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Local Control of Mining Activities on Federal Lands

*James S. Burling**

The conflict between development and preservation of natural resources is often embroiled in the conflict between the powers of state and federal government to control development affecting public lands. In this article, the author considers recent decisions in California and Wyoming respecting the regulation of mining operations and focuses on the issues of federal preemption and the nature of patented and unpatented mining claims. The author concludes that while a local agency may regulate private activities such as mining on federal lands, that agency may neither prohibit nor deliberately frustrate the purpose of federal laws designed to promote and regulate mining.

Highway 1 in California affords some of the most spectacular highway scenery in the continental United States. Framed by the Pacific Ocean to the west and the redwood dotted coast range to the east, the Highway 1 landscape has long been a haven for tourists. A favorite feature is Pico Blanco, a clean white mountain peak rising in the Coast Range south of Big Sur, California. Pico Blanco has become a popular cause recently for a variety of environmental groups. Pico Blanco is white because it is composed entirely of a chemically pure high grade limestone deposit. This deposit, which lies partially inside the Los Padres National Forest, is covered by unpatented mining claims that belong to a small, family-owned mining business, the Granite Rock Company. Granite Rock desires to mine a portion of this chemically pure limestone deposit which is not visible from Highway 1. In 1981, the federal government approved a five-year[1]

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plan of operation for a small scale feasibility testing mining program.[1] The State of California Coastal Commission and the County of Monterey would prefer that Granite Rock not mine the property. Numerous environmental organizations have expressed similar opinions.

The dispute over Pico Blanco is a classic distillation of the struggle between private property owners, the federal government, and state and local officials over the development of natural resources. The ultimate resolution of this dispute may well affect the balance between competing claimants to the use and control of natural resources on public lands for years to come. A federal district court decision in this dispute has dramatically altered, or misinterpreted, the fundamental nature of mining claims.[2] The Ninth Circuit Court of Appeals, in reversing the district court decision, sharply limited the power of local governments to regulate mining on federal lands and even cautioned the federal government against overregulation of mining in national forests.[3] This controversy is further complicated by the Coastal Zone Management Act (CZMA)[4] which provides a framework for state protection of the coastal zone.

BACKGROUND

Early Attempts at Preservation

In response to a perceived need to prevent all development along the Big Sur coast, a number of environmental organizations lobbied for a federal takeover of the region. Specifically, a proposal was made in the mid-1970's that the federal government acquire state and private properties in the area and create a national recreation area.[5] The national forests of the Big Sur coast would have been incorporated into this recreation area as well. Under this scheme, private property owners would have acquired the status of inholders and local governments would be required to act in a manner consistent with the purposes and requirements of the federal recreation area. For example, if mining were to be found inconsistent with the recreational purpose of the area, then such mining would be restricted or condemned. The strongest opposition to this plan came from local property owners. Their concerted lobbying effort against the federalization scheme is credited with defeating the federal takeover.[6] Because the plan was defeated, the state and local governments retain jurisdiction over activities within their boundaries.

Principal among the organizations which opposed a mining operation along the coast was the Big Sur Foundation, a group dedicated to restricting development in the region in order to maintain the environmental

1. Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361, 1366 (N.D. Cal. 1984), *rev'd.*, 768 F.2d 1077 (9th Cir. 1985).
2. *Id.* at 1361.
3. Granite Rock Company v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985).
4. 16 U.S.C.A. §§ 1451-1464 (West 1985).
5. S. 2551, 96th Cong. 2d Sess. (1980); H.R. 7380 96th Cong. 2d Sess. (1980); *See* Yonhay, *Big Sur—The Politics of Preservation,* NEW WEST, Dec. 22, 1980, at 33-43.
6. *See* Yonhay, *supra* note 5, at 39-43.

status quo. With the defeat of the federalization plan, and with the election of a presidential administration perceived as favoring development interests, opponents of mining activities on the Big Sur coast considered alternative plans. In 1982, the Foundation conducted a study and formulated a strategy to stop the mining at Pico Blanco.[7] Subsequent actions by the State Attorney General's office, the California Coastal Commission, and the County of Monterey have, with regard to the mining of Pico Blanco conformed with the strategy outlined by the Big Sur Foundation. This strategy, which will be developed in more detail below, basically consists of the assertion by state and local authorities of comprehensive regulatory jurisdiction over private mining activities on federal land. This regulation is designed to prohibit or severely restrict the mining of the Pico Blanco deposit.[8] The assertion of regulatory authority is coupled with a claim that unpatented mining claims are the functional equivalent of private property, and thus subject to extensive local regulation unfettered by a substantial threat of federal preemption. This last notion was implicitly accepted by the federal district court in *Granite Rock v. California Coastal Commission* and represents a radical departure from established principles of mining law.[9]

Mining Plan of Operations

Pursuant to its inherent authority under the Organic Act, the Forest Service requires that any mineral operator working in a national forest first submit a plan of operations before commencing work which is likely to cause a significant disturbance of surface resources.[10] In 1981, pursuant to regulations, Granite Rock Company filed a plan of operations to cover activities from 1981 to 1986. The plan envisioned removal of ore at the rate of 15,000 to 32,000 tons per year from a seven acre area not visible from Highway 1.[11] This small scale operation was designed primarily to test the feasibility of a larger operation involving approximately twenty acres and for an anticipated life of twenty-five to forty-five years.[12] The plan provides the Forest Service with a means to assess all potential environmental problems incident to mining, including road building, tailings disposal (if any), noise, water supply, and reclamation. All details pertinent to a mining operation must be included in the plan and deviation from it is not allowed by the Forest Service. Under all such plans, the mining operations are subject to Forest Service monitoring.[13]

Although state authorities ordinarily do not have an opportunity to participate actively in the approval process for mining plans of operation

7. Hillyer, Responsibility of Monterey County, the California Coastal Commission and the United States Forest Service for Regulating Surface Mining on Pico Blanco, a Report to the Big Sur Foundation (March 11, 1983) (unpublished manuscript, on file at Big Sur Foundation, Monterey, California).

8. *See id.* at 63-69, 136-144.

9. *See Granite Rock*, 590 F. Supp. at 1367-75.

10. 36 C.F.R. § 228.4-.5 (1985).

11. *See* Appellant's Opening Brief at 506, Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985).

12. *Id.*

13. 36 C.F.R. § 228.4-.5 (1985).

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within national forests, state coastal authorities are given such power for mines within the Coastal Zone under the federal CZMA.[14] As applied here, after receipt of notice of the plan of operations, the California Coastal Commission had thirty days to inform the Forest Service and the Granite Rock Company of its desire to review the plan. The California Coastal Commission, however, failed to respond in any way to the plan of operations, thus losing its opportunity to participate in the approval process.[15] The plan was approved by the Forest Service in February 1981, and shortly thereafter Granite Rock commenced operations. The plan of operations itself has not been subject to attack by the Coastal Commission, although three years after its approval several environmental groups and the County of Monterey sued the Forest Service over alleged inadequacies in the approval process.[16] The suit is pending.

