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The Problem of Federal-Private Split Mineral
Estates: Who Has Control? (April 23)

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DAVID B. SHAVER, ANDREW C. MERGEN & SCOTT W. HARDT,
THE PROBLEM OF FEDERAL-PRIVATE SPLIT MINERAL ESTATES:
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HOT TOPICS IN NATURAL RESOURCES

SPRING 1996 PROGRAMS

MONDAY, FEBRUARY 5

A TRUST FOR WHOM? MANAGING COLORADO'S 3 MILLION ACRES OF STATE LAND

Historically, state trust lands have been managed for public schools revenue. Now there is pressure to protect some state lands as open space. Should trust lands be managed for broader public values? Is this consistent with existing legal mandates? Speakers: State Land Board Commissioner **Maxine Stewart**; **John Evans**, Colorado Board of Education; **Reeves Brown**, Colorado Cattlemen's Association; The Nature Conservancy's Colorado State Director **Mark Burget**. Special focus on the recently implemented Multiple Use Program and also on how The Nature Conservancy is working with the State Land Board to preserve resources. Center Director **Elizabeth Rieke** will moderate.

TUESDAY, MARCH 12

AIR QUALITY AND TRANSPORTATION ON COLORADO'S FRONT RANGE: TAKING RESPONSIBILITY FOR DIFFICULT CHOICES

With communities along Colorado's Front Range continuing to grow at a rapid rate, government, private businesses and citizens are faced with difficult choices concerning air quality and transportation. Can we control the "brown cloud" and increasing congestion on our roads and freeways? What decisions and sacrifices must be made, and who will take responsibility for them? **Wade Buchanan**, Chairman of the Regional Air Quality Council (RAQC), will moderate a panel addressing these issues including **David Pampu**, Deputy Executive Director of the Denver Regional Council of Governments (DRCOG); **Christine Shaver**, Environmental Defense Fund attorney; and **Ken Hotard**, Senior Vice-President of the Boulder Area Board of Realtors.

TUESDAY, APRIL 23

THE PROBLEM OF FEDERAL-PRIVATE SPLIT MINERAL ESTATES: WHO HAS CONTROL?

Many federally owned lands overlies privately owned oil and gas and mineral rights. Increasingly, the competition between agency multiple use directives and private interests in resource development has resulted in legal battles between the federal government, which seeks to regulate use of the federally owned surface estate for resource extraction, and the private owners of mineral estates. **Andrew Mergen**, the Center's 1996 El Paso Natural Gas Law Fellow, will look at problems and potential solutions associated with these split mineral estates.

12:00 noon

Holland & Hart

555 17th St., 32nd Floor, Denver

Box lunches provided

One Hour of Continuing Legal Education (applied for)

Prepayment required. Seminar cost: \$15 if received 3 working days before program; \$18 thereafter. Cost includes lunch. Additional charge of \$5 for CLE credit, if desired. Limited scholarships.

Register by phone or FAX with credit card or send check payable to the University of Colorado to Natural Resources Law Center, Campus Box 401, Boulder, CO 80309-0401. Phone 492-1288; FAX 492-1297. Kathy Taylor, Coordinator.

National Park Service Regulation of Private Mineral Estates

Hot Topics in Natural Resources, April 23, 1996

David B. Shaver, Chief, Geologic Resources Division
National Park Service

I. Mineral Operations in the National Park System

- A. Presently, there are about 680 private mineral development operations inside the boundaries of thirty-three National Park Service (NPS) areas.
- 65 operations on Federal mining claims
 - 31 mining operations extracting private minerals
 - 580 nonfederal oil and gas operations
- B. Over two-thirds of the 368 NPS units contain privately held mineral rights, both full fee ownership (inholdings) and split estates.
- Total land area affected is about 5 million acres.
 - An estimated 70 NPS units have the present potential for economic development of private minerals.

II. National Park Service Mandate and Regulatory Authority

- A. NPS Organic Act of 1916 - directs the NPS to conserve the resources of parks unimpaired for the enjoyment of future generations. Section 3 gives broad authority to develop regulations as necessary for the proper use and management of park units. (16 USC §1 et seq.)
- 1970 amendments clarify that all units of the National Park System are subject to this mandate.
 - 1978 amendments direct that the authorization of activities shall not be in derogation of the values and purposes for which park units have been established, except as directly and specifically provided by Congress.
- B. Mining in the Parks Act of 1976 - directs the NPS to regulate mineral development operations on patented and unpatented Federal mining claims in parks. This statute is unusual in that Congress explicitly grants authority to regulate mining on private lands (i.e., patented claims). (16 USC §1901 et seq.)

