RECLAMATION OF STRIP-MINED FEDERAL LAND: PREEMPTIVE CAPABILITY OF FEDERAL STANDARDS OVER STATE CONTROLS

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In the aftermath of the 1973 Arab oil embargo and the consequent "energy crisis," many have come to assume that the future energy needs of the United States will be filled by coal, and goals for coal production have been increased greatly.[1] Much of this increase will come from the Western United States. Western coal is cheaper,[2] and reserves are vast.[3] Western coal also is more acceptable under the 1970 Clean Air Act,[4] since it is generally low in sulphur.[5] Although the federal government owns about 60 percent of western coal re-

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1. Preembargo estimates anticipated that 980 million tons of coal would be produced by 1985, up from about 600 million tons in 1972. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED FEDERAL COAL LEASING PROGRAM, table 1-4, at 1-25 (1975) [hereinafter cited as PROGRAMMATIC EIS]. Following the embargo, Project Independence set a goal of 1.2 billion tons by 1985. *Id.*

2. In 1973 strip-mined Montana coal sold f.o.b. mine for about $2.80/ton or 16 cents per million BTU. In contrast, strip-mined West Virginia coal sold for about $8.50/ton or 31 cents per million BTU. Underground eastern coal is even more costly. U.S. DEPARTMENT OF INTERIOR, EFFECTS OF COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS 17 (Final Interim Report, 1975).

3. Existing federal coal leases and pending preference-right leases are estimated to contain as much as 26 billion tons of recoverable coal reserves. PROGRAMMATIC EIS, *supra* note 1, at 1-81, tables 1-26 to -27. An additional 105 billion tons of nonfederal coal may already be under lease. Leshy & Lash, *A Black Mark*, 17 ENVIRONMENT No. 9, at 9 (Dec., 1975). The Northern Great Plains alone is expected to produce 977 million tons of coal per year by the end of the century, given an accelerated pace of development. U.S. DEPARTMENT OF INTERIOR, *supra* note 2, at 44. On this basis, the Northern Great Plains should have 64 mines exporting coal by the year 2000, along with 25 new coal-fired plants and 41 coal gasification plants. Additionally, 14 such power plants are planned for the Four Corners area. TIME, Mar. 1, 1976, at 46-47.

4. Clean Air Amendments of 1970, 84 Stat. 1676 (codified in scattered sections of U.S.C.); PROGRAMMATIC EIS, *supra* note 1, at 1-26 to -27; U.S. DEPARTMENT OF INTERIOR, *supra* note 2, at 2.

5. PROGRAMMATIC EIS, *supra* note 1, at 1-34.

sources, ownership patterns give it effective control over development of more than 80 percent of these resources.[6] Most of the recoverable coal reserves in the West are overlain with relatively thin layers of topsoil, and the coal is therefore accessible primarily by surface mining methods.[7]

Almost simultaneously with this new coal rush in the West, state and local officials have rediscovered the once popular doctrine of states' rights. As a result, greater state control has been sought over actions and programs of the federal government. In particular, the concern of western state governors about federal encroachment in the energy field[8] has become increasingly pronounced, with assertions of state sovereignty gaining force.[9] As energy resources are developed in the West, various areas of federal-state conflict will emerge. It is already evident that there are distinct differences of opinion regarding certain

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6. *Id.* at 1-27.
7. *Id.* at 1-37.
8. Such concern, of course, involves many areas—labor, welfare, agriculture, and various domestic assistance programs, for instance. However, nowhere is the concern greater than in the energy field. As one commentator has reported, "State sovereignty, eroded through years of quiet abdication to the federal regulatory behemoth, may be staging a comeback, with the issue of energy resource development as the rallying point." Nicklaus, *Energy Fuels States Rights*, Albuquerque Journal, Nov. 16, 1975, § A, at 8. This "new federalism," *see* remarks of Jack Horton, Ass't Secretary of Interior, in Billings, Mont., Apr. 1, 1975, as reported in Billings Morning Gazette, Apr. 2, 1975, appears to represent a reawakening among political liberals of a position long favored by conservative commentators. *See* Broder, *Control of Congress Required*, Rocky Mountain News, Nov. 21, 1975, at 75, col. 1; Kilpatrick, *New York City Changes Grand Design*, Denver Post, Dec. 9, 1975, § B, at 20, col. 2.
9. A federal official recently stated that the question in energy development was whether the federal government should "dig up the west or tape it over with solar panels." Remarks of Robert W. Fri, Deputy Administrator of the United States Energy Research & Development Administration, to New York Conference, as reported in Rocky Mountain News, Nov. 16, 1975, at 7, col. 2. Western governors have increasingly expressed opposition to the attitude embodied in such remarks. For example, Governor Richard Lamm of Colorado has said that the states must seek more involvement in the federal funding process for domestic programs or risk becoming vassals of the central government. "There is a strong and widespread feeling that our federal system is not working well and that it is badly out of balance." Remarks of Governor Richard Lamm at Nat'l Governors' Conference, Washington, D.C., Feb. 22, 1976, as reported in Rocky Mountain News, Feb. 23, 1976, at 6, col. 1. Governor Thomas Judge of Montana has stated that he is not satisfied with the Interior Department's offers of cooperation. "I'd like the final say and the turn-down and be able to say where mining should and shouldn't take place." Denver Post, July 30, 1975, at 3, col. 4. Former Governor Tom McCall of Oregon has urged that states resist federal inroads in many areas, particularly in collective bargaining and energy facility siting. "[Federal] politicians and bureaucrats can play one [state] against another. Get your own act together and the federal government will go back to being what it was destined to be." Rocky Mountain News, Aug. 16, 1975, at 8, col. 3; Denver Post, Aug. 16, 1975, at 2, col. 6. Governor Mike O'Callaghan, chairman of the Western Governors' Conference, has said that "[t]here will be a demand by some of the governors that the states have more of a voice in decision making about the federal lands in their states." Rocky Mountain News, Sept. 20, 1976, at 34, col. 1. This feeling has probably been best summarized by Governor Jerry Apodaca of New Mexico, who said that "the west will not become the energy colony for the rest of the nation." Rocky Mountain News, Nov. 16, 1975, at 7, col. 2. *See also* Lundstrom, *Energy and States' Rights*, THE NATION, Sept. 11, 1976, at 208.

aspects of strip mining.[10] Among the most significant of these emerging federal-state energy development conflicts is the issue of control and jurisdiction over federal land during and after strip mining.

This Article will focus on this emerging conflict and the various steps that have been taken toward its resolution. A brief background of correlative state and federal control over reclamation of strip-mined federal land initially will be traced. Legislative and executive efforts to address this problem then will be surveyed. Finally, the constitutional doctrines governing federal preemption and control of federal property will be analyzed as a basis for determining whether federal directives completely replace state standards governing reclamation of strip-mined federal land. The preemption concept will be examined with regard to both congressional and executive mandates, and the consequent status and effect of state standards will be suggested.

