Land & Water Law Review

Volume 19 | Issue 2 Article 8

1984

# Natural Resources - Property Clause - Local Land Use Regulation Preempted - Brubaker v. Board of County Commissioners, El Paso County

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**NATURAL RESOURCES — PROPERTY CLAUSE — Local Land Use Regulation Preempted.** ***Brubaker v. Board of County Commissioners, El Paso County,*** **652 P.2d 1050 (Colo. 1982).**

In 1966, twenty-five mining claims were located within the boundaries of Pike National Forest west of Colorado Springs.[1] The locators began preliminary exploration on the claims, but these activities were halted by the United States Forest Service in 1967.[2] Shortly thereafter, the United States brought an action before the Interior Board of Land Appeals (IBLA) contesting the validity of the claims.[3] In 1971, with resolution of the claim dispute still pending, the Forest Service obtained an injunction against any further exploration on the claims.[4] The IBLA ruling, handed down in 1975,[5] declared eighteen of the twenty-five disputed claims void for failure to discover valuable mineral deposits.[6] With respect to the remaining seven claims, the IBLA concluded that if certain limestone outcroppings discovered prior to withdrawal could be verified as valuable, the claims might be valid.[7] The ruling also authorized test drilling in order that the claim dispute could finally be resolved.[8]

Claimants than brought an action in federal district court to force implementation of the IBLA ruling.[9] The court entered an order allowing the test drilling to proceed, but also required the claimants to submit an operating plan for approval by the United States Forest Service.[10] Prior to approval, the plan was modified to include a provision directing the claimants to comply with all applicable state, county, and municipal laws.[11] In response to this directive, the claimants applied to the El Paso County Board for a special use permit.[12] Following exhaustive hearings on the application the permit was denied. The Board reasoned that the proposed drilling was inconsistent with long range county land use planning and also incompatible with existing permitted uses in the area.[13]

After this denial, the claimants filed an action in El Paso County District Court, asserting that the action of the Board impermissibly con-

1. Brubaker v. Bd. of County Comm'rs, El Paso County, 6523 P.2d 1050, 1052 (Colo. 1982).
2. *Id.*
3. *Id.*
4. United States v. Foresyth, 321 F. Supp. 761 (D. Colo. 1971). It was the position of the government that the locators would not be entitled to perform any further exploration after the date on which the Forest Service request to withdraw the area from mineral entry was filed in the public record. *Id.* at 764.
5. United States v. Foresyth, IBLA 73-166 (Oct. 30, 1975).
6. 652 P.2d at 1052.
7. *Id.* at 1052-53. In order to establish the validity of a mining claim, it must be proven that a valuable mineral deposit exists. 30 U.S.C. § 22 (1976). In a dispute between the United States and a claimant, a mineral deposit is valuable only if it may be removed and marketed at a profit. This determination must normally be made prior to withdrawal from mineral entry. United States v. Coleman, 390 U.S. 599 (1968).
8. 652 P.2d at 1053.
9. *Id.*
10. *Id.* Federal regulations outline the rules and procedures required to ensure that adverse environmental impact to national forest lands as a result of mining activity are minimized. 36 C.F.R. § 228.5 (1981).
11. 652 P.2d at 1053.
12. *Id.* The El Paso County Board considered the permit necessary as the area to be affected was zoned for agriculture.
13. *Id.*

flicted with the operation of federal law[14] and therefore was preempted.[15] The court found that the traditional tests for establishing federal preemption were not met and upheld the Board's action. On appeal, the decision was reversed. In a majority opinion, the Colorado Supreme Court held that the Board had applied its zoning laws so as to prohibit a use of federal land which was authorized by federal statute, and that such action was void by virtue of applied preemption doctrine principles.[16]

