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Granite Rocks and the State's Influence
Over Federal Land Use

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This article is an abridged version of an article which appears in volume 18 of Environmental Law. Its genesis was a presentation given at a symposium sponsored by the Natural Resources Law Center and held in Denver on April 15, 1987.

Granite Rock and the States' Influence over Federal Land Use*

By John D. Leshy **

The Supreme Court's decision in California Coastal Commission v. Granite Rock Company (107 S. Ct. 1419 (1987)) leaves unanswered many questions about the scope of state regulatory authority over activities being conducted on federal land. But it is a significant victory for advocates of state power, for it allows the states to apply their own regulatory permitting statutes independently of parallel federal regulations. Thus the states possess a significant bit of leverage, if they choose to exercise it, in the delicate interplay between state and federal policymaking for federal lands. This article will identify and suggest answers to some of the questions that remain in the wake of the decision, and will offer some suggestions about how both the states and the federal government might constructively go about responding to it.

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1. Can a state order mining on public lands to cease pending determination of its permit requirements?

Justice O'Connor's opinion for the majority does not address this question, but the answer would almost have to be yes. The Supreme Court's decision plainly gives a state the power to enforce its environmental regulatory laws by requiring permits from private entities conducting activities on federal land within its jurisdiction. Being able to enforce the permit requirement with an injunction, at least if the ordinary requirements of injunctive relief were met, seems a nearly necessary corollary of being able to require the permit in the first place.

This implicates the Ninth Circuit decision in Ventura County v. Gulf Oil Corp. (601 F. 2d 1080 (9th Cir. 1979)), which laid considerable emphasis on the idea that enforcement of the local permit requirement there would have halted the activity. This point did not escape dissenting Justice Powell in Granite Rock, for he decried, as the "most troubling feature" of the majority's decision, that "if the Coastal Commission can require Granite Rock to secure a permit before allowing mining operations to proceed, it necessarily can forbid Granite Rock from conducting these operations."

If the state can enforce its permit requirement by injunctive relief, its leverage over the mining operation is made more concrete, because the burden of going forward in the courts has been substantially lifted from the shoulders of the state.

Instead, the miner who wants to argue that stringent state regulation has been preempted, but who also wants to proceed with mining while the issue is litigated, will now be obliged either to comply with the state requirements, or to seek a stay of their enforcement from the courts.

2. What differentiates state environmental regulation from land use planning?

Justice O'Connor's opinion assumed, without deciding, that while environmental regulation is protected, land use planning is preempted -- a matter taken up in the next section. Justice O'Connor appreciated the impossibility of drawing a bright line between the two, and it is not easy to improve upon her explanation:

"Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however land is used, damage to the environment is kept within prescribed limits."

The slipperiness of the distinction offers a substantial opportunity to state and local governments, especially those who are willing to review and, if necessary, recharacterize their regulatory processes to shade them toward environmental regulation. This is not to suggest that the courts will be

fooled merely by labels. Most judges are familiar with preemption cases; many judges have served in legislatures and understand the political process well enough to penetrate fabrications. But these cases almost inevitably involve a careful sifting of facts, statutes and regulations, and, as Granite Rock itself demonstrates, how a state chooses to paint its regulatory objective can make a substantial difference in the outcome.

But Justice O'Connor's definition of environmental regulation leaves somewhat open the hard case, where the state is not seeking to mandate particular uses of the land, but where its effort to mitigate environmental damage effectively controls, if not how the land will be used, at least how it may not be used. If, for example, the Coastal Commission were to require, as a condition of Granite Rock's permit, that the company backfill and reclaim its open pit after mining, the cost might be so prohibitive as to forestall any mining in the first place. Is that reclamation requirement better characterized as land use planning or environmental regulation? This is the gray area sketched out by Justice O'Connor, where "a state environmental regulation [is] so severe that a particular land use would become commercially impracticable."

3. How far can a state go in denying or imposing conditions on its permit?

By itself a state permit gives the state only some procedural and timing leverage over activities on federal land. For the permit requirement to have genuinely substantive influence over how federal lands are managed, the state must have authority both to condition the permit upon compliance with substantive state controls over the mining operation and, possibly, to deny a permit if there are no circumstances under which the operation can proceed in compliance with state law.

Here too the Granite Rock majority avoided definitive resolution of this issue because it was not necessary to do so in the context of a threshold challenge to the state's permit requirement. But Justice O'Connor did address the issue obliquely, in discussing whether the state regulation in question was better characterized as a land use or an environmental regulation. This permitted her, in turn, to mention a couple of different formulations of the appropriate inquiry to be followed in passing on a state permit condition: First, whether the state's environmental regulation was "reasonable," and second, whether it was "so severe that a particular land use [became] commercially impracticable."