HISTORICAL PERSPECTIVE

The concern over whether the federal or state government has control over strip-mined federal land is a very recent development. Primarily two factors account for this. First, coal from strip-mined federal land has played a very small part in overall United States' coal production through the years.[11] Until very recently, most of the controversy regarding strip mining centered on nonfederal coal areas, such as Appalachia. However, production from western coal lands has increased markedly since 1960 and much of the future increase will come from federal land.[12] As more and more federal coal is strip-mined in the West, state and environmentalist concern over reclamation will grow.

The second and primary reason for the lack of past concern for control over reclamation of strip-mined federal land is that the federal government made virtually no effort to exercise control. The vacuum left by federal inaction was filled by state officials who simply assumed control of reclamation on federal land under the terms of state law or under the express terms of federal coal leases. Although the

10. In addition to the issue of control and jurisdiction over strip-mined federal land, there are questions regarding state versus federal control over the leasing and development of federal coal, the siting of coal or nuclear energy facilities utilizing western resources, and the assistance to areas impacted by rapid energy development.

11. Federal production was just a little more than 1.5 percent of United States production in 1972, or 10.2 million tons out of a total of 595 million tons. PROGRAMMATIC EIS, *supra* note 1, at tables 1-4, 1-6.

12. Western coal, which once accounted for 3 percent of total production, now accounts for 8 percent and is projected to be as much as 18 percent of the total by 1980. PROGRAMMATIC EIS, *supra* note 1, table 1-4, at 1-25 to -27. By 1974 production of coal under federal lease amounted to 3 percent of the United States total. H.R. REP. No. 681, 94th Cong., 2d Sess. 9 (1976).

Mineral Leasing Act of 1920[13] permits the Department of Interior to issue regulations to carry out the purposes of the Act,[14] no reclamation regulations were issued until 1975.[15] The practical result of this inaction was that, although mine operators might have to obtain both state and federal mining permits, they were subject to only state reclamation regulations or legislation. Of those western states having mined-land reclamation laws,[16] all specifically or impliedly apply the state law to federal, state, and private land.[17]

Beneath the surface, however, a conflict was gradually developing based on an emerging federal policy of claiming plenary authority over federal land.[18] Under this theory, states are devoid of authority over federal land except as consented to by the United States. The states, predictably, have reacted unfavorably to such assertions of exclusive federal jurisdiction over mined-land reclamation, contending

13. 30 U.S.C. §§ 181-287 (1970).
14. *Id.* § 189.
15. 40 Fed. Reg. 4428-38 (1975) (proposed 30 C.F.R. § 211).
16. Colorado, Montana, New Mexico, North Dakota, South Dakota, Utah, and Wyoming all have mined-land reclamation statutes. See COLO. REV. STAT. ANN. §§ 34-32-101 to -32-118 (1973 & Supp. 1975); MONT. REV. CODES ANN. §§ 50-1034 to -1057 (Supp. 1975); N.M. STAT. ANN. § 63-34-8 (1974); N.D. CENT. CODE §§ 38-14-01 to -14-13 (Supp. 1975); S.D. COMPILED LAWS §§ 45-6A-1 to -6A-33 (Supp. 1976); UTAH CODE ANN. §§ 40-8-1 to -8-23 (Supp. 1975); WYO. STAT. §§ 35.502.20-.502.41 (Cum. Supp. 1975). Only Arizona and Nevada—neither presently mining much coal susceptible to strip mining—do not have such legislation.
17. The Colorado reclamation statute provides for the reclamation of "land subjected to surface disturbance by open mining," COLO. REV. STAT. ANN. § 34-32-102 (1973), and the regulations promulgated under the act "govern the reclamation of *all* open mining operations on *all* lands within the State of Colorado." Proposed Colorado R. & Reg. of the Land Reclamation Board, I-A-3 (1976) (emphasis added). Similarly, the Wyoming Environmental Quality Act of 1973 is intended to apply to all land in Wyoming, WYO. STAT. §§ 35-502.20, 35-502.23 (Cum. Supp. 1975), and the regulations issued thereunder provide for application to "*all* lands affected by any aspect of a mining operation." WYO. LAND QUALITY R. AND REG., ch. II, sec. 1 (1975) (emphasis added). North Dakota law provides that it is unlawful "for *any* operator to engage in surface mining of coal without first obtaining from the commission a permit to do so," N.D. CENT. CODE § 38-14-03 (Supp. 1975) (emphasis added); and the same 1975 law purports to give the state commission the power to deny approval of a mining plan if the operation will "adversely affect state, national, or interstate parks, or any historical, archaeological, or paleontological site," *Id.* § 38-14-05.1(5). New Mexico provides that "*no person* may engage in stripmining without a stripmining permit issued by the commission for that particular mine." N.M. STAT. ANN. § 63-34-6 (1974) (emphasis added). The New Mexico regulations specifically provide that operators of mines on a federal coal lease may submit their approved federal mining plan, plus supplementary information required by the New Mexico law, in order to comply with the New Mexico act. N.M. COAL SURFACE MINING COMM'N REG. sec. 14 (1973). A host of Montana strip mine acts purport to apply Montana laws and regulations to all strip mine operations within the state. *See* Strip and Underground Mine Reclamation Act, MONT. REV. CODES ANN. §§ 50-1034 to -1057 (Supp. 1975), and regulations thereunder; Strip Mined Coal Conservation Act, *id.* §§ 50-1401 to -1409, and regulations thereunder; Strip and Underground Mine Siting Act, *id.* §§ 50-1601 to -1617, and regulations thereunder.
18. Statements by Raymond A. Peck, then Acting Deputy Ass't Secretary of Interior for Lands and Minerals (Power and Regulations), in Denver, Colo., Sept. 2, 1975. *See* INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART II: A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION 251-52 n.6 (1957); PUBLIC LAND LAW COMM'N, ONE THIRD OF THE NATION'S LAND 278 (1970).

that state reclamation law should coexist with federal law on federal land and should control where more stringent.[19] This underlying jurisdictional controversy blossomed in 1975 with proposals by both the legislative and executive branches of the federal government for regulatory schemes governing strip mining. Reclamation proposals were advanced as part of both schemes. The debate in each case brought to the forefront the need to reconcile national interests in coal production and in the management of United States' property with state concerns regarding the impact of surface mining on the lands and people within their borders.

RECENT FEDERAL EFFORTS TO RESOLVE THE JURISDICTIONAL CONFLICT

The congressional effort to control strip mining centered on House Resolution 25—the Surface Mining Control and Reclamation Act of 1975—which, following passage by both houses of Congress, was blocked by a Presidential veto.[20] The Surface Mining Act made major concessions to state reclamation policy and law, Congress having found that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this act should rest with the states."[21] The basic scheme of the Act established minimum federal reclamation standards for federal, state, and private land, to be supplemented by more stringent state standards.[22] Thus, a state law setting standards more restrictive than those in the federal act was expressly recognized as applicable to federal as well as to state and private land.[23]

Following the veto of the Surface Mining Control and Reclamation Act, an attempt was made in the Senate to resurrect a federal strip mine bill by attaching the vetoed Act's provisions dealing with

19. The 10 states comprising the Western Governors' Regional Energy Office, Inc. —Arizona, Colorado, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming—maintain that state laws should control reclamation on federal lands, as long as the state law is as stringent as, or more stringent than, the federal standard.