## BACKGROUND

The preemption doctrine is fundamentally rooted in the supremacy clause[17] which provides the constitutional framework for federal preemptive power over contrary state legislation.[18] It is important to note, however, that while every congressional exercise of an enumerated power has potential preemptive capabilities,[19] the potential may be limited by the tenth amendment police power reservation.[20] This is particularly relevant where, as in *Brubaker,* the power of Congress to enact legislation comes from the property clause.[21] Prior to 1976, this power was treated as proprietary rather than legislative, and it was only after the United States Supreme Court decision in *Kleppe v. New Mexico*[22] that the federal government could assert full preemptive power on public land issues. However, despite the impact the *Kleppe* decision has had on state and federal relationships, it is clear that, with respect to federally owned lands, the federal government continues to share its jurisdiction with the appropriate state or local entity.[23] More specifically, and in the context of the *Brubaker* dispute, the power of local governments to regulate land use in the national forest has been recognized in the federal courts.[24]

There are two situations where federal preemption of state law is likely to occur. First, if Congress has supplied a clear expression of its intent to

14. Act of May 10, 1872, ch. 152, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. §§ 22-54 (1976)).
15. 652 P.2d at 1054.
16. *Id.* at 1060.
17. U.S. CONST. art. VI. The supremacy clause provides that, "[t]his constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.
18. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
19. Engdahl, *Preemptive Capability of Federal Power,* 45 U. COLO. L. REV. 51, 55-56 (1973).
20. U.S. CONST. amend. X. The tenth amendment provides that "[t]he powers not delegated to the United States by the constitution, nor prohibited by it to the states are reserved to the states respectively, or to the people." *See, e.g.,* National League of Cities v. Usury, 426 U.S. 833 (1976).
21. U.S. CONST. art. IV, § 3, cl. 2. The property clause provides, in part, that "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 . . ."
22. 426 U.S. 529 (1976). Prior to the *Kleppe* decision, it was argued and supported by case law that under the property clause, Congress acted as a proprietor, subject to state law. *See, e.g.,* Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885). That view, however, was replaced with a general proposition that congressional power with respect to the property clause is legislative as well as proprietary, with full preemptive capabilities. 426 U.S. at 540.
23. Omaechevarria v. Idaho, 246 U.S. 343 (1918).
24. City and County of Denver v. Bergland, 517 F. Supp. 155, 168 (D. Colo. 1981).

supercede all state regulation in a particular field, no state laws which embrace that field will be enforceable.[25] Second, in the absence of any clear expression or other such manifestation, a court may imply preemptive intent.[26] The factors which a court may take into consideration in this context include: inferences revealed by statutory language and respective legislative history;[27] the pervasiveness of the federal regulatory scheme;[28] the nature of the subject matter vis-a-vis the demand for uniformity of regulation;[29] and finally whether the state law conflicts with federal law so as to present an obstacle to the purposes and objectives of Congress.[30]

The applicable federal law in *Brubaker* is the Mining Law of 1872[31] which provides no clear expression of an intent to preempt the entire field of mining and in fact makes clear reference to existing and applicable state and local regulation of mining activities.[32] As a result, preemption doctrine analysis in the context of mining activities on federal land necessarily involves a search for implied preemptive intent.[33]

## THE DECISION

The Colorado Supreme Court, in striking down the Board's action, recognized the power of Congress to enact and enforce laws governing the use of federal lands[34] and specifically concluded that the underlying objective of the Mining Law of 1872 was to encourage exploration and development of mineral resources on public lands.[35] The court, relying heavily on the similar case of *Ventura County v. Gulf Oil Corporation,*[36] went on to hold that the Board's denial of the special use permit "reflect[ed] an attempt by the county to substitute its judgment for that of Congress concerning the appropriate use of these lands [and that] such a veto power . . . strikes at the central purpose and objectives of the applicable federal law."[37] In response to the Board's argument that the operating plan approved by the Forest Service provided an explicit basis for local jurisdiction, the court held that since the provision related to applicable state and local regulation, and that a preemption finding would render all non-federal regulations inapplicable, the provision was in no way determinative in their analysis.[38] Furthermore, the Board's assertion that its action was supported by the savings provisions of sections 22[39] and 26[40] of the Mining

25. Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).
26. Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971).
27. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).
28. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).
29. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
30. Hines v. Davidowitz, 312 U.S. 52 (1941).
31. 30 U.S.C. §§ 24-54 (1976).
32. 30 U.S.C. §§ 22, 26, 28 (1976).
33. Engdahl, *supra* note 19, at 52.
34. 652 P.2d at 1055-56.
35. *Id.* at 1056.
36. 601 F.2d 1080 (9th Cir. 1979), *aff'd without opinion,* 445 U.S. 947 (1980). In *Ventura,* county zoning laws were held preempted by the Mineral Lands Leasing Act of 1920. 30 U.S.C. §§ 181-287 (1976).
37. 652 P.2d at 1056.
38. *Id.* at 1057.
39. Section 22 provides, in part, that "lands belonging to the United States . . . shall be free and open to exploration and purchase . . . under regulations prescribed by law, and

Law met with similar disfavor.[41] Interpreting the direct conflict language of these provisions, the court reasoned that local regulations which prohibit mining activities could not stand the test of preemption; indicating, however, that non-prohibitive local regulation would be treated differently.[42]

The court in *Brubaker* thus concluded that the denial of a special use permit functioned as a prohibition to a use of federal land authorized by Congress. As such, the denial represented a direct conflict "with the objectives and purposes of Congress reflected in the federal mining laws,"[43] and was therefore preempted.[44]

## PROHIBITION V. REGULATION: THE LIMITS OF AUTHORITY

In *Ventura County v. Gulf Oil Corporation,*[45] the Ninth Circuit Court of Appeals was confronted with application of the preemption doctrine in the context of the Mineral Lands Leasing Act of 1920.[46] The government's lessee in *Ventura* was requested by the county to apply for a zoning permit prior to drilling operations. Gulf Oil refused to make the application and the county filed for injunctive relief.[47] Relying hevily on *Kleppe v. New Mexico,*[48] the court reasoned that because the county had sought to prohibit Gulf from any further activity, the conflict between federal and state law was direct.[49] In striking down the county zoning law, the court held that, as a prohibition to an authorized use of federal land, the local regulation represented an impermissible obstacle to the objectives of Congress.[50]

Although the *Ventura* court made no reference to the 1976 decision in *State Ex Rel. Andrus v. Click,*[51] the issues presented there were essentially the same. The Idaho Supreme Court, faced with a potential conflict between state regulations and the Mineral Lands Leasing Act,[52] held that state regulation of federally authorized mining activities was consistent with congressional intent, but only to the extent that the state law did not operate as a prohibition of such activities.[53] This conclusion was based on a

according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." 30 U.S.C. § 22 (1976).

40. Section 26 provides, in part, that "locators of all mining locations . . . so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possesory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth. . . ." 30 U.S.C. § 26 (1976).
41. Brubaker v. Bd. of County Comm'rs, 652 P.2d 1050, 1058 (1982).
42. *Id.*
43. *Id.* at 1060.
44. *Id.*
45. 601 F.2d 1080 (9th Cir. 1979).
46. *See supra* note 36.
47. 601 F.2d at 1082.
48. 426 U.S. 529 (1976). *See supra* note 22.
49. 601 F.2d at 1084.
50. *Id.* at 1086.
51. 97 Idaho 791, 554 P.2d 969 (1976).
52. *Id.* at 974.
53. *Id.*

1905 United States Supreme Court decision which upheld a Montana location requirement. In *Butte City Water Co. v. Baker,*[54] the Supreme Court held that state location requirements did not establish a sufficient conflict so as to render them void, indicating, however, that state laws which would prohibit federally authorized mining activities would not be permissible under established preemption doctrine principles.[55]

The preemption doctrine as appliced in this line of cases involved the interpretation of congressional intent with respect to federal mining law, particularly the Mineral Land Leasing Act of 1920. While *Brubaker* involved the Mining Law of 1872, it seems apparent from the language of these acts that Congress intended to allow states to regulate mining activities, at least to the extent that such regulation presented no conflict with the federal regulatory scheme.[56] Further, the *Ventura* decision made it clear that a state effort to prohibit federally authorized mining activities is a direct conflict with congressional objectives.[57]