C. Individual Park Enabling Statutes - often contain specific language related to restrictions on acquisition of private minerals, and calling for regulations to manage development of private mineral rights. Examples include:

- Big Thicket National Preserve (1976): The Secretary shall not acquire the mineral estate without the consent of the owner unless he first determines that such property or estate is...threatened with uses that are, or would be, detrimental to the purposes of [the unit].
- Jean Lafitte National Historic Park (1978): The Secretary may not acquire right to oil and gas without the consent of the owner, but the exercise of such rights shall be subject to such regulations as the Secretary may promulgate in furtherance of the purpose of [the unit].

III. NPS Regulation of the Development of Private Minerals

A. The NPS is under a clear Congressional mandate to conserve the resources of the parks and to protect these resources from adverse effects. By its nature, mineral development poses threats to park resources. Therefore, mineral development must be carefully controlled to mitigate resource damage, eliminate unacceptable adverse effects, and restore the unavoidable temporary effects of development.

B. In the absence of NPS regulations, private development is only subject to state or local regulations, which are almost always inadequate to meet Park Service resource protection standards.

- Uncontrolled mineral development operations have left a legacy of resource damage, environmental contamination, and safety problems in national parks, and unregulated operations continue to present management concerns. Over 2,500 abandoned mineral sites exist in 146 park units.
- Unregulated operations cause resource effects such as unnecessary surface disturbance, sensitive habitat destruction, groundwater contamination, and abandoned operations. These sites contain unplugged leaking oil and gas wells, hazardous mine openings, contaminated soils, toxic wastes, and unreclaimed surface disruption. These operations also present visitor safety hazards, as well as adversely affecting the visitor experience through visual, noise, and other aesthetic intrusions.
- Cleanup and restoration of unregulated mineral extraction sites places a significant burden on the NPS and the American taxpayer. For example, Cuyahoga Valley National Recreation Area has spent about \$800,000 plugging 40 abandoned wells in the past ten years. Many more such wells exist on park lands throughout the system. Estimates to restore abandoned mining sites range into the tens of millions of dollars.

- C. In 1978, the NPS published regulations controlling the development of Federal mining claims in parks. (36 CFR Part 9, Subpart A) About a year later in 1979, NPS promulgated regulations to control non-Federal oil and gas development in units of the system. (36 CFR Part 9, Subpart B) The development of non-Federal mineral rights other than oil and gas are controlled by the NPS through a special use permitting system that is similar to the 9A and 9B regulatory process.
- D. NPS regulations require an operator to submit a proposed plan of operations and obtain NPS approval prior to undertaking the mineral development operation.
- The plan lays out what, when, and how, the mineral operation is to proceed.
 - Plan addresses contingency for accidents and site restoration method.
 - NPS works with the operator to identify potential resource impacts, develop alternative operational methods or mitigation strategies, and reclamation.
 - Plan approval requires posting of an appropriate reclamation bond with NPS.
- E. The NPS regulations and plan of operations approval process are tied directly to resource protection. All conditions and stipulations attached to an approved plan of operations has its basis in preserving some cultural or natural resource, or a visitor protection concern.

IV. Benefits of NPS Minerals Management Regulations

- A. To park resources - advance planning applied through the plan of operations approval process, and posting of reclamation bonds, has resulted in permitted operations proceeding in a manner that protects resources and ensures site reclamation. Regulated operations have resulted in only minimal and temporary disruption to park resources.
- B. To the public/taxpayers - proper regulation, through the use of operating stipulations and contingency planning, can prevent unnecessary environmental contamination and costly cleanup. The permitting and bonding process also ensures that the operator pays for the mitigation of adverse effects and the reclamation of sites and access corridors.
- C. To the operators - a good plan of operations, which addresses all phases of the development, can often save the operator money in the long run. For example, use of containerized mud systems minimizes loss of drilling fluids and eliminates the costs of mud pit cleanup and disposal. Similarly, reducing the size or number of drill pads and associated access roads can significantly lower the reclamation costs connected with developing an oil and gas field.

V. Conclusions

- A. NPS has authority and duty to regulate development of split mineral estates in order to protect the resources of the parks from the adverse effects of development.
- B. Exercise of regulatory authority must be reasonable, with demonstrated resource protection objectives associated with restrictions and stipulations. The application of restrictions and stipulations may increase the cost of the operations without constituting a compensable taking of property.
- C. The process is most effective, and completed in the most timely manner, when there is early consultation between the potential operator and the park staff. Often this could involve an on-site visit prior to the preparation of an operating plan. Such meetings allow for the explanations of needs and concerns from both sides, so that the operating plan can be developed in the most resource protective manner from the start, avoiding unnecessary paperwork and costly delays.
- D. In some situations, operational stipulations and mitigation measures may not be enough to prevent unacceptable impacts to park resources. In such a case, the NPS has the authority to deny the operation. It is arguable that even a denial of an operating permit may not constitute a taking, but rather is a valid exercise of police power in the protection of US property. No NPS case law exists on such a permit denial, but it likely will arise in the future and will be interesting!