20. H.R. 25, 94th Cong., 1st Sess. (1975) (vetoed on May 20, 1975, an attempt to override failing on June 10, 1975). A predecessor to the House bill—S. 425, 93d Cong., 2d Sess. (1974)—also had been vetoed by President Ford.

21. H.R. 25, 94th Cong., 1st Sess. findings, § (e) (1975).

22. The resolution provided in part: "Any provision of any State law or regulation . . . which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operations than do the provisions of this Act . . . shall not be construed to be inconsistent with this Act." *Id.* § 505(b).

23. This scheme was manifested in the following language:

> Each state in which there is, or may be, conducted surface coal mining operations, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, shall submit to the Secretary . . . a state program which demonstrates that such State has the capability of carrying out the provisions of this Act . . . .

Id. § 503(a). Such provisions of the Surface Mining Control and Reclamation Act

public lands to Senate Bill 391,[24] a bill amending the Mineral Leasing Act of 1920.[25] However, the House deleted the added provisions,[26] an amendment in which the Senate reluctantly concurred.[27] Thus, when Senate Bill 391 was finally passed over a veto by President Ford,[28] its only provision in regard to reclamation required the lessee to submit a reclamation plan for the Secretary of Interior's approval not later than 3 years after issuance of a lease.[29] A reintroduced House

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of 1975 manifested a congressional belief that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this act should rest with the states." *Id.*, findings § (e).

24. 122 CONG. REC. 9981 (daily ed. June 21, 1976) (remarks of Senator Lee Metcalf); *see* S. 391, 94th Cong., 1st Sess. (1975). Cognizant of the problems which might result from subjecting federal lands to standards different from those governing state and private lands under state law, the Senate provided a mechanism for encouraging uniformity between state and federal standards. The bill incorporated into federal leases such state reclamation laws as were found to conform with the requirements of the bill. *Id.* tit. II, § 202(c). Additionally, it provided for federal-state cooperation whenever "non-Federal and Federal lands . . . are interspersed or checkerboarded and . . . should, for conservation and administrative purposes, be regulated as a single management unit." *Id.* § 202(e).

25. 30 U.S.C. §§ 181-287 (1970).

26. *See* 122 CONG. REC. 168-71 (daily ed. Jan. 21, 1976). The House substituted its own coal leasing bill, H.R. 6721, 94th Cong., 1st Sess. (1975), which was a companion bill to Senate Bill 391 without strip mine provisions. The coal leasing bill had originally been intended to follow and supplement strip mining legislation. 122 CONG. REC. 13197 (daily ed. Aug. 3, 1976).

27. 122 CONG. REC. 9988 (daily ed. June 21, 1976); *see id.* at 9981 (remarks of Senator Lee Metcalf).

28. President Ford vetoed Senate Bill 391 on July 3, 1976. In his veto message, the President declared that the bill "would insert so many rigidities, complications, and burdensome regulations into Federal leasing procedures that it would inhibit coal production on Federal lands, probably raise prices for consumers, and ultimately delay our achievement of energy independence." 122 CONG. REC. H. 8311 (daily ed. Aug. 4, 1976). The President specifically objected to "the way that S. 391 restricts the flexibility of the Secretary of the Interior in setting the terms of individual leases so that a variety of conditions—physical, environmental and economic—can be taken into account." *Id.* Although the President believed that the bill would adversely affect domestic coal production, he did recognize "sound reasons for providing in Federal law—not simply in Federal regulations—a new federal coal policy that will assure a fair and effective mechanism for future leasing." *Id.*

The Senate overrode the President's veto of Senate Bill 391 on Aug. 3, 1976, by a vote of 76 to 17. 122 CONG. REC. 13204 (daily ed. Aug. 3, 1976). The House did likewise on Aug. 4, 1976, by a vote of 316 to 85. 122 CONG. REC. 8311-20 (daily ed. Aug. 4, 1976).

29. Pub. L. No. 94-377, § 6, 90 Stat. 1083, *amending* 30 U.S.C. § 201(a) (1970), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2895. Even this provision caused some controversy and was cited by President Ford as one of his grounds for vetoing the bill. *See* 122 CONG. REC. 8311 (daily ed. Aug. 4, 1976). Although the 3-year reclamation provision was initially inserted at the request of the Department of Interior, 122 CONG. REC. 8312 (daily ed. Aug. 4, 1976) (remarks of Representative Patsy Mink), Secretary Kleppe later reversed his position, stating:

> It would be impossible in many instances to comply with the requirement to prepare a detailed mining and development plan within three years after issuance of a lease. Lessees must obtain suitable markets, analyze reserves, arrange transportation, complete baseline data programs, and plan environmental protection efforts before they can complete the development and submission of mining plans which describe proposed operations in the detail and specificity which the Interior Department already requires in order to assure attainment of environmental and production goals.

Letter from Thomas Kleppe, Secretary of the Department of Interior, to Nelson A.

strip mine bill[30] has been tabled since March 23, 1976.

Shortly before the President's veto of the Surface Mining Act, the Department of Interior issued the first draft of proposed federal coal mine operating regulations.[31] Most observers believe the issuance of such regulations was an attempt to reduce support for renewed attempts at congressional strip mine legislation. In any event, the January 1975 draft of proposed regulations omitted any reference to the application of state law to federal land. After extensive discussion and comment, the coal mine operating regulations were reissued in September 1975, again as proposed regulations.[32] The September 1975 version of the proposed regulations specifically addressed the question of jurisdiction and control of reclamation on federal lands, providing that state controls regarding reclamation of land disturbed by surface mining of coal would apply to federal land, but only if their application were deemed appropriate by the Secretary of the Interior.[33] In making this determination, the Secretary had to find that the state standards were no less stringent than federal controls and that application of state law "would be consistent with the interest of the United States in the timely and orderly development of its coal resources."[34]

Rockefeller, President of the Senate, Aug. 3, 1976 (reprinted at 122 CONG. REC. 13193 (daily ed. Aug. 3, 1976)).

Deputy Assistant Secretary of Interior Raymond A. Peck has also been quoted as stating that the provision is less satisfactory from an environmental standpoint than departmental regulations requiring approval of such plans only "before significant groundbreaking," 30 C.F.R. § 211.10(a)(1) (1976), a point which often occurs more than 3 years after the lease is granted. According to Peck, the requirement "will produce artificial and speculative plans" which will need constant amending, thus forcing environmentalists to deal with a "moving target." [1976] 7 ENVIR. REP. (BNA) 573-74.

Senator Lee Metcalf, in rejecting Interior Secretary Kleppe's objection to the provision, countered:

> If production is to occur by the tenth year, as required by the bill, then it is a matter of some urgency that the lessee begin timely development of his mining and reclamation plan so as to allow sufficient time for review, modification—if necessary—and approval by the Secretary.

122 CONG. REC. 9983 (daily ed. June 21, 1976).

30. H.R. 9725, 94th Cong., 2d Sess. (1976). This bill is virtually identical to vetoed H.R. 25. See text & notes 21-23 *supra*.

31. 40 Fed. Reg. 4428-38 (1975).

32. 40 Fed. Reg. 41122-39 (1975). As originally planned, these proposed regulations were to become part of 30 C.F.R. § 211 and 43 C.F.R. § 3041.