Assertions of State Regulatory Authority

Although the California Coastal Commission failed to participate in the plan of operations review process, it informed the Granite Rock Company on October 17, 1983, after more than two years of operation, that Granite Rock had to obtain a coastal development permit pursuant to the California Coastal Act. The Commission explained that the operation had to be consistent with the California Coastal Management Program, and that the operation was generally subject to state jurisdiction.[17] Because of an ongoing bitter dispute between the Coastal Commission and the Granite Rock Company over the maintenance of a hiking trail over Granite Rock property, used by the public with company permission,[18] the Granite Rock Company feared that the Coastal Commission would not act favorably in a coastal development permitting process. For this reason, Granite Rock sued the California Coastal Commission claiming that the Commission lacked jurisdiction over mining operations in the national forest because the CZMA did not give states jurisdiction over mining claims. Granite Rock argued that the Mining Law of 1872 did not permit a local government to veto mining activitiy on federal lands, and that the general doctrine of federal preemption precluded state permitting authority.[19] The Coastal Commission responded that it had the jurisdictional authority to require a permit under the CZMA and its general police power. The Commission, in following the lead of the Big Sur Foundation, claimed that its jurisdiction over unpatented mining claims derived from the fact that mining claims were the functional equivalent of fee title.[20]

In a surprising decision, the Federal District Court for the Northern District of California held that the Granite Rock operations were subject

14. 16 U.S.C.A. § 1456(c)(3) (West 1985).
15. *Granite Rock*, 590 F. Supp. at 1366.
16. Big Sur Foundation v. Block, No. C-94-6784-JPV. (N.D. Cal. filed Oct. 15, 1984).
17. *Granite Rock*, 590 F. Supp. at 1366.
18. The Coastal Commission required Granite Rock to dedicate over a million dollars worth of private (nonfederal) property to the state in exchange for permission to repair landslide damage on the trail. *See infra* note 100.
19. *Granite Rock*, 590 F. Supp. at 1366-67.
20. *See* Brief for Appellee, Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985).

to Coastal Commission permitting jurisdiction under the CZMA, were subject to the general police permitting power of the state, and that federal unpatented mining claims were the functional equivalent of estates in fee.[21] This decision, until it was reversed by the Ninth Circuit,[22] represented a substantial departure from established mining law, added a new twist to the CZMA, and represented a powerful tool for environmentally oriented state governments to assert permitting authority and perhaps the power of prohibiting private resource development on federal lands. Under the reasoning of the district court, this state authority was not limited either to the coastal zone or to mining operations. The Ninth Circuit, however, disagreed with the district court decision and set a strong precedent against the ability of a local government to impose permitting requirements on federally approved private mining operations on federal lands.[23] This article will focus on the implications and validity of the district and appellate court decisions and their potential application to other natural resource developments on the public lands.

State Regulatory Authority Under the Coastal Zone Management Act of 1972

The Coastal Zone Management Act was passed by Congress in 1972 due to concern over the loss of coastal wetlands and estuarine environments and to prod states into controlling coastal development.[24] The Act employs grants to encourage states to implement and enforce their own coastal management plans in accordance with federal guidelines and subject to the approval of the Secretary of Commerce.[25] While the Act encourages states to manage territory already within a state's jurisdiction according to federal guidelines, the Act expressly excludes from state coastal act jurisdiction "lands the use of which is by law subject solely to the discretion of or which is held in trust by the federal government, its officers or agents."[26] Such federal lands are subject to federal consistency review whereby the appropriate federal agency must determine that activities on federal lands are consistent with state plans.[27] The Act is designed to facilitate comprehensive land management of state coastal zones by new state agencies, but also to prevent this newly facilitated state management from unduly interfering with activities on federally owned or controlled property.

Thus, if mining claims fall within the Act's federal lands exclusion, they are outside the "coastal zone" and the ambit of direct regulatory control by the state agency. States have regulatory authority over lands

21. *See Granite Rock*, 590 F. Supp. 1367-75.
22. *Granite Rock*, 768 F.2d at 1077.
23. *Id.*
24. 16 U.S.C.A. §§ 1451-1464 (West 1985) *See* CONFERENCE REP. No. 1544 92d Cong., 2d Sess. 12, *reprinted in*, 1972 U.S. CODE CONG. & AD. NEWS, 4822 [hereinafter CONFERENCE REPORT].
25. 16 U.S.C.A. §§ 1452(2), 1455 (West 1985).
26. *Id.* § 1453(1). The California Coastal Commission by state law also has no permit authority outside the Coastal Zone. CAL. PUBL. RES. CODE, § 30604(d) (West Supp. 1985).
27. 16 U.S.C.A. § 1456(c) (West 1985).

within the coastal zone, however. In *Granite Rock* the Coastal Commission argued that the mining claims were nonfederal property and were within the coastal zone. It also asserted that the CZMA granted to state agencies a level of regulatory authority so broad that all federal authority which might exist within the coastal zone was subordinated to local jurisdiction.[28] Having failed to participate in the consistency review process[29] of Granite Rock Corporation's mining plan of operations, the Coastal Commission attempted to assert regulatory control over the mining operation by requesting that the company apply for a coastal development permit. The Commission claimed jurisdiction under two theories: the CZMA and its state police power. Jurisdiction under the CZMA depends primarily upon whether mining claims fall within the federal lands exclusion and whether the CZMA permits state agencies to act free of federal preemption. Jurisdiction under the state police power depends upon whether the commission had authority independent of the CZMA. Jurisdiction also depends upon the reach of federal preemption. These issues are discussed below.

THE CONFLICT BETWEEN STATE AND FEDERAL JURISDICTION

The Nature of Unpatented Federal Mining Claims

Whether or not the California Coastal Commission has CZMA jurisdiction over unpatented federal mining claims on federal lands depends on whether or not such claims are located on "lands the use of which is subject solely to the discretion of or which is held in trust by the federal government, its officers, or agents."[30] The Coastal Commission argued, and the district court agreed, that mining claims are subject to state CZMA jurisdiction because they are not under the type of federal control pertinent to the CZMA exclusion.[31] The Ninth Circuit did not reach this issue and decided the case on other grounds, ruling that a state's power over mining claims is restricted by the federal preemption doctrine, and this doctrine is unaffected by the source of a state's power, be it the CZMA or police power.[32]

Because the Ninth Circuit did not reach the issue of whether mining claims are federal property within the coastal zone, the questions raised by the district court's decision concerning the true nature of federal mining claims are still unanswered. Although the appellate court eventually ruled that a state has no direct permitting authority over mining operations on federal lands,[33] the question of whether mining claims should be treated as federal, state, or private property may still be crucial in determining the extent to which a state may regulate mining operations on federal lands.

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28. *Granite Rock*, 768 F.2d at 1080.
29. *See supra* text accompanying notes 14, 15. A coastal state can trigger the consistency review process. 16 U.S.C.A. § 1456(c)(3)(A) (West 1985).
30. 16 U.S.C.A. § 1453(1) (West 1985).
31. *Granite Rock*, 590 F. Supp. at 1367-70.
32. *Granite Rock*, 768 F.2d at 1083.
33. *Id.*

The district court held that "the special property interest created by the Mining Act in valid and patentable claims simply does not fit within Section 1453(1)'s exclusion of lands subject to federal discretion."[34] This conclusion was based on the court's finding that claims are valid property interests, the functional equivalent of a title in fee simple, which cannot be taken by the United States without just compensation. It is well-established that mining claims are valuable property rights protected by the constitutional proscriptions against the taking of property without just compensation.[35] Thus, the power of the federal government to manage valid unpatented mining claims is subject to constitutional restrictions. It is apparent that the district court believed such claims were not subject to the *sole* discretion of the federal government because the constitutional limits imply that the claims were also subject to some discretion of the individual claim owner.[36]

