FEDERAL LANDS AND LOCAL COMMUNITIES

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The federal government owns nearly one third of all land in the United States, a total of some 700 million, resource-rich acres scattered unevenly around the country.[1] Many federal lands are located in isolated areas far from towns and cities. Others are found near or in the midst of thickly settled areas. Wherever located, these federal parcels form important parts of nearby communities. Inevitably, the activities conducted on federal lands affect these local communities and their members in numerous ways.

Communities commonly regulate local land uses to foster public health and welfare and to improve the quality of community life.[2] Some cities and counties emphasize economic development. They employ land use rules that foster orderly economic growth. Other communities attach greater value to aesthetics and the interests of future generations. They sacrifice short-term economic growth by preserving natural resources and historic areas and by burdening industry with strict pollution limits and land use restraints. Local land use rules recognize the close, inextricable ties between land and community. Local rules recognize that land uses occur not in isolation but in the midst of human communities, and that such uses directly affect, for good or ill, the lives of nearby residents. Because of the natural links between land uses and communities, land use law has long been a prerogative of local governmental units.

This Article examines the role of the federal government as local landowner and community member. It looks in particular at the three principal economic activities undertaken on federal lands: mineral extraction, grazing, and timber harvesting. These activities all are conducted on federal lands by private parties under terminable rights granted by federal land management agencies. This Article considers whether the federal government as landowner and sponsor of these economic activities is legally obligated to recognize its role as a community member and to abide like other community members with state and local land use rules.

The federal govenment's obligations as local landowner turn largely on the single issue of preemption; that is, on whether the statutory schemes

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1. *See* U.S. DEP'T. OF INTERIOR, PUBLIC LAND STATISTICS 1983, 10, 36, 37 (1984); M. CLAWSON, THE FEDERAL LANDS REVISITED 63-122 (1983).

2. *See* R. FREILICH & E. STUHLER, THE LAND USE AWAKENING 1-49 (1981); D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 38-58 (1971).

governing these economic activities preempt local land use laws so as to leave federal land managers free to contravene local desires. Until recently, state and local governments rarely attempted to restrict economic activities on federal lands to further contrary policy goals.[3] Indeed, for decades federal land conflicts typically pitted pro-development local interests against a federal bureaucracy that was more cognizant of the benefits of resource conservation. Over the past decade these roles have become blurred and the resulting federal-local conflicts more varied.[4] Many state and local governments now surpass the federal government in their willingness to sacrifice short-term economic development for cleaner human environments and more balanced biological communities. In pursuing these policy choices, state and local governments often attempt to restrain conflicting private development activities on federal lands. Their efforts raise complex questions about the preemptive effects of federal statutes and federal agency decisions. These questions will only gain in importance as economic growth continues to slide from its once-exalted position of policy dominance.

The first part of this Article reviews this developing conflict as it appears in reported judicial decisions. In a dozen decisions over the past decade, state and federal courts have articulated the view that state and local governments are free to regulate, but not to prohibit, private economic activities on federal lands. These decisions, however, apply a simplistic preemption analysis. They seize upon broad statutory phrases authorizing particular economic activities on federal lands and infer from them some powerful, pro-development federal objective that overrides local efforts to further alternative environmental and social goals. For the most part, they ignore the many alternative policy objectives expressed by Congress. More importantly, they ignore the detailed land planning processes mandated by Congress and fail to appreciate contemporary reasons for continued federal land ownership. Part I of this Article evaluates this emerging regulation-prohibition distinction; it finds that the distinction lacks substance and will be impossible to apply with any degree of consistency.

Part II reconsiders the principal statutory schemes governing mining, mineral leasing, grazing, and timber sales on federal lands. It concludes that these federal statutory schemes standing alone have virtually no preemptive effect, even if the local land use plans flatly prohibit particular developmental activities. These federal statutes should be interpreted as authorizing an

3. Commentators often refer to recent state attempts to wrest control of federal lands from the federal government as the "Sagebrush Rebellion." *See* J. FRANCIS, ENVIRONMENTAL VALUES, INTERGOVERNMENTAL POLITICS, AND THE SAGEBRUSH REBELLION 29 (J. Francis & R. Ganzel ed. 1984); Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C.D. L. REV. 317 (1980); Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505.

4. *See generally* Engdahl, *Some Observations on State and Federal Control of Natural Resources*, 15 HOUST. L. REV. 1201 (1978); Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 U.C.L.A. J. ENVTL. L. 145 (1982); Note, *State and Local Control of Energy Development on Federal Lands*, 32 STAN. L. REV. 373 (1980). A fine survey of the history of western federal lands is in W. WYANT, WESTWARD IN EDEN (1982). For a thoughtful essay on the relationship between federal lands management and the intangible values of local communities, see Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499 (1984).

override of local land use restraints only when federal land planners on a case-by-case basis and after a site-specific analysis determine that the local restraints conflict with fundamental federal purposes. Such an analysis often should result in federal interests yielding to local desires. This interpretation respects the importance of the detailed, multiple-use land planning processes mandated by Congress. More fundamentally, it allows for greater sensitivity to local community desires and provides for vastly improved land use decisionmaking.

The final part of this Article suggests an alternative, more focused preemption test, and considers its merits and implications.

I. PREEMPTION DOCTRINE AND THE RISE OF THE REGULATION-PROHIBITION DISTINCTION

The aged but still thriving General Mining Law of 1872[5] (Mining Law) presents a useful starting point to consider the efforts by courts to reconcile federal land development and conflicting local land use restraints. Most preemption cases have arisen under this law.[6] The Mining Law, moreover, with its anachronistic provisions, provides a useful focus for introductory comments on the origins of this new federal-local conflict.

The Mining Law allows citizens to enter federal lands without permit or charge and to prospect for "hardrock" minerals.[7] Prospectors who discover valuable mineral deposits can stake out, or "locate," mining claims around the discovered deposits.[8] Thereby, they can acquire the exclusive right to extract the minerals free from royalty obligations or other charges. Discovery and proper location give the claimant an unpatented mining claim.[9] The claim is a valuable, transferable property right of potentially indefinite duration.[10] The holder of an unpatented claim can obtain a patent to the land by proving discovery and proper location, developing the claim with work valued at $500 or more, and paying a nominal fee.[11] While a claim is unpatented, the holder may use the land surface only for reasonable mining-related activities. A federal agency must approve all surface-dis-

5. Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22-39 (1982)).

6. *See, e.g.*, Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3644 (U.S. Mar. 31, 1986) (No. 85-1200); Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 F.2d 231 (Colo. 1984); Brubaker v. Board of County Comm'rs, El Paso County, 652 P.2d 1050 (Colo. 1982); State *ex rel.* Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976); Elliott v. Oregon Int'l Mining Co., 60 Or. App. 474, 654 P.2d 663 (1982); State *ex rel.* Cox v. Hibbard, 31 Or. App. 269, 570 P.2d 1190 (1977).

7. 30 U.S.C. § 22 (1982). *See* United States v. Locke, 105 S. Ct. 1785, 1788 (1985); Bayshore Resources Co. v. United States, 2 Ct. Cl. 625, 628 (1983).

8. 30 U.S.C. § 26 (1982).

9. *Id.*

10. *See* Freese v. United States, 639 F.2d 754 (Ct. Cl.), *cert. denied*, 454 U.S. 827 (1981); United States v. Etcheverry, 230 F.2d 193, 195 (10th Cir. 1956) ("It constitutes property to its fullest extent, and is real property subject to be sold, transferred, mortgaged, taxed, and inherited without infringing any right or title of the United States.").

11. 30 U.S.C. § 29 (1982). *See* South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980) (patent issuance is a ministerial rather than a discretionary act and hence does not require preparation of an environmental impact statement).

rupting exploration and development activities.[12] The Mining Law seems to envision that unpatented claimants will routinely seek patents, but patenting is not required. For various pragmatic reasons, few claimants today seek patents.[13]

The Mining Law offers free ownership of any minerals discovered to encourage private parties to prospect for hardrock minerals. This substantial incentive, together with various pro-development statutory expressions,[14] reflects a distinct congressional policy to promote mining on federal lands. Tempering this pro-development stance are numerous statutory provisions that support countervailing values. To reduce adverse environmental impacts, the Bureau of Land Management (BLM) and the Forest Service are empowered to regulate surface operations.[15] Both are obligated, in reviewing and approving private mining plans, to adhere to the strictures of the National Environmental Policy Act.[16] The agencies must also conform individual land use decisions to the policies set forth in overall land use plans.[17] These land use plans must mix resource development with the protection of watersheds and wildlife and with the promotion of recreational and aesthetic values. Both agencies have withdrawn lands from the operation of the mining laws. Both are authorized, when appropriate, to withdraw other lands in similar fashion and thereby dedicate them entirely to nonmining uses.[18]

The Mining Law is anachronistic in several respects. Fully five decades ago, the federal government halted its massive land disposition operations and embraced a policy of land retention and stewardship.[19] The Mining Law, however, survives on the books. A carryover from the lengthy pro-

12. *See* United States v. Weiss, 642 F.2d 296 (9th Cir. 1981); United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979).

13. *See* PUBLIC LAND STATISTICS 1983, *supra* note 1, at 145 (in fiscal 1983, 134,000 new unpatented claims and 1,400,000 total unpatented claims were outstanding, and only 154 patents, covering approximately 15,000 acres, were issued during the year); Anderson, *Federal Mineral Policy: The General Mining Law of 1872*, 16 NAT. RESOURCES J. 601, 603 (1976).

14. *See* 30 U.S.C. § 21a (1982).

15. 16 U.S.C. § 478 (1982) (prospectors and miners "must comply with the rules and regulations covering . . . national forests"); 16 U.S.C. § 551 (1982) (general Forest Service authority to manage the use and occupancy of national forests); 30 U.S.C. § 612 (1982) (applicable to unpatented mining claims located after 1955); 43 U.S.C. §§ 1732, 1733 (1982) (BLM authority to manage public lands without impairment of rights of mineral claimants). *See* United States v. Weiss, 642 F.2d 296 (9th Cir. 1981); United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979); United States v. Langley, 587 F. Supp. 1258 (E.D. Cal. 1984); Haggard, *Regulation of Mining Law Activities on Federal Lands*, 21 ROCKY MTN. MIN. L. INST. 349 (1975); Hecox & Desautels, *Federal Environmental Regulations Applicable to Exploration, Mining and Milling*, 25 ROCKY MTN. MIN. L. INST. 9-1 (1979); Kimball, *Impact of BLM Surface Management Regulations on Exploration and Mining Operations*, 28 ROCKY MTN. MIN. L. INST. 509 (1983); Miller, *Surface Use Rights Under the General Mining Law: Good Faith and Common Sense*, 28 ROCKY MTN. MIN. L. INST. 761 (1983).

16. 42 U.S.C.A. §§ 4321-70a (West 1977 & Supp. 1985). *See* Friends of the Earth, Inc. v. Butz, 406 F. Supp. 742 (D. Mont. 1975); Hecox & Desautels, *supra* note 15, at 9-29 to 9-31, 9-51 to 9-64.

17. 16 U.S.C. §§ 528, 531, 1604 (1982); 43 U.S.C. §§ 1712, 1732 (1982). *See infra* text accompanying notes 111-19.

18. *See* 43 U.S.C. § 1714 (1982); Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982).

19. *See* M. CLAWSON, *supra* note 1, at 27-37; G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 139-43 (1981); P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 563-84, 607-13, 724-45 (1968); Gates, *The Federal Lands—Why We Retained Them*, in RETHINKING THE FEDERAL LANDS 35 (S. Brubaker ed. 1984).

disposition age, the law is the last remaining method by which private citizens can obtain land from the government. More recently, the federal government embraced the policy of charging users fair market value for economic resources taken from federal lands.[20] The Mining Law remains as a prominent reminder of the contrary nineteenth-century policies that offered low-cost land to pioneers and entrepreneurs willing to develop and occupy the expansive American West.

The land disposition era ended after the federal government had rid itself almost entirely of its eastern and midwestern landholdings, but before it had found takers for its massive holdings in and west of the Rocky Mountains.[21] As a result, the federal government remains a major landholder in the western states. This role engenders regular, often bitter, complaints that the federal government mistreated the West by failing to continue the cheap disposition policies followed in other states.[22] Many factors combined to bring the disposition era to an end. The chief factor, it seems clear, was the desire of Congress and the executive branch to substitute responsible federal long-term land management for private, short-term land use practices, private practices that too often involved exploitation without regard for future resource needs and adverse environmental effects.[23]

For decades, state and local complaints about federal land ownership and land management techniques focused on federal conservation practices that, according to many Westerners, unduly limited development.[24] Actual and potential federal land users tended to favor enhanced economic development. They rarely stood in the way of the economic activity that the federal government was prepared to permit. Because of this traditional pro-development local orientation, an appellate court did not face a direct conflict between a federally permitted development operation and a potentially contrary state law until 1976. The resulting decision, *State ex rel. Andrus v. Click*,[25] has been followed by a dozen additional decisions. Viewed together, these decisions and the conflicts underlying them reflect pronounced value shifts in communities where federal lands are located.[26] To an increasing degree, local communities now recognize the many benefits generated by un-

20. *See* 43 U.S.C. § 1701(a)(9) (1982). Another significant deviation from this policy is contained in the grazing fee pricing structure. *See* 43 U.S.C. §§ 1901(a)(5), (b)(3), 1905 (1982).

21. *See* P. GATES, *supra* note 19, at 563-84, 607-13, 724-45. For a survey of federal lands, see ONE THIRD OF THE NATION'S LANDS: A REPORT TO THE PRESIDENT AND TO THE CONGRESS, PUBLIC LAND LAW REVIEW COMMISSION 19-30 (1970).