33. 40 Fed. Reg. 41138 (1975) (proposed 30 C.F.R. § 211.74).

34. *Id.* The exact wording of the September version of the proposed regulations was as follows:

> (a) Upon request of the Governor of any State, the Secretary shall promptly review the laws, regulations, administrative practices and procedures in effect, or due to come into effect, with respect to reclamation of lands disturbed by surface mining or coal, subject to the jurisdiction of that State, to determine whether such controls may appropriately be applied as Federal law to operations relating to coal owned by or subject to the jurisdiction of the United States. He shall take into account all relevant constructions and applications of such controls by competent State and local judicial and regulatory authorities, the desirability and practicability of uniformity between Federal and State controls, and the public policy of the State regarding the development of coal resources located therein.
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> (b) After such review, the Secretary may, by order, direct that all or part

The significance of the proposed change as to the application of state law was not lost on state officials, environmentalists, or federal legislators. Unfavorable comment on the proposed section abounded.[35] The requirement particularly objected to was that state law be "consistent with the interest of the United States in the timely and orderly development of its coal resources."[36] This, it was argued, gave the federal government a means of preempting more stringent state standards.[37]

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of such State laws, regulations, practices, and procedures shall be applied as Federal law by the authorized officers of the Department with respect to coal within that State owned by or subject to the jurisdiction of the United States, if he determines that such application would (1) effectuate the purposes of this Part; (2) result in protection of environmental values which is at least as stringent as would otherwise occur under exclusive application of Federal controls; and (3) would be consistent with the interest of the United States in the timely and orderly development of its coal resources.

Id. at 41138; *see id.* at 41130.

35. For example, the Senate Interior Committee said: "with regard to State reclamation laws, it is our firm conviction that all State air and water quality standards should be enforced on Federal lands, and that Federal reclamation standards should be at least as stringent as State laws, with the exception of cases where States prohibit surface mining." Letter from Senators Henry Jackson, Floyd Haskell, and Lee Metcalf to Acting Secretary of Interior Kent Frizzell, Oct. 9, 1975, at 8.

36. In this regard, the Environmental Policy Center offered the following observations:

In other words, the proposed regulations do not establish a mechanism to balance Federal-State authority, but, rather establish a mechanism whereby the Federal government can pre-empt State laws and regulations by simply finding that all three conditions . . . do not exist. The most obvious mechanism to allow Interior to supercede more stringent state laws regulating surface coal mining, would be to make the finding . . . that the more stringent state laws are *not* "consistent with the interest of the United States in the timely and orderly development of its coal resources."

Unless it is indeed the intent of the Department of Interior . . . to supersede state laws and authority, where the states have enacted laws and regulations more stringent than the proposed regulations, the Interior Department should clarify in subsequent proposed regulations that more stringent state statutes and regulations shall not be construed to be inconsistent with the interest of the United States.

Comments of Environmental Policy Center on proposed 30 C.F.R. § 211 and 43 C.F.R. § 3041, Nov. 25, 1975.

37. For example, the State of Colorado took the following stand:

I. *APPLICATION OF STATE LAWS TO RECLAMATION ON FEDERAL LANDS*

Colorado believes that application of state reclamation standards to all coal mining operations is imperative. The failure to do so will create dual reclamation systems, federal/state confrontations, and unfair burdens for mining operators.

The proposed regulations erode and pre-empt areas of traditional state involvement. By establishing new federal regulations with accompanying enforcement mechanisms, long-standing state jurisdiction over such mining operations is brought into question. Will both state and federal regulations apply? Will operators apply to both governmental entities? Will bonds be required for state and federal permits? What will happen when standards or enforcements decisions conflict?

Colorado's position is that state laws will apply to mining on federal lands, and it is the intention of Colorado to enforce state laws in all instances, unless agreement can be worked out with our federal counterparts. We will not simply vacate our traditional, long-standing role in this area because of the advent of new federal regulations.

Testimony submitted to Dep't of Interior by Harris Sherman, Director, Colorado Dep't

Possibly in response to such criticism, the final version of the regulations made significant changes in this area from the September draft. Although the Department of Interior has not disclaimed general and complete control over reclamation of strip-mined federal land,[38] the final version of the regulations allows the states a greater voice in the matter.[39] The federal regulations now provide that if state standards "afford general protection of environmental quality and values at least as stringent" as the federal regulations themselves, the state controls will apply.[40] This deference to state law is qualified, however, in that state requirements may be overridden if they "would unreasonably and substantially prevent the mining of Federal coal . . . and . . . it is in the overriding national interest that such coal be produced without such application of [the state's] requirements."[41] This limitation is

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of Natural Resources, for public hearings on proposed regulations in Denver, Colorado, Dec. 9, 1975.

The Western Governors' Regional Energy Policy Office, Inc., a coalition of 10 western Governors facing similar energy development problems, commented on the proposals as follows:

> We propose the following substitute language . . .:
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> "This part does not preempt or affect the application of State reclamation law to exploration or mining operations involving federal coal, and operators must comply with such State laws.
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> "Federal exploration and/or mining plans shall not be issued until the mining supervisor has received written confirmation within a reasonable time from the State official having responsibility for the administration of State reclamation laws that such plan may be implemented consistent with the State mining plan or permit. In order to assure consistency between the Federal and State requirements, the mining supervisor must consult with the State official. Provided that the State requirements are as stringent as, or more stringent than, the operating or reclamation standards contained in this part, the mining supervisor must include such requirements in the Federal plan unless the Secretary finds in writing and on the basis of substantial fact that (1) such State requirements will arbitrarily and capriciously prevent development and mining for the Federal coal and (2) it is in the overriding national interest not to apply such State requirements to that particular mining plan."
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> We recommend that in every instance where state reclamation standards are as stringent, or more stringent than, federal standards, the Secretary enter into a memorandum of agreement or understanding between that state and the appropriate federal agencies. Such agreement will specify that the state shall have responsibilities for administration and enforcement of the applicable reclamation laws, unless that state shall specifically request other administration and enforcement procedures.
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> . . . .
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> We feel that the application of state law, and the administration and enforcement of the reclamation law by state officials, is of paramount importance. We think that state reclamation laws can be more properly tailored to the situation in each state. However, in any case, we believe that federal reclamation regulations should establish a minimum standard to be applied in each state.

Letter from W.L. Guy, Staff Director, Western Governors' Regional Energy Policy Office, Inc., to Thomas Kleppe, Secretary of Interior, Dec. 22, 1975, at 2.

38. See text accompanying note 18 *supra.*

39. 41 Fed. Reg. 20252-73 (1976) (adding 43 C.F.R. § 3041 and amending 30 C.F.R. § 211).

40. 30 C.F.R. § 211.75(a) (1976).