In evaluating these suggestions, it may be useful to separate two issues: First, how far the state can go in regulating before it is preempted by federal law; and second, how far

the state can go in regulating before it unconstitutionally takes whatever property right the miner possesses. The state courts, addressing these issues in the context of the Mining Law, have generally lumped them together, following some version of what has been called the "regulatory/prohibitory distinction" -- that states have the power to regulate mining operations on federal land, but not to prohibit them.

These courts are probably correct in meshing the two. From the beginning, the Mining Law has contemplated a large role for state and local governments, at the same time it has offered private miners the possibility, if certain conditions are satisfied, of acquiring property rights in federal land. Thus, generally speaking, the federal interest for preemption analysis would seem to be adequately protected so long as the state did not regulate to the point of taking whatever property right the miner may have under federal law.

While the "regulatory-prohibitory distinction" has a nice ring to it, its application raises some important questions. One is whether proscribing a state veto means only that the state may not expressly prohibit mining or whether, instead, it prevents the state from regulating so heavily that the mining operation is effectively, though not expressly, prohibited. If it is the former, then the test is not very helpful, because it merely counsels a state to hide its prohibitory intent behind onerous conditions attached to the permit to mine. But if it is the latter, it founders on the shoals of the federal statute under

which Granite Rock is operating here -- the Mining Law of 1872. That law's test for the validity of a mining claim, by which miners perfect valid property rights against the landowner United States, is whether the mining claimant has made a "discovery" of a "valuable mineral deposit." Establishing a discovery, a multitude of reported decisions has made clear, turns substantially on whether a commercially viable mineral deposit has been found. And that, as numerous decisions hold, is influenced by the costs of extracting the deposit, including the cost of complying with applicable regulatory requirements.

Almost any state (or federal, for that matter) regulation is bound to increase a miner's cost of operations. If the regulation is onerous enough, the deposit may be rendered uneconomic to mine. If so, the miner's legal "discovery," and her property right, vanish, presumably without compensation. This possibility has not seemed to trouble the Supreme Court in the past. It has made clear, for example, that California could levy a tax on Granite Rock's interest in its unpatented mining claims, which would surely detract from the commercial viability of the deposit.

Moreover, to say that a state (or federal government) may regulate only to the extent it does not effectively prohibit mining leads to an odd result. Because it would limit the extensiveness of the regulation depending upon the economic viability of the particular operation, it would tend to allow regulation only of clearly profitable mining operations, and not

marginal ones. But the state's interest in mitigating environmental impacts is not likely to vary with the profit margins of mining claimants. Indeed, it may often be true that economically marginal mining operations are the most environmentally destructive.

Like "takings" questions in general, this issue is likely to escape definitive generic resolution. Indeed, the hazards of applying the "regulatory-prohibitory distinction" might have counseled the Granite Rock majority to avoid an explicit endorsement of it, even to the point of neglecting to cite, much less discuss, the state court decisions that have adopted it. In the end, the agencies and the courts will probably muddle through by assessing the "reasonableness" of the state's environmental regulation. Perhaps we will even see employed in this context the late twentieth century judiciary's favorite buzzword, a "balancing" of the strength of the state's interest in mitigating environmental impacts against the legitimacy of the miner's expectation of a right to mine, leavened by whatever national interest one might find in the matter.

4. Do the modern federal land use planning statutes preempt independent application of state land use (as opposed to environmental) regulations?

This is another question left unresolved in Granite Rock, because the majority characterized the Coastal Commission's

regulations as "environmental" rather than "land use." Yet it did broach the topic, and assumed without deciding the issue that the modern federal land planning laws have preempted "the extension of state land use plans onto unpatented mining claims in national forest lands." Future courts may have to consider the question, however, if they are faced with state regulations that they choose not to characterize as "environmental" in their orientation.

There is considerable room to challenge the assumption the Court made. The federal land planning statutes do, as the Court points out, call more for consultation and cooperation between state and federal governments than for independent application of state zoning plans. For example, the Federal Land Policy and Management Act of 1976 (FLPMA), the most full-blown version of modern congressional balancing of state and federal interests in land use planning for the federal lands, stops short of giving non-federal governments a land use planning-based veto over activities on federal lands managed by the Bureau of Land Management (BLM). Instead, the Secretary of the Interior is obliged to make federal land use plans "consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act." Dissenting Justice Scalia found this language controlling, arguing that it would be "superfluous . . . if the States were meant to have independent land use authority over federal lands."