The court's reasoning, however, is questionable. The fact that a claim owner has discretion over claims and is protected by the Constitution does not necessarily imply that the federal government lacks sole regulatory jurisdiction over those claims. By analogy, private fee simple property is fully subject to the jurisdiction of city, county, and state governments, and can be strictly zoned or regulated within constitutional bounds. Like federal mining claims, private fee simple property is protected by constitutional prohibitions against taking without just compensation.[37] Nevertheless, it is still subject to local control. It is unclear why unpatented mining claims should not be considered subject to exclusive federal control simply because there are constitutional restrictions against taking without compensation.[38]

The district court also appears to have equated unpatented mining claims with fee simple interests in land, such claims being the functional equivalent of other types of private real property not located in federal territory. The court emphasized that an unpatented mining claim, upon application of the holder, can be taken to patent.[39] Once a mining claim is patented it is cleary a fee simple interest in land, no longer designated as "federal" land. The patented claim is subject to local and state jurisdiction, and no federal ownership is retained over it.[40] Until the claim is fully patented, however, the property has not been divested from the government, and the federal government retains complete ownership and jurisdiction over that claim.[41] The holder of that unpatented claim, while he has

34. *Granite Rock*, 590 F. Supp. at 1368.

35. *See, e.g.*, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337 (1963); Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639, 644 (1935); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 316 (1930).

36. *Granite Rock*, 590 F. Supp. at 1367-68.

37. U.S. CONST. amend. V.

38. The federal government's sole discretion really begins in its choice to allow mining claims to be created on federal lands.

39. *Granite Rock*, 590 F. Supp. at 1368.

40. Germania Iron Co. v. U.S. 365 U.S. 379, 383 (1897).

41. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Freese v. United States, 639 F.2d 754, 755-56 (Ct. Cl. 1981).

a valuable property right, does not own a fee simple estate. An unpatented mining claim carries with it only the limited right to extract and remove minerals pursuant to the federal mining laws. A patented mining claim is like any other parcel of fee simple land on which any activity may be conducted in accordance with state and local law.

The district court, however, points to the non-discretionary nature of patent applications as proof that the federal government lacks sole discretion.[42] Because a claim must be taken to patent upon the completion of a few "technical" procedures, the court reasoned, there is no significant difference between an unpatented and patented mining claim with respect to federal jurisdiction.[43] The court also held that the federal government can not prevent mining, thus evidencing a lack of sole federal discretion. The court's reasoning, however, is subject to debate.

By classifying unpatented claims as the functional equivalent of patented claims, the court raised several troubling questions. The first question involves the effect of making a patent application. It is well established that the holder of an unpatented mining claim need never apply for a patent and may proceed to mine an entire mineral deposit without doing so.[44] The Granite Rock Company, for example, chose not to apply for a patent due to the costly, time-consuming, and uncertain nature of that proceeding. The district court failed to appreciate that a mining claim usually passes through three stages. First, it exists as an unpatented claim. Second, it exists as an unpatented claim with a patent application on file. Finally, the claim becomes a patented mining claim. Traditionally, it is only when the last stage is reached that federal jurisdiction ceases to exist.[45] Under the district court's holding, however, the degree of federal ownership and control during the first two stages is attenuated. This position creates significant uncertainties over the status of unpatented mining claims and is not supported by statutory or common law.

A second question raised by the court involves the relationship between federal ownership and federal jurisdiction. Traditionally, the end of federal ownership meant the end of federal jurisdiction.[46] Federal jurisdiction over federally owned lands stems from Article IV of the United States Constitution.[47] This federal jurisdiction appears to be without limit.[48] Once property no longer belongs to the federal government and

42. *Granite Rock,* 590 F. Supp. at 1368.

43. *Id.*

44. Andrus v. Shell Oil Co., 446 U.S. 657,.658 n.1 (1980); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Chambers v. Harrington, 111 U.S. 350, 353 (1884).

45. *See* Cameron v. United States, 252 U.S. 450, 460-61 (1920) (power of the federal government does not cease until legal title has passed); Adams v. United States, 318 F.2d 861, 872 (9th Cir. 1963) (title does not pass with patent application but only with patent approval).

46. *See supra* text accompanying note 41.

47. U.S. CONST. art. IV, § 3, cl. 2. *See* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); United States v. City of San Francisco, 310 U.S. 16, 29 (1940). Certain limited types of property not at issue here are controlled pursuant to Article I. *See* Engdahl, *State and Federal Power Over Federal Property,* 18 ARIZ. L. REV. 283, 288-90 (1976).

48. *Kleppe,* 426 U.S. at 539.

is removed from article IV status, federal jurisdiction is removed with the caveat that the federal government has authority to regulate all categories of property in order to protect neighboring federal territory.[49] Thus, once a claim is patented the federal government may regulate it only to protect federal property.[50] Unpatented mining claims are subject to federal regulation, whether or not they affect other federal property, because they are federal property. The district court's blurring of the line between patented and unpatented claims, which formerly reflected a difference between private fee and federal ownership, creates questions about the extent of federal regulatory control over its own property.

A third question raised by the district court's decision involves the role of local jurisdiction over federal territory. Traditionally, local governments have had the power to regulate activities on all federal lands when not preempted by the federal government.[51] Whether a parcel of land was covered by an unpatented mining claim, a timber lease, or other private right made no difference; the land was still subject to local regulatory control. If unpatented mining claims are not federal property, as suggested by the district court, and not subject to federal article IV jurisdiction, the preemptive limitations upon local police power may be diminished. Although the court declined to reach the issue of local police power because it found separate CZMA jurisdiction,[52] its holding throws into flux the traditional limitations over local control of privately held interests on federal lands.

A fourth question is whether the court's holding is limited to unpatented mining claims. It based its holding not only on a finding that unpatented claims may be patented, but also on the grounds that such claims are valid property rights, and that the federal government cannot prevent mining on mining claims.[53] It is worth remembering that many other private interests on federal lands such as timber, geothermal, and fuel and fertilizer mineral leases are also property rights. The federal government has the power to regulate these interests but not the power to prevent the specified lease activity. While the validity and origin of the court's "discretion to prevent" test are uncertain,[54] the government may condemn the property or cancel the lease and pay contract damages if it truly wishes to prevent such activity.[55] By holding that the federal

49. *Id.* at 546-47 (1976); United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979).

50. This is true unless other independent constitutional authority for regulation is relevant.

51. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 530 (1976).

52. *Granite Rock*, 590 F. Supp. at 1371.

53. *Id.* at 1370.

54. The district court also intimated that the federal government's sole discretion power only extends to regulations which "impermissibly encroach" upon the right to exploit placer claims for mining purposes. *Id.* at 1373. The federal government, however, can prevent certain mineral activities. United States v. Richardson, 599 F.2d 290 (9th Cir. 1979) *cert. denied*, 444 U.S. 1014 (1980).

55. North American Transp. & Trading Co. v. United States, 53 Cl. Ct. 424 (1918) *aff'd*, 253 U.S. 330 (1920). In addition, the appellate court in *Granite Rock* noted that the Forest Service may condition mining on compliance with environmental regulations, although such regulations must be reasonable. *Granite Rock*, 768 F.2d at 1081.

government lacks sole jurisdiction over unpatented mining claims because they are protected property rights and because there are limitations on federal control, the court raises the possibility that federal jurisdiction over all types of private rights in federal lands may be limited and that local control may be expanded. The implications of this are far-reaching and it remains for another day to articulate more precisely the relationship between federal and local control over private property rights in federal lands.