41. *Id.* § 211.75(a)(i)-(ii). This language substantially reflects the suggestion of the Western Governors' Regional Energy Policy Office, Inc., *see* text of suggested regulation note 37 *supra,* though the words "unreasonably and substantially" have been sub-

mitigated slightly by requiring that the governor of the state be consulted before state controls are superseded.[42]

Although this final version gives the states greater leeway in controlling reclamation, it fails to clarify whether the regulations are intended to and do in fact preempt state law. There are two permissible interpretations of their effect: under the first, the section would preempt all state law,[43] but permits the Department of Interior to adopt state regulations as federal law for application to federal land; an alternative reading would permit continued application of state law to federal land, in lieu of the federal reclamation standards set forth in the regulations. The states have consistently urged the latter interpretation, and that view appears to have been confirmed by a policy statement recently issued by the Secretary of Interior:

> It is and has been my intention that the regulations dealing with reclamation operations on Federal lands [30 CFR part 211] be consistent with the well established policy of this Department which recognizes that the Federal government and the respective state governments have jurisdiction to regulate reclamation subject to the protection of paramount Federal interests. . . . [T]hese regulations do not, nor were they intended to preclude the application of the reclamation laws and regulations of the respective State as they may relate to Federal coal lands covered by the Mineral Leasing Act.[44]

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stituted for "arbitrarily and capriciously." Where only certain provisions of the state reclamation law are found contrary to the national interest, the remainder of the state law must be adhered to. 30 C.F.R. § 211.75(a)(iii) (1976).

42. 30 C.F.R. § 211.75(a)(2) (1976). This regulation also provides for formulation of "a joint Federal-State program with respect to surface coal mining reclamation operations for administrative and enforcement purposes," with state administration and enforcement controlling such programs as long as federal interests are protected. *Id.* § 211.75(b). This provision is specifically aimed at avoiding "[d]uality of administration and enforcement of reclamation laws governing surface coal mine reclamation operations." *Id.*

Several additional provisions of the new regulations also have a bearing on the issue of reclamation of strip-mined federal land. For example, the regulations provide generally that "the policy of the Department [is] to issue leases, permits and licenses for coal only where reclamation of the affected lands to the [regulations'] standards . . . is attainable and assured and a reclamation program will be undertaken as contemporaneously as practicable with operations." 43 C.F.R. § 3041.0-1(b) (41 Fed. Reg. 20253 (1976)). Additionally, the regulations refer twice to a mining operator's duty to reclaim affected lands "to a condition capable of supporting all practicable uses which such lands were capable of supporting immediately prior to any exploration or mining . . . ." *Id.* § 3041.2-2(f)(1) (41 Fed. Reg. 20257 (1976)); 30 C.F.R. § 211.40(a)(1) (1976).

43. The constitutional question of preemptive capability is treated at text accompanying notes 50-101 *infra.*

44. Policy statement, issued by Thomas Kleppe, Secretary of Interior, in attachment to letter to Governor Thomas Judge of Wyoming, October 12, 1976. In response to concerns voiced by state officials, Deputy Under Secretary William Lyons has assured states that the phrase "paramount federal interests," as used in the policy statement, is intended to mean no more than those interests defined by the "national interest" and "unreasonably and substantially prevent" clauses of 30 C.F.R. 211.75(a) (1976).

If there is now general agreement that the regulations are not intended to preempt state law, there remain substantial problems and disagreements concerning the application of these provisions. First, the provision permitting the Secretary to override state law under the "national interest" and "unreasonably and substantially prevent" clauses[45] appears inconsistent with a lack of preemptive intent. Reconciliation is possible only by viewing these clauses as merely a restatement of what is implicit in sections 30 and 32 of the 1920 Mineral Leasing Act:[46] that state law applies unless the state regulatory scheme is such as to defeat the purpose of the federal law.[47]

A second potential problem arises from the Department of Interior's limitation of the types of state laws encompassed by the regulation to reclamation performance standards.[48] In proposing the adoption of Wyoming's reclamation statute the Department clearly indicated that procedural laws relative to permits, bonding, variances, surface owner consent, and designation of land unsuitable for mining were not within the regulation's scope and therefore could be adopted.[49] The states, on the other hand, see no provision for selectively preempting portions of state law or for considering only portions of a law for inclusion under section 211.75(a). Rather, they view the regulation as requiring that the Secretary accept or reject the state reclamation scheme in its entirety.[50]

Although it is possible that some of these questions may be resolved by negotiation, the legal and constitutional status of state reclamation controls under section 211.75 can be determined only by

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These assurances were given at a meeting of western states and Interior officials, in Denver, Colorado, October 29, 1976.

45. 30 C.F.R. § 211.75(a)(i)-(ii) (1976).

46. 30 U.S.C. §§ 187, 189 (1970).

47. Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966); *see* text & notes 80-90 *infra*.

48. 41 Fed. Reg. 35717 (Aug. 24, 1976).

49. On September 23, 1976, the Department of Interior held hearings on the proposed adoption of Wyoming reclamation regulations. State officials, industry representatives, and environmentalists all objected to the narrow reading used by the Department in assessing the Wyoming law. At that hearing the Governor of Wyoming testified that "[t]he proposed amendment is deficient because it excludes Wyoming laws dealing with mining permits, performance bonds, bond release, lands unsuitable for surface mining, and variance procedures. . . . The piecemeal adoption of Wyoming law proposed in your regulations constitutes an attempt by the Department of Interior to deprive Wyoming's citizens of the environmental safeguards adopted by our state legislature." Testimony of Governor Ed Herschler, September 23, 1976.

50. The regulation permits agreements between the Department of Interior and states for enforcement and administration of reclamation regulations. 30 C.F.R. § 211.75 (b) (1976). The Department takes the position that state regulations not included nor adopted under section 211.75(a) are subject to inclusion in a 211.75(b) agreement. In other words, "what we don't include under (a), we will pick up under (b)." Statements by William Lyons, Deputy Under Secretary of Interior, at meetings in Denver, Colo., October 13, 29, 1976.

examining the constitutional scope of the federal directives vis-à-vis stricter state standards.

CONSTITUTIONAL PRINCIPLES GOVERNING STATE AND FEDERAL RECLAMATION JURISDICTION

The foregoing legislative and executive developments in the area of reclamation of federal strip-mined property provide a background for analysis of the constitutional issues concerning jurisdiction and control over reclamation on such land. Two basic constitutional precepts are of particular significance here—the division of governmental power over federally owned property under articles I and IV of the United States Constitution, and the capability of the federal government to preempt state action in certain areas.

The Extent of Federal Power Under the Article IV Property Clause

The issues under the article IV property clause, while related to the preemption question, are at the same time entirely independent thereof. The initial determination must be whether either or both of the federal and state governments have sovereign authority over article IV lands. Only if it is found that both have such authority does the question of preemption in the event of conflict take on significance.

Although article IV of the Constitution enumerates a congressional power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," there is substantial evidence that this power was viewed not as a sovereign power of governmental jurisdiction, but as the power merely of a proprietor, subject to limitation by state law just as is the power of a private proprietor.[51] Thus, the classic view interpreted article IV as recognizing sovereign authority in the states and con-

51. *E.g.*, Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); State v. Bonelli Cattle Co., 108 Ariz. 258, 495 P.2d 1312 (1972); Electric Construction Co. v. Flickinger, 12 Ariz. App. 500, 472 P.2d 111 (1970); Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 290-96 (1976).