## ANALYSIS OF THE COURT'S OPINION

The underlying purpose of the Mining Law of 1872, as recognized by the court in *Brubaker,* is to encourage exploration and development of mineral resources on public lands.[58] It is clear, however, that there was no manifestation of congressional intent to preempt the entire field of mining, either explicitly or impliedly.[59] Considering the remaining factors which might compel a preemption finding,[60] application of the doctrine to a situation like that presented in *Brubaker* necessarily concerns the direct conflict standard.[61] In *Brubaker,* the Colorado Supreme Court found support for its holding in the *Ventura* decision,[62] but also recognized compelling logic independent of *Ventura.*[63] The court, as noted earlier, relied on the direct conflict rationale to support its decision.[64] The strength of the *Ventura* decision as compelling precedent, as well as the strength of the court's rationale with respect to the direct conflict issue, will be the subject of the following analysis.

The difficulties in drawing analogies between *Ventura* and *Brubaker* are substantial. To begin, the *Ventura* court was confronted with an entirely different federal scheme.[65] While the Mineral Lands Leasing Act is

54. 196 U.S. 119 (1905).
55. *Id.* at 125.
56. *See supra* notes 39-40.
57. Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1084 (9th Cir. 1979).
58. 652 P.2d at 1056.
59. Hubbard, *Dredge Mining and Wild Burros—A Tale of Two Cases and the Issue of State Versus Federal Regulation of Mineral Development on Public Domain Lands,* 23 ROCKY MTN. MIN. L. INST. 71, 80-81 (1977).
60. *See supra* note 26 and accompanying text.
61. With respect to mining activities on federal land, the demand for uniformity is weak. Also, federal mining legislation is not so persuasive that it could be inferred that congress has left no room for state regulation. As a result, the application of the preemption doctrine in this area is a function of the direct conflict issue. *See* Hubbard, *supra* note 59, at 83-84.
62. 652 P.2d at 1056.
63. *Id.* at 1059.
64. *Id.*
65. 601 F.2d at 1082.

exhaustive in its consideration of regulated land use and environmental concern,[66] the Mining Law of 1872 has been noted for its lack of bona fide regulation of mineral exploration activities.[67] In addition, the Forest Service permit to drill for oil in *Ventura* made no reference to local regulation.[68] The situation presented in *Brubaker,* on the other hand, involved a United States Forest Service operating plan which made it clear that there must first be compliance with state and local laws.[69] Finally, it may be inferred that the *Ventura* court considered the federal scheme so pervasive that it necessitated an implied preemption holding.[70] Because the claims made in *Brubaker* were under the authority of an entirely different set of federal statutes,[71] it was inappropriate for the Colorado Supreme Court to rely so heavily on the *Ventura* decision.

Irrespective of the precedential bearing the *Ventura* decision has on the result in *Brubaker,* Justice Lohr's opinion indicates that the decision could have been supported by the direct conflict standard alone.[72] This position is arguably weakened by two important considerations. First, the court ignored the fact that the primary movers in the effort to prevent exploratory drilling on the lands in question were the Forest Service and the Bureau of Land Management,[73] each an agency of the federal government and acting under the authority of federal law.[74] At a very minimum, these actions signify a willingness on behalf of the federal government to waive consideration of the direct conflict issue.

Second, when the test for preemption is narrowed to the direct conflict issue, the purposes and objectives of congressional action should have been argued and considered in the context of all relevant public land use legislation. When Congress enacted the Mining Law of 1872, the concern was with economic development of the nation's natural resources. Notwithstanding this fact, the policy concerns of 1872 have been overlayed with subsequent legislation which reflect new and different congressional objectives. In *Brubaker,* the court failed to consider subsequent acts of Congress which would support the action of the El Paso County Board. The most relevant in this context are the National Environmental Policy Act of 1969 (NEPA),[75] the Environmental Quality Improvement Act of 1970,[76] and the Federal Land Policy and Management Act of 1976