22. *See* C. COGGINS & C. WILKINSON, *supra* note 19, at 56-65; Leshy, *supra* note 3.

23. *See* P. GATES, *supra* note 19. *Compare* Dowdle, *Why Have We Retained the Federal Lands? An Alternative Hypothesis*, in RETHINKING THE FEDERAL LANDS 61 (S. Brubaker ed. 1984).

24. *See generally* P. GATES, *supra* note 19, at 563-84, 607-13, 724-45.

25. 97 Idaho 791, 554 P.2d 969 (1976). The *Click* decision was preceded by Texas Oil & Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969), which dealt with a conflict between a state forced pooling and communitization order and a federal statute requiring the consent of the Secretary of the Interior before federal lands could be included in a pooling scheme. *Click* was also preceded by Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966), which concluded that state, not federal, law governed the validity of a federal oil and gas leasehold transfer. *Id.* at 72.

26. *See supra* note 6 and *infra* notes 45-75.

altered natural areas.[27] They recognize, it would seem, that resource-laden lands can at times be used best as "open space" despite resulting short-term losses of jobs, taxes, and other economic indicia of community well-being. The decision in *Click* is worth considering in detail, for it reveals some of the considerable difficulties that arise in applying traditional preemption law to this special instance of federal-local conflict.

A. Andrus v. Click *and the Origins of the Regulation-Prohibition Distinction*

In *Click*, the Idaho Supreme Court considered the applicability of a state environmental protection statute to an unpatented mining claim.[28] The Idaho law required dredge mining operators to obtain a permit from the State Board of Land Commissioners. The statute authorized the board to deny a permit if the proposed operation "would not be in the public interest, giving consideration to economic factors, recreational use for such lands, fish and wildlife habitat and other factors which in the judgment of the state land board may be pertinent."[29] The statute also instructed permittees who disrupted the land surface to restore the land to something comparable to its natural contour and condition.[30]

It is clear today that Congress can legislate on all matters relating to the management and use of federal lands and that such rules override conflicting state and local rules.[31] Until relatively recently, doubts as to the scope of this federal power remained alive. But the United States Supreme Court brought these doubts to an end in *Kleppe v. New Mexico*[32] with strong language interpreting broadly Congress' power to legislate on matters relating to federal property. In the absence of federal legislation, however, state and local governments can apply their laws as if the federal lands were privately owned.[33] Unless a state consents to relinquish some or all of its legislative authority, a state can apply its laws fully to federal lands and activities conducted on them until they collide with federal laws or are otherwise federally preempted.[34] The contours of the conflict faced in *Click* were therefore

27. *See* Barnhill, *The Role of Local Government in Mineral Development*, 28 ROCKY MTN. MIN. L. INST. 221, 242-69 (1983).

28. *Click*, 97 Idaho at 795-96, 554 P.2d at 973-74.

29. IDAHO CODE § 47-1317(j) (Cum. Supp. 1985).

30. IDAHO CODE § 47-1314 (Cum. Supp. 1985).

31. A good survey of the historic controversy about the scope and the preemptive effect of federal power is contained in Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C.L. REV. 617 (1985).

32. 426 U.S. 529 (1976).

33. *Id.* at 543-44.

34. *Id.* For example, when the federal government purchases land with plans to construct "Forts, Magazines, Arsenals, Dock-Yards, and other needful buildings," and the state consents to the purchase, the property is held under the Jurisdiction Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 17. Federal authority is exclusive. Yet, in granting its consent to a purchase, a state can reserve specified legislative and jurisdictional powers. James v. Dravo Contracting Co., 302 U.S. 134 (1937). In the case of federal land held under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, the state and federal governments may agree on any division of legislative and jurisdictional duties. Collins v. Yosemite Park and Curry Co., 304 U.S. 518 (1938). In the absence of such a cession of authority by a state, "a state undoubtedly retains jurisdiction over federal lands within its territory." Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). An additional limit on state power is provided by the intergovernmental immunities doctrine, which restricts state power to tax federal lands and ac-

quite clear: the Idaho dredge mining statute applied to the unpatented mining claim unless Congress or some federal agency had preempted the statute.

The Idaho court in *Click* resolved this preemption controversy by concluding that the federal statutes left room for a state environmental-protection permit requirement, at least so long as the state law did not prohibit or render impossible all mining activities on the unpatented claims.[35] The court reached this conclusion by applying a well-established test to determine the preemptive effect of federal statutes. This test asks two questions: 1) did Congress in the particular instance evidence an intent to occupy the legislative field so that all state law within the field is preempted; 2) does the state law actually conflict with federal law, so that compliance with both laws is impossible or the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[36] In recent years, the Supreme Court has demanded clear, distinct evidence of congressional intent to preempt before invalidating a state law on the first ground. On the issue of intent a court may consider, in addition to statutory language and legislative history, whether the legislative scheme is so pervasive as to leave no room for state supplementation. A court may also consider whether the federal interest is so dominant, or the object of the federal regulation of such character, as to give rise to a clear implication that state laws are precluded.[37]

The court in *Click* found nothing in the language or history of the mining laws reflecting congressional intent to occupy entirely the field of mining regulation.[38] The court encountered more difficulty determining the presence or absence of an actual conflict between the two regulatory schemes. Initially, the court turned to the first prong of the actual conflict test, which looks to the possibility of joint compliance. The court addressed this issue by engaging in a bit of reformulation. The court asked whether a mining claimant could comply with both statutes, and not whether compliance with both statutes was in any way possible.[39] Of course, actual compliance was possible since the mining operator could always comply with dual legislative schemes by halting operations. The court's reformulation of the inquiry, however, ignored this possibility. By engaging in its reformulation, the court

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tivities and limits this power in a few other limited areas. *See* United States v. County of Fresno, 429 U.S. 452 (1977).

35. *Click*, 97 Idaho at 796-800, 554 P.2d at 974-78.

36. *Id.* at 796-99, 554 P.2d at 974-77. *See, e.g.*, Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 105 S. Ct. 695, 698 (1985); Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 1910 (1985); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 292-96 (2d ed. 1983).

37. *See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 625-28, 632-39, 642-46 (1975).

38. *Click*, 97 Idaho at 798, 554 P.2d at 976. A possible exception to this generalization is the recent Ninth Circuit decision in Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985). *See infra* text accompanying notes 49-60. The *Granite Rock* opinion contains a discussion that indicates the court based its finding of preemption on a congressional preemptive design. The opinion, however, is sufficiently vague, and the court's survey of congressional intent so sparse (if not nonexistent), that the decision cannot reasonably be accepted as a reasoned inquiry into the presence or absence of a congressional desire to preempt.

39. 97 Idaho at 796, 554 P.2d at 974 ("[W]here a right is granted by the federal legislation, state regulation which rendered it impossible to exercise that right would be in conflict.").

assumed that a state statute that rendered mining impossible always conflicts with federal mining laws. The Idaho dredge mining statute, however, did not have such an impermissible effect since neither the permit requirement nor the surface restoration rule halted all mining. Quite significantly, the court, in a footnote, declined to consider the constitutional significance of a permit denial, a possibility not raised by the facts of the case.[40] Despite this professed avoidance, the court expressed distinct views concerning this issue in its language on impossibility. A permit denial renders mining operations impossible; under the court's analysis, this generates an actual, impermissible conflict between the federal and state schemes.

The second prong of the test for actual federal-state conflict involves the search for undue state interference with federal purposes and objectives. The test required the *Click* court to undertake the deceptively difficult task of identifying the congressional purposes and objectives underlying the mining laws and related statutes. The Idaho court, like subsequent courts, encountered substantial difficulties in this task; but unlike subsequent courts, it did not view the issue as facile. The court began its inquiry by noting that hopes of economic development prompted the Mining Law in the first instance. The court quoted at length from the 1970 pro-mining policy statement set forth by Congress in the Mining and Minerals Policy Act.[41] Also relevant, however, were the many federal environmental protection statutes such as the National Environmental Policy Act,[42] a statute fully applicable to federal land management decisions. The court deduced from these various mining and environmental statutes an overall congressional policy of encouraging mining but limiting the activities associated with mining to minimize adverse environmental impacts. The court concluded that the Idaho act comported with Congress' purposes. The act fostered environmental protection but did not prohibit all mining activities. The court, however, did not contemplate the possibility that at times environmental concerns could override the pro-development policy and thereby justify a complete ban on mining. The court also did not consider numerous other federal provisions that further weaken federal pro-mining policy. For example, the court ignored statutes requiring that the BLM and the Forest Service manage federal lands to foster preservationist goals that conflict directly with mining activities.[43] In short, the court assumed that federal policy favored mining on all lands open for entry and that state laws rendering mining impossible interfered with federal policy.

The preemption analysis in *Click* is deficient in several respects. The court recognized that mining development is only one of several competing, congressionally established policy objectives. But the court presumed, with no real evidence or discussion, that mining is the dominant, essential federal objective. More significantly, the court gave no consideration to the detailed land planning processes followed by the Forest Service.[44] Nor did the court

40. *Id.* at 797 n.3, 554 P.2d at 975 n.3.
41. *Id.* at 798-99, 554 P.2d at 976-77 (quoting 30 U.S.C. § 21a (1982)).
42. 42 U.S.C. §§ 4331(a), 4371(a) (1985), *cited in* 97 Idaho at 799, 554 P.2d at 977.
43. *See infra* text accompanying notes 109-30.
44. Because the case arose before the effective date of the Forest and Rangeland Renewable

consider the wisdom of Congress deciding the best use of a particular land parcel when that parcel is over two thousand miles distant and Congress is unaware of the peculiar features of the parcel, the effects of mining on the parcel, or the alternative uses of the parcel. In essence, the court's analysis was limited by the way it framed the preemption issue. The court asked whether the federal statutes preempted state law; it did not consider the possibility of federal preemption arising from more a reasoned, more detailed federal agency land use decision.

B. *The Growth of the Distinction*

The Idaho Supreme Court in *Click* upheld environmental regulations that made mining more difficult and expensive. The court in dictum disapproved state and local rules that prohibited mining or rendered it impossible. Despite the opinion's analytical deficiencies, this distinction has thrived. The Oregon Court of Appeals twice embraced this distinction in lieu of any independent analysis of the preemption issue.[45] The Colorado Supreme Court adopted the distinction as well in *Brubaker v. Board of County Commissioners*,[46] a more reasoned but still very limited decision involving the more difficult case of a permit denial.

In *Brubaker*, El Paso County denied an unpatented mining claimant a special use permit for mining in an agricultural zoning district after finding that the proposed operation collided with long-range county development plans and with surrounding land uses.[47] Upon challenge, the Colorado court struck down the zoning ordinance as applied since it was, in the court's analysis, an obstacle to the accomplishment of federal purposes. The court recited in full the federal preemption test, but focused solely on the alleged actual conflict between the local zoning law and the purposes and objectives of the federal mining laws. The court found that the dominant federal purpose of the mining laws was the encouragement of mineral development. From this general expression of purpose the court seemed to jump, quite surprisingly but nonetheless readily, to the conclusion that Congress viewed mining as the most appropriate use of the county lands at issue.[48] With this conclusion, the court easily struck down what it viewed as an attempt by the county to substitute its land-use judgment for that of Congress.

The *Brubaker* analysis is weak in many respects. In a simplistic man-

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Resources Planning Act of 1974, 16 U.S.C. §§ 1600-87 (1982), the land planning processes conducted by the Forest Service were undertaken pursuant to the Forest Service's inherent power, rather than pursuant to any congressional mandate. *See infra* notes 109-114 and accompanying text.

45. *See* Elliot v. Oregon Int'l Mining Co., 60 Or. App. 474, 654 P.2d 663 (1982); State *ex rel.* Cox v. Hibbard, 31 Or. App. 269, 570 P.2d 1190 (1977). In *Hibbard*, the court upheld a state law requiring a permit before removing material from a stream bed. The court cited and quoted *Click* and referred favorably to the regulation-prohibition distinction. In *Hibbard*, the miner failed to seek a permit. The court, accordingly, did not discuss permit denial or permit issuance under conditions that rendered mining economically or technologically impossible. In similar brief fashion the same court, a few years later in *Elliott*, struck down two county ordinances that prohibited mining. In the court's view, these ordinances presented obvious examples of preemption caused by a "physical impossibility" of compliance with both federal and state law.

46. 652 P.2d 1050 (Colo. 1982).

47. *Id.* at 1053.

48. *Id.* at 1056.

ner, the court discerned from a few federal statutory provisions a powerful, overriding federal desire to encourage mineral development. In reaching this conclusion the court ignored many contrary statutory pronouncements. With little discussion, the court rejected the county's argument that federal environmental laws tempered the pro-development tone of the mining laws and justified a finding that federal purposes were often best served by the elevation of environmental concerns over economic development. Like the Idaho court in *Click*, the *Brubaker* court focused on the possible preemptive effects of the federal statutes standing alone. The court did not determine whether preemption could occur only if the Forest Service, before approving a mining plan, considered the types of specific factual issues and local public input that underlie reasoned land planning decisions. Also as in *Click*, the court did not consider whether local government is better equipped than Congress to assess the wisdom of mining on a particular parcel.

Recently, the Ninth Circuit in *Granite Rock Co. v. California Coastal Commission*[49] conspicuously embraced the regulation-prohibition distinction in modified form. In *Granite Rock*, the California Coastal Commission attempted to require limestone miners on Forest Service lands to obtain permits under state rules designed to protect the ecologically fragile coastal zone.[50] Upon review, the Ninth Circuit concluded that federal law preempted the state permit requirement. The court, however, upheld in dictum the right of the state to regulate mining for environmental purposes.[51] In the court's view, the state's error lay not in its attempt at regulation; the error lay in its effort to reserve the power to halt all mining operations through the permit requirement. In reaching this conclusion, the court modified the regulation-prohibition distinction. The court allowed state regulation; it disallowed, in addition to outright state prohibitions, all state permit requirements that purported to reserve the power to prohibit.