Finally, the court seems to ignore a host of other federal statutes and regulations in arriving at its "no discretion" decision. Federal rules and regulations that pervade all mining activity on federal lands point to the existence of federal discretion over mining claims. The ability of the United States to regulate mineral development on federal lands is unquestioned.[56] The basis for this regulation is the property clause of the Constitution and the commerce clause coupled with the necessary and proper clause.[57] An example of the immense degree of federal discretion over mining claims is provided in *United States v. Richardson*.[58] In that case, the ninth circuit considered whether the Forest Service, under the provisions of its Organic Act[59] and the Surface Resources Act,[60] could force the owner of a mineral claim to abandon the traditional but environmentally destructive exploration technique known as "trenching" in favor of a more expensive drilling program. The Ninth Circuit held, in what it considered to be a decision of "poetic justice," that the claim owner could be forced to change his excavation techniques in order to protect the surface resources of the Gifford Pinchot National Forest.[61] If this is not discretion by the Forest Service, then it is hard to imagine what is.

Federal Lands As Lands Held in Trust by the Federal Government for the People of the United States

In addition to lands not under the sole discretion of the federal government, the CZMA also excludes lands "the use of which . . . is held in trust by the Federal Government."[62] Both of these exclusions together encompass national parks, forests, wildlife refuges, and other such lands.[63] The *Granite Rock* district court, after finding that mining claims are not within the first exclusionary prong of sole discretion, also concluded that the trust lands exclusion applies only to Indian reservations.[64] The court pointed

56. *See* United States v. Goldfield Deep Mines Co. of Nevada, 644 F.2d 1307 (9th Cir. 1981); United States v. Weiss, 642 F.2d 296 (9th Cir. 1981); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979).

57. U.S. CONST. art. IV, § 3, cl. 2 (property clause); *Id.*, art I, § 8, cl. 3 (commerce clause); *Id.*, cl. 18 (necessary and proper).

58. 599 F.2d 290 (9th Cir. 1979).

59. 16 U.S.C.A. § 551 (West 1985).

60. Surface Resources Act of July 23, 1955, 30 U.S.C.A. §§ 601-614 (West. 1971).

61. United States v. Richardson, 599 F.2d 290, 290-93 (9th Cir. 1979). *See* Marsh & Sherwood, *Metamorphosis in Mining Law: Federal Regulatory Amendment and Supplementation of the General Mining Law Since 1955*, 26 ROCKY MTN. MIN. L. INST. 209 (1980).

62. 16 U.S.C.A. § 1453(1) (West 1985).

63. *See* CONFERENCE REP. *supra* note 24, at 12.

64. *Granite Rock*, 590 F. Supp. at 1369-70.

to a wealth of established precedent for the assertion that reservation lands belong to the United States and are held in trust for the Indians.[65] The court, however, ignored the traditional rule that *all* article IV lands are held in trust for the people of the United States.[66] The principle that federal lands such as national forests are held in trust by the federal government for the people of the United States set a standard by which management of federal lands can be judged.[67] Such management must serve the broader public interest whether that be for mineral development by private developers or conservation programs by federal wildlife experts. If such lands are not held in trust, as the district court suggests, then the parameters of management goals may be less certain. The court, however, may not have intended to imply that lands such as national forests are not held in trust by the federal government. It may simply be the court's belief that Congress, in discussing trust lands, had narrowed the traditional definition of such lands only with respect to this one statute. There is no authority, however, for such a view.

There is no indication in the plain language of the CZMA or in the legislative history of the Act that Congress intended to exempt one subcategory of trust land from its jurisdictional exclusion. The district court, however, through grammatical sleight of hand declared that trust lands cannot include other federal lands "the use of which is subject solely to the discretion of . . . the Federal Government" because such an interpretation would result in redundant CZMA exclusions.[68] The finding of a redundancy to refute the plain language of an unambiguous statute is unwarranted. "Trust land" is a broad category which encompasses most of the federal lands that are affected by the CZMA. Lands under the "sole discretion" of the federal government logically include lands under federal jurisdiction and other lands for which Congress was reluctant to authorize a substantial state regulatory role. These lands include lands under lease to the federal government, such as Cape Kennedy or other federal projects.

Finally, if Congress intended to incorporate only Indian reservation land in the CZMA jurisdictional exclusion, it is likely that they would have expressly done so. Congress has ample ability and experience in drafting statutes which expressly refer to "Indian lands."[69] Congress without doubt would have referred to "Indian lands" or "Indian territory" if it had intended to restrict its exclusion to those lands only. The CZMA instead

65. *Id.* at 1369. The court cited, among others, United States v. Bowling, 256 U.S. 484, 486-87 (1921).

66. *See* United States v. California, 332 U.S. 19, 40 (1947); Light v. United States, 220 U.S. 523, 536-37 (1911) ("all public lands of the nation are held in trust for the people of the whole country"); United States v. Trinidad Coal and Coking Co., 137 U.S. 160 (1890); United States v. Beebe, 127 U.S. 338 (1888).

67. *See, e.g., Granite Rock,* 590 F. Supp. at 1369-70; Light v. United States, 220 U.S. 524 (1911); United States v. Beebe, 127 U.S. 338 (1888).

68. There is no redundancy, of course, given the court's questionable conclusion that mining claims are not within the sole discretion of the federal government. *Granite Rock* 590 F. Supp. at 1369; 16 U.S.C.A. § 1453(1) (1985).

69. *See, e.g.,* 18 U.S.C.A. § 1162 (which deals with state jurisdiction over "Indian country").

refers to land "held in trust by the federal government," a term which has heretofore referred to a number of categories of land including national forests.

FEDERAL PREEMPTION OF LOCAL CONTROL OVER MINING CLAIMS

A final and critical issue raised in the *Granite Rock* controversy is the degree to which a local or state government can regulate activities on a federal mining claim without being preempted by the federal government. Indeed, it is on the issue of federal preemption that the Ninth Circuit's decision in *Granite Rock* is most significant. State and local regulation of mining claims was contemplated by the Mining Law of 1872[70] and is permissible unless a particular regulation adversely affects other federal property or is preempted by other federal law or regulation. This preemption doctrine, as applicable to federal lands, was summarized by the Supreme Court when it explained that "[t]he police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject."[71]

Federal preemption of local regulation occurs when Congress clearly expresses an intent to usurp local power,[72] when federal regulation is so pervasive that there is no room left for local regulation[73] or when the local regulation produces a result inconsistent with the stated purpose of a federal statute.[74] There have been a number of cases in which the doctrine of federal preemption has swept away local regulation of mining activities.[75] Where local authorities have required a mineral operator to obtain a local permit in order to proceed with development activities on unpatented mining claims, the permit requirements have often been found preempted and unenforceable.[76] This is precisely the issue upon which the Ninth Circuit reversed the district court in *Granite Rock,* and found federal preemption arising from the operation of the mining laws.[77] These three

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70. 30 U.S.C.A. §§ 21-54 (West 1985).

71. Omaechevarria v. Idaho, 246 U.S. 343, 346 (1918). It is quite possible that the CZMA has restricted the state police power over development activities in federal coastal areas to the consistency review process only. *See infra* note 91.

72. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 147-50 (1963).

73. Pennsylvania v. Nelson, 350 U.S. 497, 502-04 (1956).

74. Silkwood v. Kerr-McGee, 464 U.S. 238, 248 (1984); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Omaechevarria v. Idaho, 246 U.S. 343, 346 (1918).