66. *Id.* at 1083-84.
67. State *ex rel.* Andrus v. Click, 97 Idaho 791, 554 P.2d 969, 976 (1976).
68. 601 F.2d at 1083-84.
69. 652 P.2d at 1053.
70. 601 F.2d at 1084-85. The *Ventura* court held that the Mineral Lands Leasing Act preempted local zoning laws regardless of whether the permit would have been granted or denied. Since the actual conflict issue had not yet ripened, the decision may be read as holding that Congress intended to occupy the entire field to the exclusion of the states by virtue of the complexity and pervasiveness of the enacted regulatory scheme.
71. 652 P.2d at 1054.
72. *Id.* at 1059-60.
73. *Id.* at 1052-53.
74. The Organic Administration Act authorizes the Secretay of Agriculture to make rules and regulations for the protection of the national forests. 16 U.S.C. § 551 (1982). The operating plan approved in *Brubaker* is required by pursuant federal regulations. 36 C.F.R. § 228.5 (1981). The Bureau of Land Management has authority to lease mineral deposits underlying national forest lands. 43 C.F.R. § 3400.2, 3400.3-3 (1981).
75. 42 U.S.C. §§ 4321-4347 (1976).
76. 42 U.S.C. §§ 4371-4374 (1976).

(FLPMA).[77] This legislation was intended to temper the pro-development objectives of 1872 by providing federal agencies with the policy guidelines and implementation plans necessary to ensure that environmental concerns are given proper consideration.

*NEPA and the Environmental Quality Improvement Act*

In 1872, the concern for economic development of our nation's natural resources was paramount. Public land use legislation enacted during that period reflects this pro-development stance. Such concerns, however, as objectives of Congress, were drastically tempered by the passage of NEPA and subsequent environmental legislation. NEPA proclaimed a national policy for the enhancement of environmental quality, recognizing "the profound influences of population growth, high-density urbanization, industrial expansion, [and] resource exploitation. . . ."[78] The act also expressed a federal mandate to improve and coordinate federal planning, programs, and resources in such a way that a balance could be achieved between population and resource use.[79]

The Environmental Quality Improvement Act was passed shortly after NEPA and evidences NEPA policy by enacting statutes which relate to prevention, abatement, and control of environmental pollution, particularly with respect to water and land resources.[80] The legislation also recognizes that implementation of these policies is not only a responsibility of the federal government, but of state and local governments as well.[81]

Rejecting any real implications which this legislation might have on its analysis,[82] the court in *Brubaker* relied on the 1973 decision in *United States v. SCRAP*[83] in which the United States Supreme Court held that "NEPA was not intended to repeal by implication any other statute."[84] This decision, however, does not fully resolve the issues relating to conflicts with other federal legislation. In *Flint Ridge Development Co. v. Scenic Rivers Association,*[85] the Supreme Court reiterated its position that NEPA overlays the mandates of federal agencies, indicating, however, that when a conflict of a clear and fundamental nature exists, it is the original and primary mandate which must take precedence.[86] This holding was refined by the Fifth Circuit in *Louisiana Power and Light Co. v. FPC.*[87] There the court held that "the proper test is whether compliance with the dictates of NEPA would give rise to a violation [of other] statutory responsibilities. . . ."[88]

It is apparent from this line of cases that NEPA does in fact overlay the entire spectrum of federal land use legislation. When conflicts arise it is up

77. 43 U.S.C. §§ 1701-1782 (1976).
78. 42 U.S.C. § 4331 (1976).
79. *Id.*
80. 42 U.S.C. § 4371(b) (2) (1976).
81. *Id.*
82. 652 P.2d at 1059.
83. 412 U.S. 669 (1973).
84. *Id.* at 694.
85. 426 U.S. 776 (1976).
86. *Id.* at 779.
87. 557 F.2d 1122 (5th Cir. 1977).
88. *Id.* at 1126.

to the courts to determine the extent of the conflict and then rule accordingly. In *Brubaker,* the El Paso County Board denied the special use permit on essentially environmental grounds.[89] None of the authorities discussed above, however, would seem to imply that NEPA must be ignored in determining whether a state action conflicts with congressional purposes and objectives. On the contrary, it would be more appropriate to argue that NEPA must be considered as long as no federal statutory conflict is determined to exist. Given this proposition, it could be argued that the Board's action in *Brubaker* furthered the environmental concerns of NEPA, and that recognition of this fact would be entirely consistent with congressional intent. Such an approach would merely reflect the proper concerns and perspectives in the public land use context of 1980.