The preemption analysis in *Granite Rock* is brief and unsatisfactory. The court quoted the full federal preemption test,[52] but made no real attempt to apply it rationally by looking for preemptive intent or for some actual federal-state conflict. Indeed, the court's preemption discussion is so imprecise that it is difficult to discern whether the court found preemption because of some preemptive congressional design or because of some actual conflict. In describing the nature of its inquiry, the court asked whether the state statute intruded into some sphere of federal authority.[53] This question

49. 768 F.2d 1077 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3644 (U.S. Mar. 31, 1986) (No. 85-1200).

50. 768 F.2d at 1079.

51. *Id.* at 1083.

52. *Id.* at 1080. The *Granite Rock* court quoted the test as recently set forth in Silkwood v. Kerr-McKee Corp., 464 U.S. 238, 248 (1984) (citations omitted):

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Id.

53. *Granite Rock*, 768 F.2d at 1083.

seemed designed to determine whether Congress intended to occupy the field fully and to prohibit any state intrusion. By presenting this question, the court suggested that its preemption inquiry focused on the intent prong of the test.[54] In discerning the presence or absence of a congressional intent to preempt, however, courts normally look to all relevant indicia of intent,[55] a task that the court in *Granite Rock* did not undertake. Instead, the court seemed to discern a congressional preemptive design from extensive Forest Service efforts to regulate the adverse environmental effects of mining operations.[56] The comprehensiveness of the Forest Service conservation effort is not, standing alone, a persuasive basis for an inference of preemption. For some years courts placed considerable weight on the comprehensive character of a federal regulatory scheme when searching for a preemptive aim, but the Supreme Court's decision in *New York Department of Social Services v. Dublino*[57] reduced the importance of this factor. Since then, this factor has played a distinctly lesser role.[58] As the Supreme Court noted, complex national problems often result in detailed federal statutory schemes, whether or not accompanied by a preemptive design.[59]

Perhaps the court in *Granite Rock* intended to base its finding of preemption on some actual federal-state conflict. But the only "conflict" was the requirement that both a federal and a state permit be obtained. In the absence of inconsistent permit terms, dual permit requirements do not create an instance of impossible compliance any more than other instances of dual regulation. Arguably, the state permit rule at issue stood as an obstacle to the accomplishment of federal purposes. Nevertheless, the court should have reached such a conclusion only after surveying the numerous statements of federal policy. The court, quite clearly, did not undertake this survey. Like its predecessors, the *Granite Rock* court did not appreciate the complexity and variety of affected federal purposes. Furthermore, the court did not consider whether the Forest Service planning process provided an adequate substitute for the preempted state and local efforts.[60]

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54. The reference to a federal "sphere" presumably meant a field of legislation that Congress fully occupied. Congress can clearly express its intent to occupy or implicitly express it through the pervasiveness of the federal scheme. When Congress expresses an intent to create an exclusive sphere of federal control, no showing of actual conflict is necessary. Pacific Gas & Elec. Co. v. State Energy Resources Cons. and Dev. Comm'n, 461 U.S. 190, 212-13 (1983).

55. An example of a detailed search for congressional intent is provided in *Pacific Gas*, 461 U.S. at 205-12.

56. *Granite Rock*, 768 F.2d at 1083.

57. 413 U.S. 405, 415 (1973).

58. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 36, at 295.

59. *See* DeCanas v. Bica, 424 U.S. 351, 359-60 & n. 8 (1976).

60. The Ninth Circuit's decision in *Granite Rock* can be interpreted in yet another way. The court suggested that the Forest Service determined the wisdom of the mining operations at issue by balancing mining development policies and environmental concerns. *Granite Rock*, 768 F.2d at 1081, 1083. When the Forest Service approved the mining operation plan after completing this balancing, its approval reflected a firm federal resolution that the mining operation should proceed. Backed with this weight, Forest Service approval overrides any state and local efforts to halt the mining operation, presumably because of an actual federal-nonfederal conflict. This interpretation of *Granite Rock* is supported by the court's citations to First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946) and *Pacific Gas*.

The court's use of *First Iowa* and *Pacific Gas* reflects a serious misunderstanding of the Forest Service's role and of the federal interests in mining development. In *First Iowa*, the Supreme Court held that federal requirements for the licensing of hydroelectric dams preempted state efforts to

A second line of preemption decisions has arisen out of alleged conflicts between local laws and various federal statutes regulating mineral leasing on federal lands. These decisions, like the hardrock mining ones, also embrace in one form or another the regulation-prohibition distinction.[61] Oil, gas, coal, various fertilizer chemicals, and certain other minerals are exempt

require permits for the same projects. The Supreme Court characterized the hydroelectric dam as a "federal project," 328 U.S. at 164, and determined that federal licensing reflected a federal desire that the dam be built. In *Pacific Gas*, by contrast, the federal license did not carry such a connotation. There, the Court concluded that the federal nuclear licensing scheme fully occupied the field of nuclear safety and precluded a state from regulating nuclear reactors on safety grounds. *Pacific Gas*, 461 U.S. at 211-12. Notwithstanding federal interests in promoting the development of energy sources, the issuance of a federal license did not reflect federal support for building the reactor. Thus, the state remained free to regulate reactors on nonsafety grounds, to impose permit rules, and to deny needed permits if it saw fit. 461 U.S. at 212, 222-23.

Both *First Iowa* and *Pacific Gas* are important precedents in determining the premptive effect of federal approval for private mining, logging, and grazing operations on federal lands. The question, of course, is which of the two is more applicable. *First Iowa* involved a detailed, site-specific determination by the federal government as to the overall desirability of a hydroelectric dam for a particular location. The federal license, in the Court's view, expressed a federal desire that the dam be built. *First Iowa*, 328 U.S. at 180-81. In *Pacific Gas*, the federal agency did not fully survey all relevant factors and did not decide on the overall desirability of the nuclear reactor at the precise proposed location. Instead, the agency only specified that a reactor, if built, must be constructed and operated in accordance with detailed federal safety standards. *Pacific Gas*, 461 U.S. at 211-13, 222-23. *First Iowa* then, seems the more applicable precedent when the issuing agency clearly indicates that the permitted activity is federally desired and when the agency, during the permit issuance process, considers the full range of relevant policy factors on a site-specific basis. In contrast, *Pacific Gas* seems more relevant if the agency omits categories of competing interests during the permit proceeding. *Pacific Gas* suggests that the nonfederal rules are not preempted if they serve purposes other than those served by the federal regulatory efforts. It also suggests that preemption is inappropriate if, during the federal agency approval process, the overall desirability of the project is not determined in such a way as to evidence a clear federal determination that the project be conducted.

A federal agency permit process possesses preemptive weight under this analysis only if the state and local concerns are fully and fairly considered; the federal agency is empowered to halt the project based on these concerns; and the disappointed state and local residents may challenge final agency determination to proceed. As discussed *infra* in the text accompanying notes 177-193, site-specific Forest Service and BLM decisions that satisfy these criteria can and should preempt contrary state and local rules. Agency decisions of this type seem reasonably close to the factual underpinnings of *First Iowa*. In the absence of such a detailed, reviewable agency decision, however, preemption should not be found. In particular, *First Iowa* does not support a finding of preemption based solely on the existence of federal statutes and regulations. The Ninth Circuit in *Granite Rock* erred in not examining the Forest Service review process and not determining whether the Forest Service fully and fairly determined whether mining development should override contrary state and local concerns for the particular site at issue. Had the court done so, it would have found that the Forest Service review in such cases is a limited one. The Forest Service does not undertake to manage the minerals located on its lands. 36 C.F.R. § 228.1 (1985). The Forest Service also does not claim the right to disapprove or halt a proposed mining operation. 36 C.F.R. § 228.5 (1984) (by implication). The sole aim of the Forest Service is to specify terms that ensure that mining operations, if and when conducted, will not unduly disrupt the surface of national forest lands. 36 C.F.R. § 228.1 (1984). The Forest Service does not expressly consider other impacts and does not balance mining development against competing goals to determine the overall wisdom of the operation. 36 C.F.R. § 228 (1984). Given this restricted inquiry, *Pacific Gas* rather than *First Iowa* is the more pertinent precedent.

61. In Bilderback v. United States, 558 F. Supp. 903 (D. Or. 1982), the court considered the preemptive effects of federal grazing laws. The case involved a tort claim action against the United States. At issue was whether the Oregon open range law, permitting animals to roam free, applied to federal rangeland operated by the Forest Service. The court found an actual conflict between the state law that permitted free roaming livestock in any open range area, and federal livestock regulations that regulated livestock grazing on federal lands and prohibited grazing without prior permits. Finding an actual conflict, the court seemed to suggest that all state range laws were preempted. *Id.* at 906. In reaching its specific holding, the court followed the lead of several earlier decisions that found state fencing laws inapplicable to federal lands. These fencing law decisions seemed to involve, at least in the view of the courts involved, clear instances of actual federal-nonfederal conflict.

from private appropriation under the mining laws. Instead, the federal government makes them available under a variety of leasing statutes, principally the Mineral Lands Leasing Act of 1920.[62] Lands are available for lease only if so designated by the BLM.[63] Some leases are issued on a competitive basis, particularly when the leased lands are clearly of value.[64] Other leases, typically for lands that do not contain valuable deposits, are issued noncompetitively to the first qualified applicant.[65] Lessees are subject to substantial federal regulation.[66] Additionally, the issuance of leases and the implementation of other major BLM or Forest Service lease-related actions must comply with the National Environmental Policy Act.[67]

The Ninth Circuit considered the preemptive effects of these mineral leasing rules in its earliest major preemption decision, *Ventura County v. Gulf Oil Corp.*[68] In *Ventura County*, the court struck down the county's attempt to enforce a permit requirement against a federal oil and gas lessee. The Ninth Circuit perceived an actual conflict between the federal laws, which specified when and how leasing was permissible, and the Ventura County zoning ordinance, which in the court's view sought to achieve the same purpose.[69] Like the court's later decision in *Granite Rock*, the opinion is perplexing. The court did not discuss congressional intent. The court did not identify any instance of impossible compliance created by the competing state and local schemes. These omissions suggest that the court found the local rule preempted by an actual federal-local conflict caused by undue local interference with dominant federal purposes and objectives. Yet, the court did not examine the underlying federal purposes and objectives. Such a task required the court to consider the many statutes promoting noneconomic uses and values as well as the mineral leasing authorization statutes. Rather, the court seemed to suggest that the pervasiveness of the applicable federal regulation left no room for competing local regulation.[70] This issue of pervasiveness, however, normally is used to gauge federal intent, and the court did not undertake a legitimate, detailed survey of the evidence of federal intent. Certainly the court did not heed the Supreme Court's often-repeated admonition[71] that courts must not presume or infer

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The courts did not speculate on whether other types of state grazing regulations might survive a preemption analysis. *Id.* at 907.

62. Ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1982)).

63. *See, e.g.*, 30 U.S.C. §§ 201 (coal), 211 (phosphate), 226 (oil and gas), 241 (oil shale), 352 (minerals on acquired lands) (1982).

64. *See, e.g.*, 30 U.S.C. §§ 201 (coal), 226(b)(1) (oil and gas within a known geological structure of a producing oil or gas field) (1982).

65. *See, e.g.*, 30 U.S.C. § 226(c) (oil and gas not located within a known geological structure of a producing oil or gas field) (1982).

66. An example of the extensive regulation of oil and gas exploration and production activities is presented in Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983).

67. *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390 (1976); Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983); Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553 (D.C. Cir. 1979); Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985).

68. 601 F.2d 1080 (1979), *aff'd mem.*, 445 U.S. 947 (1980).

69. 601 F.2d at 1084-86.

70. *Id.* at 1083-84.

71. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 36, at 295. *E.g.*, Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981); Exxon Corp. v. Governor of Md.,

intent but instead must find that Congress manifested its preemptive intent in clear terms.

Ventura County and *Granite Rock* stand as the principal appellate decisions on the preemption issue. *Ventura County*'s status is further magnified by the Supreme Court's summary affirmance of the judgment.[72] Oddly, the *Ventura County* decision has been consistently, perhaps deliberately, misread. The court invalidated the county's attempt to enforce a permit requirement on the ground that the permit rule represented an impermissible county attempt to assert "ultimate control" over the oil operations.[73] It was immaterial to the court whether or not a permit was sought or issued; the only relevant fact was that Ventura County, by demanding a permit application, asserted implicitly its right to deny a permit and hence its power to determine federal land uses. In applying *Ventura County*, however, several Mining Law decisions construed the opinion to preempt only clear state or local mineral prohibitions and to allow local permit requirements so long as the requested permits in fact are granted. This interpretation allowed courts to uphold permit schemes in cases where no permit was sought or where a permit was sought and granted.[74] Most recently, the Supreme Court of Wyoming interpreted and so limited *Ventura County* in *Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission*.[75] This pre-*Granite Rock*

437 U.S. 117, 132 (1978); New York State Dept. of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

72. *Ventura County*, 445 U.S. 947 (1980). The Supreme Court's only plenary consideration of the preemption issue occurred in Wallis v. Pan American Petroleum Corp., 384 U.S 63 (1966). There the Court decided that state law, not some newly-fashioned federal common law, determined the validity of a transfer of an interest in a federal oil and gas lease. The case raised various prudential concerns surrounding the development of federal common law rules, *see* City of Milwaukee v. Illinois, 451 U.S. 304, 312-17 (1981), and therefore, in some respects, is not directly analogous. Yet, it is significant that the Court found no preemptive intent in the mineral leasing laws. Before developing a federal common law rule, the Court demanded that "a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown." *Pan American Petroleum Corp.*, 384 U.S. at 68. The court saw no need to override state law since "no significant threat to any identifiable federal policy or interest" existed. *Id.*

73. *Ventura County*, 601 F.2d at 1085 ("The issue is whether Ventura has the power of ultimate control over the Government's lessee, and this issue persists whether or not a use permit would eventually be granted.").