75. *See, e.g.,* Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd,* 445 U.S. 947 (1980).

76. *Id.*; Brubaker v. Board of County Comm'rs, 652 P.2d 1050, 1056 (Colo. 1982); Elliott v. Oregon Int'l Mining Co., 60 Or. App. 322, 654 P.2d 663 (1982). *See also* Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984).

77. An additional test for any finding of preemption has been suggested in Engdahl, *supra* note 47 at 362-70. Engdahl argues that while Congress may utililze any of its enumerated powers for any prupose, including an "extraneous objective," Congress has preemptive powers only when it exercises its enumerated powers for policies not extraneous to those powers. Thus, for example, Congress may preempt state regulation of truck traffic, but not state regulation of on-farm laborer living standards since the latter is not within the *purpose* of Congress' commerce power. By this reasoning, Engdahl finds Congress to be totally incapable of preempting state regulation of mining activities on federal lands because there is no enumerated power to which federal mining policies relate. If there were any preemptive

tests for preemption are useful in discerning the rationale for these preemption cases, in understanding their applicability to the *Granite Rock* facts, and in developing a model for determining precisely when preemption will be found to preclude local regulation of mining activities.

Express Preemption

Preemption of local permitting requirements over mining activities on federal lands has never resulted from a finding of express congressional intent to preempt. Clearly federal mining law contemplates that local regulation shall play a major part in mining operations.[78] While it is arguable that the part played by local regulators has diminished in proportion to federal regulations over the years, local regulation is still permitted by federal law. Though preemption has not arisen from an expression of congressional intent to preempt state and local regulation, this lack of express intent is not a bar to preemption on other grounds.

Pervasiveness of Regulation

Preemption has been found where federal mining regulations are so pervasive that they occupy the field and leave no room for local regulation.[79] The scope of power granted the federal government by the property clause is very broad and allows the federal government to legislate and regulate all activity that affects federally owned land. In *United States v. Kleppe* the Supreme Court considered the government's power to manage wild burros on and off federal land and concluded that "[t]he power over the public land . . . entrusted to Congress is without limitations."[80] For this reason, "when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. . . . A different rule would place the public domain of the United States completely at the mercy of state legislation."[81]

The effectiveness of the United States in regulating mineral development activities on federal lands is well documented.[82] The federal govern-

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capability, it would have to stem from an enumerated power, such as the promotion of national defense, rather than the property clause.

This rather novel theory was not at issue in *Granite Rock* because it was not addressed by the parties or the court. In addition, it does not follow from any of the traditional tests for preemption, and Engdahl does not cite any express authority for this proposition. It seems obvious that federal regulation of mining on federal lands is the direct result of policies contemplated by Congress in exercising its enumerated powers over commerce or its own article IV property.

78. 30 U.S.C.A. § 22 (West 1971) (mining claims regulated "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"). *See also* Butte City Water Co. v. Baker, 196 U.S. 119 (1905) (Montana state regulation of mining claims upheld as not in conflict with federal statute); 1 LINDLEY, LINDLEY ON MINES, §§ 61, 63, 76 (3d ed. 1914). *But see id.* § 249 ("nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws").

79. *See supra* text accompanying note 76.

80. United States v. Kleppe, 426 U.S. 529, 539 (1976) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).

81. *Id.* at 543 (quoting Camfield v. United States, 167 U.S. 518, 526 (1897)).

82. *See supra* text accompanying notes 56-61.

ment may even establish which types of exploration activities are appropriate on certain unpatented mining claims.[83] This regulation of decisions previously left to the individual miner demonstrates the pervasive and all-encompassing nature of federal regulation over mining claims. State regulation cannot contradict this federal authority and control. The question thus becomes one of whether a particular state regulation does in fact contradict federal law.

For example, in *Ventura County v. Gulf Oil Corp.*,[84] the extensive regulation of oil exploration and drilling under the Mineral Leasing Act of 1920[85] was a contributing factor to the preemption of Ventura County's demand for a right of final project approval. When federal regulation is not pervasive, however, local regulation may be permitted where it does not frustrate federal statutory purposes, and does not make a mining operation impossible. In *Granite Rock*, the Ninth Circuit expressly rejected the argument that federal regulation under the Mining Law of 1872 is so pervasive that all local law must be preempted.[86]

In a recent Wyoming case, *Gulf Oil Corporation v. Wyoming Oil and Gas Conservation Commission*,[87] the Wyoming Supreme Court held that a drilling permit requirement with an access condition was not preempted by federal law. In *Gulf Oil*, a state agency granted a permit to drill for oil on a federal mineral lease. The permit contained the condition that Gulf could not use its preferred access route through the town of Story, but rather had to rely on an alternative access route. Gulf objected on the ground that no other feasible access route existed. The court, however, was unpersuaded and agreed with the state agency that Gulf had not carried its burden of proving that no other feasible access routes, including helicopter transport, existed. The court rejected the argument that federal mineral leasing and environmental statutes were so pervasive that they preempted local law. Rather, the court found that "far from excluding state participation, [Congress] has prescribed a significant role for local governments in the regulation of the environmental impact of mineral development on federal land."[88] Thus, no conflict existed with any pervasive scheme of federal law.[89]

The vitality of *Gulf Oil* is in doubt, however, because of the Ninth Circuit's clear holding that a state is preempted from requiring permits for federal mineral operations. It is arguable, however, that Wyoming may still impose a condition that access not be made through the village of Story. While a permit for drilling appears precluded by the logic of *Granite*

83. *Id.*
84. 601 F.2d 1080 (9th Cir. 1980), *aff'd*, 445 U.S. 947 (1980).
85. 30 U.S.C.A. §§ 181-287 (West Supp. 1985).
86. *Granite Rock*, 768 F.2d at 1083.
87. 693 P.2d 227 (Wyo. 1985). For a further discussion of the facts and issues in *Gulf Oil*, see Note, *The Broadened Jurisdiction of the Wyoming Oil and Gas Conservation Commission*, 21 LAND & WATER L. REV. (1986).
88. *Gulf Oil*, 693 P.2d at 235.
89. *See also* State *ex rel.* Andrus v. Click, 97 Idaho 791, 554 P.2d 979 (1976) (no preemption of state pollution permitting requirements for dredge mining). *But see Granite Rock*, 768 F.2d at 1083 (rejecting *Click's* logic).

Rock, a permit requirement for access through nonfederal lands may not be preempted, so long as the permit requirement does not interfere with federal management of federal land.[90] To date, this issue has not been addressed by either the ninth or tenth circuits.

In *Granite Rock* it is also arguable that the consistency review provisions of the CZMA were intended to supplant other local regulation of federally owned coastal areas.[91] Whether or not such local regulation is precluded in any particular situation may best be determined on a case-by-case analysis.

In *Granite Rock* the California Coastal Commission asked Granite Rock to obtain a permit. Although there is evidence that the commission was opposed to the mining plans,[92] it is not clear that the commission would have used the permitting process to require conditions or regulation inconsistent with federal mining and environmental laws and regulations. Yet, a mere ability to veto a project for want of a permit was found to be inconsistent by the Ninth Circuit.[93]

Frustration of Federal Statutory Purpose

The long history of federal mining statutes demonstrates that it is the unambiguous intent of Congress to encourage and promote mining activities on federal land.[94] As one court recognized, "[t]he general purpose of the mineral laws is well understood; it was to encourage citizens to assume the hazards of searching for and extracting valuable minerals deposited in our public lands. . . ."[95] This statutory purpose preempts any local attempts which would frustrate or prohibit mining.