*The Federal Land Policy and Management Act*

The Federal Land Policy and Management Act of 1976 (FLPMA)[90] represents a consolidation of hundreds of public land statutes and the first comprehensive document to spell out the powers and duties of the Bureau of Land Management (BLM).[91] In FLPMA, Congress expressed a desire that mineral development efforts not interfere with nonfederal environmental control efforts.[92] The Act also requires the Secretary of the Interior to provide for meaningful involvement of state and local officials in BLM planning.[93] Even if the planning requirements of FLPMA do not directly apply to the proposed mineral drilling in *Brubaker,* the Act suggests increasing congressional deference to state and local regulation of mineral development.[94] In addition, while it is not yet clear how FLPMA may change the direction of state and federal relationships in this area,[95] the Act as it is written is fully capable of providing courts with congressional purposes and objectives. The Colorado Supreme Court needlessly confined its analysis to the narrow objectives of the Mining Law of 1872, and, in doing so, undermined the legitimate concerns of the El Paso County Board. Constituent demands for adequate protection from inconsistent and damaging land uses were reflected in the Board's denial of the special land use permit. To the extent that these demands were consistent with the philosophy of recent federal legislation, a direct conflict with congressional purposes and objectives becomes more difficult to perceive.

89. The Board found specifically that the proposed special use was incompatible with existing permitted uses and that it would result in undue congestion. At hearings before the Board, public objections to the proposal focused on the noise, congestion, and general incompatability with residential land uses in the area. Brief for Appellee at 11-13, Brubaker v. Bd. of County Comm'rs, El Paso County, 652 P.2d 1050 (1982).
90. 43 U.S.C. §§ 1701-1782 (1976).
91. Hubbard, *supra* note 59, at 89.
92. 43 U.S.C. § 1712 (c) (8) (1976). The act declares that "in the development and revision of land use plans, the Secretary [of the Interior] shall . . . provide for compliance with applicable pollution control laws, including *State* and Federal air, water, *noise* or other pollution standards or implementation plans. . . ." (Emphasis added).
93. 43 U.S.C. § 1712 (c) (9) (1976).
94. Note, *State and Local Control of Mineral Development on Federal Lands,* 32 STAN. L. REV. 373, 379 (1980).
95. The Department of the Interior has estimated that it may take until 1989 before the FLPMA planning process is complete. 44 Fed. Reg. 42,590 (1979).

## CONCLUSION

The property clause grants Congress wide ranging powers with respect to mineral development on public lands. State and local governments, however, have historically enjoyed concurrent jurisdiction over these lands. When federal and state laws conflict, as they often do, preemption doctrines may provide a remedy. The result, however, is rarely favorable to state or local interests.

In its analysis of preemptive intent, the *Brubaker* court correctly recognized the purposes and objectives of the Mining Law of 1872, and concluded that because the Board's action prohibited rather than regulated federally authorized mining activities the action was impermissible. In this respect, the court's decision is consistent with previous case law which has struck down state regulations that attempted to prohibit federally authorized mining activities.

The court's analysis, however, is weakened by its failure to incorporate and define congressional objectives in a broad, rather than narrow, perspective. By limiting the analysis to the Mining Law of 1872, the court effectively ignored recent federal legislation which indicates congressional deference to state environmental concerns. El Paso County would not have been involved in this dispute but for the zealousness of the Forest Service and its attempt to prevent drilling activities on the lands in question. The action of the Board was based on the environmental concerns of their constituents, and was entirely consistent with the position of the federal government. In this context, the doctrine of preemption by direct conflict should not have been applied without consideration of all relevant land use legislation. Given such a broad perspective on the purposes and objectives of Congress, the court should have upheld the lower court's disposition of the matter.

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