RECENT LITIGATION REGARDING FEDERAL SPLIT ESTATES: WHO HAS CONTROL? WHAT ARE THE LIMITS?

Andrew C. Mergen
1996 El Paso Gas Fellow,
Natural Resources Law Center, CU Law School
(On leave U.S. Dept. of Justice, ENRD).¹

I. A Brief Overview and History of Split or Severed estates.

A. What are Split Estates?

When the mineral and surface rights to a single plot of land are held by different parties a split estate is formed.

B. History of Split Estates.

1. Under traditional common law doctrine an owner of land controlled it from the heavens to the center of the earth.²
2. a. The concept of a separate property interest in minerals severable from the surface estate has had an erratic development. Early recognition of a separate mineral interest appears to have been most frequently and vigorously asserted by sovereign entities claiming rights to precious metals or strategic deposits.
 - b. The roots of American mineral/mining law derive primarily from the laws of Spain, as adopted by Mexico, and from English common law. England and Spain early evolved differing concepts as to the severability of minerals from the surface estate. The chief distinction between the systems lay in the assertion of ownership of mines; while Spanish sovereigns traditionally claimed property in minerals as an incident of sovereignty, English sovereigns laid claim only to mines of gold and silver and regarded these as a personal severable prerogative.³

¹ The views expressed in this outline and in today's talk are entirely my own and do not necessarily represent the views of the U.S. Dept. of Justice. Because this outline represents only a working draft I welcome comments. I may be reached currently at (303) 492-5493, or as of June 1996 at (202) 514-2813 or finally at MergenA@aol.com

² United States v. Causby, 328 U.S. 256, 260-261 (1946).

³ See generally, Sylvia L. Harrison, Disposition of the Mineral Estate on United States Public Lands, 10 Public Land L. Rev. 131 (1989).

c. Today, a land owner may create as many separate estates as there are different minerals or strata of minerals.⁴

d. If parties failed to specify their relative rights by deed, the common law resolved conflicts among them by making the mineral estate dominant.⁵

C. Two Types of Federal-Split Estates

1. The subsurface (but not the surface) is federally-owned. During 19th c. U.S. pursued a general policy of withholding from homestead -ing and railroad patents those area where known mineral existed. Once a patented issued later-discovered minerals belonged to the private owner. In 1906 -- after the loss of substantial coal deposits -- Congress passed various reform Acts that federal patents for nonmineral purposes must contain a reservation of mineral rights in the United States. Thus, major land grant statutes, such as the Stock-raising Homestead Act of 1916 create estates with the surface vested in a private owner and subsurface ownership in the U.S. Hardrock minerals on these lands are open for entry under the 1872 Act. An estimated 60 million acres involve these federally-held subsurface rights. While these rights can create significant problems for individuals and communities they are not the subject of this outline.⁶

2. The second type of federal split estate (and the focus of this outline) involves those situations where the surface is federally owned but the subsurface (mineral or oil and gas rights) are privately held.⁷ Exchanges of federal and non-federal lands, done for such purposes as consolidating former checkerboard patterns of ownership, or acquiring lands with high public values into federal ownership has often times resulted in the United States acquiring only surface ownership. Of the over three hundred units within the National Park Service (NPS), two hundred are estimated to contain mineral estates and

⁴ See, e.g., Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 651, 180 N.W. 787, 789 (1920); Chartiers Block Coal Mining Co. v. Mellon, 152 Pa. 286, 294, 25 A. 597, 598 (1893).

⁵ See Stoebeck, A General Theory of Eminent Domain, 47 Wash L. Rev. 553, 562-608 (1972) (dominance of mineral estate derived from the King's right to do everything necessary to coin money).

⁶ These problems are briefly discussed in C. Wilkinson, Crossing the Next Meridian 60-61 (and accompanying notes) (1992).

⁷ The two types of federal split estates are discussed briefly in G. Coggins, Federal Public Land and Resources Law 3d ed., 585-599 (1993).

20-25% are estimated to contain valuable minerals. Forest Service (USFS) estimates that there are approximately six million acres of outstanding mineral deposits held under National Forest System Lands.

