or agricultural landowner", he can exercise a veto over a mining permit or license. The state system provides for extensive private enforcement of the sanctions contained in the Act. The state program does not impinge directly on tract selection or leasing under EMARS; to the extent that the surface owner stands as an obstacle in obtaining mining permits and mining licenses under state law, the WEQ doubtless influences nominations of tracts in the early stages of EMARS.

The federal program is comprehensive in the sense that it shepherds tract selection, leasing, operations, and reclamation of lands underlain by federal coal. The federal program does not reach privately owned "fee coal." The federal program polices its leases either through the terms of the leases or through approval or rejection of the mining and reclamation plan. The federal program considers state interests through EMARS. However, the federal program husbands

217. 41 FED. REG. 20252, 20253 (1976).
218. New York State Dept of Social Services v. Dublino, *supra* note 134, at 419, 421-422.

its own overriding national interests in the coal mining operating regulations, except to the extent that state reclamation standards may find their way into federal mining plans.

Even this superficial comparison of the state and federal schemes reveals that these are not parallel programs. Yet there is an area of substantial overlap in that each administrative system produces a decision to mine or not to mine based on an independent calculus of economic and environmental costs and benefits. The cases in the Burger Court are not clear about the meaning that should be ascribed to such an overlap. In *Burbank* the Court found legislative history suggesting that noise control through curfew was part of the mandate of the Environmental Protection Agency in the Noise Control Act.[219] The ordinance overlapped that authority. In *Askew* the federal scheme provides no remedy for the state government or for private citizens. Therefore, state legislation creating a right of action to recoup cleanup costs and losses resulting from oil spills was viewed to be mere gap-filling. In *Dublino* the statute contemplated local administration and diversity in result. But in *Goldstein* and *Kewanee* actual overlap was not enough to justify preemption where there was no "real possibility" that the objectives of the patent laws would be thwarted. Distilling the cases, one is tempted to cling to the learning that overlap of programs may indicate a pervasive federal regulatory scheme, when the overlap is coupled with a genuine possibility that the federal objectives may be thwarted. Thus the fact of overlap would appear to be an inconclusive, but important factor to consider in determining whether or not the federal regulatory scheme is sufficiently pervasive to justify setting aside a state regulatory effort.

An intent to exclude the state may be inferred from the preeminence of the federal interest over the state interest. The legitimacy of the state interest seems undeniable. The tradition of local influence in federal mining law is a venerable one. State courts have enjoyed concurrent jurisdiction

219. *See* City of Burbank v. Lockheed Air Terminal, Inc. *supra* note 134, at 637 (1973).

from the beginning. Many federal questions in mining law are themselves dependent upon state law.[220] Part three of this article discussed the history of the police power on the public lands. When the land has been patented to private hands subject to mineral reservations, the state's reliance interest in its police power seems still greater. Further, the state government is directly affected by the social costs attendant to industrialization. Yet the record of extractive industries providing an adequate tax base to cover them is not likely to inspire unbridled enthusiasm for development, even when one considers the state's growing share of federal royalties from mineral leases.

The agricultural interests tend to feel threatened by mineral development. They argue with some appeal that their reasonable expectations attached to surface patents subject to reservations of the coal did not include the expectation of strip mining, since the technology at the time of their patents warned only of deep mining. They feel they have assumed the risks of subsidence, but not destruction of their grazing lands. Perhaps the strongest state interest is to retain a reasonable control over a way of life unique to the Rocky Mountain West. The people of the western states are being asked to give up a measure of values most easterners cannot comprehend. These are values asked in exchange for what to many westerners may seem a dubious privilege of citizens of Chicago, Seattle, Denver, and Los Angeles to live free from "brownouts." They are values worth considering. The citizens of those states have a strong interest in having their state government doing the considering.[220a]

But there is a national stake in the development of western coal that is likewise unrelenting. The nation has a proprietary interest in the coal; it is still in the public domain. The people of Chicago, Seattle, Denver, and Los Angeles might feel entitled to take the western coal, because in a sense

220. *See generally,* Sherwood and Greer, *Mining Law in a Nuclear Age: The Wyoming Example, supra* note 8; and Sherwood and Greer, *Possessory Interests in Wyoming Mineral Claims, supra* note 8.