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90. *See infra* text accompanying notes 121-24.

91. Although this issue was not reached by the Ninth Circuit in *Granite Rock,* it should be noted that Title 16, United States Code, Section 1456(c) provides for a federal review of activities on federal lands to ensure that such activities on federal lands are consistent with local coastal protection plans. The California Coastal Commission failed to take advantage of this provision. *See supra* text accompanying note 15. The conference report indicated that Congress may have intended the consistency review provisions to be the exclusive means by which a state coastal authority could regulate activities on federal land. According to the report, "[f]ederal lands are not included within a state's coastal zone. As to the use of such lands which would affect a state's coastal zone, the provisions of Section 307(c) [16 U.S.C. § 1456(c)] would apply." H.R. REP. No. 1544, 92d Cong., 2d Sess. 12, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4822 (brakcets in original). *See also* 15 C.F.R. § 923.33(c) (1984).

Note also that by this reasoning even the police power of the local government over development activities may be restricted to participation in the consistency review process. Finally, in Secretary of Interior v. California, 464 U.S. 312, 334 (1984) it was noted that the consistency review process did not give the states an unfettered veto power over coastal development.

92. *See infra* text accompanying notes 100-102.

93. *Granite Rock,* 768 F.2d at 1082.

94. *See, e.g., Granite Rock,* 768 F.2d at 1081; Brubaker v. Board of County Comm'rs, 652 P.2d 1050, 1056 (Colo. 1982).

95. United States v. Rizzinelli, 182 F. 675, 682 (D. Idaho 1910). *See also* New Mercur Mining Co. v. South Mercur Mining Co., 102 Utah 131, 142, 128 P.2d 269. 274 (1942), *cert. denied,* 319 U.S. 753 (1943); Brubaker v. Board of County Comm'rs, 652 P.2d 1050, 1057 (Colo. 1982); Deffeback v. Hawke, 115 U.S. 392, 401 (1885) (the Mining Act is "to promote the development of the mining resources of the United States").

Congressional statements of policy subsequent to 1872 confirm that Congress continues to support and encourage the development of mineral resources on federal lands. For example, in the Mining and Minerals Policy Act of 1970[96] Congress declared that "it is the continuing policy fo the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries. . . ." This goal is repeated in the Federal Land Policy and Management Act of 1976 (FLPMA),[97] and in the National Materials and Minerals Policy, Research and Development Act of 1980.[98]

In contrast to this strong federal policy to promote and encourage mining on federal lands, the goals and effects of the California Coastal Commission serve to discourage mining. It is the uncontroverted policy of the Coastal Commission to impose stringent conditions and exactions on property owners who engage in any development on the coast.[99] For example, there is every likelihood that the Coastal Commission would require Granite Rock Company to dedicate substantial amounts of private property to the commission or state in exchange for the right to continue mining operations on federal lands.

Already the Coastal Commission is attempting to require the same plaintiff to dedicate over one million dollars worth of private property to the state in exchange for the right to repair and maintain an existing hiking trail across the Granite Rock property to be used by members of the public.[100] If the Coastal Commission is found to have the ability to require a permit, any permit conditions unrelated to the purpose of the mining laws will raise unique preemption issues. Finally, the Coastal Commission has been instrumental in "encouraging" the County of Monterey to adopt a Big Sur coast land use plan.[101] While the Coastal Commission presently disapproves of the plan as a whole because it does not place enough restrictions on development, it does approve the plan's mineral resources section which states that, "large scale mineral development is declared inappropriate."[102]

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96. 30 U.S.C.A. § 21a (West 1971).

97. 43 U.S.C.A. § 1701(a)(12) (West Supp. 1985).

98. 30 U.S.C.A. §§ 1601, 1602, 1605 (West Supp. 1985).

99. *See, e.g.,* Pacific Legal Foundation v. California Coastal Comm'n, 33 Cal. 3d 158, 163; 655 P.2d 306, 308, 188 Cal. Rptr. 104, 107 (1982).

100. Granite Rock Co. v. California Coastal Comm'n, No. 79877 (Monterey, Cal. Super. Ct.) (complaint filed Oct. 24, 1983). The specifics of this case are amazing and demonstrate well the attitude of the Coastal Commission. Granite Rock owns private property adjacent to its mining claims. A hiking trail runs through this property and is used by the public with Granite Rock's permission. After Granite Rock cleared some undergrowth and repaired some erosion damage on the trail, the Coastal Commission insisted that Granite Rock obtain a development permit for the trail repair and dedicate over one million dollars in private property (corridors running along the trail and a nearby stream) to the state in exchange for the permit.

101. California Coastal Commission, Big Sur Coast Land Use Plan (Memorandum Aug. 21, 1984).

102. *Id.* at 5.

When a local agency attempts to regulate mining on federal lands to the point that mining becomes virtually impossible, or attempts to prohibit or impose a highly discretionary or confiscatory permitting process upon mineral activity on federal lands, courts have repeatedly held that such requirements are preempted by federal laws. A clear expression of this doctrine is found in the Ninth Circuit's *Granite Rock* decision. There, the court unequivocally held that a state has no permitting authority over mining on federal lands. The court followed the reasoning used in a line of cases which holds that the state regulation cannot deliberately interfere with the congressional purpose to promote mining.[103] The court also relied on a series of nonmining cases such as *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*,[104] where the mere presence of federal authority to either allow or disallow a development such as a power project is often enough to preclude a state's ability to hold a similar power to approve or deny the same project. These two bases for the court's ruling are discussed below.

Preemption Based on the Purpose of the Mining Laws

A series of state cases and one Ninth Circuit case examined the purpose and effect of federal mining laws. The conclusion reached in these cases was that while state environmental regulation is not precluded, it is certainly limited by federal mining law. For example, in *Brubaker v. Board of County Commissioners*,[105] the Colorado Supreme Court held that the El Paso County Board of Commissioners was preempted from refusing to grant a special use permit for drilling operations on federal land because the operations had already been approved by the federal government. Despite assertions by the county that it was merely conditioning development upon compliance with reasonable legislative standards, the court found that there was preemption because the board applied its zoning ordinances to prohibit a federally authorized use of federal property.[106]

In *Brubaker* and *Granite Rock*, the courts found unpersuasive the argument that federally approved operating plans provide an express basis for local jurisdiction. The operating plan in *Brubaker*, required that "the operator . . . shall comply with the regulations of . . . State, County, and Municipal laws. . . ."[107] In *Granite Rock*, the plan stipulated that "Granite Rock is responsible for obtaining any necessary [coastal commission] permits."[108] In *Brubaker*, the court determined that the local regulations were not "applicable," and further that the Forest Service is without power to issue a permit which makes the ultimate decision of whether or not there can be mineral development on federal property subject to the discretion of local authorities.[109] Finally, the court held that "Forest Service

103. *See Granite Rock*, 768 F.2d at 1081-83 (citing *Ventura County*, 601 F.2d at 1080).
104. 328 U.S. 152 (1940).
105. 652 P.2d 1050 (Colo. 1982).
106. *Id.* at 1054.
107. *Id.*
108. *Granite Rock*, 768 F.2d at 1083.
109. *Brubaker*, 652 P.2d at 1057.

