NEW MEXICO LAW REVIEW

Volume 19
Issue 3 *Summer 1989*

Summer 1989

Federal Public Lands: The States' Authority to Regulate Activities on Federal Land - California Coastal Commission v. Granite Rock Co.

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FEDERAL PUBLIC LANDS: The States' Authority to Regulate Activities on Federal Land—*California Coastal Commission v. Granite Rock Co.*

I. INTRODUCTION

In *California Coastal Commission v. Granite Rock Co.*,[1] the United States Supreme Court held that California could require a private company to obtain a state permit before continuing its federally approved mining activities in a national forest. The Court found that no federal statute or regulation preempted the state permit requirement.[2] The Court used a "traditional" preemption analysis even though federal property and the property clause of the U.S. Constitution were involved.[3] In dissent, Justice Powell argued that the Court should have given more weight to the federal interest in regulating the uses of federal property.[4] Justice Powell characterized the Court's decision as giving the states the power to override decisions of the Forest Service when their "views on environmental and mineral policy" conflict with those of the Forest Service.[5]

This Note discusses the Court's preemption analysis in *Granite Rock* to determine the extent of a state's authority to regulate the uses of federal land. This question is important, especially in western states such as New Mexico, because of the large amount of western land which the federal government owns.[6] Many western states claim that they should have a greater say in federal bureaucratic decisions concerning the management of federal lands within their boundaries.[7] Western states would welcome the decision in *Granite Rock* if, as Justice Powell suggests, it gives states greater authority over federal lands.

The *Granite Rock* decision, however, is not so broad. Although the Court approved state regulation in this case, it only allowed the states the power to make reasonable environmental regulations of private mining activity on federal land, not the power to prohibit such mining. Furthermore, the Court did not define reasonable environmental regulation, thus leaving each exercise of state authority open to challenge as unreasonable.

1. 480 U.S. 572 (1987).
2. *Id.* at 593.
3. *Id.* at 593-94.
4. *Id.* at 603-04.
5. *Id.* at 606.
6. *See* Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).
7. *E.g.*, Babbitt, *supra* note 6.

The *Granite Rock* Court, however, did reject Granite Rock's claim that the property clause of the Constitution excluded all state regulation of federal property. Although this does not give the states any greater authority over federal property, it reaffirms their position that they have some authority.

II. STATEMENT OF THE CASE

Granite Rock Company possesses an unpatented mining claim in the Los Padres National Forest in California.[8] Under the claim, Granite Rock has a possessory title to the claim while the federal government retains a reversionary interest in it.[9] In 1980, Granite Rock proposed to begin mining the claim and submitted a Five Year Plan of Operations to the District Forest Ranger for his approval.[10] Forest Service mining regulations require the Five Year Plan to help minimize the adverse environmental effects of mining on the surface of the national forests.[11] The Forest Service approved Granite Rock's plan after preparing an environmental assessment of the plan and requiring certain modifications to the plan.[12] In 1981, Granite Rock began mining.[13]

In 1983, the California Coastal Commission (CCC) informed Granite Rock that the California Coastal Act (CCA) applied to Granite Rock's mining activities.[14] Under the CCA, anyone undertaking development of California's coastal zone has to obtain a permit from the CCC.[15] The CCA classifies mining as a type of development.[16] The CCC required

8. *Granite Rock*, 480 U.S. at 576. This claim is actually "on and around Mount Pico Blanco in the Big Sur region of [the] Los Padres National Forest . . . . [This is] conceded to be an area of great scenic beauty. . . ." Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361, 1366 (N.D. Calif. 1984).

9. 30 U.S.C. §§ 22, 26 (1982). The holder of such an unpatented claim may retain the possessory title indefinitely or may purchase the land fee simple after complying with the patent requirements of the Mining Act of 1872. Ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C. §§ 21-54 (1982). Until a claim is patented, however, the United States "retains the title, with a valuable residuary and reversionary interest." United States v. Rizzinelli, 182 F. 675, 681 (N.D. Id. 1910). The Mining Act of 1872 is discussed in more detail *infra* at notes 58-62 and accompanying text.

10. *Granite Rock*, 480 U.S. at 576. The Forest Service, under the Secretary of Agriculture, has authority to promulgate rules of occupancy and use of the national forests. Organic Act of 1897, 16 U.S.C. §§ 478, 551 (1982). Holders of unpatented mining claims in national forests are subject to these rules of occupancy and use. *Rizzinelli*, 182 F. at 681, even when those rules actually regulate the mining itself. United States v. Weiss, 642 F.2d 296 (9th Cir. 1981).

11. 36 C.F.R. §§ 228.4-228.5 (1988).

12. *Granite Rock*, 480 U.S. at 576.

13. *Id.*; *Granite Rock*, 590 F. Supp. at 1366.

14. 480 U.S. at 576. The California Coastal Act (CCA) created the California Coastal Commission (CCC) to regulate development within the coastal zone of California. CAL. PUB. RES. CODE §§ 30000-30900 (West 1986 & Cum. Pocket Part 1989).

15. California Coastal Act, CAL. PUB. RES. CODE § 30600(a) (West 1986).

16. *Id.* § 30106.

Granite Rock to obtain a coastal development permit for any mining it undertook after the date of the notification.[17]

Rather than apply for the permit, Granite Rock brought suit in federal court to enjoin the CCC from enforcing the permit requirement.[18] Granite Rock claimed that federal law regulating mining on unpatented claims preempted the state's regulatory power. Specifically, Granite Rock cited the Mining Act of 1872 and the Forest Service mining regulations.[19] The district court held that so long as the CCC did not use its permit requirement to deprive Granite Rock of its right to mine on federal land, the Mining Act of 1872 would not preempt the requirement.[20] Furthermore, the court found that neither Congress nor the Forest Service intended that the Forest Service mining regulations preempt state law when they were promulgated and the court found no conflict between the federal regulations and possibly more stringent state requirements.[21] The district court dismissed Granite Rock's complaint.[22]

The Ninth Circuit Court of Appeals reversed, holding that the state permit requirement impermissibly intruded into the sphere of the Forest Service's authority.[23] The Supreme Court granted the Coastal Commission's petition for certiorari and reversed the court of appeals.[24] Because

17. *Granite Rock*, 480 U.S. at 611-12 (Scalia, J., dissent) (quoting Coastal Commission's letter to Granite Rock).

18. *Id.* at 577; *Granite Rock*, 590 F. Supp. at 1366.

19. 590 F. Supp. at 1370. Granite Rock also argued that the Federal Coastal Zone Management Act excluded federal land from the jurisdiction of state coastal zone management programs established pursuant to it. The California Coastal Commission "constitutes the State's coastal zone managment program for purposes of the federal [Coastal Zone Management Act]." *Granite Rock*, 480 U.S. at 576; California Coastal Act, CAL. PUB. RES. CODE §§ 30000-30900 (West 1986 & Cum. Pocket Part 1989). The federal Coastal Zone Management Act provides "monetary assistance to states that develop and implement coastal Management Programs consistent with its standards." *Granite Rock*, 590 F. Supp. at 1365 (citing 16 U.S.C. §§ 1451, 1453(g) (1982)).