Article I, § 8 of of the Constitution gives to Congress a power of "exclusive [l]egislation" over certain property, a power which has been interpreted as totally excluding state jurisdiction over such lands. *See* Reily v. Lamar, 6 U.S. (2 Cranch) 344 (1805); United States v. Cornell, 25 F. Cas. 650 (C.C.D.R.I. 1820). This provision, however, is operative only as to lands used for "Forts, Magazines, Arsenals, Dock-yards and other needful Buildings," James v. Dravo Contracting Co., 302 U.S. 134, 141 n.3 (1937), *quoting* U.S. CONST. art. 1, § 8, cl. 17, as to which the state has ceded jurisdiction. Little of the federal land on which mining is permitted comes under the article I property clause, almost all such land being article IV "public domain" land. Of the 761 million acres of federal land, 704 million fall under this classification. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS, table 7, at 10 (1975).

ferring no such authority on the federal government.[52] Even under these classic principles of property clause doctrine, however, there were two avenues to preemption by federal enactments under the property power.

It has long been recognized that the federal government has the exclusive power to control acquisition of title and other rights in federal land.[53] Moreover, as an adjunct to this power, Congress has authority to protect the federal property interest, laws enacted pursuant thereto being preemptive of contrary state laws.[54] The recent federal reclamation initiatives could be viewed as encompassed within this rule. The inherent objective of a reclamation law is to minimize the destruction to the land from strip-mining activities. Additionally, both the vetoed bill and the Interior Department regulation would expressly supercede state reclamation laws failing to meet certain minimum standards, giving effect only to those state laws imposing standards more stringent than the federal restrictions.[55] Such provisions further demonstrate the protective purpose underlying the federal regulation. This rationale, however, provides no basis for preemption of state laws which give protection at least equal to that provided by the federal standard. In addition, questions remain regarding the provision allowing the Secretary of Interior to disregard state reclamation laws where they would unreasonably, substantially, and contrary to the national interest prevent the mining of federal coal.[56] Such a determination by the Secretary would not be based on protection of the land, but rather on questions of the national interest in energy production. Whether a statute must be read as a whole in determining its protective purpose, or whether each provision must be read separately, is a question as yet unresolved. The difficulty of applying the latter method, however, along with the courts' generally expansive view of federal power,[57] might favor the former rule.

The "national interest" provision might qualify for preemptive power in any event under a second exception to the classic property clause principles. As pointed out above, Congress' use of article IV property as a means for effectuation of an enumerated sovereign power would have preemptive force by virtue of the enumerated

52. Engdahl, *supra* note 51, at 290-96.
53. *See, e.g.*, Broder v. Natoma Water Co., 101 U.S. 274 (1879); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92 (1872); Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858).
54. *E.g.*, Hunt v. United States, 278 U.S. 96 (1928); United States v. Alford, 274 U.S. 264 (1927); Camfield v. United States, 167 U.S. 518 (1897).
55. 30 C.F.R. § 211.75 (1976).
56. *Id.*
57. *See, e.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) (dam construction furthers Congress' power over river navigation).

objective.[58] There is no indication that either the Mineral Leasing Act or Senate Bill 391 was enacted pursuant to the commerce power or any other sovereign power of Congress. Nevertheless, an argument could be made that these enactments are within the scope of the commerce and defense powers. Minerals developed from federal land invariably are destined for interstate commerce, and energy-producing minerals in particular are critical to such commerce and also are heavily involved in international relations. The new federal regulations specifically delimit the national interest in coal production as the single justification for overriding stringent state reclamation laws. It thus might be argued that the primary preemptive effect of the new standards has been narrowed to an area of sovereign federal power.[59]

Whether these principles give preemptive capability to the federal reclamation standards may be a moot question, however, in light of a recent Supreme Court decision that seemingly has upset the course of property clause doctrine. In *Kleppe v. New Mexico*[60] the Court upheld an application of the federal Wild Free-Roaming Horses and Burros Act[61] that conflicted with a state law authorizing state entry onto federal land to take possession of free-roaming horses or mules.[62] Using unnecessarily broad language,[63] the Court specifically declined to base its holding on narrow grounds such as the exceptions discussed above.[64] Rather, it gave a sovereign, and thus preemptive, authority to all federal enactments under the article IV property clause.[65] Corresponding state authority was recognized though it was viewed as subordinate to the federal power,[66] as indeed it must be once the sover-

58. See text accompanying notes 53-54 *supra.*

59. A third possible limitation on state power over federal land might exist by virtue of the doctrine of intergovernmental immunities. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding invalid a state tax on notes issued by the Bank of the United States). Under this doctrine it is now well established that federal property is exempt from state taxation. Van Brocklin v. Tennessee, 117 U.S. 151 (1886). Such immunity, however, does not extend to private persons using federal lands, *see* United States v. Boyd, 378 U.S. 39 (1964); City of Detroit v. Murray Corp., 355 U.S. 489 (1958); United States v. Township of Muskegon, 355 U.S. 484 (1958); thus, the production of minerals or timber from federal land by federal lessees is taxable by the states.

60. 426 U.S. 529 (1976).

61. 16 U.S.C. §§ 1331-1340 (Supp. IV, 1974).

62. N.M. STAT. ANN. §§ 47-14-1 to -14-10 (1953).

63. The Court could have found the Wild Free-Roaming Horses and Burros Act to be in furtherance of Congress' commerce power or its privileges to protect federal property, thus avoiding the departure from established law which now marks the decision.

64. 426 U.S. at 537.

65. The Court's language on this point was specific: "In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain." *Id.* at 540. The use of the word "legislature" rather than "sovereign" does not appear significant. *See* quoted material note 66 *infra.* For further discussion of this topic, see Engdahl, *Preemptive Capability of Federal Power,* 45 U. COLO. L. REV. 51 (1973).

66. Absent consent or cession a state undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And

eign nature of the federal property power was recognized. Thus the Supreme Court has apparently abandoned the theory of semiexclusive state authority in favor of a dual federal-state power, thereby invoking the normal principles of preemption, a result which might have flowed in any event from the various exceptions to the classic principles.

Federal Preemption Under the Supremacy Clause

The preemption doctrine, under which state legislation must yield to the federal lawmaking power, is grounded in the supremacy clause of the United States Constitution, which declares the Constitution and laws made in pursuance thereof "the supreme law of the land."[67] Limiting this clause to laws made pursuant to the Constitution renders preemption impossible unless the federal government is constitutionally empowered to exercise sovereign authority in the particular area.[68] Preemption questions generally arise from the fact that in certain areas both state and federal governments have sovereign powers,[69] and thus both state and federal legislation may be enacted affecting the same subject.

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when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

426 U.S. at 543 (citations omitted).

67. U.S. CONST. art. VI.

68. Engdahl, *supra* note 65, at 52-55. It is now accepted that Congress can utilize an enumerated power as a means to bring about a nonenumerated objective. Although a law of this sort is thus constitutional, it does not have the preemptive capability of a law aimed at accomplishing an enumerated objective. *Id.* at 68-69.