74. *See Granite Rock*, 590 F. Supp. at 1372-73 (concluding that *Ventura County* must be read narrowly in light of United States v. Weiss, 642 F.2d 296 (9th Cir. 1981), which upheld the power of the Forest Service to regulate surface activities on unpatented mining claims); Brubaker v. Board of County Comm'rs, El Paso County, 652 P.2d 1050, 1056-59 (Colo. 1982); Elliott v. Oregon Int'l Mining Co., 60 Or. App. 474, 478, 654 P.2d 663, 667-68 (1982) (by implication from its suggestion that *Ventura County* was consistent with its earlier decision in State *ex rel.* Cox v. Hibbard, 31 Or. App. 269, 570 P.2d 1190 (1977)); Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n, 693 P.2d 227, 237 (Wyo. 1985). *See also* Skaw v. United States, 740 F.2d 932, 940 (Fed. Cir. 1984) (invalidating state permit rule that prohibited mining on federal lands at issue); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231, 242 (Colo. 1984) (rejecting as premature a preemption claim against a local permit requirement until a permit was sought and issued on the grounds that "it would be sheer speculation to hypothesize how and to what extent the conditions of any permit might possibly conflict with the statutory and regulatory scheme applicable to federal lands within the Gunnison National Forest").

75. 693 P.2d 227 (Wyo. 1985). In *Gulf Oil*, the state oil and gas commission granted Gulf a drilling permit but attached to it environmental-preservation conditions deemed unacceptable by Gulf. In upholding the permit restrictions against preemption challenge, the court found no evidence of congressional intent to preempt. *Id.* at 235. In its view, the policies in the mineral leasing laws were altered by environmental preservation rules, especially the Environmental Quality Improvement Act of 1970, which included a provision assigning to states and local governments "pri-

decision upheld the validity of a state permit requirement that imposed environmental-preservation conditions on oil and gas operations on federal lands.[76]

C. *Form, Substance, and the Distinction Between a Regulation and a Prohibition*

Despite inconsistent analyses and material variances in holdings, these decisions reflect an emerging judicial consensus that federal mining and mineral leasing laws may be supplemented by state regulation but may not be "interfered with" by state and local rules that prohibit or make "impossible" mining or mineral exploration. These decisions, however, are subject to numerous deficiencies: they fail to adequately identify and examine the federal policies underlying the mining and mineral leasing laws; they fail to consider the reasons for continued federal land ownership and the implications of statutorily mandated federal land planning processes; and they fail to contemplate seriously the consequences of a limited preemption approach, consequences vastly more beneficial than the courts seem to presume. Before examining these criticisms it is appropriate to consider the utility and coherence of this distinction and to suggest reasons why courts have so quickly and uniformly embraced it.

For several reasons, the regulation-prohibition dichotomy seems so distinctly troublesome that it gives good cause to seek an alternative preemption standard. Mining and mineral exploration ventures are laden with numerous risks, risks that are evaluated differently by different mining companies.[77] Profitability is inherently speculative since it turns on highly un-

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mary responsibility" for implementing the national policy favoring the enhancement of environmental quality. *Id.* at 235-36 (citing 42 U.S.C. § 4371(b) (1982)). This policy declaration, the court concluded, undercut any claim of congressional intent to preempt more restrictive state and local environmental protection rules. *Id.* at 236. Since the state commission granted the permit and Gulf satisfied the attendant permit conditions, no actual federal-state conflict existed. *Id.* at 238.

76. This misinterpretation presumably will come to an end after *Granite Rock*, since *Granite Rock* concludes that permit requirements are invalid, whether or not a permit is sought or denied. *See supra* text accompanying notes 49-60.

In Citizens for a Better Henderson v. Hodel, 768 F.2d 1051 (9th Cir. 1985), the Ninth Circuit apparently followed the regulation-prohibition distinction, although the preemption discussion is so brief as to leave some doubt. In *Henderson*, the court considered whether the City of Henderson could restrict the construction of a power line across a federal right-of-way located within the city. The federal statute authorizing the granting of such rights-of-way required grantees to comply with all applicable state and local laws. The court viewed this statute as a tautological statement that merely required compliance with those state and local laws that were not preempted; the statute did not insulate nonfederal laws from federal preemption. *See infra* text accompanying notes 134-141. The court assumed that the Henderson land use regulations prevented power line construction, a result that, in the court's view, generated an actual federal-local conflict. *Henderson*, 768 F.2d at 1055. The court did not consider the validity of a local land use rule that regulated but did not prevent the private activity. The decision in *Henderson* is similar to other decisions involving power lines contracted by federal agencies. *See* Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, U.S. Dept. of Energy, 683 F.2d 1171 (8th Cir. 1982); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981).

The Oregon Attorney General recently acknowledged and applied the regulation-prohibition distinction in the context of the siting of geothermal power facilities. Or. Op. Att'y Gen. OP-5744 (Feb. 25, 1985).

77. *See generally* United States v. Coleman, 390 U.S. 599 (1968); 4 COAL LAW & REGULATION § 85.01 (P. McGinley & D. Vish eds. 1984); 1 ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MINING § 1.04 (2d ed. 1984); 4 ROCKY MTN. MIN. L. FOUND., AMERICAN LAW OF MIN-

certain revenues and on costs that are often difficult to estimate. A mining company has limited exploration capacity and seeks to employ its exploration resources on the project that offers the most attractive blend of certainty and projected profitability. At any given time, some operators will take on projects with high risks of failure but high potential yields if a valuable deposit is found. Others will seek more conservative exploration targets that may yield lower profits but offer lower chances of failure.

In this light, consider a federal land parcel that is open to entry under the mining laws and is subject to a local surface restoration rule. In form this restoration rule seems to be a valid regulation rather than an invalid prohibition.[78] Yet, the added cost of surface restoration may, in the calculus of some mining operators, render the proposed mining operation unprofitable. To another operator some profit potential may exist, but the prospect may seem unattractive if better looking projects exist. If either or both miners avoids entry because of the local rule, does the rule become a prohibition? Moreover, is the rule valid if it renders mining unprofitable on some parcels but causes no adverse effects on others? Alternatively, consider a local permit scheme that affords the regulating agency power to issue permits subject to conditions. Presumably, a permit denial is an impermissible prohibition. What of a permit granted only on conditions that are not technologically feasible? What of permit conditions that render a project possible but clearly unprofitable? What of permit conditions that some operators perceive as rendering the project unprofitable but that others do not, or that some perceive as rendering the project insufficiently profitable while others do not?

It seems clear that a regulation-prohibition distinction is inherently vague, if not meaningless, without additional guidance on its application. It is equally clear that no interpretive guideline can transform the distinction into a predictable, sensible test. The distinction could be applied predictably based on the form of the local regulation: a prohibition or permit denial would be invalid, while a regulation or a permit issuance would be upheld. Alternatively, employing the Ninth Circuit's formal approach, a regulation could be upheld while a prohibition or permit requirement could be struck down.[79] A formal test of this type, however, is nearly meaningless since a valid regulation or conditional permit could halt proposed mining operations just as surely as a flat prohibition. A formal test simply encourages regulation-minded localities to employ permissible regulatory forms over impermissible ones.

The regulation-prohibition distinction alternatively could be applied to distinguish among the impacts or effects of regulations; for example, a regulation that caused a miner to leave could exceed the bounds of a permissible

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ING §§ 35.11, 35.12 (2d ed. 1984); Just, *Economic Valuation of Proposed Mining Ventures—Exploration, Geology and Ore Reserves*, 45 MINING CONGRESS J. 43 (1959); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW 1-16 (1984); Haggard & Curry, *Recent Developments in the Law of Discovery*, 30 ROCKY MTN. MIN. L. INST. 8-10 to 8-19 (1984); SOUTHWESTERN LEGAL FOUNDATION, ECONOMICS OF PETROLEUM EXPLORATION (1961).

78. *See* State *ex rel.* Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976) (surface restoration rule is valid regulation, not invalid prohibition).

79. *See supra* text accompanying notes 49-52.

local rule, regardless of form. A regulation-prohibition test as refined in this manner would be less consistent in application than a form-based approach since it may require difficult determinations: did the regulation truly drive the miner out; was the departure designed to force a repeal of the regulation; or was the departure motivated alternatively by unrelated concerns? Even aside from the difficulty in discerning motivation, the approach seems potentially chaotic. A regulation could drive out one mining operator but not another; it could drive out a miner at one time but not at another time, when resource prices are up or alternative mining sites are relatively unattractive; or, of course, it could drive out miners on one regulated parcel but not on another.

An effects-based interpretation, in short, seems as disjointed and meaningless as a form-based approach. A mixture of the two approaches, moreover, does not materially reduce the troubles.[80] However applied, the regulation-prohibition distinction suffers from serious practical defects aside from the analytical difficulties that produced it. In the context of land use planning such a result seems unacceptable since it would cause serious problems for federal land managers, local governments, and mining companies. Adding strength to the already powerful need for certainty is the possibility that a local government could face substantial damage liability by misjudging the validity of a local regulation. The court in *Eastern Oregon Mining Association v. Grant County*[81] recently raised this possibility. In *Grant County*, the court imposed damage liability under 42 U.S.C. § 1983[82] on a county whose regulatory ordinance was earlier ruled invalid.

One can only speculate as to why courts so readily adopted the regulation-prohibition distinction. The test draws little support from the language and legislative history of pertinent federal laws. Furthermore, it seems unworkable in practice. One possible reason is that courts fail to distinguish fully between the power of the federal government to preempt local law and the actual exercise of that power by the federal government. Federal power under the Property Clause[83] remained at least somewhat in doubt until *Kleppe v. New Mexico*.[84] There the Supreme Court resoundingly recognized a dominant federal role in all matters relating to the management and use of federal lands. *Kleppe* contains strong language on the preemptive power of federal laws and the need for federal decisions to override inconsistent local rules. The Court stated that a contrary ruling could leave federal lands and federal land managers at the mercy of local legislators.[85] This language is cited at times in federal lands preemption decisions as though it encouraged

80. The distinction could invalidate any state law that, in form *or* effect, prohibited a particular activity. This approach would require a two-step preemption inquiry with each step raising the difficulties discussed in the text.

81. Civ. No. 81-533 FR, slip op. (D. Or. May 31, 1984).

82. 42 U.S.C. § 1983 (1982) (federal damage action against persons acting under the authority of state law who violate federal rights).

83. U.S. CONST. art. IV, § 3, cl. 2. *See* Gaetke, *supra* note 31, at 381; Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980).

84. 426 U.S. 529 (1976).

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

or supported a finding of preemption.[86] In fact, while *Kleppe* upholds Congress' power to preempt, it says nothing about the actual exercise of that power (outside the specific facts at issue). Nor does *Kleppe* consider the need for preemption on issues relating to the economic development of federal lands. A finding of nonpreemption in a particular setting does not undercut potential federal powers or deviate from the lessons of *Kleppe*.

A second source of possible judicial confusion lies in the apparent failure of courts to perceive any difference between a federal action and a private action conducted on federal lands.[87] Mining, harvesting of timber, and grazing on federal lands are all conducted by private parties; the federal government's role is that of landlord and steward. Clearly these activities would be subject to state and local laws but for the coincidence of federal ownership of the underlying lands. The distinction has significance, as illustrated by *United States v. County of Fresno*.[88] There the Supreme Court allowed California to tax a federal employee's private leasehold interest in federally owned housing even though the state clearly could not tax the federal real estate itself.

Because these regulated economic activities are privately conducted, the federal interests at stake are lessened. In any preemption analysis, federal interests must be carefully identified and limited to avoid overstatement. When this identification process is conducted, it becomes clear that even a blanket local prohibition of economic activity will often interfere only insignificantly with true federal interests. The private-federal distinction is important as well, and perhaps more so, in identifying actual federal preemptive intent. When a federal entity decides to construct a bridge or situate a waste dump in a particular location, the federal land use choice is clear. Federal preemption should normally follow. When a private operator decides to mine or drill on a particular federal parcel, however, federal intent is more opaque and less site-specific. Federal interests in fostering mineral development could be served equally well by mining or drilling elsewhere or in a different manner. The intent demonstrated by a congressional decision to make federal lands available for private activities and generally to en-

86. *See Ventura County*, 601 F.2d at 1083; *Brubaker*, 652 P.2d at 1060; *Elliott*, 60 Or. App. at 482, 654 P.2d at 668.

87. In its decisions the Ninth Circuit ignores the distinction between federal activities and private activities conducted on federal lands. The court relies on cases involving activities undertaken by elements or instrumentalities of the federal government to support its finding of nonpreemption. For example, in Citizens for a Better Henderson v. Hodel, 768 F.2d 1051 (9th Cir. 1985) (discussed *supra* note 76), the court relied, in its very brief preemption analysis, on Hancock v. Train, 426 U.S. 167 (1976), to supply the applicable preemption standard. *Hancock* involved the application of state air pollution permit rules to pollution sources operated by the federal government; the *Hancock* Court concluded that such rules are preempted absent clear congressional intent to the contrary. 426 U.S. at 179. The preemption test applicable to private activities, however, is just the reverse: state and local laws are *not* preempted absent either clear congressional intent to preempt or actual conflict. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 258 (1984) (applying test to a nuclear reactor subject to extensive federal regulation). By relying on *Hancock* as the applicable test, the court seemed to suggest that private users of federal lands, simply by reason of their location on federal land, enjoy the same immunities from state and local regulation as do federal agencies. This conclusion, if followed, places exceptional, unnecessary importance on the coincidence of federal land ownership, and it seriously disrupts the powers of state and local governments located in regions with substantial federal land ownership.