Under the federal Coastal Zone Management Act (CZMA), the coastal zone is defined as excluding federal land the use of which is in the sole discretion of the federal government. 16 U.S.C. § 1453(l) (1982). Granite Rock argued that this meant that all federal land was excluded from state jurisdiction under state programs established under the CZMA. *Granite Rock*, 590 F.Supp. at 1367. This argument was unsuccessful in the district court because that court found that only certain types of federal land fell within the definition of lands the use of which was in the sole discretion of the federal government: namely, Indian reservations and federal enclaves (e.g. military installations). *Id.* at 1370. The Ninth Circuit Court of Appeals did not reach the question. Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077, 1080 (9th Cir. 1985). The Supreme Court reached the question but decided that even if the CZMA excluded federal lands from its definition of the coastal zone, it did not invalidate the state permit because the state had sufficient authority independent of the federal CZMA to require the permit. *Granite Rock*, 480 U.S. at 593. Further, after examining the legislative history of the CZMA, the Court found no federal intention to change the distribution of federal and state authority with the enactment of the CZMA, so the CZMA did not preempt the state's exercise of authority in this case. *Id.* at 592.

20. *Granite Rock*, 590 F. Supp. at 1373.

21. *Id.* at 1374.

22. *Id.* at 1375.

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

24. *Granite Rock*, 480 U.S. at 579.

the Supreme Court found no federal intention to preempt the Coastal Commission's permit requirement, it upheld the state's right to enforce "reasonable" environmental regulations on private mining in national forests.[25]

III. BACKGROUND

Before a court can find that a federal law preempts a state law, it must determine that both the federal and state laws are valid. Only after a court decides that both the federal and state laws are valid, will it analyze the situation for preemption by interpreting the federal laws—by determining whether Congress intended to preempt state law.[26] This section first discusses the federal and state authority for enacting the laws claimed to be in conflict in *Granite Rock*. It then outlines the federal laws which Granite Rock claimed preempted the state permit requirement.

A. *Federal and State Authority to Enact Laws Affecting Federal Property*

Federal authority to enact laws affecting federal property flows from the property clause of the Constitution.[27] A state has authority to enact laws affecting federal property as well, based on its inherent sovereign power over all of the territory within its boundaries.[28] So long as neither the Constitution nor federal statutes exclude states from enacting laws affecting federal property, states can do so.

1. Preemptive Capability of Federal property clause Legislation

Under the supremacy clause of the United States Constitution, federal laws which are made pursuant to one of Congress's enumerated powers have the capacity to preempt state laws.[29] There has been much debate, however, concerning whether the supremacy clause applies to legislation enacted pursuant to the article IV property clause.[30]

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25. *Id.* at 593.

26. L. TRIBE, CONSTITUTIONAL LAW at 479-81 (2d ed. 1988).

27. U.S. CONST. art. IV, § 3, cl. 2.

28. States have all authority not granted to Congress in the Constitution. U.S. CONST. amend. X; L. TRIBE, *supra* note 26, at 299.

29. U.S. CONST., art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land . . . ."

30. *E.g.*, Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L. J. 693 (1981); Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Gaetke, *Refuting the 'Classic' property clause Theory*, 63 N.C. L. REV. 617 (1985). The property clause merely states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . . ." U.S. CONST. art. IV, § 3, cl. 2.

Those who have argued that the supremacy clause did not apply to property clause legislation claimed that the article IV property clause only granted Congress the rights of a proprietor over federal lands.[31] Under this interpretation, the federal government was similar to any other landowner in a state. Any laws Congress enacted pursuant to the property clause had no more preemptive force over state laws than would the decisions of other landowners. Thus state law would be supreme over federal laws enacted pursuant to the property clause. Only when Congress regulated federal property as a necessary and proper means of reaching a federal goal under one of its plenary powers would federal property law be capable of preempting state law.

Others argued that the clause granted Congress supreme legislative power over federally owned land.[32] Under this theory, the article IV property clause granted Congress a plenary power the same as the other

31. *See* Engdahl, *Conflicting Jurisdictions of Federal, State and Local Authorities: The Federal Preemption Doctrine*, 31 MIN. L. INST. 1-1 (1985); Engdahl, *supra* note 30.

Briefly, one of the bases for this argument is the Equal Footing Doctrine, codified in Article V of the Northwest Ordinance. (The Northwest Ordinance, or the Ordinance of 1787, created the Northwest Territorial government to govern the United States territory located northwest of the Ohio River; it was enacted on July 13, 1787, by the Congress assembled under the Articles of Confederation. Northwest Ordinance.) Under the Equal Footing Doctrine all new states were to be admitted into the union "on an equal footing with the original States in all respects whatever . . . ." Engdahl, *Conflicting Jurisdictions, supra*, at 1-10 (quoting the Northwest Ordinance). At the time of the confederation, the federal government itself owned no land. *Id.* The original thirteen states had general governmental jurisdiction over all of the lands within their boundaries. *Id.* The federal government later became a landowner: from the lands transferred to it under the Northwest Ordinance and later from the Louisiana Purchase. *Id.* When the Louisiana Purchase and later acquisitions became new states, the federal government remained the owner of large tracts within the new states. *Id.* If the federal government retained any legislative control over these lands—that is, if Congress could enact statutes regarding the uses of federal land which would preempt state regulations—then the new states would not have general governmental jurisdiction over all of the land within their boundaries. *Id.* If the United States had more authority over its property than "the managerial power of a landowner," the new states would not have been admitted on an equal footing with the old. *Id.*; *see also* Brodie, *supra* note 30 (a discussion of three possible theories of federal power over federal property).

Those who make this argument, the "Classic" theorists, claim that the Supreme Court has upheld their view of the federal property power through the years. For a complete discussion of the precedents see Engdahl, *State and Federal Power, supra*.

32. Gaetke, *supra* note 30. These scholars argue that even if the "Classic" theorists' interpretation of the Equal Footing Doctrine is correct, the subsequent ratification of the Constitution probably altered the meaning of that doctrine. *Id.* They also argue that the land compromise set out in the Northwest Ordinance was invalid because under the Articles of Confederation the federal government did not have power to own land. *Id.* Therefore, any theory of federal authority over federal property which relies on an interpretation of the Northwest Ordinance is invalid as well. *Id.* Finally, the opponents of the "Classic" property clause theory have their own interpretations of the Supreme Court opinions on which the "Classic" theory rests its case. For a full treatment of these arguments see *id.*

The clearest idea that emerges from these two interpretations of the same precedents is that until its 1976 statement in Kleppe v. New Mexico, 426 U.S. 529 (1976), the Supreme Court was ambiguous in its statement of the nature of Congressional authority under the property clause.

enumerated powers listed in article I, section 8.[33] Federal property laws made pursuant to the property clause would thus preempt state laws whenever Congress intended that they do so.