II. Recent Litigation involving Federal Split Estates on federal lands managed by the US Fish and Wildlife Service (USFWS), USFS and NPS.⁸

A. Caire v. Fulton, Civil Action 84-3184 (W.D. La. 1986) (This decision is unreported).⁹

1. Facts: D'arbonne National Wildlife Refuge in northeast La. was officially established in 1975 for wildlife and habitat purposes. Refuge is home to the endangered Red Cockaded Woodpecker. Land was originally acquired by the Army Corps of Engineers. Only the surface was acquired, despite the fact that some of the lands acquired overlaid the once highly productive Monroe gas field. Original condemnation papers stipulated that oil and gas operations on the refuge would be regulated pursuant to USFWS regulations found at 50 C.F.R. 29.32. This language, however, was later removed from the condemnation papers.

By mid-80's substantial volume of oil and gas operations on the refuge was having severe environmental effects. Situation became critical when a local operator proposed drilling 58 new gas wells on approximately 500 acres of the refuge. Result in 1 well per 8 acres of land and require that for each well a full acre of land be stripped of vegetation. FWS concluded that these actions w/o mitigation would drive the woodpecker from the refuge. In order to avoid these consequences FWS sought to impose permitting requirements and conditions including the posting of a performance bond, the clustering of drilling and directional and slant drilling. The operator refused, contending that FWS was w/o authority to impose conditions.

2. Holding: District Court held that USFWS lacked authority to impose permit conditions because gov't had deleted original regulatory stipulations when it acquired property. Court held that operator was only bound by Louisiana's "reasonableness" standard. No appeal was taken by the United States.

⁸ The Bureau of Land Management (BLM)'s authority to regulate the surface in the context of split estates is explored in M. Mansfield, On the Cusp of Property Rights: Lessons from Public Land Law, 18 Ecology L. Q. 43 (1991).

⁹ Although this decision is unreported the litigation is discussed in some detail in a report prepared by the General Accounting Office, National Wildlife Refuges: Continuing Problems with Incompatible Uses Call for Bold Action (Sept. 1989).

B. Dunn-McCampbell Royalty Interest, Inc., et al. v. National Park Service, et al., 5th Cir. No. 95-40770 (appeal currently pending).

1. Facts: Dispute involving oil and gas operations at Padre Island National Seashore (an NPS unit). Padre Island longest stretch of undeveloped ocean beach in the US -- serves as habitat for a wide variety of wildlife, including threatened or endangered wildlife Kemp's Ridley Sea Turtle, Peregrine Falcons, Piping Plover. Park land was acquired in 60's. In 1962 Congress passed Padre Island Enabling Act authorizing Secretary of Interior to acquire lands for the Seashore. Lands belonging to the State could only be acquired with its permission. Land was to managed consistent with NPS Organic Act and other NPS authorities. Congress also provided that Secretary shall permit a reservation by the grantor of mineral rights, together with the use of the surface as may be required for mineral development. Texas Consent Statute (1963) permitted acquisition of relevant state lands but reserved the mineral estate to the State. Ultimately, the land acquired for the Seashore was the surface estate and the respective mineral estates were reserved to the grantor.

In 1979, pursuant to the NPS Organic Act, and the enabling acts establishing the various parks, NPS enacted regulations which govern the activities within any unit of the NPS. 36 CFR Ch. 1 subpart B. The regulations are intended to insure that activities within the NPS units are consistent with the purposes of the National Park System. At the most basic level regulations no access to a site of operations will be granted unless NPS has approved a plan of operations which serves as the operator's access permit. Plan allows NPS to assess whether use is reasonable, whether there are viable alternatives and mitigation measures. NPS reviews the plan to determine impacts, alternatives and conditions.

This litigation arose when Dunn filed a complaint asserting that because the mineral estate is dominant under state law, Dunn had an "unfettered right" to use and even to "destroy" surface lands during mineral development. Dunn asserted that NPS was wholly w/o authority to regulate its operations. Dunn contended, alternatively, that such regulation constitutes an uncompensated taking in violation of the 5th amendment.

2. Holding: The district court held Dunn's challenge to the regulations was time barred. The court also held, assuming timeliness, that Dunn's claims failed as a matter of law. The court found that the property clause of the Constitution grants Congress broad authority to regulate conduct on federal lands. The court held that Congress properly exercised that authority in passing the Organic Act, and that the NPS validly promulgated the 9B Regulations to implement that authority. Court also held that to the extent that there is a conflict between the 9B regulations and Texas law, federal law must prevail under the Supremacy Clause of the Constitution. Finally, Dunn's Takings

claim was transferred to the Court of Federal Claims. The case (all but the Takings Claim) is currently on appeal to the 5th Circuit.

C. Duncan Energy Company v. U.S Forest Service, 50 F.3d 584 (8th Cir. 1995) (Duncan I) & Duncan Energy v. U.S. Forest Service, 8th Cir. No. 95-4260 (Appeal Pending) (Duncan II).

1. Facts (Duncan I). Dispute involving Oil and Gas operations on the Little Missouri National Grasslands, which is part of the Custer National Forest, in North Dakota. Meridian Oil Co. owns the subsurface mineral estate, while Duncan Energy has an exploration agreement with Meridian.