But this provision does not necessarily oust the states from an independent role, for its phrasing sustains the interpretation that Congress merely wanted the Secretary of the Interior to make the initial judgment about whether state and local plans are preempted. These nonfederal governments still retain the right to seek judicial review of a secretarial decision preempting the applicability of their plans, to test whether preemption is "consistent with Federal law and the purposes of this Act." Under this view, Congress did not establish an automatic preemption of state and local land use planning authority in FLPMA. Rather, it left the matter up to the more traditional case-by-case review, by the agency initially, and then by the courts.

5. May subdivisions of state government apply their environmental regulatory permit schemes on federal lands?

This question suggests one way to distinguish the Ventura decision from Granite Rock, for the former involved a county while the latter involved the state. Once again Justice O'Connor's majority opinion was characterized by silence, one footnote merely pointing out that no local permit requirement is involved.

To lay fundamental preemptive emphasis on the character of the nonfederal government involved would seem to fly in the face of the long-established maxim that for nearly all federal constitutional purposes, including application of the Supremacy

Clause, local governments are regarded merely as units of state government. Local governments derive their power from the states, and are, within state constitutional limitations, dependent upon state delegations of power. While Congress can draw distinctions between local and state government if it chooses, it does not appear to have done so very often in the context of federal lands.

Nevertheless, there is a risk if the states and local governments push this idea too vigorously. It is probably natural to expect that the Forest Service, the BLM, and the Congress will be more willing to allow state regulation on federal lands than to tolerate regulation by every county, village, or special governmental district. At some point in this spiral downward through governmental layers, these agencies and Congress might feel compelled to intervene and aggressively invoke a national interest in how these lands are managed. And if that happens, there is a risk that, from the states' perspective, the baby (state regulation) might be thrown out with the bathwater (local regulation). Some suggestions for sidestepping that and other pitfalls are set out in the conclusion below.

6. To what extent can the federal agencies change the balance of power created by the Granite Rock decision?

Finding no evidence that the agency had intended to preempt state law, Justice O'Connor's opinion rather curtly dismissed the

miner's argument that the Forest Service's regulations, designed to protect the use of the surface from hardrock mining operations like Granite Rock's, had themselves preempted the state permit requirement. The question remains whether the agency could, by amending its regulations, expressly preempt application of state permit requirements.

Although the Forest Service did not adopt its surface management regulations until 1974, the agency had been granted regulatory authority by Congress 77 years earlier, in the 1897 Organic Act for national forest management. This act delegated legislative power to the agency to make "rules and regulations" to "regulate [the] occupancy and use" of the forests. While the delegation was practically uncabined -- so much so that it took two rounds of decision in the Supreme Court to uphold it against a challenge, brought by grazing interests, that it was unconstitutionally overbroad -- other parts of this same act reveal an intent that the states retain a significant measure of police power over activities on federal lands. Specifically, Congress provided that state jurisdiction should "not be affected or changed by reason of [the] existence" of the national forests. Thus it remains unclear whether Congress intended to grant the Forest Service the authority to preempt state law.

Analysis of the statutory authority of the other principal federal land management agency, the Bureau of Land Management in the Department of the Interior, leads to the same inconclusive conclusion. Exercising authority given it by a number of

statutes, including the Federal Land Policy and Management Act and the Mining Law itself, BLM has promulgated its own generally parallel (but not identical) regulations to protect surface uses on BLM lands from Mining Law activities. Yet these statutes do not unequivocally delegate power to the federal agency to preempt state law; to the contrary, they fairly bristle with features designed to enhance rather than diminish the role of the states in federal land management.

Although one cannot say with assurance whether the federal agencies have the power, without further action by Congress, to reverse Granite Rock's holding that California's permit requirement applies, the question will arise only if a federal agency determined to force the issue. There is ample reason to doubt whether the federal agencies have the political will even to attempt preemption. It would take eyebrow-raising action by any Administration -- especially the current one, whose leader is an aggressive proponent of reinvigorated federalism -- to attempt to throw the states off the territory they have won in the hard-fought battle of Granite Rock.

7. How far does Granite Rock apply outside the mining law context?

Focusing on the specific statutory framework before it, Justice O'Connor's majority opinion cites almost no cases, draws on no other statutes or regulatory areas for guidance by analogy,

and pays little attention to the rich history of state-federal relations in land management. Yet one cannot conclude that the decision has no implications outside the framework of the Mining Law, for the majority does not really tie its analysis to the Mining Law at all, except to the limited extent it asks whether the Forest Service's surface management regulations have preempted state regulation. Instead, the majority asks whether the state regulation is land use or environmental in essential character. And that, significantly, is an issue that applies across practically the entire spectrum of possible uses of federal land.