In 1976 the Supreme Court resolved this dispute in *Kleppe v. New Mexico*.[34]The Court held that Congress can enact legislation respecting the uses of federal public lands which "necessarily overrides conflicting state laws under the supremacy clause."[35] Therefore, the property clause gives Congress an enumerated power.[36]

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33. Article I, § 8 gives Congress the following powers, among others: power to levy taxes, borrow money, regulate interstate commerce, regulate naturalization of citizens, regulate bankruptcy, coin money, declare war, provide and maintan an army, navy and militia and power to make all laws necessary and proper to exercise these powers. U.S. CONST. art. I, § 8. The view that the property clause grants Congress a plenary power the same as the powers in article I, § 8, appears to be generally accepted, without comment, by Constitutional law commentators. *See, e.g.*, Tribe, *supra* at 298-300 (discussion of Congress' enumerated powers lists the property clause power as one of those enumerated powers).

34. 426 U.S. 529 (1976).

35. *Id.* at 543. In *Kleppe*, the New Mexico Livestock Board sought an injunction against the BLM (Bureau of Land Mangement) to stop it from enforcing the federal Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-40 (1970 ed., Supp. IV), and a declaratory judgment that the Act was unconstitutional. *Kleppe*, 426 U.S. at 534. The New Mexico Livestock Board had "rounded up and removed 19 unbranded and unclaimed burros" from federal public land pursuant to its authority under the New Mexico Estray Law, N.M. STAT. ANN. §§ 47-14-1 to -10 (Repl. Vol. 1966); *Kleppe*, 426 U.S. at 529. The burros were then sold at public auction. *Kleppe*, 426 U.S. at 533. The federal Act directed that these wild free-roaming burros should be preserved in their native habitats. *Id.* at 531, 534-36. Under its authority to protect the wild burros, the BLM "demanded that the Board recover the animals and return them to the public lands." *Id.* at 534.

The federal legislation which required that wild burros be allowed to freely roam the public lands clearly conflicted with the state legislation which required the capture and sale of burros found freely roaming public lands. If Congress enacted the Wild and Free-Roaming Horses and Burros Act pursuant to an enumerated power under the Constitution, then the federal Act would preempt the state law under the Supremacy clause. *Id.* at 543; U.S. CONST. art VI, cl. 2.

The New Mexico Livestock Board argued, however, that the property clause did not give Congress power to enact the Wild and Free-Roaming Horses and Burros Act. *Kleppe*, 426 U.S. at 536. Instead, the property clause only gave Congress power to "dispose of and make incidental rules regarding the use of federal property" similar to the power of any other proprietor to determine under what conditions someone may use his land. *Id.* at 536-37. The only exception to this limit on federal power was that Congress could make laws "to protect federal property" which would override conflicting state legislation. *Id.*

The Court rejected New Mexico's reading of the property clause as too narrow. *Id.* at 537. The Court found that the property clause grants Congress "the powers both of a proprietor and of a legislature over the public domain." *Id.* at 540. The Court reasoned that by granting Congress authority to "make all needful rules" respecting federal property, and thus, the authority to determine what are needful rules, the property clause granted Congress plenary power over federal property. *Id.* at 539. The Court went on to reassure the states that such plenary authority did not of its own force exempt federal lands from state legislative and police powers. *Id.* at 543. But such authority did grant Congress the authority to enact laws which would override conflicting state laws. *Id.* Thus, the Court ruled in favor of the BLM that the federal Wild and Free-Roaming Horses and Burros Act preempted the New Mexico Estray Law. *Id.* at 546-47.

36. Some still argue that *Kleppe* was wrongly decided. "[T]here is a good probability that *Kleppe v. New Mexico* will be overruled and the historic property clause doctrine restored." *Kleppe*'s view of the article IV property power is "unhistorical, contra-precedential, and unsupportable . . ." Eng-

2. State Authority to Enact Laws Respecting the Uses of Federal Property

Although *Kleppe* determined the nature of federal authority under the property clause, it did not clearly explain its extent. One of Granite Rock's arguments for federal preemption of the Coastal Commission permit was that the property clause constitutionally excluded all state regulation concerning the use of federal public land.[37] This argument was based on language from the Court's 1916 opinion in *Utah Power and Light Co. v. United States*.[38] In that case, the United States sued the Utah Power and Light Company to stop the company from continuing to occupy a hydro-electric generating plant the company had built in a national forest reserve.[39] The company had built the plant without seeking approval from the Secretary of Agriculture.[40] In defense of its unapproved occupancy of federal land the company claimed that the State of Utah had authorized the use of vacant, unoccupied land for the development of hydro-electric power under the state's eminent domain laws.[41] The Court found, however, that, under the property clause and precedents interpreting it, "the power of Congress [over federal public lands] is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired."[42] The Court went on to say that Congress retained sufficient power over federal lands within a state "to control their occupancy and use."[43]

On its facts, *Utah Power and Light Co. v. United States* stands for the proposition that the property clause prohibits a state from granting private rights in federal property through the exercise of its eminent domain laws, even though it has such a right with respect to property owned by an individual. Granite Rock argued that this holding should be extended: that the property clause grants "exclusive legislative power" over the federal public lands to Congress and that states can only regulate the use of federal public lands when Congress "expressly grants this power to them."[44]

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dahl, *supra* note 31, at 1-15 to -18. In 1979, in Ventura County v. Gulf Oil Corp., Ventura County raised the state of New Mexico's argument from *Kleppe* which was that Congress could not preempt state law under the property clause. 601 F.2d 1080, 1083 (1979). The Ninth Circuit rejected this argument as "legally frivolous" after *Kleppe*, and the Supreme Court affirmed the Ninth Circuit's decision without an opinion. *Id.* at 1083, *aff'd mem.*, 445 U.S. 947 (1980). The California Coastal Commission did not raise such an argument in *Granite Rock*.

37. *See Granite Rock*, 768 F.2d at 1079.
38. 243 U.S. 389 (1916).
39. *Id.* at 402-03.
40. *Id.* at 403.
41. *Id.* at 394.
42. *Id.* at 404.
43. *Id.* at 405.
44. *See Granite Rock*, 768 F.2d at 1079.