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regulations governing such operating plans recognize that those plans may not be used to prohibit legislatively authorized mining activities."[110] In *Granite Rock,* the Ninth Circuit put it more succinctly holding that because federal regulations preempted state permitting authority, "[a] routine staff statement cannot change the effect of the formally adopted regulations."[111]

In *Elliott v. Oregon International Mining Company,*[112] the Oregon Court of Appeals held that state regulation which prohibited a mineral claimant from conducting surface mining on land where the surface estate is owned by a private owner but the mineral estate was reserved to the federal government was preempted by federal law because the state regulation clearly interfered with purposes of the federal mining laws.[113]

This case served to clarify the Oregon Supreme Court's earlier position in *State ex rel. Cox v. Hibbard*[114] that state environmental regulation of mining activities was not preempted by federal law. *Elliott* made it clear that while such reasonable regulation was permissible, it could not prohibit the federally sanctioned mining activities.

In *Ventura County* the Ninth Circuit Court of Appeals held that Ventura County's alleged licensing authority over drilling operations pursuant to leases on federal lands was preempted because it was contrary to federal law.[115] The *Granite Rock* appellate court quoted with approval the holding in *Ventura County* that "Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress."[116] The very existence of the licensing condition was held to be preempted, and the fact that Gulf had not applied for a license was found to be irrelevant.[117] This same rationale was applied in *Skaw v. United States,* in which the absence of local permits for a mining claim was held to be irrelevant to the requirement that the federal government compensate the taking of a claim.[118]

In *State ex rel Andrus v. Click,*[119] the Idaho Supreme Court upheld a local regulation which required a dredging permit as long as the requirement did not render it impossible to mine or conflict with federal law. The vitality of the *Click* decision, however, has been severely undermined by the *Granite Rock* decision in which the Ninth Circuit referred to *Click* and

110. *Id.*
111. *Granite Rock,* 768 F.2d at 1083.
112. 60 Or. App 474, 654 P.2d 663 (1982).
113. *Id.* at 482-83, 654 P.2d at 668.
114. 31 Or. App. 269; 570 P.2d 1190 (1977).
115. *Ventura County,* 601 F.2d 1080. The local regulations frustrated the purpose of the Mineral Leasing Act of 1920, which leaves room for nonconflicting state regulation. The *Ventura* court also found the pervasive nature of federal energy regulation relevant.
116. *Granite Rock,* 768 F.2d at 1082 (quoting *Ventura County,* 601 F.2d at 1084).
117. *Ventura County,* 601 F.2d 1084-85. The *Ventura* court relied upon Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955), and First Iowa Hyrdo-Electric v. Federal Power Comm'n, 328 U.S. 152, 177-79 (1940), in which local licensing requirements were held preempted by federal law.
118. Skaw v. United States, 740 F.2d 932, 940-41 (Fed. Cir. 1984).
119. 97 Idaho 791, 554 P.2d 969 (1976).

https://scholarship.law.uwyo.edu/land_water/vol21/iss1/4

stated "[w]e find unpersuasive the argument that the Mining Act and these regulations do no more than encourage mining subject to minimum federal environmental regulation, leaving the states free to condition the ability to mine on adhering to more stringent requirements."[120]

Finally, in *Gulf Oil*,[121] the evidence of congressional intent to include state participation in mineral leasing and environmental laws was seen by the Wyoming Supreme Court as a sanction for such local regulation. Furthermore, the court concluded that the Wyoming regulations "constitute legitimate means of guiding mineral development without prohibiting it."[122] The fact that the condition imposed by the state permit, namely helicopter access, was considered by Gulf to effectively preclude an economical exploration program did not enter the court's equation because Gulf had not proved such access was prohibitory. Only if Gulf had been able to prove that the permit's access condition in fact made mineral exploration impossible could it have been assumed that a conflict with a statutory congressional purpose might exist.

Interestingly enough, the court in *Gulf Oil*, relied favorably on the district court decision in *Granite Rock* for the proposition that state permitting authority was permissible.[123] With the reversal of the lower court's *Granite Rock* decision, the rationale for the *Gulf Oil* decision is somewhat less persuasive. The Tenth Circuit has not yet had an opportunity to address these issues.

The court in *Gulf Oil* also distinguished *Ventura* and *Brubaker* on the grounds that the regulations in those cases were clearly intended to prohibit mineral exploration, whereas the Wyoming state agency attempted only to protect the environment rather than prohibit exploration.[124] In *Granite Rock*, however, the Ninth Circuit rejected the distinction between regulation and prohibition and followed the Supreme Court's decision in *First Iowa*.[125]

Preemption Based on the First Iowa Doctrine

The Ninth Circuit in *Granite Rock* was careful to note that though federal law encourages an activity, it does not follow that a state environmental regulation which incidentally discourages the activity is automatically preempted.[126] Some local regulation is, therefore, acceptable.[127] This approval of local regulation, even if it incidentally interferes

120. *Granite Rock*, 768 F.2d at 1083.
121. 693 P.2d 227 (Wyo. 1985).
122. *Id.* at 237.
123. *Id.* at 238.
124. *Id.* at 237.
125. *See Granite Rock*, 768 F.2d at 1082.
126. *Id.* at 1081.
127. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 204 (1983); Silkwood v. Kerr McGee Corporation, 464 U.S. 238, 256 (1984). In Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), local regulations were upheld despite incidental interference with a federal purpose to promote coal use. The Coastal Commission argued that this case effec-

with the federal purpose of encouraging mining raises the question of whether the *Brubaker* line of cases provides sufficient justification for the preemption of local regulation if it interferes with the purposes of federal mining law. In the *Brubaker* cases, however, the interference was more than "incidental." Furthermore, these cases are supported by *Granite Rock* in which the appellate court looked beyond the issue of incidental interference and found that state permitting requirements do not necessarily escape preemption, even if issuance of the permit is conditioned only upon reasonable requirements.[128] The court was unpersuaded that a distinction could be made between permit requirements designed to prohibit mining and those designed only to regulate it because there are instances in which a state permitting requirement is absolutely preempted, regardless of whether or not that requirement is based upon only reasonable conditions.[129]

The holding in the *Granite Rock* appellate decision that state permit requirements may be preempted is based upon the *First Iowa* doctrine that state regulations which interfere with federal purposes are preempted, and upon the second prong of the preemption test that state laws may not interfere with the operation of federal law. There, the Supreme Court held that because the Federal Power Act requires that a federal permit be obtained prior to the construction of a hydroelectric dam, the state could not also condition the construction of the dam upon the attainment of a state permit.[130] Following this reasoning, the Ninth Circuit in *Ventura* concluded that because federal authorities had already issued drilling permits, the local authorities could not require separate drilling permits.[131]

It is crucial to an understanding of *First Iowa*, however, to recognize that a local permit requirement is not per se preempted by a federal permit requirement for the same project. Thus, in *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*,[132] the Supreme Court held that a utility could be prevented from building a federally approved nuclear power plant by a state requirement that a state nuclear waste disposal certificate first be obtained.

In order to reconcile *Pacific Gas* with *First Iowa*, it is necessary to look beyond the mere existence of a federal permit requirement and consider exactly what activity is being permitted by the federal regulatory scheme. In cases like *First Iowa*, for example, it was found that the federal permit requirement was part of a comprehensive federal planning process

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tively overruled *Ventura*, but is is clear that it did not because the congressional coal policy was very broad and general and did not expressly nor intentionally preempt all local regulations. *Id.* at 633-36. In *Ventura*, on the other hand, local regulations were interfering with specific federal permitting regulations and policies.