Perhaps the most important feature of this decision, indeed, is the majority's firm rejection of dissenting Justice Powell's argument that preemption generally ought to be found more readily on federal land than in other contexts. Powell apparently views preemption issues involving federal property much like the Court has tended to view them in the foreign affairs context -- as starting with the idea that the states must meet a heavy burden of justifying the legitimacy of their regulatory interest in light of a rather overwhelming constitutional commitment to federal supremacy. His citation to Hines v. Davidowitz makes clear that, for himself and Justice Stevens, (but not, apparently, for Justices Scalia and White, dissenting separately) the property clause of the constitution is akin to the war and defense powers, "imperatively . . . demand[ing] broad national

authority [where] any state power that may exist is restricted to the narrowest of limits."

The majority brushes off this suggestion without elaborate comment, rejecting any thought that "traditional pre-emption analysis is inapt in this context." Thus the property clause is not, for at least five and possibly seven Justices currently on the Court, a domestic counterpart of the foreign affairs power. By this feature alone, Granite Rock goes a substantial way toward reviving the states as genuine partners in the process of regulating activities on federal land.

Nevertheless, preemption analysis quintessentially turns on context, and especially the statutory setting. On federal lands, this will vary somewhat from resource to resource. As noted earlier, here the Court assumes that the Mining Law, considered by itself, allows room for the application of state regulatory permitting schemes, and therefore the only question is whether more recent and more generic federal laws like the land use planning acts have intervened to preempt otherwise applicable state laws. It remains to be seen whether the Court is equally willing to make the same assumption about other substantive federal land management statutes like the Taylor Grazing Act, the National Forest Management Act or the Mineral Leasing Act.

8. Will the Granite Rock decision discourage state participation in the federal land planning processes?

At first blush, one is tempted to answer this question in the affirmative. By upholding the state's power to require a permit under its own law, independent of the federal regulatory system, the Court appears to have invited the states to shun the opportunities nearly all federal agency land and resource planning processes afford for state and local government participation. And this invitation might seem especially appealing because these nonfederal governments have traditionally not been especially vigorous about using the opportunities to influence federal agency decisionmaking that federal law already provides.

In Granite Rock itself, for example, California had unaccountably waived its right to review, against the "consistency" requirements of the federal Coastal Zone Management Act (CZMA), the plan of operations the company had submitted to the Forest Service.

Of course, nothing in the Granite Rock decision requires the states or local governments to regulate, and some may not have an interest in the matter, or a state law scheme that permits it. Overall, in fact, the Western states' record in seeking to regulate federally sponsored activities is decidedly spotty. So far, for example, most states have not been very aggressive about taking advantage of the opportunity the Supreme Court handed them in California v. United States to control the operation of

federal reclamation water projects. The political power of the reclamation beneficiaries in the affected states -- beneficiaries who form one side of one of the sturdiest iron triangles in American politics -- has so far been sufficient to head off most state attempts to exert an independent voice. But even here there are some signs of change, for a recent report commissioned by the Western Governors' Association recommends more vigorous state advocacy with respect to the policies of the Bureau of Reclamation.

The states have made considerable progress in recent years adopting regulatory schemes to protect the environment. A representative of the American Mining Congress recently told a congressional committee that state environmental regulation of hardrock mining had now become practically the norm. Only three of fourteen western states had such schemes in 1970, while ten have them today. Indeed, although Granite Rock involved regulation by the state Coastal Commission, California also adopted a comprehensive Surface Mining and Reclamation Act in 1975 that, the state Attorney General has opined, applies to federal lands. This statute could well figure prominently in Granite Rock's operation in the aftermath of the Supreme Court's decision.

Even given the increased presence of state regulatory schemes, however, the state and local governments would do well to resist the invitation to avoid participation in the federal land planning process. For one thing, Granite Rock does not eliminate the possibility that some state requirements may still,

in the end, be preempted by federal law. Moreover, federal agencies retain ultimate power to authorize particular uses of federal lands, and thus remain in substantial control of what actually happens on these lands. If state and local governments want to influence these agencies directly on such questions as whether to issue mineral leases or grazing permits, conduct timber sales or set aside wildlife habitats, it will likely be more effective for them to use the federal land use planning process rather than state regulatory processes. Although their influence over the federal agencies on these questions is exercisable more through persuasion than through the force of law, it is nonetheless significant, for the political power of the states in the halls of the executive bureaucracies is usually not substantially less than their power in the halls of Congress. Secretaries of the Interior and the heads of most important federal land management agencies, for example, usually come from the Western states and have a sensitivity that approaches an affinity for state concerns.