In *Granite Rock*, the Ninth Circuit Court of Appeals avoided deciding whether the property clause itself conflicted with all state regulation of the uses of federal land because it found that Congress had actually preempted the state regulation in this case.[45] The Supreme Court, however, squarely faced the issue.[46] It said that it had already made this decision in *Kleppe*:

> The Property Clause itself does not automatically conflict with all state regulation of federal land. Rather . . . "Congress . . . retains the power to enact legislation respecting [federal] lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the supremacy clause."[47]

Congress' power under the property clause is like all of its other enumerated powers: Legislation enacted pursuant to the property clause is supreme.[48] The states, however, may legislate concerning the uses of federal property so long as those laws do not conflict with any federal enactments.[49]

In *Granite Rock*, the Supreme Court did not break new ground with its interpretation of Congress's power under the property clause. It did, however, reaffirm its earlier statements concerning that power.

B. Relevant Federal property clause Legislation

Granite Rock acquired its right to mine in the Los Padres National Forest under the Mining Act of 1872[50] which is administered by the Secretary of the Interior and his delegate, the Bureau of Land Management.[51] Granite Rock's right to mine, however, is limited by the authority which the Secretary of Agriculture and his delegate, the Forest Service, have to administer the national forests.[52]

The nature and extent of the authority over mining in national forests which Congress intended to grant to these two departments is not so simple to discern. The federal laws affecting unpatented mining claims were enacted at different times for different purposes. Some of the laws were enacted when the national mood was to dispose of all federal land into private hands.[53] Other laws were enacted after the federal purpose

45. *Id.* at 1079.
46. *Granite Rock*, 480 U.S. at 580.
47. *Id.* (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)).
48. *See Granite Rock*, 480 U.S. at 580.
49. *Id.* at 581.
50. Ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.).
51. *E.g.*, 30 U.S.C. §§ 21(a), 28(b), 29-30 and 34 (1982).
52. *See, e.g.*, 16 U.S.C. §§ 478, 551 (1982).
53. *E.g.*, Babbitt, *supra* note 6, at 852-53 (passage of FLPMA in 1976 "reversed the long-held presumption that most of the public domain would eventually be disposed of."); G.F. COGGINS & C.F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 58-165 (2d ed. 1987).

was to dispose of a majority of federal land but to reserve some land for various purposes.[54] Finally, the more recent laws have been enacted after the U.S. decided to retain what remained of federally owned land.[55] Furthermore, in most of the laws aimed at the Forest Service, Congress's focus was forestry and the management of renewable resources.[56] It is not clear what Congress intended with regard to unpatented mining claims in national forests. Justice Powell's characterization of the federal laws at issue in *Granite Rock* is apt:

> [I]t is fair to say that, commencing in 1872, Congress has created an almost impenetrable maze of arguably relevant legislation in no less than a half-dozen statutes, augmented by the regulations of two Departmens of the Executive. There is little cause for wonder that the language of these statutes and regulations has generated considerable confusion.[57]

1. The Right to Mine on Federal Public Land

Under the Mining Act of 1872 the United States had given Granite Rock Co. the exclusive right to mine the land in its claim. The Mining Act opened all "lands belonging to the United States" to prospecting for "valuable mineral deposits" and to purchase by the discoverer of such a deposit.[58] The Mining Act applies to "hardrock" minerals, i.e., valuable minerals other than "fuel" minerals.[59] Locators of valuable mineral deposits have "the exclusive right of possession and enjoyment" of the claim from the time of discovery of the deposit.[60] Prospectors may obtain a fee simple in the land if they complete the patenting process.[61] Those, such as Granite Rock, who choose not to patent their claims, may retain their possessory title as long as they complete at least $100 worth of labor or improvements on the claim each year.[62]

54. G.F. COGGINS & C. F. WILKINSON, *supra* note 53, at 134-160 ("Federal policy in the 19th century was not solely one of disposition. There was also a nascent impulse to segregate and preserve for the common good . . . ." *Id.* at 135).

55. *See supra* note 53.

56. *E.g.*, 16 U.S.C. § 475 (1982) (National Forests were established to "improve and protect the forest . . . [to secure] favorable conditions of water flows, and to furnish a continuous supply of timber."); *id.* §§ 1600-87.

57. *Granite Rock*, 480 U.S. at 606 (Powell, J., dissenting).

58. 30 U.S.C. § 22 (1982).

59. "Fuel" minerals include coal, oil and gas, among others. 30 U.S.C. § 21(a) (1982). The disposition of deposits of fuel minerals found on federal land is governed by the Mineral Leasing Act of 1920, § 1, ch. 85, 41 Stat. 437 (codified as amended in scattered sections of 30 U.S.C. §§ 181-287 (1982)).

60. 30 U.S.C. § 26 (1982).

61. *Id.* § 29.

62. *Id.* § 28.

2. Forest Service Authority to Regulate Mining

In the Surface Resources Act of 1955, Congress explicitly gave the Secretary of Agriculture and the Forest Service authority to regulate the surface effects of mining on unpatented claims in national forests.[63] Under this Act, the Secretary or the Forest Service may prohibit unreasonably destructive mining operations.[64]

Furthermore, the Secretary has implicit authority to regulate unpatented claims under the Forest Service Organic Act of 1897.[65] Under this Act, the national forests are open to entry by anyone "for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof."[66] The Secretary of Agriculture, however, has the authority to regulate the "occupancy and use" of the national forests and "to preserve the forests thereon from destruction."[67] All people who enter the national forests, for any purpose, must abide by the Secretary's rules.[68]

In 1974, pursuant to its authority under the Organic Act, the Forest Service promulgated regulations to "minimize adverse environmental impacts on National Forest System surface resources" of mining on unpatented claims.[69] Under the regulations, any miner who proposes to do work which might disturb the surface of the national forest must submit a notice of intention to the District Ranger.[70] If the District Ranger determines that the proposed operations will significantly disturb surface resources, the miner must submit a Plan of Operations.[71] The Plan of Operations must include a map of the area of operations, as well as the size and location of the actual surface area which will be disturbed.[72] The Plan must also include a description of the type of operations to be conducted, the period during which activity will take place, and how the miner will meet certain environmental protection requirements.[73] The District Ranger can choose to approve the miner's plan as submitted, require modifications before approval, or have an environmental statement prepared before approval.[74]

63. Ch. 375, § 1, 69 Stat. 367 (codified at 30 U.S.C. § 601 (1982)).

64. United States v. Richardson, 599 F.2d 291 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980).

65. Act of June 4, 1897, ch. 2, § 1, 30 Stat. 11, 34-36 (codified as amended at 16 U.S.C. §§ 473-82 and 551 (repealed in part, 1976) (1982).

66. *Id.* § 478.

67. *Id.* § 551.

68. *Id.* § 478.

69. 36 C.F.R. §§ 228.1-228.15 (1987); 16 U.S.C. §§ 478, 551 (1982).

70. 36 C.F.R. § 228.4(a).

71. *Id.*

72. *Id.* § 228.4(c)(2).

73. *Id.* § 228.4(c)(3).

74. *Id.* § 228.5.