220a. *See* NEHRING AND ZYCHER, COAL DEVELOPMENT AND GOVERNMENT REGULATION IN THE NORTHERN GREAT PLAINS: A PRELIMINARY REPORT (1976).

it is their coal. It is argued that the proprietary interest, as distinguished from a "sovereign" interest has less preemptive capacity when placed against the state's police power[221] The distinction appears to be of little use in a case involving preemption of state surface mining controls. Modern cases have not been faithful to the distinction.[222] Rather the cases speak of plenary power of the Congress to dispose of public lands.[223] Certainly the mining of federal coal is what disposing of coal resources is all about.

The federal interest is not so easily disposed of for still another reason. The federal power to regulate surface mining of federal coal on or off public lands finds its source beyond the property clause. EMARS and the coal mining operating regulations find their mandate not only in the Mineral Leasing Act of 1920, but also in the National Environmental Policy Act which itself emanates from the commerce clause of the Constitution.[224] The federal interest becomes even more compelling because of its national security impact. Energy security not only of the United States but of its allies and western Europe is dependent upon a high degree of energy independence.[225] Energy independence in turn rests at least for the rest of this century on successful development of western coal. The Supreme Court has been far from reticent in according preemptive capability on facts suggesting state intrusion, however attenuated, into foreign affairs.[226]

Persuasive arguments can be made that the federal regime itself supports an inference of congressional intent to clear the states from enforcing their own surface mining controls when the minerals involved belong to the United States. There exists a clear possibility that enforcement

221. *See* BARRY, EXTENT OF STATE CONTROL OVER RECLAMATION ON FEDERAL LANDS (Western Governor's Regional Energy Policy Office) 13 (1976).
222. *See* Utah Power and Light Co. v. United States, 243 U.S. 389 (1917); Federal Power Comm'n. v. Idaho Power Co., *supra* note 113; Transwestern Pipeline Company v. Kerr-McGee Corp., *supra* note 77.
223. Federal Power Comm. v. Idaho Power Co., *supra* note 113.
224. *See* Department of the Interior, Coal Mining Operating Regulations, 41 FED. REG. 20252, 20253 (1976).
225. *See* Willrich, *Energy Independence for America*, 52 INT'L AFFAIRS 53, 57 (1976).
226. Zschernig v. Miller, *supra* note 131.

of state law by the Department of Environmental Quality may yield results inconsistent with federal objectives. Despite the fact that the state legislation and the federal regulations overlap only partially, EMARS and the coal mining operating regulations may be fairly read to be pervasive, since the partial overlap is coupled with a genuine possibility of conflict. Tract selection and approval of mining operation involves a balancing of environmental and economic costs and benefits. Little may be gained from diversity here. Indeed, the orderly development of federal coal reserves requires uniformity in development policy. Among the critical factors which should order the progress of development are those built in to the EMARS tract selection process:

> Depth, quality, thickness, and extent of the coal resource; resource accessibility; competitive situation; value of existing land uses; relation to existing communities; potential impacts on economic structures (e.g. employment, available services, etc.); service and access corridors; and rehabilitation potential.[227]

It is plain that independent calculus of the factors may well yield disparate conclusions about which tracts should be mined first. Orderly development of the region should not be restrained by state boundary lines, let alone local regulations. Orderly coal development should start with those resources accessible at the least total social cost. State and local land use plans might well encourage development in areas in which state and local government squawk least, not those which cost least.

Federal supremacy in the coal lands would wreak havoc in Wyoming's plans to control surface mining. The federal concern is to control, with state government influence, the siting of mining tracts and to regulate with some state participation the operating of the mines and reclamation of the coal lands. There is room for the state to assert its interest in the federal scheme. There is much room beyond the siting and operating of coal mines, where the state might con-

227. *See* 41 FED. REG. 22054.

trol growth and development. However, enforcement of state environmental standards more stringent than federal standards or determinations by the state which have the effect of withdrawing land from coal production[228] would place a more serious clog on the federal regulatory process. In Wyoming 40% of the federal coal lies beneath private lands; in North Dakota that figure is 98%.[229] Federal regulations trammeled by hostile state regulations on such large blocks of land might well nullify the federal scheme.

Finally, the federal interests in national security, environmental protection, and this proprietary interest in disposing of the public lands together might well be held to predominate over the state police power.