69. Although the powers of the federal government are limited to those enumerated in the Constitution, state power is of a broad general nature, encompassing all sovereign power not proscribed to the states in the Constitution. Such proscribed powers include the authority to coin money and to declare war, which are granted exclusively to Congress. U.S. CONST. art. 1, § 10. Another exclusive enumerated power is Congress' power to exercise "exclusive [l]egislation" over certain property when the states have ceded such power to the federal government. *Id.* art. I. This article I property generally consists of federal enclaves, such as forts and post offices, and includes Washington, D.C. Because of the "exclusive [l]egislation" language in the article I property clause, the states generally have no authority over these enclaves. See Engdahl, *supra* note 51, at 288-90.

The Supreme Court has recently elaborated on the basic federal-state division of authority. Citing Alexander Hamilton's *The Federalist No. 32* for the proposition that the states retain all prior rights of sovereignty except those exclusively delegated to Congress, the Court in Goldstein v. California, 412 U.S. 546 (1973), asserted that exclusive federal authority could exist if the Constitution expressly grants authority to Congress and prohibits that authority to states, exclusive authority is granted to Congress, or authority is granted to Congress, "to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *Id.* at 552-53. In assessing the third of these possibilities, the Court cautioned that one must

> be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty."

Id. at 554-55, *quoting* The Federalist No. 32, at 243 (B. Wright ed. 1961) (A. Hamilton).

While the early cases took the position that the mere grant of power to the federal government prohibited the states from acting in areas encompassed by that power,[70] the modern view is that federal and state law must actually conflict in order for the federal law to prevail.[71] Actual collision of the terms of state and federal law is not the only type of conflict that will bring the supremacy clause into play, however; preemption also may be found when there is state incompatibility with congressional exclusionary intent.[72] Such an intent may be explicitly stated, or it may be inferred from the language or scope of the federal enactment. For instance, a scheme of federal regulation may be so pervasive as to give rise to a congressional intent to preclude state regulation of the same subject matter.[73] Additionally, if state law is deemed to obstruct or frustrate the accomplishment of Congress' legislative objectives, federal law may be accorded preemptive authority.[74] Inferences of intent, in short, must be made on a case-by-case consideration of "what is being regulated, by whom, for what purpose, statutory language, congressional intent and potential frustration of Federal policy."[75] The Supreme Court itself has stated, "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question."[76]

The modern Court's view of inferred intent is somewhat restrictive, possibly to prevent the ever-expanding federal authority from engulfing state power altogether. The Court thus has rejected inferences of preemption based solely on the comprehensiveness of a

70. *See, e.g.*, Missouri Pac. Co. v. Porter, 273 U.S. 341, 346 (1927); Napier v. Atlantic Coast Line, 272 U.S. 605, 612 (1926); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 207-09 (1824).

71. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 331, 337, 341 (1973); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-42 (1963); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 250 (1959) (Harlan, J., concurring) ("[C]onflict is the touchstone of pre-emption . . . .").

72. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 329, 337 (1973); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963); Engdahl, *supra* note 65, at 54-55.

73. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973) (regulation of aircraft noise); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (regulation of warehouses).

74. Perez v. Campbell, 402 U.S. 637, 656 (1974) (federal Bankruptcy Act precludes inconsistent state financial responsibility provision); Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (federal Alien Registration Act precludes inconsistent state alien registration statute); Wauneka v. Campbell, 22 Ariz. App. 287, 290, 526 P.2d 1085, 1088 (1974), *noted in* "Enforcement of State Financial Responsibility Laws Within Indian Country," 17 ARIZ. L. REV. 639, 831 (1975) (federal treaty with Indians precludes state financial responsibility provisions to be enforced against Indians on the reservation); Williams v. Superior Court, 15 Ariz. App. 480, 483, 489 P.2d 854, 857 (1971) (federal control of air space and air traffic precludes school board action to enjoin take-offs and landings near schools).

75. Marino v. Town of Ramapo, 68 Misc. 2d 44, 58, 326 N.Y.S.2d 162, 180 (Sup. Ct. 1971).

76. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973).

federal regulatory scheme.[77] Recent cases, in fact, have called for a specific declaration or other clear manifestation by Congress of its preemptive intent. Emphasizing a spirit of "cooperative federalism,"[78] the Court has stated in regard to laws governing welfare payments that:

> the problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution.
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> . . . If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.[79]

The standard for inferring preemption thus appears to be rather flexible but strict. A thorough examination of all aspects of the state and federal regulatory schemes is required, with a clear showing necessary to refute the presumption of possible coexistence.

The permissibility under the sovereignty clause of state reclamation regulations must be determined in relation to the Mineral Leasing Act of 1920[80] and the reclamation regulations issued pursuant to that Act.[81] It would appear initially that no general congressional intent to preempt state laws affecting mining leases could be found. In fact, several courts have so held.[82] The language of the Act seems clearly to express no congressional intent to preempt, by providing that "[n]othing in this chapter shall be construed or held to affect the rights of the States, or other local authority to exercise any rights which they may have, including the right to levy and collect taxes . . . ."[83] and that "[n]one of [certain restrictive lease] provisions shall be in conflict with the laws of the State in which the leased property is situated."[84]

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77. New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 415 (1973); *see* Goldstein v. California, 412 U.S. 546, 567-70 (1973) (federal copyright laws, though comprehensive, do not preempt all comparable state action).

78. The importance of this factor appears in the Court's statement that "[c]onflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial." New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 423 n.29 (1973).

79. *Id.* at 413, 415, *quoting* Schwartz v. Texas, 344 U.S. 199, 202-03 (1952) (federal work incentive program held not to preempt certain New York work rules).

80. 30 U.S.C. §§ 181-287 (1970).

81. 30 C.F.R. §§ 211.40-.41, .75 (1976).

82. *E.g.*, Hagood v. Heckers, 182 Colo. 337, 346, 513 P.2d 208, 213 (1973); Ohmart v. Dennis, 188 Neb. 260, 265, 196 N.W.2d 181, 185 (1972); McKee v. Interstate Oil & Gas Co., 77 Okla. 260, 263, 188 P. 109, 111 (1920); Dame v. Mileski, 80 Wyo. 156, 167, 340 P.2d 205, 207 (1959).

83. 30 U.S.C. § 189 (1970).

84. *Id.* § 187. The lease provisions referred to would, among other things, provide for the safety and welfare of miners, prohibit child labor, and secure complete freedom of purchase for workmen. *Id.*

These provisions have been interpreted as leaving to the states the full power to exercise their police power over federal mineral leases and lessees,[85] the scope of the Act being limited to governing the letting of public lands and the relations between the government and the lessee.[86] Consequently, state laws such as those taxing income from federal mineral lands[87] and requiring the forced pooling of oil and gas under federal lease[88] have been upheld.

The above principles, of course, leave room for a finding of preemption where a state law operates to destroy or frustrate the congressional purpose.[89] It has been suggested that unreasonable state reclamation provisions might so frustrate the purposes of the Mineral Leasing Act as to require the application of federal law.[90] The purpose of the Mineral Leasing Act is not apparent on its face; however, the Court of Appeals for the Tenth Circuit was probably accurate in identifying the purpose as the promotion of orderly development of certain mineral deposits in public lands.[91] While there is no indication that any existing state reclamation standard frustrates this purpose,[92] it is possible that an extremely stringent, rigid standard could do so under some circumstances. Nonetheless, it seems generally true that reclamation standards are peripheral to the purpose of the Mineral Leasing Act and thus not subject to preemption by the federal law.[93]

A more interesting question regarding preemption is presented by the recently issued federal administrative regulations specifically establishing standards for reclamation of federally leased mineral lands.[94] While it is true that a valid federal regulation has the force of law and is capable of preempting a conflicting state law or regu-

85. Texas Oil & Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366, 369 (W.D. Okla. 1967), *aff'd per curiam*, 406 F.2d 1303 (10th Cir. 1969).