88. 429 U.S. 452 (1977).

courage those activities is much less forceful and overriding than the intent revealed by a site-specific congressional authorization of a federally conducted operation. The issue is whether Congress made a specific determination as to the best use of a particular parcel or whether Congress simply expressed a broadly applicable policy. Such broad policy pronouncements, when mixed with other expressed policies, may or may not guide the use of an individual federal tract. This issue provides the key for reconsidering the preemptive effects of various federal statutes authorizing economic operations on federal lands.

II. PREEMPTION AND THE FEDERAL LAND PLANNING PROCESS

Under the standard preemption doctrine, preemption occurs only if Congress intends to occupy an entire regulatory field or if the state or local law conflicts with federal law or some important federal purposes or objectives.[89] The federal laws regulating private operations on federal lands express no clear preemptive intent. Indeed, in several areas they envision a substantial role for supplemental state laws. Across the board they appear to leave open the possibility that state and local rules may be consistent with federal laws. As the decisions to date recognize, preemption occurs in this context only by reason of an actual federal-nonfederal conflict.

The courts that considered this preemption issue developed the regulation-prohibition distinction to test for actual federal-nonfederal conflict. The test rests on an important assumption. It assumes that a federal statute authorizing a particular activity conflicts with and overrides a state prohibition of the activity. This position, however, blurs the distinction between authorization and prescription. The courts fail to realize that federal statutes of general application do not determine or prescribe the use of any particular federal parcel. They fail to realize that a decision to use a particular federal parcel for mining or timber harvesting is a decision made by a private party, by a federal agency, or by the two together. Quite clearly, it is not a decision made by Congress. This point, once recognized, provides the key to a more sensible, reformulated preemption test. Congress does not determine the proper use of particular land parcels; rather, Congress through its legislative efforts has set in motion a detailed land planning process designed to decide optimum uses on a parcel-by-parcel basis. In making these decisions, the regulating federal agencies are granted broad authority and are required to blend and serve multiple, conflicting values and potential land uses. Congress authorizes many conflicting uses of each federal parcel and instructs the managing agency to choose among those uses in a rational, informed manner. For example, Congress may authorize oil drilling on a particular federal tract, a tract that might be unsuited for such a use. A BLM decision to lease the tract for drilling could well be arbitrary and hence unlawful in light of conflicting policy goals.

As explained in this part, preemption of state and local land use rules should occur only by reason of specific agency action. In interpreting

89. *See supra* text accompanying notes 36-37.

agency conduct to determine its preemptive effects, courts should presume that state and local rules apply in full to federal lands absent a specific, reasoned agency decision to preempt. Only this approach ensures fair and adequate consideration of local desires. Only this presumption requires the federal government as landowner to be a sensitive, respectful member of nearby towns and counties. Finally, only this approach reflects adequately the long-recognized ties between land uses and local communities.

A. *Agency Discretion and the Conflicting Goals of Federal Land Planning*

The economic activities conducted on federal lands are authorized by permissive rather than mandatory federal statutes. In each instance, some discretionary administrative action rests between the governing federal statute and the private development activity. None of the statutes, therefore, dictates the proper use of any land parcel.

Mineral leasing on federal lands is conducted under statutes that authorize federal agencies, particularly the BLM, to lease certain lands for mineral development.[90] The language appears discretionary, and has been so interpreted.[91] Under some leasing schemes and on certain lands, the BLM must issue leases to the first qualified lease applicant.[92] This statutory approach reduces agency discretion. Yet, even under these provisions it is within the BLM's discretionary power to decide whether lands should be open for lease applications.[93] This power reserves for the agency sufficient authority to commit lands ill-suited for mineral development to alternative uses.

The approach of the Mining Law is somewhat different, but it grants the BLM a roughly similar degree of discretion. Under the Mining Law, all federal lands are open for entry without any need for prior agency clearance.[94] Lands dedicated to other uses or otherwise poorly suited for mining are reserved or withdrawn from mining entry by Congress or the executive branch.[95] The executive branch long claimed (and often exercised) an inherent power to withdraw lands.[96] That withdrawal power is now specifically acknowledged by statute, and only a few, largely procedural restraints circumscribe it.[97] The withdrawal power vests in the BLM broad discretion to determine when and whether mining on a particular tract is appropriate. The principal limit on agency action is that the BLM must exercise its withdrawal power before a private party establishes an unpatented mining claim

90. *See supra* notes 62-65.

91. Udall v. Tallman, 380 U.S. 1, 4 (1965); Arnold v. Morton, 529 F.2d 1101, 1105-06 (9th Cir. 1976); McTiernan v. Franklin, 508 F.2d 885, 887 (10th Cir. 1976); Angelina Holly Corp. v. Clark, 587 F. Supp. 1152, 1156 (D.D.C. 1984).

92. *E.g.*, 30 U.S.C. § 226(c) (1982).

93. *Udall*, 380 U.S. at 4. *See* Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976); McDonald v. Clark, 771 F.2d 460, 463-64 (10th Cir. 1985).

94. 30 U.S.C. § 22 (1982).

95. *See* G. COGGINS & C. WILKINSON, *supra* note 19, at 197-207.

96. *See* United States v. Midwest Oil Co., 236 U.S. 459 (1915).

97. 43 U.S.C. § 1714 (1982). *See* Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982); Wheatley, *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311 (1979).

and thereby obtains a private property interest.[98] Otherwise, the private property interest can be abolished only with just compensation.

Timber harvesting on national forest land is conducted by private parties who purchase the timber at Forest Service auction sales.[99] Congress grants the Forest Service broad discretion in deciding when and on what terms timber sales will occur.[100] The National Forest Management Act[101] somewhat reduces that discretion. The Act limits the use of certain harvesting techniques, requires the protection of marginally productive timber lands, and places other substantive limits on Forest Service flexibility.[102] These new rules, however, limit agency discretion by restricting timber harvesting rather than promoting it: it remains the case that timber harvesting occurs only after an affirmative, discretionary Forest Service judgment to use the land for that purpose.

Grazing on the federal range is also subject to broad agency discretion to commit rangelands to alternative uses.[103] Private grazers use federal rangelands under BLM and Forest Service permits.[104] The permits are for fixed terms, and clear renewal rights restrict the agencies' ability to shift grazing rights to a new permit applicant.[105] The current governing statute, however, provides expressly that permits can be terminated (upon payment of modest compensation) and renewals can be denied (without compensation) if the applicable agency decides to commit the land to alternative uses.[106] This discretion supplements the agency's power to alter permit terms and to reduce the number of permissible grazing animals.[107] Although politically limited in their ability to make massive reductions in grazing permits, the BLM and Forest Service nonetheless possess clear legal authority to halt grazing on particular land parcels. As in the case of timber harvesting, grazing activities are governed by recent legislation that restrains agency discretion by mandating greater concern for land conservation and for the maintenance of long-term land productivity.[108]

The discretion of the BLM and the Forest Service in these areas, while subject to few substantive statutory limits, is restrained considerably by land planning processes and agency obligations to manage land on multiple use,

98. *See* United States v. Locke, 105 S. Ct. 1785, 1797 (1985) (discussing limited congressional power to regulate vested property interest in unpatented mining claims); Freese v. United States, 639 F.2d 754 (Ct. Cl. 1981) (denial of right to proceed to patent is not a taking so long as unpatented mining rights are not harmed). *See also* Hickel v. Oil Shale Corp., 400 U.S. 48 (1970) (government can withdraw lands covered by unpatented mining claim when there is substantial failure by claimant to satisfy annual assessment work requirements).

99. 16 U.S.C. § 472a (1982); *see* G. ROBINSON, THE FOREST SERVICE 60-118 (1975).

100. *See* 16 U.S.C. § 472a (1982); Hi-Ridge Lumber Co. v. United States, 443 F.2d 452 (9th Cir. 1971); Dorothy Thomas Found., Inc. v. Hardin, 317 F. Supp. 1072 (W.D.N.C. 1970).

101. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600-87 (1982)).

102. *E.g.*, 16 U.S.C. § 1604(g)(3)(E), (m) (1982).

103. *See* 43 U.S.C. §§ 315b (discretionary power to issue grazing permits), 1712(e) (power to exclude particular uses of federal lands), 1714 (withdrawal power) (1982).

104. 43 U.S.C. § 315b (1982). *See* Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 856-61 (E.D. Cal. 1985).

105. 43 U.S.C. § 1752(c) (1982).

106. 43 U.S.C. § 1752(c), (g) (1982).

107. 43 U.S.C. § 1752(d), (e) (1982); Perkins v. Bergland, 608 F.2d 803 (9th Cir. 1979).

108. *See, e.g.*, 43 U.S.C. §§ 1712(c)(3), 1732(b) (1982).

sustained yield principles. Each agency action—each mineral lease, land withdrawal, timber sale, and grazing permit—must comport with the governing land use plan or face invalidation.[109] The agency planning process, therefore, is no mere intra-agency, academic exercise; it provides the framework and the measure for all land use decisions.

The Forest Service has long used land use plans for the national forests to aid in formulating timber harvesting goals and blending timber production with alternative, sometimes inconsistent, forest uses.[110] Federal legislation passed in 1960 requires the Forest Service to administer the forests "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," and to mix these competing resource uses "in the combination that will best meet the needs of the American people," recognizing "that some land will be used for less than all of the resources."[111] This multiple-use mandate, if not already sufficiently complex, is made more intractable by Congress' determination that wilderness set-asides are consistent with multiple use[112] and by mining and mineral leasing laws that authorize additional competing land uses.

More recently, Congress commanded the Forest Service to carry out this multiple-use mandate by developing a series of land use plans. These plans start with broad nationwide expressions of agency goals and planning principles and descend to specific plans for individual forests.[113] This multiyear, continuing planning process, as augmented by National Environmental Policy Act procedures,[114] should add visibility and public comment to forest use decisions; it should generate heightened environmental sensitivity and greater Forest Service willingness to deviate from the "tree-farm," single-use mentality that dominated Forest Service thinking over the past four decades.

Congress now requires the BLM to complete similar planning documents for lands under the BLM's jurisdiction.[115] Like the Forest Service, the BLM is obligated to balance and mix multiple, competing land uses.[116] The agency must manage its lands "so that they are utilized in the combination that will best meet the present and future needs of the American people;" it must create land use plans that provide for "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed,

109. *See* 16 U.S.C. § 1604(i) (1982); 43 U.S.C. §§ 1712, 1732(a) (1982).

110. *See* M. CLAWSON, *supra* note 1, at 112-18; P. CULHANE, PUBLIC LANDS POLITICS 45-74 (1981); H. KAUFMAN, THE FOREST RANGER 98-102 (1960); G. ROBINSON, *supra* note 99, at 39-47, 265-76; Wilson, *Land Management Planning Processes of the Forest Service*, 8 ENVTL. L. 461, 467-68 (1978).

111. 16 U.S.C. §§ 528, 531 (1982). *See* P. CULHANE, *supra* note 110, at 110-32; Culhane, *The Concept of Multiple Use Forestry*, 8 ENVTL. L. 281 (1978); Note, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L.J. 787 (1973).

112. 16 U.S.C. § 529 (1982).

113. 16 U.S.C. §§ 1601-04 (1982); Wilson, *supra* note 110 *passim*.

114. *See* 42 U.S.C. § 4332(2)(c) (1982); Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983).

115. 43 U.S.C. § 1712 (1982); Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 74-109 (1983).

116. 43 U.S.C. §§ 1702(c), (h), 1712(c)(1) (1982); Coggins, *supra* note 102, at 32-74. On the operation of the BLM at local levels, see P. CULHANE, *supra* note 110 *passim*; P. FOSS, POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN 99-139 (1960).

wildlife and fish, and natural scenic, scientific and historical values."[117] BLM land use plans that exclude mining activities from a particular parcel must also comply with the special procedure governing withdrawals.[118]

As this brief survey makes clear, the Forest Service and the BLM are committed to difficult, ongoing planning processes. The various multiple-use mandates and vague statutory planning directions provide little guidance. Yet, the task is even more difficult; other federal statutes announce additional federal policies and objectives that these agencies should consider in their planning. The National Environmental Policy Act, for example, commands these agencies "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony."[119] Numerous federal statutes governing federal land uses echo this broad injunction.[120] Other statutes call for sensitivity to soil erosion;[121] direct the Interior and Agriculture Departments to conserve wildlife and to develop specific wildlife habitat improvement programs;[122] establish wetlands preservation as a national policy;[123] provide special protections for endangered species[124] and wild, free-roaming horses and burros;[125] direct these agencies to study lands for special protection as wilderness areas,[126] wild and scenic rivers,[127]and national trails;[128] provide additional protections for lands in the coastal zone;[129] and even call specifically for efforts to reduce reservoir sedimentation.[130]

It is the BLM's and Forest Service's unenviable task to translate these multiple policy goals into specific decisions about the use of hundreds of millions of acres of national land. The agencies, of course, are not expected to further all policies on each acre of federal land.[131] They are expected, rather, to use discretion in deciding the best blend of resource uses and then to carry out that decision by dedicating the parcel to the designated uses.