To enforce compliance with the regulations, Forest Service personnel periodically inspect mining operations.[75] If a miner is not complying with the regulations and if this "noncompliance is unneccessarily or unreasonably causing injury, loss or damage to surface resources" the Forest Service must serve notice on the miner.[76] The notice must specify the actions the miner should take to comply with the regulations.[77] If a miner continues mining without complying with the regulations, the Forest Service may ask a federal district court to enjoin the miner from further mining, at least until the miner complies with the regulations.[78]

The Forest Service may also have some control over where a mine can be located within a national forest. In 1976, Congress enacted the National Forest Management Act (NFMA)[79] which requires the Forest Service to develop land-use plans for units of the national forest system.[80] Once such plans are developed, the Forest Service may only issue permits for uses of the national forest which are consistent with the Forest Service's land-use plans.[81] This requirement would seem to mandate that the Forest Service not approve a Plan of Operations required under its mining regulations unless mining was an approved use under the NFMA land-use plan for an area.

It is not clear, however, that the NFMA gives such authority to the Forest Service. The NFMA speaks only of Forest Service land-use plans with respect to "renewable resources."[82] Since hardrock minerals are not renewable resources, the Forest Service land-use planning process may not include planning for mining uses. Furthermore, when it promulgated its mining regulations, the Forest Service itself disclaimed any authority to manage mineral resources in the National Forests: "the responsibility for managing such resources is in the Secretary of the Interior."[83]

3. Limitations on Forest Service's Authority to Regulate Mining

After the Forest Service promulgated its mining regulations, certain miners questioned the Forest Service's authority to regulate mining authorized by the 1872 Mining Act.[84] The Ninth Circuit Court of Appeals

75. *Id.* § 228.7(a).
76. *Id.* § 228.7(b).
77. *Id.*
78. *See* United States v. Weiss, 642 F.2d 296 (9th Cir. 1981). The regulations, themselves, do not provide for any enforcement mechanism other than notice to the miner.
79. Pub. L. No. 94-588, § 2, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600-14 (1982)). The NFMA was an amendment to the Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, § 2, 88 Stat. 476 (1974) (codified as amended at 16 U.S.C. §§ 1600-14 (1982)).
80. 16 U.S.C. § 1604(a).
81. *Id.* § 1604(i).
82. *E.g., id.* § 1600(1)-(7).
83. 36 C.F.R. § 228.1 (1988).
84. *See* United States v. Weiss, 642 F.2d 296 (9th Cir. 1981).

upheld the Forest Service's authority to reasonably regulate mining to protect the national forests.[85] Because the miner enjoys a right to mine under the Mining Act of 1872, "prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition."[86] Thus, although the Forest Service has some authority to regulate mining on national forests, it cannot prohibit mining authorized by the Mining Act of 1872.

IV. DISCUSSION

The main question for the Court in *Granite Rock* was whether Congress had enacted a law which "would preempt any requirement that Granite Rock obtain a California Coastal Commission permit."[87] To reach this point, the Court had reaffirmed that Congress had the power to enact federal legislation concerning federal property which would preempt state law.[88] At the same time, the Court had rejected Granite Rock's claim that the property clause granted Congress exclusive authority over the uses of federal property.[89] The Court thus left itself with the problem of applying the preemption test to the complex group of federal statutes which applied to Granite Rock's mining activities. The real question for the Court in *Granite Rock* was whether enforcing the California permit requirement would impair the supremacy of federal law.[90]

A. The Preemption Test

In *Granite Rock,* the Supreme Court used the same two part preemption test it has used in a variety of other situations.[91] The two parts are: 1. whether Congress intended to preempt state law, thus requiring that the state law give way; or 2. even if Congress did not intend to preempt state

85. *Id.* at 299.

86. *Id.*

87. *Granite Rock*, 480 U.S. at 581.

88. *See supra* notes 30-36 and accompanying text.

89. *See supra* notes 37-49 and accompanying text.

90. *C.f.* Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

91. International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (federal Clean Water Act preempts state nuisance law as applied to pollution sources outside the state); Hillsborough County v. Automated Medical Labs, 471 U.S. 707, 712-13 (1985) (federal blood plasma regulations do not preempt county blood plasma regulations aimed at same health and safety goals); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (federal Atomic Energy Act does not preempt state tort remedies for injuries from radiation in a nuclear plant); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) (federal Atomic Energy Act does not preempt state law prohibiting construction of new plant on basis of economic viability not safety); Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 139, 152-53 (1982) (federal regulation allowing federally chartered savings and loan associations to exercise "due-on-sale clause" in mortgage preempts state common law doctrine to the contrary).

law, whether the state law actually conflicts with the federal law, and thus must give way.

1. Intentional Preemption

The Court will find that Congress intended to preempt state law either when Congress expressly says that it intends to preempt, or when such an intent can be inferred.[92] The Court will infer that Congress intended to preempt state law when the nature of the federal law shows that Congress intended its legislation to occupy a field.[93] When federal legislation occupies a field, all state regulations "no matter how well they comport with substantive federal policies" will be invalidated.[94]

The Court has found that Congress occupied a field when the federal scheme of regulation was very comprehensive,[95] or when the field regulated was one in which the federal interest was dominant,[96] such as in foreign affairs or when national uniformity is a goal. Conversely, the Court has found that even a comprehensive scheme of federal regulation did not preempt state law when Congress only intended the federal regulations as minimum rather than exclusive standards.[97] Thus, the real question is whether Congress intended to exclude all state regulation on a certain subject or portion of a subject.

2. Actual Conflict

Even when Congress does not intend to preempt all state regulation of a certain field, any state law which actually conflicts with a federal law must give way. There are two ways in which the Court has found that a state law may conflict with a federal law: 1. when it is impossible to comply with both the federal and the state laws at the same time[98] or 2. when "imposition of the state standard . . . would frustrate the objectives of the federal law."[99]

In *Granite Rock,* there was no direct conflict between the federal and state laws. Granite Rock could comply with both federal and state regulations of its mining activities. Since the federal government did not require Granite Rock to mine its claim, even if the Coastal Commission prohibited mining on the claim, Granite Rock could comply with both

92. *See* Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 713 (1985).
93. *E.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
94. L. TRIBE, *supra* note 26, at 497.
95. *Hillsborough County*, 471 U.S. at 713.
96. *Rice*, 331 U.S. at 230.
97. Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 147-48 (1963).
98. E.g., Kleppe v. New Mexico, 426 U.S. 529 (1976) (New Mexico Livestock Board could not comply with New Mexico Estray Law requiring capture and sale of wild burros on public lands without violating federal act requiring that such burros be left free to roam federal public land).
99. Silkwood v. Kerr-McGee, 464 U.S. 238, 256 (1984).

federal and state law. Thus, in *Granite Rock,* the Court was faced with the more difficult question of whether the Coastal Commission permit frustrated the objectives of a federal law.