USFS regulates the federal surface pursuant to its special use regulations. 36 CFR 251.15. The regulations provide that all uses of USFS lands (w/ few exceptions not relevant here) are special uses that must be approved through a letter of authorization or permit. USFS (like NPS) assesses a developer's surface use plan to determine potential effects and possible alternatives and mitigation measures.¹⁰ USFS claims no authority to deny access or prevent development.

In Dec. 1992, Duncan submitted a surface use plan for a well site. After receiving the plan the USFS began its analysis. In March of 1993, Duncan still lacked permission to drill and informed the USFS that in its view it had an absolute right to drill and access the site. In March of 1993 Duncan began constructing its well site w/o USFS authorization. Duncan also went to district court seeking a declaratory judgment that the USFS lacked any authority to regulate access to a privately held oil and gas estate. USFS countersued for a permanent injunction from operations until the USFS had authorized such activities.

2. Holdings: The district court held that the mineral estate is the dominant estate and that the surface estate was therefore subservient to the development and extraction of minerals. Court held that when the US owns only the surface, it does not have any authority (outside of state law) to regulate mineral extraction or development.

The Court of Appeal reversed and remanded. The Court held that the USFS has the authority to determine the reasonable use of the federal service. The Court found such authority under the Property Clause and the Bankhead-Jones Farm Tenant Act, under which the relevant lands were acquired. Finally, the Court held that to the extent North Dakota law conflicts, it must yield to federal law under the Supremacy Clause and choice of law principles. The case was remanded to the district court so that the district court could the

¹⁰ NPS regulations, however, are far more detailed.

USFS's request for a permanent injunction.

3. The Remand (Duncan II). In a footnote in the court of appeals decision the panel explained that the Forest Service must be expeditious in its consideration of surface use plans. The Court indicated that two months seemed a reasonable time for this inquiry. (This was the amount of time agency counsel suggested at oral argument was typical). On remand the district court entered an order stating that the Forest Service's authority must be exercised within 60 days and if it was not the USFS was w/o authority to regulate the surface. The government's appeal of this order is currently pending in the 8th Circuit.

III. Who has Control? Sources of Federal Authority over Federally Owned Surface.

A. THE PROPERTY CLAUSE

Art. IV, para. 3, Cl. 2 -- "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 * * *."

Courts have generally given a broad reading, holding that property clause power extends to the regulation of conduct occurring on or off federal land, which affects that land. Minnesota v. Block, 660 F.2d 1240, 1249-1250 (8th Cir. 1981), cert. denied, 455 U.S. 10007 (1982); Free enterprise Canoe Renters Assoc. of Missouri v. Watt, 711 F.2d 852, 854-855 (8th Cir. 1983); United States v. Vogler, 859 F.2d 638, 641 (9th Cir. 1988); United States v. Lindsay, 595 F.2d 5, 6 (9th Cir. 1979). See Kleppe v. New Mexico, 426 U.S. 529, 539 (1976), stating that while the furthest reaches of the power granted by the property clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public lands thus entrusted to Congress is without limitations."

Criteria -- If Congress enacts restrictions "to protect the fundamental purpose" for which the federal land has been reserved, and those restrictions "reasonably relate to that end," courts must conclude that Congress acted within its constitutional prerogative." Minnesota v. Block, 660 F.2d at 1250.

B. The SUPREMACY CLAUSE

Art. VI, cl. 2 -- In relevant part, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land * * *."

As stated in Kleppe v. New Mexico, 426 U.S. at 543:

Absent consent or cession a State undoubtedly retains jurisdiction over federal

lands within its territory, by Congress equally retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

Federal preemption of state law may occur in two general ways: (1) where Congress evidences an intent to occupy a given field, or (2) if Congress has not entirely displaced state law, state law is preempted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law stands as an obstacle to the accomplishments of the full purposes and objectives of Congress." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

C. Choice-of-Law Standards

To the extent state law would abrogate a congressionally-declared program of national scope it must yield under choice-of-law principles. United States v. Little Lake Misere Land Co., 412 U.S. 580, 597 (1973) ("to permit state abrogation of the explicit terms of a federal land-acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs"); United States v. Albrecht, 496 F.2d 906, 911 (8th Cir. 1974), holding that while "laws of real property are usually governed by the particular states, * * * the reasonable property right conveyed to the United States in this case effectuates an important national concern * * *, and should not be defeated by any possible North Dakota law barring the conveyance of this property right."