86. Mid-Northern Oil Co. v. Montana, 268 U.S. 45, 48-49 (1925). A recent government report concurs: "The legislative history of these sections clearly indicates congressional intent to let the state police power govern the operations of federal mineral lessees, even to the extent of overriding contrary regulations or lease provisions promulgated by the Secretary of Interior." OFFICE OF TECHNOLOGY ASSESSMENT, (DRAFT) STUDY ON MINERAL ACCESSIBILITY ON FEDERAL LANDS ch. 9, at 9 (1976).

87. Hagood v. Heckers, 182 Colo. 337, 343-44, 513 P.2d 208, 214-15 (1973).

88. Texas Oil & Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366, 369-71 (W.D. Okla. 967), *aff'd per curiam*, 406 F.2d 1303 (10th Cir. 1969).

89. See discussion note 69 *supra*.

90. Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966).

91. Harvey v. Udall, 384 F.2d 883, 885 (10th Cir. 1967).

92. In fact, Interior Secretary Thomas Kleppe and his assistant, Raymond A. Peck, have acknowledged that the converse is true. [1976] 7 ENVIR. REP. (BNA) 28.

93. One writer has summarized the current judicial view toward preemption as follows: "where Congress has not made clear its intention to preempt, or where a conflict is unripe or peripheral to the purpose of the federal statute, state legislation will be allowed to stand." Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 653 (1975). *See also* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 491-92 (1974); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 139-40 (1973).

94. See text & notes 31-50 *supra*.

lation,[95] its actual preemptive effect in a given situation must be based on the intent of the underlying statute.[96] Administrative regulations are valid only insofar as they carry out the intent of Congress, and any administrative attempt to transcend that intent is a "mere nullity."[97] In regard to reclamation provisions issued under the Mineral Leasing Act, preemption may thus be governed by the language of sections 387 and 389 deferring to state laws for governance of lessee activities.

The effect of this language on the scope of the Interior Department's regulatory power was addressed by an Oklahoma federal court in *Texas Oil & Gas Corp. v. Phillips Petroleum Co.*[98] In upholding application of Oklahoma's forced pooling law to federal oil and gas lessees, the court noted that the Interior Department's rule-making power under the Mineral Leasing Act is defined in section 189, which also recognizes the states' regulatory rights. The limitation in the Act in favor of the states, according to the court, must operate also as a limitation on the Secretary of Interior's regulatory powers.[99] Consequently, "[s]tate law applies to such leaseholds where no significant threat to any identifiable federal policy or interest is shown,"[100] despite a federal regulation on the same subject.

This interpretation of section 189 would seem to support not only the validity of state reclamation laws more stringent than the federal standards, but also a state provision which actually conflicts with a federal administrative standard for reclamation. Whether such reasoning would be upheld if a state enactment prohibited reclamation activity, thus preventing the federal government—and indeed, all

95. *In re* Rules & Regulations Nos. 31 & 32, 193 Neb. 59, 63, 225 N.W.2d 401, 405 (1975); Marino v. Town of Ramapo, 68 Misc. 2d 44, 58, 326 N.Y.S.2d 162, 180 (Sup. Ct. 1971) ("The pre-emption doctrine applies where valid *regulations* enacted by a Federal agency conflict with State legislation, although the latter may merely supplement the former. . . . In other words, the phrase in the supremacy clause 'Laws of the United States' encompasses valid Federal regulations."); *see* Toye Bros. Yellow Cab Co. v. Irby, 437 F.2d 806, 809 (5th Cir. 1971). This principle was specifically applied to regulations issued under the Mineral Leasing Act in Hodgson v. Midwest Oil Co., 297 F. 273 (D. Wyo. 1924). Evaluating an Interior Department notice provision, that court stated:

> While the Leasing Act itself does not provide for notice, it in effect gives the Interior Department the right to prescribe rules and regulations to carry the act into effect. Such rules and regulations were prescribed by the Land Department requiring notice to be given of all applications for leases, which regulations should be given the full force and effect of statutes, when not inconsistent with or repugnant to the law itself.

Id. at 276.

96. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1973); *In re* Rules & Regulations Nos. 31 & 32, 193 Neb. 59, 63, 225 N.W.2d 401, 405 (1975); Marino v. Town of Ramapo, 68 Misc. 2d 44, 58, 326 N.Y.S.2d 162, 180 (Sup. Ct. 1971).

97. Dixon v. United States, 381 U.S. 68, 74 (1965), *quoting* Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936).

98. 277 F. Supp. 366 (W.D. Okla. 1967).

99. *Id.* at 370.

100. *Id.* at 371.

owners of property on which mining takes place—from protecting and restoring their land is another question. The statute certainly seems sufficient to rebut a federal claim that the Interior Department's regulations preempt similar state laws and give the Secretary power to suspend the operation of those laws. The Secretary, as provided in the literal language of the regulation, may omit the state standards from the lease, but this will not necessarily void the operational effectiveness of the state law.[101]

CONCLUSION

It is commendable that the federal government has at last moved to require reclamation of strip-mined federal land. Nevertheless, the issuance of federal regulations should not be seen as subverting the primary state interest in reclamation of such lands within state borders. The regulations themselves recognize the state interest, and seek to effect a workable compromise between state and federal concerns. Compromise may indeed be the only acceptable solution, for without negotiation and agreement, there will be overlapping, duplicative, and conflicting state and federal regulatory efforts. Such a situation would surely thwart the attainment of national energy goals and frustrate the use of federal lands. The federal alternative to cooperation, compromise, and negotiation, is federal preemption. Preemption would be galling to the states, and probably unworkable because of its impact on state authority in areas such as health, safety, welfare, air, water, and land use. The state alternative to compromise, cooperation, and negotiation is assertion of state constitutional prerogatives. However, this solution would require extensive litigation, with uncertain outcome given the dicta in *Kleppe v. New Mexico*. Even if preeminent state sovereignty over reclamation on federal land were established by such a suit, the result might be reversed by federal legislation enacted pursuant to an enumerated power. It therefore would appear to be in the best interest of both federal and state officials to negotiate a workable compromise regarding the application of federal and state law to federal land, and the enforcement and administration of such law.

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101. A recent Office of Technology Report agrees: "In enacting sections 30 and 32 of the Leasing Act, Congress clearly intended that the state police power give way only where there is a direct conflict with an explicit provision in the leasing act itself, and not when the conflict is with a lease provision, rule, or regulation promulgated pursuant to the act. . . . Thus, the Secretary of the Interior cannot under law unilaterally determine whether state law should be applicable to the activities of federal mineral lessees." OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 86, at 9-10. The Secretary claims to have such authority, and attempts to use it in the new reclamation regulations, but the study concludes that he in fact lacks such authority. *Id.*