Each of the factors which the court has used to infer an intent to preempt state legislation appears on these facts. Nevertheless courts should not be quick to read a preemptive intent into federal legislation.[230] The Secretary of the Interior has a mandate under the Mineral Leasing Act of 1920 to show solicitude toward state interests.[231] The EMARS program contemplates interaction between state and federal agencies. Accordingly under *Dublino* the preemptive capacity of EMARS should be slight. However, under the coal mining operating regulations the Secretary of the Interior showed little solicitude toward state interests in regulating the mining operations and reclamation. Certainly one may infer that the Secretary may have intended greater preemptive effect in his coal mining and operating regulations. Whether that agency intent should be imputed to the Congress is a more difficult question. The state interests are legitimate and pressing. The end of "cooperative federalism" would not be well served by federal courts setting aside state legisla-

228. For example, the state might regard the mine operator's reclamation plan as inadequate, or find that mining might impair an area determined to be of unique historical, archaeological, scenic or natural value; further an objecting surface owner who can show a substantial prohibition of his operations. *See* WYO. STAT. § 35-502.24(g) (Supp. 1975).

229. *Hearings on S.391 before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st. Sess., Table I, App. I, at 570 (1975).

230. United States v. Bass, 404 U.S. 336 (1971).

231. 30 U.S.C. § 189 (1970).

tion on the strength of an intent inferred from administrative regulations.[232]

V. CONCLUSION

Persuasive arguments favor preemption. At the same time, in the absence of special facts presenting clear conflict between state and federal programs, preemption must be grounded on congressional intent inferred from action by the Secretary of the Interior. When even the Secretary's intent to exclude the states must be inferred from the federal program itself, the element of congressional intent, the touchstone of the preemption doctrine, becomes a mere fiction. In such circumstances the case for accommodation of the two regulatory regimes is strong.

As applied to state surface mining legislation traditional renderings of the preemption doctrine have all the utility of a sledge hammer in repair of an antique clock. To preempt the Wyoming Environmental Quality Act so far as it applies to lands underlain by federal coal would lead to an administration of different reclamation standards and disparate remedial options for surface owners throughout the state. Since a single coal mining operation is likely to involve both fee coal and federal coal, total preemption of the state program would burden a single mine operator with compliance with a complex of administrative procedures and substantive regulations. To let the state program stand in its entirety is to put sizable obstacles in the way of the federal program.

What is called for is a fine-tuning of the two regulatory schemes. Accommodation may be achieved through a selective application of the preemption doctrine. The Supreme Court has favored a cautious approach to preemption, staying its hand in anticipation of close review of the interfaces of state and federal legislative schemes. In *Kewanee Oil Co. v. Bicron Corp.*, the Supreme Court was invited to limit application of the preemption doctrine only so far as the state law

232. Victory Carriers, Inc. v. Law, *supra* note 208.

applied to clearly patentable technologies. It rejected the argument on the ground that it forced state courts into the ungainly position of determining whether a technology defined as a trade secret under state law was also a patentable discovery under federal law.

A selective application of the preemption doctrine to Wyoming surface mining legislation is not attended by such entanglement of the state and federal systems. Rather, it is necessary only to determine the areas of overlap and to determine whether the overlap presents a clear threat to the purposes of Congress. Overlap between the WEQ and the federal coal leasing and operating regulations exists in that each system requires permits and licenses, which assure approval of mining and reclamation plans and a means of enforcing their terms. The overlap does present a clear possibility that federal objectives may be thwarted. Upon a showing that mining will prohibit substantially surface operations, a surface owner may block mining operations authorized under the federal regulations. State administrators may in effect withdraw lands from mining, when the mining and reclamation proposals fail to meet state standards, stricter than federal standards but not incorporated into federal mining plans. Finally, an overlap is presented by a determination under state law that mining would destroy unique historical, cultural, or archeological values. Under these circumstances, preemption should be invoked to the extent state law renders unminable tracts approved for coal mining under federal law.

Outside the zone of overlap the state would be free to operate under the WEQ. The state could carry on its continuous supervision of the mining and reclamation operations. Statutory damages, measured by the reasonable value of the surface, would be unaffected. The state's private enforcement remedies would remain intact. Selective preemption of Wyoming surface mining regulations serves the developing concept of "cooperative federalism." National and state interests are accommodated. An established state program need not be set aside on the strength of an attenuated attribution of congressional intent.