D. Additional Federal Sources of Authority

1. Agency Organic Acts, Management Acts and Enabling Legislation
2. National Environmental Policy Act
3. Endangered Species Act

E. Other important considerations: actual terms of deeds, instruments etc. In the D'arbonne litigation (see II A.) the district court concluded that the US had bargained away its regulatory authority b/c mention of the regulations originally included in the notice of condemnation had been omitted from a stipulated settlement.

IV. Limits on Federal Authority: The Takings Clause

A. The Takings Clause: prohibits the federal government from "taking" property for public purpose without paying just compensation.

The S. Ct. has come to interpret the Clause to require that the government compensate real property owners when regulation (as opposed to physical occupation) has resulted in severe economic loss. This is the so-called regulatory "takings" doctrine. The jurisprudence in this area is widely considered an unfathomable mess.

Split Estate problems have played a formative role in the case law; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) both concern subsidence legislation intended to protect surface estates from the effect of coal mining and come to opposite conclusions.

B. Lucas v. South Carolina Coastal Commission, 112 S. Ct. 2886 (1992) S.Ct.'s most recent regulatory taking pronouncement. Lucas requires compensation whenever a land use regulation deprives an owner of all economic use unless the regulation duplicates a provision of nuisance law or some other state common law property doctrine.¹¹

C. Conclusions: Under Lucas, current case law, and the authority reviewed in III above, federal agencies have authority to impose a number of conditions on oil and gas operations. Whether the agencies have authority to refuse to permit operations without paying just compensation is a much closer question.

¹¹ The most useful academic commentary on Lucas is the symposium in the May 1993 issue of the Stanford Law Review. The symposium features commentary from both ends of the political spectrum.

NATURAL RESOURCES LAW CENTER
HOT TOPICS IN NATURAL RESOURCES LAW
THE PROBLEM OF FEDERAL-PRIVATE SPLIT MINERAL ESTATES

Scott W. Hardt
Ballard Spahr Andrews & Ingersoll
Denver, Colorado

Two separate access-related issues may arise in connection with development of privately-owned minerals underlying a federal surface estate: (i) the scope of federal land managers' authority to limit or regulate access across federal lands to the split estate lands, and (ii) the scope of federal land managers' authority to limit or regulate use of the federal surface of the split estate lands. The federal land management agencies have successfully asserted broad authority to regulate access to inholdings across lands owned by the United States. It is less clear what scope of authority they have to regulate use of a federal surface estate by developers of an underlying severed mineral estate.

I. FEDERAL POWER TO REGULATE USE OF FEDERAL SURFACE ESTATE

Federal power to enact legislation protecting federal surface estate is very broad under the Property Clause. Kleppe v. New Mexico, 426 U.S. 529 (1976). Property Clause allows for federal regulation of activities on non-federal lands that may affect federal lands -- full breadth of this power has not been determined. Kleppe, 426 U.S. at 539-40; Stupak-Thrall v. United States, 70 F.3d 881 (6th Cir. 1995), opinion vacated (April 11, 1996); United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979). The Commerce Clause may also provide a significant source of constitutional power to regulate use of federal surface estates. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981); Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), cert. denied sub nom., Cargill, Inc. v. United States, 116 U.S. 407 (1995).

II. APPLICABILITY OF STATE LAW

State law addressing the management and protection of natural resources generally applies on federal lands, unless preempted by constitutionally-authorized federal legislation. California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987); United States v. Nye County, 1996 WL 146199, at *9 (D. Nev. March 28, 1996). Consequently, state doctrines governing protection of surface owners from mineral development activities (e.g., reasonable use, accommodation) should apply to the federal-private split estate situation, unless Congress has preempted state law. State law is preempted where Congress has enacted constitutionally-authorized legislation that conflicts with state law or Congress has acted to preempt the entire area of regulation. Kleppe, 426 U.S. at 543.

III. CONGRESSIONAL AUTHORIZATIONS TO REGULATE USE OF FEDERAL SURFACE ESTATES

The existence of constitutional power to regulate use of federally-owned surface estates does not, in itself, allow federal land managers to take on-the-ground actions. Congress must have legislatively delegated its constitutional power to the executive agencies that are responsible for managing the federal surface.

A. National Forest System Lands

1. 1897 Organic Act

Authorizes Forest Service to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. The Organic Act expressly forbids the Forest Service from exercising its authority thereunder to "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof." 16 U.S.C. § 478. However, persons entering the national forests to prospect, locate and develop mineral resources must comply with such rules and regulations. Id.

Although the Forest Service has traditionally taken the position that it has no authority to regulate exploration and development of privately-owned minerals that may impact federal surface and that such impacts are to be addressed by state law, the Federal Court of Appeals for the Eight Circuit has held that such authority exists under the 1897 Organic Act. Compare Duncan Energy Co. v. U.S. Forest Service, 50 F.3d 584 (8th Cir. 1995) with United States v. Minard Run Oil Co., Civ. No. 80-129 (W.D. Pa. December 16, 1990). However, even under Duncan, the Forest Service may only impose "reasonable" surface-use restrictions and may not go so far as to prohibit mineral development, pursuant to its statutory surface management authorities. See also United States v. Weiss, 642 F.2d 296, 299 (9th Cir. 1981).