B. *Federal Lands and State and Local Governments*

In deciding the best use of each land parcel, numerous statutory provisions direct the BLM and the Forest Service to work closely with state and local officials and to seek their input early in the planning process. These statutory provisions, discussed below, do not describe the force and effect of state and local land use plans and environmental protection laws, but they

117. 43 U.S.C. § 1702(c) (1982).
118. 43 U.S.C. § 1712(e)(3) (1982).
119. 42 U.S.C. § 4331(a) (1982).
120. *E.g.*, 16 U.S.C. §§ 528, 531(a), 1604(e)(1), (g)(3), (k), (1982); 30 U.S.C. §§ 1161, 1201(c), 1272, 1281 (1982); 43 U.S.C. §§ 1701(a)(8), (a)(11), 1712(c)(8), 1732(b), (c), 1901(a)(3) (1982).
121. 16 U.S.C. §§ 590a, 2001, 2003 (1982).
122. 16 U.S.C. §§ 661, 669, 670g (1982).
123. 16 U.S.C. § 1301 (1982).
124. 16 U.S.C. § 1531 (1982).
125. 16 U.S.C. § 1331 (1982).
126. 16 U.S.C. § 1132 (1982); 43 U.S.C. § 1782 (1982).
127. 16 U.S.C. § 1275 (1982).
128. 16 U.S.C. §§ 1241-43 (1982).
129. 16 U.S.C. § 1451 (1982).
130. 16 U.S.C. § 3441 (1982).
131. 16 U.S.C. § 531(a) (1982); 43 U.S.C. § 1702(c) (1982).

are vital nonetheless. They suggest, quite clearly, that both the BLM and the Forest Service are empowered to override state and local land use plans and are granted at least limited power to override state and local environmental laws. More importantly, the provisions suggest that agency decisions to preempt state and local law must be informed, reasoned ones. They must reflect a careful weighing of state and local desires. They must reflect some responsible agency attempt, when feasible, to shift land use goals among parcels to accommodate community needs and desires. They must, in short, reflect a sensitivity to the reasons why land use planning is traditionally a subject of local regulation.

Reading federal lands statutes is a difficult, delicate task. Federal land law is a composite of hundreds of provisions enacted by Congress over more than a century. New laws were often added to old without repeal and codification.[132] Patchwork in nature, the federal lands statutes cannot reasonably be read as a single text. Individual sections must be read in their historical settings. In a given problem area, the numerous, overlapping statutes must be examined together in a search for a composite or consensus meaning. Precise phrasing must often yield to broadly revealed goals and principles.

In this light, it is possible to survey and to gather some meaning from the few dozen statutory provisions that deal with the federal-local relationship. These provisions provide the key to a more sensible preemption test. When analyzed together, these sections reveal the proper role of state and local law in the management of federal lands. These federal statutes fall into several distinct categories and can best be analyzed on a category-by-category basis.

The place to begin this statutory survey is with those federal provisions that recognize an explicit role for nonfederal law in the management of federal lands by referring to state or local law as the rule of decision on a particular issue. The General Mining Law of 1872 contains several provisions of this type.[133] The statutes in this first category originated when federal presence in the West was slight and when Congress had virtually no expertise or interest in the details of mining camp operations. As federal interests and knowledge both increased, Congress halted its reliance on state laws. As a result, these state-law incorporation provisions did not serve as models for later statutes. Today these statutes are of limited importance outside their specific areas of application except as a reflection of Congress' willingness to allow state law to fill open gaps in federal statutory schemes.

Somewhat more helpful in determining the proper role of state and local laws are several brief, broadly phrased savings clauses contained in the principal federal lands statutes. These clauses purport to preserve the states' full police power.[134] The Mineral Leasing Act, for example, states expressly that nothing in the act "shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may

132. *See* G. COGGINS & C. WILKINSON, *supra* note 19, at xx.

133. *E.g.*, 30 U.S.C. §§ 22, 28, 43 (1982).

134. *E.g.*, 30 U.S.C. §§ 189, 201(b)(1), 357 (1982); 43 U.S.C. § 315n (1982); Pub. L. No. 94-579, § 701(g)(6) (1976) (FLPMA).

have."[135] The Taylor Grazing Act provides that the police power of the states shall not be "impaired or restricted" and that all state laws regarding public health or public welfare "shall at all times be in full force and effect."[136] The 1976 Federal Land Policy and Management Act states that it neither limits state police power nor deprives any state or local body "of any right it may have to exercise civil and criminal jurisdiction on the natural resource lands."[137] Similar in tone are several clauses like the one that requires coal exploration permit holders to comply with all "applicable" state and local laws and regulations.[138]

Clauses like these may be construed to disclaim all federal preemption. They are not so read, however, largely because such an interpretation would render other statutory terms meaningless and would leave states free to void federal terms they dislike.[139] Instead, courts view such clauses as meaningless or tautological. Courts interpret them to preserve the force of only those state and local laws that are not preempted.[140] This latter interpretation comports with the normal presumption that specific federal statutes always override inconsistent state rules. In most statutory schemes this seems far closer to what Congress intended. Perhaps the best interpretation of these clauses is that they disclaim congressional intent to preempt state and local laws, except in the case of actual conflict,[141] and they express in imprecise terms a general congressional desire to allow state and local bodies maximum feasible legislative flexibility. In cases of indecision, such clauses seem to tilt the balance in favor of nonpreemption.

Recent federal land use statutes employ clauses of a third type, clauses that vest in states primary responsibility for environmental protection.[142] These provisions recognize special state interests in fish, wildlife, and soil conservation.[143] In a few instances, they expressly require private users of federal lands to comply with state and local environmental protection laws.[144] These provisions reflect a long-established congressional policy to allow states to tighten federal pollution control standards, a policy reflected in the Clean Air Act[145] and the Clean Water Act.[146] Applicants for certain rights of way across federal lands, for example, must comply with state pollution control laws.[147] Coal lessees are expressly required to comply with

135. 30 U.S.C. § 189 (1982).
136. 43 U.S.C. § 315n (1982).
137. Pub. L. No. 94-579, § 1701(g)(6) (1982).
138. 30 U.S.C. § 201(b)(1) (1982).
139. *See Ventura County*, 601 F.2d at 1086. *See also* United States v. Darby, 312 U.S. 100, 124 (1941) (tenth amendment interpreted as tautological).
140. *See* Citizens for a Better Henderson v. Hodel, 768 F.2d at 1055 (requirement in 43 U.S.C. § 1761 (1982) that users of rights-of-way across federal lands must comply with applicable state and local laws only requires compliance with those laws not preempted); Kirkpatrick Oil & Gas Co. v. United States, 675 F.2d 1122, 1124 (10th Cir. 1982); *Ventura County*, 601 F.2d at 1086.
141. *See* Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n, 693 P.2d 227, 235 (Wyo. 1985). *See also* California v. United States, 438 U.S. 645 (1978) (interpreting similar provision in Reclamation Act of 1902 to uphold state water laws unless actually inconsistent with federal law).
142. 42 U.S.C. § 4371(b)(2) (1982); 30 U.S.C. § 1201(f) (1982).
143. 16 U.S.C. §§ 528, 670h, 2003(b), 2901 (1982).
144. 43 U.S.C. §§ 1712(c)(8), 1732(c) (1982). *See* 30 U.S.C. § 185(v) (1982).
145. 42 U.S.C. § 7416 (1982).
146. 33 U.S.C. § 1370 (1982).
147. 43 U.S.C. § 1765(a) (1982).

the Clean Air Act and the Clean Water Act, laws that allow states to implement more stringent pollution limits.[148] Generally, however, these clauses, like the savings clauses, express more sentiment than substance. They reflect a congressional inclination to allow states to impose more restrictive business-limiting emission standards. Yet, they reflect no reasoned, detailed congressional balancing of the local interests in pollution control against the federal interests in federal land development. Rarely are the clauses so clear that their language alone justifies a finding of nonpreemption. As do the savings clauses, these state pollution clauses seem to express simply a general congressional desire, when practical, to require private users of federal lands to comply with otherwise applicable state and local rules.

In a fourth group are federal statutory provisions that direct federal land management agencies to coordinate planning efforts with state and local officials. The Secretary of Agriculture, for example, is authorized to cooperate with interested state and local agencies in managing national forests[149] and to consult with state agencies in developing comprehensive wildlife habitat improvement plans.[150] Maximum cooperation with the states is required when surface coal mining is undertaken.[151] In the Federal Land Policy and Management Act of 1976 (FLPMA), Congress recognized that federal land use plans will improve if coordinated with state planning efforts.[152]

More important than these general entreaties for intergovernmental harmony are the many provisions that set forth specific procedures requiring federal planning officials to seek local input or to determine local effects of actions on federal lands. The BLM, for example, is specifically obligated to coordinate its grazing allotment plans with the states.[153] National forest planners must provide an opportunity for state and local participation in the planning process.[154] Prospective coal leases in the National Forests must be submitted to the governor of the affected state. The governor can, by objecting to the lease, force the Secretary of the Interior to reconsider issuance.[155] All coal leasing must comply with governing land use plans, which must be prepared in consultation with appropriate state agencies and local governments.[156] Even with this consultation, the BLM before issuing coal leases must consider the effects of the mining on the "impacted community or area."[157] In developing its general land use plans, the BLM must estab-

148. 30 U.S.C. § 201(a)(3)(E) (1982).

149. 16 U.S.C. § 530 (1982).

150. 16 U.S.C. §§ 670g, 670h (1982).

151. 30 U.S.C. §§ 1273, 1292(c) (1982). *See also* City and County of Denver v. Bergland, 517 F. Supp. 155, 203 (D. Colo. 1981) (Forest Service under NEPA is required to cooperate with state and local governments to take into consideration substantive provisions of nonfederal land use regulations).

152. 43 U.S.C. § 1701(a)(2) (1982).

153. 43 U.S.C. § 1752(d) (1982).

154. 16 U.S.C. § 1612 (1982).

155. 30 U.S.C. § 201(a)(2)(B) (1982). *See also* 30 U.S.C. § 1281(a) (1982).

156. 30 U.S.C. § 201(a)(3)(A) (1982).

157. 30 U.S.C. § 201(a)(3)(C) (1982).

lish procedures to give state and local governments adequate opportunity to participate.[158]

A similar group of federal clauses requires federal agencies to determine whether their action is consistent with, or at least not detrimental to, the public interest.[159] Hidden within these clauses is the longstanding issue of whether federal lands should be managed to further the interests of the national public or should be managed with greater emphasis on the interests of the local public. The Report of the Public Land Law Review Commission contains the most revealing examination of the "publics" served by federal land management policies. This examination distinguishes between the national public and the local public and urges clear consideration of the interests of both.[160] These statutory public interest provisions should be similarly construed, and they should be considered violated, in spirit if not in letter, by planning processes that ignore local community interests and desires.

The final category of statutory clauses refers indirectly to, or assumes the existence of, some state or local power to regulate private activities on federal lands. For example, sections that require both the Forest Service and the BLM to cooperate with state and local law enforcement officials clearly suggest that state and local laws apply on federal lands.[161] More revealing is a FLPMA section requiring the BLM to notify state and local governments of impending federal land sales. This notice is needed, according to the statute, to allow such governments to "change or amend *existing* zoning or other regulations concerning the use of such lands" before the sales take place.[162]

These numerous statutory provisions sometimes impose specific procedural requirements on federal land management agencies. When applicable, these provisions restrain and channel agency conduct. They also provide, however, valuable guidance in resolving general preemption issues and in interpreting the reasonableness of federal agency actions that appear to ignore local interests and local land use restraints. They are valuable, that is, as evidence of congressional views on the proper relationship between federal land management agencies and state and local legislative and regulatory bodies. In reading these statutes for general guidance of this type, greater weight perhaps should be accorded the more recent federal statutes. Such statutes are more detailed than the early enactments and reflect more particularized congressional attention to interjurisdictional conflicts. The two statutes most reflective of mature congressional thought are the FLPMA,[163]

158. 43 U.S.C. § 1712(f) (1982). *See also* 43 U.S.C. § 1720 (1982) (coordination of land sales with states).

159. 30 U.S.C. §§ 211, 301, 601 (1982); 43 U.S.C. § 1701(a)(5) (1982) (must consider views of general public).

160. ONE THIRD OF THE NATION'S LAND, *supra* note 21, at 33-38. *See* Harvey, *Uses and Limits of the Federal Lands Today*, in RETHINKING THE FEDERAL LANDS 108, 110-14 (S. Brubaker ed. 1984).

161. 16 U.S.C. § 551a (1982); 43 U.S.C. § 1733(d) (1982).

162. 43 U.S.C. § 1720 (1982) (emphasis added). *See also* Lane County v. Bessett, 46 Or. App. 319, 612 P.2d 297 (1980).

163. Pub. L. No. 94-579, 90 Stat. 2477 (1976) (codified as amended at 43 U.S.C. §§ 1701-84 (1982)). Federal-state relations under FLPMA are discussed in Fairfax, *Beyond the Sagebrush Revolution: The BLM as Neighbor and Manager*, in WESTERN PUBLIC LANDS 79, 89-90 (J. Francis & R. Ganzel eds. 1984).

which details the current BLM land planning process, and the Forest and Rangeland Renewable Resources Planning Act of 1974,[164] which prescribes current Forest Service planning procedures. Both statutes reflect clear congressional recognition of the legitimate desires of state and local governments to influence, if not control, private activities on federal lands.