128. 768 F.2d at 1081-82.

129. *Id.* at 1082.

130. First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152, 164 (1946).

131. *Ventura County*, 601 F.2d at 1084.

132. 461 U.S. 190 (1983).

intended to cover virtually all aspects of the construction of a hydropower dam.[133] For that reason, the state could not dictate design parameters for the project if such state parameters conflicted with decisions made through the federal planning process. Likewise, in *Ventura County,* the federal drilling permit encompassed a federal decision to allow drilling on a particular parcel of federal property and the county was thus preempted from making an independent decision on an identical issue.[134] In *Pacific Gas,* the federal permit requirement was designed to ensure the safety of nuclear power plant construction and therefore the state was not allowed to impose its own independent safety permitting system. Because the federal permitting regulation did not cover or even attempt to address such nonsafety issues as the economic aspects of waste disposal, the state was free to regulate in this area.[135]

Applying this reasoning to mining law, the *Granite Rock* appellate court considered the realm of considerations addressed by the Forest Service's regulatory approval process of mining plans of operations. The court found that the purpose for requiring a plan of operations is to protect the surface resources and environment.[136] Although Forest Service regulations do not establish environmental standards, and the regulations recognize that states may enact stricter environmental standards, the final decision to allow or not to allow mining on federal lands rests with the Forest Service. Thus, the court reasoned that although a state may urge the Forest Service to reject or revoke a mining permit on state environmental grounds, the federal government alone has ultimate authority over environmental protection of the national forests and only the Forest Service may interfere with a federal mining permit.[137]

SUMMARY: WHEN LOCAL REGULATIONS ARE PREEMPTED BY FEDERAL MINING LAW

This reasoning leads to the crux of the issue: When does a state permitting requirement impermissibly interfere with a federal permitting scheme? Apparently a state permit requirement does not interfere simply because it incidentally discourages a federally approved activity. Where Congress intended certain regulatory decisions to rest with the federal government, however, state regulations which interfere with those decisions violate the supremacy clause.

Thus, the court in *Brubaker* held that El Paso County cannot require a drilling permit which duplicates a federal drilling permit.[138] Similarly, the court in *Elliot* held that Grant County may not completely prohibit

133. *First Iowa,* 328 U.S. at 164. *See also* Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

134. *Ventura County,* 601 F.2d at 1084. *See also,* Sperry v. Florida, 373 U.S. 379 (1963) (federal patent attorneys not required to obtain state permit to practice law).

135. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 198, 204 (1983).

136. *Granite Rock,* 768 F.2d at 1081.

137. *Id.* at 1083.

138. *Brubaker,* 652 P.2d at 1050.

an activity expressly considered and permitted by federal law.[139] Finally, in *Gulf Oil* it must be questioned whether the Oil and Gas Conservation Commission has the power to grant Gulf Oil a permit to drill a well, subject to the condition that Gulf find an alternative route. The propriety of this decision must turn on whether the commission's denial of Gulf's preferred access contradicts a federal determination of the same issue. The federal government initially conditioned its permit on the use of a northern access route and then temporarily suspended operating and producing requirements pending a review of the access route.[140] Thus, the federal government's permitting process clearly encompasses environmental considerations and an express decision on the proper access route. Therefore, if the *Granite Rock* analysis were to apply in *Gulf Oil* it is arguable that Gulf Oil should be free to utilize whatever access route is mandated by the federal government and that the State of Wyoming has no power to require a permit dictating the use of a different access route, at least for access across federal property. *Gulf Oil* can probably be harmonized with *Granite Rock,* however, with respect to access permits across state land. Even if the federal government expressly approved access across state lands, it is difficult to imagine that a state could not *reasonably* regulate that access, unless a later court dramatically expands the *Kleppe* doctrine.[141] In the meantime, *Gulf Oil* allows, and *Granite Rock* does not appear to forbid, permitting of activities off federal land even if incidentally addressed by federal regulation.

It should be noted that *Granite Rock* does not spell the end for all local permitting of mining operations on federal lands. Local permitting is probably still acceptable for those activities or considerations which are not covered by the federal permitting process. Thus, permits for state water rights or access over state lands may still be acceptable even if they incidentally interfere with the purposes of the mining laws. State permits pursuant to federally mandated state air quality, water quality, or reclamation programs would also survive preemption,[142] as should state attempts to control nuisances not otherwise specifically allowed by federal authorities.[143] Entities such as the Coastal Commission, however, which are bent on prohibiting local mining, must beware. There is still no room for state law which purposely stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[144]

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139. Elliot v. Oregon Int'l. Mining Co. 60 Or. App. 474, 654 P.2d 633 (1982).

140. *Gulf Oil,* 693 P.2d at 233.

141. *See supra* text accompanying note 47-49.

142. *See, e.g.,* 36 C.F.R. § 228.8 (1985). The Coastal Commission argued that because these permits were allowed or even required by federal law, then all state permitting requirements must be allowed.

143. Certain examples of state shutdowns of mining operations to abate notorious nuisances are well established. For example, California was able to stop large scale hydraulic mining that was choking the rivers with silt and causing extensive flooding and crop damage in the Sacramento Valley. Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (9th Cir. 1884). In *Woodruff,* it is unclear whether the subject mining claims were patented or unpatented. Regulation, however, is a concept quite distinct from nuisance abatement.

144. *See supra* note 127.

State Regulatory Power by Default—
Federal Involvement in the Granite Rock Litigation

The failure of the district court to recognize the role of the federal government in the regulation and management of mining claims on federal property may stem in part from the lack of involvement in the litigation. Although the Departments of Agriculture, Interior, Commerce, and Justice were apprised of the significance of the controversy, there was no federal involvement until after the district court decision was made and the Granite Rock Company had filed a notice of appeal. Thus, it was left to Granite Rock to assert the existence of crucial federal interests in this case. This lack of leadership by the federal government in the protection of vital federal interests is indicative of the climate that leads to the usurpation of federal power by state and local governments.

CONCLUSION

In the field of mineral development, *Granite Rock v. California Coastal Commission* is particularly instructive. A deposit of high-grade chemically pure limestone has been discovered in an area of outstanding natural beauty. While the planned mining operations are designed not to interfere with area's beauty, the project is being fiercely opposed by environmental groups. The private right to proceed with reasonable development of mining claims is in conflict with the local interest of preservation which, in turn, is in conflict with the federal interest in promoting a strong, regulated, minerals industry. The conflict has crystallized in a dispute over whether or not the mining company must go through a local permitting process in addition to the established federal permitting process.

The law is well established that while a local agency may regulate private activities such as mining on federal lands, that agency may neither prohibit such mining nor deliberately frustrate the purpose of the federal laws to promote a regulated mining industry.

In reaching the decision that Granite Rock Company was subject to the permitting jurisdiction of the California Coastal Commission, the district court reached some novel conclusions concerning the nature of federal mining claims. The district court's decision creates uncertainty concerning the status of property rights in mining claims and generates confusion regarding state and federal regulatory jurisdiction over those claims. The Ninth Circuit did not reach the issue of mining claim status because it found that the disputed state regulation was preempted on independent grounds. The Ninth Circuit emphasized that, because the federal government permitting process encompasses the field of environmental protection, the state cannot condition mining upon its own environmental protection permitting process. The status of other local regulation of private development activities on federal lands has yet to be settled.