2. Multiple-Use and Sustained-Yield Act of 1960 ("MUSYA")

The MUSYA, broadened the purposes for which the national forest surface resources are to be managed to include outdoor recreation, range, timber, watershed, and wildlife and fish. 16 U.S.C. § 528. The MUSYA authorizes and directs the Forest Service to administer the renewable surface resources for these multiple uses. 16 U.S.C. § 529.

3. National Forest Management Act ("NFMA")

NFMA directs that forest management activities be conducted in a manner consistent with federal land-use plans. 16 U.S.C. § 1604. Forest Service land and resource

management plans must contain prescriptions to protect various surface resources, such as wildlife diversity. 16 U.S.C. § 1604(g). NFMA defines National Forest System to include "federally owned forest, range, and related lands," and does not reference or distinguish federal ownership of surface from federal fee ownership. 16 U.S.C. § 1609(a).

B. BLM Lands

The Federal Land Policy and Management Act ("FLPMA") defines "public lands" as including any interest in land owned by the United States and managed by the BLM. 43 U.S.C. § 1702(e). This definition appears to clearly encompass surface estates owned by the U.S. and managed by BLM. Sierra Club v. Watt, 608 F. Supp. 305, 333 (E.D. Cal. 1985).

BLM is required to manage the public lands under principles of multiple use and sustained yield, in accordance with federal land-use plans. 43 U.S.C. § 1732(a). FLPMA authorizes and directs BLM to regulate, "through easements, permits, leases, licenses, published rules, or other instruments ... the use, occupancy, and development of the public lands." 43 U.S.C. § 1732(b). FLPMA does not provide any substantive standard for carrying out these management duties, other than to provide that, "[i]n managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary and undue degradation of the lands." Id. This standard arguably does not authorize BLM to prohibit those environmental impacts that would be created by a reasonable and prudent operator. See, e.g., Sierra Club v. Clark, 774 F.2d 1406, 1410 (9th Cir. 1985); Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257, 270 (1994).

C. National Park System and National Wildlife Refuge System Lands

1. National Park Service Organic Act, 16 U.S.C. §§ 1-18f. See, e.g., Dunn McCampbell Royalty Interest, Inc. v. National Park Service, C.A. No. C-94-105 (S.D. Tx. June 22, 1995).
2. National Wildlife Refuge System, 16 U.S.C. §668dd. See, e.g., Caire v. Fulton, C.A. No. 84-3184 (W.D. La. February 10, 1986).

IV. POTENTIAL LIMITATIONS ON FEDERAL AUTHORITY TO LIMIT OR REGULATE USE OF FEDERAL SURFACE ESTATE FOR DEVELOPING SEVERED MINERALS

A. Lack of Statutory Authority

See supra Section III.

B. Administrative Procedures Act ("APA")

1. Rulemaking Requirements

Federal land management agencies must comply with APA rulemaking requirements. 5 U.S.C. § 553. See, e.g., Mountain States Legal Foundation v. Hodel, 668 F. Supp. 1466, 1475-76 (D. Wyo. 1987). Consequently, the Forest Service and BLM must have formally promulgated regulations implementing any authority under the 1897 Organic Act, MUSYA, NFMA and FLPMA to limit or regulate the use of federal surface estates by developers of severed minerals.

a. Forest Service Regulations

Forest Service has promulgated regulations addressing management of surface impacts from development of reserved minerals. 36 C.F.R. § 251.15 (1995). The Forest Service does not have regulations expressly addressing development of other outstanding minerals. However, in Duncan Energy, the Court held that the Forest Service's general special-use regulations are applicable. See, e.g., 36 C.F.R. § 251.110 (special-use permit requirements for access across national forest lands to non-federal lands). Consistent with the Forest Service's statutory authorities, these regulations do not appear to authorize the Forest Service to prohibit development of outstanding minerals. Duncan Energy, 50 F.3d at 589.

b. BLM Regulations

43 C.F.R. Part 2800 (BLM rights-of-way regulations); 43 C.F.R. Part 2920 (BLM general land-use regulations). BLM's right-of-way regulations would likely apply to needed road access. Under reasoning in Duncan Energy, BLM's catch-all land use regulations, which require leases or permits for certain public land uses, may apply to use of BLM surface for mineral operations associated with severed mineral estate.

c. Regulations Governing Use of National Park System and National Wildlife Refuge System Lands

36 C.F.R. §§ 9.30-9.52, Part 14 (National Park Service regulations governing development of non-federal oil and gas, and rights of way); 50 C.F.R. Part 26 (USFWS regulations governing use of national wildlife refuge lands).