Section 1712(c)(8) of the FLPMA requires that BLM plans "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans."[165] A longer provision, section 1712(c)(9), requires the BLM to carefully consider state and local land use plans when developing BLM plans.[166] Section 1712(c)(9) states that the BLM must "keep apprised of" state and local plans; must "assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans;" and must provide for "meaningful" involvement of state and local officials in federal land planning.[167] More substantively, the FLPMA provides that BLM land use plans "shall be consistent with State and local plans to the maximum extent [that the BLM] finds [is] consistent with Federal law and the purposes of this Act."[168] The corresponding Forest Service provision is briefer than the BLM provision: the Forest Service is required to coordinate its plans with "the land and resource management planning processes of State and local governments."[169]

Taken together, these statutes make it clear that state and local laws will often yield to conflicting federal interests. They also seem to state, however, that state and local laws should be overridden only if they are in fact inconsistent with the activities to which particular federal parcels are committed. Since federal land management agencies, and not Congress, determine the best uses of federal parcels,[170] preemption should occur only if an agency decides to use federal lands in a way that conflicts with state and local rules. The principal interpretive issues, then, are two: first, what type of agency action is needed to override state and local laws; and second, what limits are placed on a federal agency's authority to make discretionary preemptive decisions.

Given Congress' strongly worded expression of solicitous concern for the interests of state and local governments, and given the clear obligations of federal agencies to pay close attention to state and local rules and plans, it seems that an agency's preemption decision must be reasoned and deliberate and must be based on a fair, focused consideration of the state or local rule at issue. In the absence of such a deliberate agency decision, preemption should not take place. Ambiguous agency action should be interpreted to favor the survival of state and local laws. A contrary rule that allows hasty, haphazard agency action to override deliberate, calculated local rules would

164. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified as amended at 16 U.S.C. §§ 1600-87 (1982)).
165. 43 U.S.C. § 1712(c)(8) (1982).
166. 43 U.S.C. § 1712(c)(9) (1982).
167. *Id.*
168. *Id.*
169. 16 U.S.C. § 1604(a) (1982).
170. *See supra* text accompanying notes 90-131.

authorize agencies to depart significantly from the regularly (if imprecisely) expressed mandate of Congress for sensitivity to local interests.

In making preemption decisions, federal land management agencies possess substantial, but nonetheless bounded, discretion. The most prominent restriction on BLM discretion is the FLPMA section 1712(c)(9) requirement of maximum consistency between federal and local land use plans. The provision's use of the term "maximum" appears to require the BLM to formulate or reformulate land use plans, whenever possible, to comport with local land use restraints.[171] It seems that preemption should occur only if the BLM decides that it cannot develop a reasonable federal land use plan that incorporates the local land use restraints. The BLM makes the initial decision; however, the decision is subject to judicial review. Before upholding such a BLM finding a reviewing court should require proof of good faith agency efforts to accomodate local land use desires.

Under section 1712(c)(8), BLM plans must also provide for user compliance with all applicable state and local pollution control laws. This directive requires the BLM, and hence the courts, to distinguish between pollution control laws and other types of land use restraints. This task can be difficult since most land use rules restrict uses that cause detrimental effects, or pollution broadly defined, on neighboring lands. Pollution laws are often drafted as effluent limitations, but they can be drafted to preserve specific ambient air or water quality levels; therefore, they may result in the outright banning of certain types of economic activities in areas with "dirty" air or water.[172] Rules on surface restoration, bans against mining or timber harvesting on delicate or highly erodible soils, and limits on draining or filling wetlands are all examples of pollution control laws that are not framed in terms of effluent limitations.

The ambiguities in the definition of "pollution control laws" are matched by the ambiguities in the term "applicable." The term differs greatly in meaning depending on whether state law applicability is determined before or after the state law is reviewed under the federal preemption test.[173] The provision's legislative history makes it clear that Congress intended to require more than BLM consideration of state pollution control laws, even more than BLM consideration under a "maximum consistency" standard.[174] Congress intended, rather, to require that BLM land users comply with the state pollution laws that would apply if the lands were privately owned.

The legislative history of section 1712(c)(8) suggests that the applicability of a state pollution law is usually determined before undertaking any

171. For a summary of the legislative history of this subsection, see Note, *supra* note 4, at 382 n.59. The FLPMA drew extensively upon the recommendations of the Public Land Law Review Commission, which urged that federal land plans "should conform to state or local zoning to the maximum extent feasible" and that, "[a]s a general rule, no use of the public land should be permitted which is prohibited by state or local zoning." ONE THIRD OF THE NATION'S LANDS, *supra* note 21, at 61-63.

172. *See, e.g.*, 42 U.S.C. § 7409 (1982).

173. *See supra* notes 134-41 and accompanying text.

174. *See* H.R. CONF. REP. NO. 1724, 94th Cong., 2d Sess. 58, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6228, 6229.

preemption analysis. This interpretation deprives the BLM of all power to authorize land uses at odds with state pollution control laws. A contrary interpretation would render the clause a mere tautology and would drain from it the stern meaning that Congress had in mind. This single FLPMA provision, however, cannot be read apart from other provisions of the Act, particularly the provisions that speak more generally to the BLM's obligation to manage its lands on a multiple-use basis and to foster the production of economic as well as noneconomic resources. In extreme cases, a state pollution control law could render the BLM unable to comply with other FLPMA sections. Such a possibility should, it seems, give rise to some latent BLM power to reconcile the impasse by invalidating state laws that fundamentally frustrate clear federal purposes.

In short, the BLM should be able to invalidate state and local land use rules if it cannot, after reasonable effort, rewrite federal plans to achieve some consistency. The BLM should also be given some power to override state pollution control laws if the state law fundamentally frustrates BLM efforts to comply with its clear statutory duties. State and local rules not fitting within these categories should apply to federal lands unless the BLM in a reasoned, deliberate decision decides to preempt them.

The Forest Service possesses broader preemption powers. Under current law, the agency is constrained only by the residual requirement that preemption occur only as the result of a specific, focused agency decision. The decision should reflect sensitivity to local interests and a desire by federal planners, when feasible, to shuffle federal land use priorities to accommodate these interests.

III. A LIMITED PREEMPTION APPROACH AND THE REASONS FOR FEDERAL LAND OWNERSHIP

In *Kleppe v. New Mexico*,[175] the Supreme Court broadly construed the Property Clause as granting to Congress full authority to regulate activities on federally owned lands and to preempt conflicting state laws. In the absence of preemption or some state agreement to relinquish its legislative authority, however, state and local laws apply to federal lands just as if the lands were privately owned.[176] Since states rarely release their legislative authority voluntarily, the viability of nonfederal laws turns almost entirely on the standard preemption inquiries into congressional intent and actual federal-nonfederal conflict. These inquiries reduce rather quickly to a single question: when does a state or local regulation interfere unduly with federal purposes?

Of the dozen judicial inquiries made concerning the presence of an actual conflict, only a few courts have conducted independent preemption

175. 426 U.S. 529 (1976).

176. *E.g.*, Wilson v. Cook, 327 U.S. 474, 488 (1946). In federal enclaves, parcels of land purchased by the federal government with the consent of the affected state and administered under the jurisdiction clause, U.S. CONST. art. I, § 8, cl. 17, state law is inapplicable unless the state consents to the purchase and reserves legislative powers or the federal government transfers powers over the enclave to the state. *See* G. COGGINS & C. WILKINSON, *supra* note 19, at 147-60; Wilkinson, *supra* note 4, at 152-53.

analyses. Moreover, as suggested above, these analyses were simplistic and presumptory. Although a now rather imposing list of courts has adopted a preemption test based on the regulation-prohibition distinction, the underlying preemption analysis needs to be repeated. Courts should reconsider the issue anew and give adequate emphasis this time to the federal land planning processes and the many statutes defining federal-nonfederal relations.

As made clear by a review of the BLM and the Forest Service planning processes and the principal statutes authorizing economic activities on federal lands,[177] Congress has not defined the best use of any federal parcels. Rather, Congress has set forth, for agency guidance, a list of broad, conflicting goals that these agencies must blend in developing land use plans. For example, when a wooded federal parcel is dedicated entirely to recreational use, wildlife preservation, and watershed protection, there is no clear frustration of federal purposes. This parcel, it is true, is not being used to further federal interests in promoting mining and timber production, but then no federal parcel can be used to further every congressionally established goal. Therefore, a state or local rule that limits or even bars mining or timber harvesting on a particular tract does not automatically conflict with federal purposes. It interferes only with the discretion vested in the governing land management agency.

In determining the presence or absence of some impermissible interference with federal purposes, attention must be focused on the land management agencies and the scope of their discretion. Preemption should occur only if a state or local law interferes unduly with agency planning efforts. It is quite appropriate for federal agencies to determine initially whether state or local interference is excessive. Yet, it is quite clear that Congress on many occasions has urged federal agencies to exercise restraint and to accommodate local desires when feasible. As the statutory survey in the preceeding Part makes clear, the BLM and the Forest Service should be able to preempt state and local laws only by way of a reasoned, deliberate, judicially reviewable agency decision. BLM preemption flexibility is less with respect to state and local land use plans under the "maximum consistency" standard, and is almost nonexistent with respect to state pollution control laws.

These general guidelines should resolve most preemption decisions. In rare instances, however, other elements of the standard preemption test may come into play. In a few instances there could be some actual federal-state conflict in the sense that a federal land user cannot follow competing schemes.[178] In such a case, the nonfederal rule should clearly give way. Additionally, in the case of some special legislation, Congress may indeed make a site-specific determination of best use and thereby evidence intent to override all interfering nonfederal rules.[179] Finally, the intergovernmental immunities doctrine could come into play to invalidate a nonfederal rule that

177. *See supra* text accompanying notes 90-131.

178. *See, e.g.*, Kirkpatrick Oil & Gas Co. v. United States, 675 F.2d 1122 (10th Cir. 1982).

179. *See, e.g.*, Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

discriminates against the federal government as landowner.[180]

A few examples illustrate this recommended preemption approach. Consider a local ordinance that requires a county permit for any mining, mineral exploration or timber harvesting within a delicate watershed that supplies a municipality's water. Under the ordinance, the issuing agency may grant the permit on conditions designed to protect the watershed or may deny it if the proposed location is too susceptible to soil run-off or other pollution that could harm the local water supply. Applying such an ordinance to a few thousand acres of national forest land conflicts minimally with Forest Service planning powers, even if the local agency denied a timber harvesting permit. By protecting the watershed, the local ordinance furthers a fundamental federal purpose. Good reasons may exist for overriding the local ordinance, but the Forest Service should be obligated to express those reasons and to explain why federal interests in timber harvesting cannot be adequately furthered by timber cutting on other national forest lands.

If the Forest Service sells timber in the regulated watershed without fairly considering and expressly overriding the county permit rule, a court should assume the survival, rather than the preemption, of the county rule. This assumption is a reasonable one, for the Forest Service may decide for several reasons, stated or unstated, not to preempt the county rule. For example, the Service may view the county permit process as a helpful supplement to the federal planning process. It may deliberately defer to the expertise of local governing bodies that are closer to the scene and more familiar with local problems and needs. As a second reason, the Forest Service in a particular instance may desire to narrow the scope of its own inquiry and for that reason preserve the effect of nonfederal rules. The Forest Service may desire to focus its attention on the adverse effects of extractive activities on Forest Service lands, and it may welcome a local government permit process designed to protect sensitive resources on nonfederal lands. A third reason for Forest Service deference might be a lack of agency competence. The Forest Service may be ill-equipped to override nonfederal rules, such as local zoning rules that are designed to channel local development and to reduce disruptive impacts on local schools, municipal services, and road construction plans. Before overriding a local zoning ordinance, the Forest Service should assess the legitimate needs of the entire community, a rather major undertaking and one that may exceed the agency's abilities. If the Forest Service acted without doing so, it could be accused of illegitimate "spot zoning."

There are many reasons, therefore, why a county permit rule should survive and why courts should not presume preemption. In some instances, the Forest Service may recognize these reasons and allow the rule to survive. In other instances, courts may conclude that the Forest Service acted too hastily in overriding a local rule and may then compel a second look. In any case, preemption should occur only after a reasoned and fair Forest Service inquiry.

180. *See* United States v. County of Fresno, 429 U.S. 452 (1977); G. COGGINS & C. WILKINSON, *supra* note 19, at 176-80; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 36, at 400-06.

As a second example of this suggested preemption approach, consider a BLM decision to grant oil and gas leases for a series of federal tracts, including several located near a town and locally zoned for nonmining uses. BLM mineral leasing must comply with the governing BLM land management plan, which in turn is subject to the "maximum consistency" preemption standard. A BLM leasing action, without more, should not preempt a conflicting local zoning rule. A leasing decision evidences a BLM desire to commit the lands to mineral development, but it does not demonstrate the type of sensitivity to local desires envisioned by the maximum consistency standard. Again, there are many good reasons why the BLM may want the zoning rules to survive, even if the rules make it difficult for the lessee to obtain a zoning variance. A simple decision by the BLM to lease mineral lands means only that the federal government, as owner, is willing to consent to the mineral extractions. This willingness should not be viewed as an intent to override conflicting local zoning rules. A much different BLM action, substantively and procedurally, should be required before such a conclusion is reached.

As a final example, consider a mining company that enters federal lands open for mining. If the company discovers a valuable mineral deposit and properly locates its claim, it acquires an unpatented mining claim. This is a valuable property right that cannot be taken by the government without compensation.[181] Should a state have the power to withhold a needed mining permit and thereby halt this federally allowed mining operation, an operation lawfully commenced without any prior BLM approval? On the one hand, FLPMA purports to leave the principal terms of the Mining Law unaffected.[182] Arguably, this suggests that any BLM obligation to respect local land use laws is inapplicable. On the other hand, it is clear that BLM land use plans can exclude mining in favor of other resource uses, so long as the BLM carries out such a decision under its withdrawal powers.[183] It is also clear that Congress, in passing the Mining Law, never intended to devote any particular lands to mineral production.[184] Therefore, it seems reasonable to apply to mining issues the preemption test generally applicable to federal land uses. Under this test, BLM inaction, such as failure to withdraw the land from mining entry, would not preempt the state permit rule.[185] Thus, so long as the permit denial did not effect a taking of private property without compensation,[186] the permit rule would survive. A con-

181. *See supra* note 98.