The problem with the formula "frustrates the objectives of a federal law," however, is that it cuts too broadly to be of much analytic use. In several recent cases the Court has held that the mere fact that a state law may discourage an activity which the federal government wants to encourage is not sufficient to find a conflict between the federal and state laws. For example, the Court has held that although federal policy generally encourages the use of coal, this policy does not allow the Court to infer a congressional intent to preempt "all state legislation that may have an adverse impact on the use of coal."[100] Furthermore, in the realm of regulation of nuclear power plants, the purpose of the Atomic Energy Act (AEA) is to encourage the development of nuclear power.[101] The Court has held, however, that the AEA does not preempt either a state prohibition against building plants until they are economically feasible[102] or the award of punitive damages against a nuclear power company under state tort law.[103] Both of these results rested on the Court's decision that the congressional purpose was not to encourage the development of nuclear power "at all costs."[104] Thus, before the Court can find that a state law frustrates a federal purpose, it must decide not only that Congress wants to encourage something but also that Congress wants to disallow all obstacles to the accomplishment of that goal.

Preemption analysis based on conflict is thus similar to that based on occupation of the field. In occupation of the field analysis, the Court must decide if Congress intended to exclude all state regulation, no matter how complementary to the federal purpose. In conflict analysis, the scope of the Court's inquiry is limited to those state regulations which impede the accomplishment of a federal goal. But again the Court must decide if Congress intended to exclude that limited set of state regulations.

3. Presumption Against Preemption

The Court usually begins its preemption analysis presuming that Congress did not intend to preempt state law.[105] The Court abandons this presumption only in a few situations, such as foreign affairs, where "[a]ny

100. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 633 (1981).

101. Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 222 (1983).

102. *Id.*

103. *Silkwood,* 464 U.S. at 258.

104. *Id.* at 257; *Pacific Gas and Electric,* 461 U.S. at 222.

105. *See* L. TRIBE, *supra* note 26, at 479.

concurrent state power is restricted to the narrowest of limits."[106] This presumption means that the Court will only find federal preemption when it finds evidence that Congress intended its law to preempt state law. The mere fact that there is no evidence that Congress intended not to preempt state law will not allow preemption.

B. The Supreme Court's Preemption Analysis in Granite Rock

The Supreme Court held that no federal law preempted application of the California Coastal Commission permit requirement to Granite Rock's mining operation.[107] The Court considered preemption in three contexts: the Forest Service mining regulations, the federal land-use planning statutes (mainly the National Forest Management Act), and the federal Coastal Zone Management Act.[108] This Note will only focus on the Court's holding in the first two contexts.[109]

Granite Rock argued that either the Forest Service mining regulations or federal land-use planning statutes preempted the Coastal Commission permit requirement.[110] The Court decided that neither of these federal laws preempted the permit requirement. First, neither of these laws occupied the field of environmental regulation on federal land.[111] Since the Court found that the Coastal Commission permit was an environmental regulation,[112] federal law did not preempt it unless the permit regulation conflicted with federal law.[113] The Court held, however, that it could not decide whether the Forest Service regulations or the federal land-use planning statutes conflicted with the state permit requirement until the state had announced the conditions it would place on any permit it issued to Granite Rock.[114]

1. Federal Law Does Not Occupy the Field of Environmental Regulation

The Court found that the Forest Service mining regulations were environmental regulations[115] and that they did not exclude all state regulation

106. Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (federal alien registration system preempts more comprehensive state system because state system would destroy federally determined balance between national security interests requiring such registration and national interest in maintaining harmony in international relations with aliens' countries of nationality).

107. *Granite Rock*, 480 U.S. at 581.

108. *Id.* at 584-85, 589.

109. For a brief discussion of the Court's holding with respect to the federal Coastal Zone Management Act, see *supra* note 19.

110. *Granite Rock*, 480 U.S. at 581-82.

111. *Id.* at 584, 589.

112. *Id.* at 586.

113. *Id.* at 588.

114. *Id.* at 589.

115. *Id.* at 582.

of private mining in national forests.[116] The regulations were environmental regulations because their purpose was "to minimize adverse environmental impacts" of mining "on National Forest System surface resources."[117] The regulations did not exclude all state regulation of mining on unpatented claims in national forests because the Forest Service had expressed no intent that they do so.[118] This result followed the Court's 1985 decision in *Hillsborough County v. Automated Medical Laboratories, Inc.*, where the Court held that if a federal agency intends its regulations to preempt state law, the Court expects the agency to express that intention in its regulations.[119] In *Granite Rock*, the Forest Service did not state an intention to preempt state regulation of unpatented mining claims in national forests.[120] Furthermore, even if the Court had been willing to infer such an intention, it could not do so because it found that the Forest Service actually intended recipients of its permits to "comply with state laws" and to obtain state permits.[121] Thus, the Forest Service regulations did not occupy the field of environmental regulation of unpatented mining claims.

The Court also determined that federal land-use management statutes did not express a Congressional intent to exclude states from applying their environmental regulations to private activities on federal land.[122] First, the Court assumed[123] that federal land-use statutes excluded states from extending their land-use plans "onto unpatented mining claims in national forest lands."[124] The Court was assuming that federal land-use statutes occupied the field of land-use planning on federal land. Then the Court distinguished land-use planning from environmental regulation. The

116. *Id.* at 584.
117. *Id.* at 582.
118. *Id.* at 583.
119. 471 U.S. 707 (1985). Automated Medical Labs operated a blood plasma collection center in Hillsborough County. *Id.* at 709. Automated was subject to federal regulation of its operating procedures and of the quality of its blood products. *Id.* When Hillsborough County enacted an ordinance requiring Automated to adhere to stricter operating standards, Automated sued, claiming the federal blood collection regulations preempted the county ordinance. *Id.* at 710-11. Automated argued that the federal regulations occupied the field of regulation of blood plasma collection because they were very comprehensive. *Id.* at 716. The Court found that the mere comprehensiveness or complexity of federal regulations, alone, was not sufficient to allow the inference that the regulating agency intended to preempt state law. *Id.* at 717. Instead, because of the nature of the regulatory process, an agency can be expected to express any intention it has to preempt state law. *Id.* at 717-18. Furthermore, in this case, the FDA (the regulatory agency for blood plasma collection centers) had stated in an earlier set of regulations that it intended not to preempt state law. *Id.* at 714. Thus, the Court found that no intent to preempt state law could be inferred from the FDA regulations. *Id.* at 717-18.
120. *Granite Rock*, 480 U.S. at 583.
121. *Id.* at 584.
122. *Id.* at 585-87.
123. The Court clearly stated that it was not deciding this issue. *Id.* at 584.
124. *Id.*

Court found a logical difference between the two: "Land use planning in essence chooses particular uses for the land; environmental regulation at its core, does not mandate particular uses of the land . . ."[125] In addition, several federal statutes made clear that Congress understood these as two different activities. In the Federal Land Policy Management Act (FLPMA),[126] Congress does not require the BLM to make its land use plans consistent with state plans, but it does require the BLM to comply with "applicable pollution control laws"—i.e., environmental regulations— including state laws.[127] Furthermore, the Court found that Congress had delegated environmental regulatory authority in the national forests to the Forest Service but had given authority to the BLM to plan for the development of mineral resources in the national forests.[128]

Finally, the Court explained that because Congress understands land-use planning and environmental regulation as different activities, even if the federal land-use planning statutes occupied their field, the statutes did not show a federal intent to exclude all state environmental regulation from federal lands.[129] In other words, since Congress did not consider land-use planning to be the same as environmental regulation, its intention to occupy the field of land-use planning in the NFMA and FLPMA did not signify an intention to occupy the field of environmental regulation on federal land. Therefore, federal law would not exclude the state permit requirement if it could be classified as an environmental regulation.