2. Arbitrary and Capricious Actions

Under the APA, agency action will be set aside by a court if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A).

3. Unreasonable Delay

Federal agencies must administer their programs without creating excessive or unreasonable delay and courts will compel agency action that has been "unlawfully withheld or unreasonably delayed." 5 U.S.C. §§ 555(b), 706(1). See, e.g., Duncan Energy, 50 F.3d at 591 n.8; Barrick Goldstrike Mines Inc. v. Babbitt, 1995 WL 408667 (D. Nev. March 21, 1994). But see Independence Mining Co. v. Babbitt, 885 F. Supp. 1356 (D. Nev. 1995).

C. Valid Existing Rights

Regulations that interfere with the reasonable use of a severed mineral estate created before an authorizing statute's effective date, may exceed the agency's authority where the statute contains a valid existing rights savings provision. Caire v. Fulton, C.A. No. 84-3184, slip op. at 11 (W.D. La. 1986). See also Santa Fe Pacific R.R. Co., 64 IBLA 27 (1982) (holding that severed mineral estate is a "vested right" subject to even greater protection than a valid existing right). For example, FLPMA provides that: "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." 43 U.S.C. § 1701 note. See also 16 U.S.C. § 1604(i) (NMFA provision providing that forest plans are subject to valid existing rights). Consequently, regulation of a reserved or outstanding mineral estate created before FLPMA's enactment in 1976 cannot unreasonably interfere with development of the mineral estate. See, e.g., Sierra Club v. Hodel, 848 F.2d 1068, 1088 (10th Cir. 1988); Solicitor's Op. M-36910 (Supp.), 88 I.D. 909 (1981). However, exercise of valid existing mineral rights may still be subject to reasonable regulation under FLPMA. Sierra Club v. Watt, 608 F. Supp. at 335; Utah v. Andrus, 486 F. Supp. at 1009-10.

D. Contractual Rights

The terms of the document creating the severed mineral estate may affect the extent to which the United States can limit the use of the federal surface estate. See, e.g., Belville Mining Co., Inc. v. United States, 763 F. Supp. 1411 (S.D. Ohio 1991) (holding that right to strip mine coal where surface was owned by U.S. and managed by Forest Service is determined by the terms of the deed creating the severed estates), rev'd in part on other grounds, 999 F.2d 989 (6th Cir. 1993); Caire v. Fulton, C.A. No. 84-3184 (W.D. La. February 10, 1986) (no authority to regulate pursuant to Migratory Bird Conservation Act where development of minerals was not expressly made subject to regulation); 36 C.F.R. § 251.15 (Forest Service reserved minerals regulations-specifying terms that must be in the deed).

E. Alaska National Interest Lands Conservation Act ("ANILCA")

Section 1323 of ANILCA guarantees a right of access to "non-federally owned land" within the boundaries of the National Forest System, but provides that such access is subject to Forest Service regulation. 16 U.S.C. § 3210 (contains similar provision for Interior

lands in Alaska). Forest Service implementing regulations define a land owner as an owner of "interests in land." 36 C.F.R. 251.111 (1995). Exercise of ANILCA access rights are subject to permitting requirements; however, exercise of access rights obtained by deed or common law may not be. United States v. Jenks, 22 F.3d 1513 (10th Cir. 1994); 36 C.F.R. § 251.110 (1995).

F. Takings Clause

A violation of the Fifth Amendment takings clause occurs if (i) the regulation does not substantially advance legitimate governmental interests, or (ii) the regulation denies the owner economically-viable use of the land (unless the activity could otherwise be prohibited under the state's common law of property). Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894, 2899 (1992); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (1994), cert. denied, 115 S. Ct. 898 (1995).

1. Environmental protection is generally a legitimate governmental interest.
2. State law governing protection of surface estates may be relevant under the nuisance/property law inquiry.
3. Otherwise, restrictions on use of the surface estate that prevent development of private minerals or make development economically unviable would likely result in a takings. See, e.g., Dunn McCampbell, slip op. at 24; Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 502 U.S. 952 (1991) (taking of coal resulted from SMCRA prohibition on surface mining); Utah v. Andrus, 486 F. Supp. at 1011.

V. CONCLUSION

Challenging the constitutional or statutory authority of federal land managers to regulate, in any way, the use of federal surface estates by developers of severed minerals is not likely to reap favorable results for mineral-estate owners. However, the scope of that authority as it applies in particular circumstances is still an open issue that should be investigated by a mineral estate owner facing unacceptable federal surface-use constraints or regulations.