Another advantage of using the land use planning process is that it tends to occur earlier. The state regulatory process often comes into play only after a considerable investment of time and resources by the federal agency and any private actor involved. State and local participation in the federal land use decisionmaking process can, by contrast, head off conflicts before they ripen into entrenched, head-to-head confrontations. That process offers the means, in other words, for a comprehen-

sive evaluation of possible federal land uses, considering all the consequences, including environmental impacts on and off federal lands that can be of particular concern to the states.

States can also use the opportunity to participate in the federal planning process as a vehicle for resolving whatever differences might exist between state and local attitudes toward particular federal land uses. In this way, a state can convert local policies into state ones or, if it deems it appropriate, override local wishes with a different state policy. Either way, the state will avoid tempting Congress or the federal agencies to preempt purely local regulatory policies.

For their part, the federal agencies have, for many of the same reasons, ample incentive to solicit state and local participation in their planning processes, and to be solicitous of state concerns in the plans that emerge. It is especially to their advantage, both politically and from the standpoint of avoiding unnecessary paperwork, to avoid being blind-sided by state environmental regulatory requirements imposed after all the federal regulatory hurdles for a particular project have been cleared.

The Mining Law deserves special mention in this context. The states should not regard Mining Law activities conducted on federal lands as outside the federal land planning process. It is true that the self-initiation feature of that law places it somewhat apart from most environmentally significant activities

that can take place on federal land, because the government's regulatory controls are exercisable in a little different way. But federal agencies possess broad authority to control these activities by regulation, or even to prohibit them altogether by means of withdrawals. Thus, as I have argued in more detail elsewhere, governmental control over Mining Law activities is an eminently sound subject for consideration in the federal land planning process. As an American Mining Congress spokesman recently put it, mining occupies a "unique, but not preferred, position" among natural resource uses on federal lands.

For all these reasons, Granite Rock ought to lead to closer state-federal cooperation in the management of federal lands, with the federal land use planning process, paradoxically, as the central vehicle. Agencies in both governments might agree to a one-stop shopping permit process; for example, a state could agree not to apply its permit requirements independently of the federal process, so long as the federal government agreed to fold the state requirements into the federal plans and permits. Various arrangements might be made to eliminate duplication and streamline enforcement, akin to those already reflected in a number of memoranda of understanding the Forest Service, BLM, and various state regulatory agencies have executed over the years.

A number of states now have "little NEPA's," statutes or administrative processes that mimic the federal National Environmental Policy Act, requiring careful advance consideration of the environmental impacts and alternatives to proposed

governmental actions that could have a significant impact on environmental quality. In those states, joint state-federal environmental impact statements, prepared in the context of formulating land use plans or deciding upon site-specific proposals, could be a useful way to promote closer cooperation and simplify life for all concerned.

Inspection and enforcement to ensure compliance with applicable requirements is another subject that merits special attention. Users of federal land are often most aggravated not by dual state-federal permitting requirements, but rather by inconsistent or confusing exercises of inspection and enforcement authority. Moreover, it is not very productive for states to expend energy in their permitting processes if they are not willing to adopt workable methods for inspection and enforcement. Especially here, cooperative agreements between local, state and federal agencies, perhaps negotiated and even promulgated through the land use planning process, can make considerable sense for all concerned.

If the states are willing to participate in the federal land planning process more vigorously, and the federal agencies are willing to be more accommodating to state concerns, then Granite Rock could be a major step toward more cooperation and less confrontation between governments in federal land management. Indeed, the ultimate result of the Granite Rock decision might be for the federal agencies and the states to arrive at accommodations, reached through the federal land planning process, that

approach the "consistency" requirement of the federal Coastal Zone Management Act. The CZMA contains a federal floor for regulating activities in the coastal zone, encourages and facilitates state planning and regulation, and allows the states to impose more stringent requirements subject to a federal override in particular circumstances where the federal agency demonstrates a clear national need for it. Legislation may not be necessary to implement this kind of accommodation -- indeed, the BLM has already made begun to move toward it in its planning regulations.

In short, both state and federal agencies have ample reason, and it would appear sufficient authority, to accommodate each other's concerns, and the planning process provides a ready framework to work through that accommodation.