2. The Coastal Commission Permit Requirement is a Means of Enforcing State Environmental Regulations

The Court decided that, in this case, the state permit requirement could be classifed as an environmental regulation. The California Coastal Act gives the Coastal Commission authority to make and enforce land-use plans as well as environmental regulations.[130] The Act, however, does not require the Commission to exercise its land-use planning authority when asserting such authority would conflict with federal law.[131] Thus, the Court had no difficulty accepting the state's argument that it would only enforce the environmental regulation part of the California Coastal Act when issuing a permit to Granite Rock.[132]

125. *Id.* at 587.

126. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701-1784 (1982)).

127. 480 U.S. at 587.

128. *Id.* at 589. The BLM has authority over location of mining claims under the Mining Act of 1872. *See supra* notes 9 and 50-62 and accompanying text for more information.

129. 480 U.S. at 587-88.

130. *Id.* at 586; California Coastal Act, CAL. PUB. RES. CODE §§ 30001-30001.5 (West 1986).

131. 480 U.S. at 586-87; California Coastal Act, CAL. PUB. RES. CODE § 30004.

132. 480 U.S. at 587.

Furthermore, since the state agreed that it would not and could not prohibit Granite Rock's mining, the Court determined that the state's environmental regulation would not slip over into the possibly federally dominated realm of land-use planning.[133] The Court reasoned that environmental regulation could become land-use planning if it was "so severe that a particular land use would become commercially impracticable."[134] So long as the Coastal Commission's environmental regulations were not so severe as to prohibit mining, they would not be land-use regulations.

3. No Actual Conflict Between Federal and State Law

The Court found no conflict between the requirement that Granite Rock obtain a Coastal Commission permit before it continued mining and the fact that Congress and the Forest Service had authorized the mining.[135] There were two bases for this holding. First, the Court concluded that it could not analyze the situation for a conflict between federal and state law because it did not know what conditions the state would place on the permit it issued to Granite Rock.[136] There were some conditions which the Coastal Commission could impose on Granite Rock which would not conflict with federal law: environmental regulations which were the same as or more stringent than those imposed by the Forest Service which were not so severe as to amount to a prohibition of mining.[137] Since the Coastal Commission could impose permit conditions which did not interfere with fields occupied by federal law, the Court found that a conflict between federal and state law was not yet present.

The other basis for the Court's finding of no conflict was that it did not find that the bare state permit requirement itself interfered with the Forest Service permit requirement.[138] So long as the state environmental regulations were not in conflict with federal law, "then the use of a permit requirement to impose the state regulation does not create a conflict with federal law where none previously existed."[139]

V. ANALYSIS

A. The Court's Occupation of the Field Analysis

The Court's occupation of the field analysis leads to one important

133. *Id.* at 586-87.
134. *Id.* at 587.
135. *Id.* at 588, 594. Congress authorized the mining with the Mining Act of 1872. 30 U.S.C. § 22 (1982). The Forest Service authorized the mining when it approved Granite Rock's Five Year Plan of Operations. *Granite Rock*, 480 U.S. at 577-78.
136. 480 U.S. at 589.
137. *Id.* at 588.
138. *Id.* at 589.
139. *Id.*

conclusion: the Court will not find a dominant federal interest in regulating the uses of federal property. Instead, it will consider federal property legislation with the usual presumption against federal preemption. The Court's understanding of the property clause can be more clearly seen by comparing its holding to Justice Powell's dissent.[140]

Justice Powell thought the Court should have given more weight to the federal interest, set out in the property clause, of regulating the uses of federal lands.[141] Because of the dominant federal interest in regulating activity on federal land, he would have looked at the Forest Service mining regulations for an intent to allow the states to regulate activities on federal land, rather than for an intent to disallow such regulation.[142] The regulations do not express an intent to allow general state regulation of unpatented mining claims in national forests, even though they allow specific state regulations to apply.[143] Justice Powell would have found that the Forest Service regulations implicitly exclude all state regulations except those which they specifically permit.[144] Thus, based on his understanding of the property clause as giving the federal government a dominant role in regulating uses of federal property, Powell would have found that the Forest Service regulations occupied the field.

Powell's analysis of the Forest Service regulations focused on what state regulation the Forest Service would permit, rather than on what regulations it intended to exclude. This is the opposite of the traditional preemption inquiry.[145] The majority of the Court, however, following the traditional approach, focused on deciding what state regulations the Forest Service intended to exclude. The implication of the majority's traditional preemption approach is that the federal government has no dominant interest in regulating the uses of federal public lands.

B. The Court's Conflict Analysis

The Supreme Court reversed the Ninth Circuit because it disagreed with the lower court's conclusion that a conflict existed between the federal authority to grant a permit to mine and the state permit requirement. The Ninth Circuit held that the Coastal Commission permit con-

140. Justice Stevens joined in Justice Powell's opinion. *Id.* at 594. Justice Scalia also wrote a dissenting opinion in which Justice White joined. *Id.* at 607. Although Justice Scalia agreed with Justice Powell's concern that the Court was abdicating federal control over the use of federal land, *id.* at 610-11, his major disagreement was with the Court's interpretation of the Coastal Commission permit as a type of environmental regulation, *id.* at 610.

141. *Id.* at 604.

142. *Id.* at 600.

143. *Id.*

144. *Id.*

145. *See supra* notes 105-06 and accompanying text.

flicted with federal law because it interfered with the Forest Service's authority to "prohibit or permit mining in national forests conditioned on meeting environmental standards."[146]

The Ninth Circuit's decision rested on two bases. First, the court read earlier precedents to require that when a federal agency has "comprehensive planning responsibility" to issue permits for private activities, any state permit requirement for the same activity will interfere with the federal sphere of authority.[147] Such state permits conflict with federal permits because they give the states "a veto power" over the federal decision.[148] Second, the court found that in this case the Forest Service had sufficient final authority over activities in national forests so that any state permit requirement was inconsistent with the Forest Service's authority.[149] The Ninth Circuit was equating final authority to "comprehensive planning responsibility." Thus, it found that the precedents it had cited applied to the Forest Service's authority to permit or prohibit Granite Rock from mining.[150] The Ninth Circuit did not say, however, how the Forest Service acquired its final authority over activities in national forests.