182. 43 U.S.C. § 1732(b) (1982).

183. 43 U.S.C. § 1712(e)(3) (1982).

184. *See supra* text accompanying notes 94-98.

185. Although miners can enter federal lands without any approvals or permits, both the Forest Service and the BLM require prior approvals before a miner can conduct operations that significantly disturb the land surface. *See* 36 C.F.R. § 228.4 (1985) (Forest Service); 43 C.F.R. § 3809 (1984) (BLM). During this review stage these agencies can impose operating restrictions designed to protect surface resources and other values. Initially, under the proposed preemption process, the BLM and the Forest Service will first review the wisdom of a nonfederal land use rule and will then decide whether or not it should be preempted.

186. A state regulation that, in form or effect, prohibits all mineral extraction on a particular parcel is unlikely to constitute a taking if alternative uses of the land are available. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 131-32 (1978). Nevertheless, when the mineral rights are severed before the effective date of the state regulation, the regulation can effectively eliminate

trary rule would invalidate all nonfederal rules without any effort by the BLM, or anyone else, to assess the wisdom of applying these rules to mining operations on federal lands. As a policy matter, this limited, more informed preemption rule seems preferable.

A court adopting this limited preemption approach should demand clear evidence of a fair, informed agency preemption decision before concluding that the agency has preempted a state or local rule. In all cases, a reviewing court should demand evidence that the federal agency considered the nonfederal land use rule at issue, assessed the merits of the rule in a full manner, gave state and local officials an adequate opportunity to argue for the continued viability of the rule, actually considered the evidence received in deciding on the course of action to follow, and made an express finding of preemption.

A court reviewing agency preemption decisions will need to employ several different substantive standards of review. In reviewing BLM decisions, a court must look for adequate evidence to meet the "maximum" consistency standard of section 1712(c)(9) of the FLPMA[187] and the even more rigorous standard that protects the viability of state or local pollution control laws.[188] In reviewing Forest Service decisions, the court must find that the agency attempted fairly to develop its land use plans to accommodate state and local rules.[189] In many specific instances, the court must look as well for compliance with the more particularized federal statutory requirements.[190]

In determining whether an agency satisfied these various statutory mandates, courts need to be flexible, if not somewhat innovative, in assessing the adequacy of the agency's action. In many Forest Service actions a court may apply this preemption test rather simply. The court might demand only limited information: evidence of a clear agency finding of preemption; evidence of a fair, open procedure designed to raise the relevant policy concerns in a timely way; and evidence that the agency action was not arbitrary and capricious.[191] In other settings, more should be required. Under the BLM maximum consistency standard, a court might require substantial evidence on the record supporting any BLM finding that federal and nonfederal rules are irreparably inconsistent.[192] In some settings, other review standards may be more appropriate.[193]

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the full value of the separate mineral interest. This result could constitute a taking. In most important respects, an unpatented mining claim is tantamount to a severed mineral right for this purpose. *See* United States v. Locke, 105 S. Ct. 1785, 1797-1801 (1985); Texaco, Inc. v. Short, 454 U.S. 516, 525-30 (1982); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Murphy v. Amoco Prod. Co., 729 F.2d 552 (8th Cir. 1984).

187. 43 U.S.C. § 1712(c)(9) (1982). *See supra* text accompanying notes 165-68, 171.

188. 43 U.S.C. § 1712(c)(8) (1982). *See supra* text accompanying notes 165, 171-74.

189. 16 U.S.C. § 1604(a) (1982). *See supra* text accompanying note 169.

190. *See supra* text accompanying notes 142-60.

191. *See* 5 U.S.C. § 706 (1982). *See generally* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

192. *See* 5 U.S.C. § 706 (1982). On the popularity of the substantial-evidence rule, see K. DAVIS, CASES ON ADMINISTRATIVE LAW 75 (1977).

193. Courts may be called upon to review an agency preemption decision in an action seeking direct judicial review of the agency decision. Alternatively, a court may face an action to halt a

This limited, site-specific preemption doctrine would improve materially on the preemption approach followed by the Ninth Circuit in *Ventura County* and *Granite Rock*. The Ninth Circuit, in striking down state permit requirements, assumed as a policy matter that the BLM and the Forest Service adequately assessed the environmental impacts of the mineral leasing and mining activities at issue.[194] In both cases, the court stressed the extensive supervisory role that the agencies undertook.[195] In neither instance, however, did the court examine whether the agency considered the wisdom of the nonfederal rules or the policy factors that lay behind them. In neither instance did the court examine what these agencies did. Indeed, in stating its holdings the court seemed to view these factors as irrelevant.

The limited preemption test here proposed would alter the Ninth Circuit approach by shifting the focus of attention to the agency and its conduct. The alteration will be a major one, but it is possible to see in *Granite Rock* a first step in the right direction. In the earlier Ninth Circuit ruling, *Ventura County*, the direct operation of the Mineral Leasing Act preempted the county rule, apparently without regard to any BLM action or inaction.[196] In *Granite Rock* the court modified this approach in a slight but significant way. The court concluded that the Mining Law *and* the Forest Service regulations in combination preempted the state permit rule.[197] These regulations required the Forest Service to ássess in detail the environmental effects of the proposed mining activities.[198] If the Forest Service had not undertaken this task, it is possible that the Mining Law, standing alone, would not have had a preemptive impact.

The shift in holdings from *Ventura County* to *Granite Rock* reflects an increased focus on agency action and a lessened focus on the federal statutes alone. Although well-aimed, this step took the court only part way and left the preemption rule on unsatisfactory middle ground. In its focus on Forest Service regulations, the court in *Granite Rock* seemed to assume that the state permit proceeding largely duplicated the Forest Service effort and sim-

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newly-started mining or logging operation on federal lands on the grounds of its noncompliance with some nonpreempted, nonfederal rule. In the former instance, the federal agency is the defendant/appellee in the case. In the latter instance, the federal agency might not be a party to the proceeding. This omission causes some inconvenience in bringing the full agency record before the court. Yet, the managing agency is likely to have enough at stake and is sufficiently knowledgeable of the matter that it will participate willingly, even if only in an *amicus* status.

One issue that courts must handle carefully is whether a participant in the original agency proceeding must challenge an adverse decision on direct review or whether the participant may wait and challenge the decision in a separate action (in state or federal court) seeking to halt a proposed development. Generally, the latter action should be allowed unless the collateral estoppel doctrine bars relitigation. In many instances, a party that seeks to bring a later separate action did not perceive enough at stake in the administrative proceeding to justify the troubles of a direct review action. A failure to seek review where little is at stake should not bar a later action when new circumstances increase the stakes. Moreover, the later separate action may provide a better setting for judicial review since it could involve a new factual setting that brings into better focus the interests underlying the nonfederal rule. Of course, a party that did not receive a fair chance to participate in the original agency proceeding should not be prejudiced by its failure to seek immediate judicial review.

194. *Granite Rock*, 768 F.2d at 1081, 1083; *Ventura County*, 601 F.2d at 1084, 1086.

195. *Granite Rock*, 768 F.2d at 1083; *Ventura County*, 601 F.2d at 1083.

196. *Id.*

197. 768 F.2d at 1080.

198. *Id.* at 1083 (citing 36 C.F.R. § 228 (1982)).

ply added a second level of environmental review where only one was needed.[199] This assumption of inherent duplication is likely to be invalid in many instances. In many cases the local rule will be based on factors different from those of interest to the federal agency. Even if the factors are the same, the state or local body may consider the physical impacts on nonfederal lands and the social and fiscal implications of the development activity in much more detail than the federal agency. The federal agency proceeding, moreover, may be poorly conducted and may not even fully air those relevant concerns specified in the agency regulations.

The court in *Granite Rock* erred in focusing on the agency regulations instead of on the actual agency proceeding. Focusing on the actual agency proceeding produces many benefits. First, it requires the federal agency to consider the relevant factors. Second, it leaves state and local officials with a greater sense that the agency adequately weighed their concerns. Third, it grants the federal agency the option to allow the nonfederal rule to survive, an option that the Ninth Circuit approach rules out.[200] Finally, it aids in creating a more complete record that facilitates later judicial review.

The limited preemption approach described in this Article comports well with the traditionally dominant role of local communities in land use planning. Land use decisions cannot be made intelligently without fair consideration of the many local effects of particular land uses. Local governments are often best equipped to handle this task, particularly when they are already engaged in determining the best uses of other surrounding nonfederal lands. For distant federal officials, such a planning task is more difficult but by no means impossible, especially if they receive sufficient input from the local public and from the nonfederal agencies. But preemption should occur only if federal officials, in fact, take on this planning function and consider and weigh the local desires and effects that should heavily influence a land planning decision.

This limited preemption approach comports as well with the recent decline of the scientific management paradigm. During the first half of this century, Congress turned federal land management issues over to professionally trained land managers. With little congressional guidance and no judicial interference, these professionals made land use decisions according to the dominant, scientific theories of proper land control.[201] In recent decades, confidence in the professional planning process has markedly de-

199. 768 F.2d at 1083.

200. In *Granite Rock*, the Forest Service officials reviewing the proposed mining operation plan stated that the company was responsible for complying with the state permit requirement. Yet, the court treated this statement as gratuitous and *ultra vires*. In the court's view, the mining laws and Forest Service regulations preempted the state permit rule: any action or inaction by Forest Service agents could not reverse that effect. By all appearances, then, the Forest Service agents were powerless to revive the effect of the state law. The Forest Service, however, should be able to require state law compliance as a condition of operating plan approval. This does not revive the effect of the state law, but nonetheless requires the company to comply with the law. The Forest Service as an agency, moreover, could change its regulations to reserve the power to preserve state law. This should succeed unless the court concludes that the mining laws standing alone carry preemptive effects.

201. *See* G. COGGINS & C. WILKINSON, *supra* note 19, at 468-69; P. GATES, *supra* note 19, at 568-84, 599-60, 610-32; ONE THIRD OF THE NATION'S LANDS, *supra* note 21, at 41-65; Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 268-78 (1978).

clined. Congress has bounded agency discretion in many ways, even on such detailed issues as the choice among types of even-aged management timber harvesting techniques.[202] More significantly, it is today clear that agency professionals are no better equipped than other informed citizens to make decisions based on fundamental values. They are no better able, for example, to decide the proper acreage for wilderness preserves, to choose between wildlife and oil production, or to assess the trade-off between economic growth and a nearby scenic mountainside unscarred by timber clear cuts and mining road erosion.

A limited preemption approach, although theoretically shifting power to state and local governments, is not likely to produce major, anti-development impacts. Local communities still benefit from economic development on federal lands. They, more than others, feel the employment increases and resulting secondary economic expansion. Shifting values are difficult to predict, but it seems likely that state and local governments will continue to place a high value on federal land development. They are not likely, it seems, to halt or obstruct development for insubstantial reasons when they will bear the principal ill-effects of such a halt.

A limited preemption approach also seems desirable because it is very much in line with the reasons for continued federal retention of large landholdings. Federal land retention began, in part, because of a perceived need to retain natural resources for future use by the federal government.[203] Retention was largely justified by the misuse and economic exploitation of lands turned over to private owners.[204] Congress desired to institute land use practices that preserved the long-term productivity of the land in order to serve the needs of future generations. This rationale persists today as the dominant, although by no means the exclusive, reason for federal land management.[205]

Quite clearly, the federal government does not retain land because of some perceived federal superiority in economically developing land. If the production of renewable and nonrenewable resources were the sole goal or even the primary goal, lands could easily be turned over to private parties for development.[206] The federal government retains land so that it can restrain and regulate, not promote, natural resource exploitation. This federal power to restrain is not reduced by a limited preemption doctrine. Such a doctrine simply augments the power of state and local governments to restrain as well. Indeed, a preemption doctrine that readily invalidates state and local restrictions seems at odds with the contemporary reasons for federal land ownership. The federal government does not own land to allow economic developers to escape state and local restraints on development. The Mining Law, to use an anomalous example, envisions that successful prospectors

202. 16 U.S.C. § 1604(g)(3)(E) (1982).

203. *See* P. GATES, *supra* note 19, at 726-45.

204. *See* P. GATES, *supra* note 19, at 563-84, 607-13, 724-45.

205. *See, e.g.*, M. CLAWSON, *supra* note 1, at 123-48; Sax, *The Claim for Retention of the Federal Lands* in RETHINKING THE FEDERAL LANDS 125 (S. Brubaker ed. 1984).

206. *See* M. CLAWSON, *supra* note 1, at 149-69; Gardner, *The Case for Divestiture* in RETHINKING THE FEDERAL LANDS 156 (S. Brubaker ed. 1984).

will proceed to obtain patents for their mining claims.[207] Under a broad preemption doctrine, a miner with an unpatented mining claim might be immune from state and local regulations; upon patent issuance, the culmination of the mining law process, federal land ownership would end and state and local rules would suddenly govern.

A limited preemption approach, most of all, encourages if it does not compel federal agencies to become responsible members of local communities. It recognizes the close ties between land and community. It stimulates federal land managers to consider the value judgments of local towns, counties, and states. In short, it transforms the federal government from an absentee landowner to a local one, a transformation that could well soften criticism of federal land ownership and thereby facilitate federal land management in the decades to come.

207. 30 U.S.C. § 29 (1982).