In rejecting the Ninth Circuit's decision in *Granite Rock*, the Supreme Court did not overrule the precedents on which the lower court relied. The Supreme Court's failure to find a conflict between the federal permit authority and the state environmental regulations rested, instead, on its failure to find final authority in the Forest Service over the uses of national forest lands. This failure to find final authority in the Forest Service was the result of the Court's analysis of the relevant federal law.[151] Since the Court found no law which gave the Forest Service such authority, it would not infer the existence of such authority. Such an approach is consistent with traditional preemption analysis which is only concerned with statutory interpretation and which presumes against preemption.[152]

Justice Powell argued that both the property clause and common sense dictated a different result in this case.[153] Justice Powell interpreted the relevant federal statutes differently from the Court: he would have found that Congress had given "comprehensive planning responsibility" over

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

147. *Id.* at 1082. The Ninth Circuit cited its earlier decision in Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980). The court of appeals also cited Sperry v. Florida, 373 U.S. 379 (1963) and First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946).

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

149. *Id.* at 1083.

150. *Id.*

151. *Granite Rock*, 480 U.S. at 593-94.

152. *See* L.TRIBE, *supra* note 26, at 510; *supra* notes 105-06 and accompanying text.

153. *Granite Rock*, 480 U.S. at 606.

the uses of national forests to the Forest Service.[154] Even without a different interpretation, however, Powell seems to be arguing that the Court should presume that Congress intended exclusive federal control over federal property unless it states otherwise.[155] Justice Powell's approach is thus similar to the Ninth Circuit's, which assumes that the federal government must have final authority over the uses of its property. Such an assumption would be a presumption in favor of preemption contrary to the Court's traditional presumption against preemption.

C. Traditional Preemption Analysis Makes Sense in this Case

The result of the Supreme Court's use of traditional preemption analysis in *Granite Rock* was appropriate because it is consistent with other decisions concerning the extent of the Forest Service's authority over unpatented mining claims in national forests. The Forest Service does not have final authority over the regulations it imposes on miners of unpatented mining claims on national forests. In *United States v. Weiss*,[156] a case involving the same Forest Service regulations considered by the Supreme Court in Granite Rock, the Ninth Circuit held that the Forest Service did not have authority to prohibit mining on unpatented claims.[157] Because the Mining Act of 1872 gives the miner a right to mine on any federal public domain land, the Forest Service may only impose reasonable regulations on such mining.[158] The final authority in any case where a miner claimed that Forest Service regulations were unreasonable would have to be a court, not the Forest Service. This is not much different from the result in *Granite Rock*. After *Granite Rock*, the courts will decide not only whether Forest Service mining regulations are reasonable, but also whether state regulations affecting unpatented claims in national forests are reasonable.

Furthermore, because Congress has not made a clear, comprehensive statement concerning its intentions regarding control of federal property,[159] the Supreme Court followed the best approach by presuming against preemption. One explanation of the Court's presumption against preemption is that it is a means of insuring that the political process protects the sovereignty of the states.[160] By declining to find that federal law preempts

154. *Id.* at 595-604.

155. "This abdication of federal control over the use of federal land is unprecedented." *Id.* at 604. "In view of the property clause of the Constitution, as well as common sense, federal authority must control with respect to land 'belonging to the United States.'" *Id.* at 606.

156. 642 F.2d 296 (9th Cir. 1981).

157. *Id.* at 299.

158. *Id.*; *see also supra* notes 84-86 and accompanying text.

159. *See supra* notes 53-57 and accompanying text.

160. L. TRIBE, *supra* note 26, at 480; *c.f.* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

state law when Congressional enactments appear ambiguous, the Court is requiring that "decisions restricting state sovereignty be made in a deliberate manner by Congress."[161] Only when Congress is forced to clearly state whether it intends to infringe on state powers will the states be able to use the political process effectively to protect themselves.[162] Since current federal property laws do not appear to represent deliberate congressional decisions concerning the extent of federal and state power over federal property, the Court's decision in *Granite Rock* to presume against preemption makes sense.

VI. IMPLICATIONS FOR THE STATES

The Court's decision in *Granite Rock* was careful and in line with most prior decisions. It preserved the power states thought they had to regulate federal property within their boundaries. But, the decision did no more. The decision does not allow states to forbid mining on federal land. Because the decision relied on a difficult distinction between land-use planning and environmental regulation, it will not be easy for other states to decide when their regulations will or will not be preempted. Furthermore, the decision makes no change in the balance of federal and state power over federal property as set out in *Kleppe v. New Mexico*.[163]

After *Granite Rock,* the states may enact reasonable environmental regulations on unpatented mining claims, but, they probably cannot prohibit mining in the process. The Court emphasized the California Coastal Commission's agreement not to prohibit mining in deciding that the Coastal Commission was engaged in environmental regulation rather than land-use planning.[164] Also, the Court did not overrule its affirmance of the Ninth Circuit's decision in *Ventura County v. Gulf Oil Co.*[165] that a federal mineral lease preempted a county zoning ordinance which would have prohibited Gulf Oil from drilling for oil on federal land. *Ventura County* can be understood, in *Granite Rock*'s terms, as the rejection of a county's attempt to enforce its land-use planning statutes on federal land. In any case where a state attempts to prohibit mining with environmental regulations, however, it will be open to the claim that it is trying to plan land uses. Taken together, the Court's affirmance of *Ventura County* and its decision in *Granite Rock* probably will not allow states to prohibit mining on federal land.

Possibly more troubling for the western states is the fact that *Granite Rock* takes nothing away from the Court's decision in *Kleppe* that Con-

161. L. TRIBE, *supra* note 26, at 480.
162. *See id.*
163. Kleppe v. New Mexico, 426 U.S. 529 (1976).
164. *Granite Rock*, 480 U.S. at 582.
165. 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980).

gress has the constitutionally granted authority to exclude all state regulation on the federal lands if it so chooses. The Court's result in *Granite Rock* rested on its interpretation of the intention of Congress as expressed in federal statutes. Although the Court rejected a finding of implied federal dominance in the field of regulation of federal property, it did not reject the possibility that Congress could enact a dominant federal statute. Furthermore, this decision could show Congress, as Justice Powell suggested, that "[t]here is an evident need for Congress to enact a single, comprehensive statute for the regulation of federal lands."[166] The question then will be whether the western states have sufficient political power in Congress to maintain some level of local control over federal lands within their borders.

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166. 480 U.S. at 606.