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# PHILOSOPHIES IN COLLISION: A PERSPECTIVE OF FLPMA

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This article began life as a discussion of the effect of The Federal Land Policy and Management Act, or FLPMA,<sup>1</sup> on mining claims and mining development in Montana. It soon became evident, however, that it is impossible to discuss FLPMA and its effects in a vacuum. The rights of public domain mineral developers are defined and effected not only by a series of federal enactments, including FLPMA, going back to the Mining Law of 1872<sup>2</sup> and earlier, but also by various, evolving constitutional doctrines. Only when the larger picture is considered can a true perspective be glimpsed as to FLPMA's effects. Accordingly, the modest objective of this article will be to discuss, in general terms, factors which created and are creating the current trends in public land policy, and where FLPMA fits in this picture.

By way of introduction and analogy, the role of FLPMA was to establish a beachhead for social land planning in front of the fortress of the Mining Law of 1872. Planning for the invasion was perhaps first articulated clearly by the Public Land Law Review Commission Report (PLLRC), in its 1970 report to the President and Congress.<sup>3</sup> Following up the recommendations of the Report, the sponsors and staff which initially drew the FLPMA bill proceeded cautiously. It was announced merely as an attempt to give the Bureau of Land Management "notice" of those mining claims which were established on the federal domain. The early BLM public literature posited it was only fair that Uncle Sam know where mining claims were located, emphasizing the difficulty and cost to the BLM to search the courthouses of the West for claims, and then to determine which ones were valid. The concern was addressed by a provision for duplicate filing with the BLM state offices as a means of giving notice of intention to hold. However, proposals change during the legislative process

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1. 43 U.S.C. §§ 1701-1782 (1982).

2. 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-42, 47 (1982).

3. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970).

and this happened in the case of FLPMA. Provisions were tacked on during the final conference committees that provided for absolute forfeiture of claims if the regulations adopted by the Bureau, and filing deadlines in the Act, were not strictly obeyed. From that point on, the private property rights acquired by the mineral claim holder under the Mining Law of 1872 were under assault. The war was on; the new "land ethics" of FLPMA and its recent relatives on one side, and the free enterprise philosophy of the 1872 Mining Law on the other.

## I. PHILOSOPHIES IN COLLISION

### A. *The Free Private Access to the Public Lands for Mining—The Mining Law of 1872*

A comprehensive overview of the Mining Law of 1872 is found in *Hardrock Mining on the Public Lands*,<sup>4</sup> and two articles in the *Public Land and Resources Law Digest*.<sup>5</sup> However, a succinct statement of its essence, as viewed by miners, can be found in the comments of Congressman Nick Joe Rahall, II, of West Virginia, Chairman of the House Interior Subcommittee on Mining and Natural Resources, which held an oversight hearing on FLPMA:

The Mining Law of 1872 invoked strong emotions from those who engage in activities under its auspices. They viewed this statute which remained fundamentally unchanged since President Grant signed it into law, as a basic right to use their entrepreneurship and explore the public domain for minerals, produce those minerals and even gain title to the land without federal government interference. This is the principle of self-initiation and free access that is so cherished as being the hardrock miner's right.<sup>6</sup>

In fact, Congressman Rahall's statement was more than just a distillation of the testimony of mining advocates who appeared at the hearing. The 1872 Mining Law,<sup>7</sup> was intended to formally recognize and preserve the local customs or rules of miners which found their origin in the European idea of "free mining," or "bergbaufreiheit," as it was called in German, and translated into English law as, literally the freedom of the mountains. Instead of the mere location and ownership of a mineral vein which had existed under prior law, the claim became an entry upon land

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4. Shanahan, *Hardrock Mining on the Public Lands*, 2 PUB. LAND L. REV. 57 (1981).

5. Knutson & Morris, *Coping With the General Mining Law of 1872 in the 1980's*, 16 LAND & WATER L. REV. 411 (1981), reprinted in 19 PUB. LAND AND RESOURCES L. DIG. 10 (1982); Hiscock, *FLPMA's Wilderness Study Areas: Valid Existing Rights and the Nonimpairment Standard*, 5 J. ENERGY L. & POL'Y. 69 (1983), reprinted in 22 PUB. LAND AND RESOURCES L. DIG. 128 (1985).

6. 133 Cong. Rec. E2583 (1987).

7. 17 Stat. 91 (1872).

based upon the discovery of mineral. With this law, a claim was considered real property in a much broader sense than before. In 1877 the Supreme Court of the United States confirmed that mining claims on public lands are property in the fullest sense of the word, which may be sold, transferred, mortgaged and inherited without infringing upon the title of the United States.<sup>8</sup>

The Amendment of 1875 set forth general requirements for location, recording, and assessment work, and provided:

[That] the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory. . . .<sup>9</sup>

Thus, the laws of the mining associations governed until they eventually became codified as state law. The United States Supreme Court, in *Lockhart v. Johnson*,<sup>10</sup> upheld local statutory regulations supplemental to and not inconsistent with federal mining laws.<sup>11</sup>

The basic precepts of the 1872 Mining law while supplemented and reworked to some extent over the years, continued basically unchanged into the 1970s. One function of the Public Land Law Review Commission of 1970 was to examine these precepts and their continued vitality and validity. As noted above, following the Commission's report the trend began toward a new direction.

### B. *The Development of Social Land Use Planning Doctrines for the Public Lands*

The Federal Land Policy and Management Act of 1976 (FLPMA) has several close relatives. The Wilderness Act,<sup>12</sup> the Wild and Scenic Rivers Act,<sup>13</sup> and the National Forest Management Act of 1976<sup>14</sup> are significant examples. The Congressional policy statements from the acts ring with the philosophies behind them. The Wilderness Act was to "assure that. . .expanding settlement and. . .mechanization, [do] not occupy. . . all areas within the United States. . .leaving no lands. . .[protected]. . .in their natural condition. . ."<sup>15</sup> The Wild and Scenic Rivers Act was to preserve "certain selected rivers. . .in free-flowing condition. . .for the benefit and enjoyment of present and future

8. *Forbes v. Gracey*, 94 U.S. 762, 767 (1877).

9. Act of Feb. 11, 1875, ch. 41, 18 Stat. 315 (codified at 30 U.S.C. § 28 (1982)).

10. 181 U.S. 516 (1901).

11. *Id.* at 527.

12. 16 U.S.C. §§ 1131-1136 (1982).

13. *Id.* §§ 1271-1287.

14. Pub. L. 94-588, 90 Stat. 2949 (1976)(codified as amended in scattered sections of 16 U.S.C.).

15. 16 U.S.C. § 1131(a).

generations."<sup>16</sup>

In FLPMA, Congress declared 13 specific purposes, among them, to manage the public lands in a manner to protect the quality of scientific, scenic, historical, ecological, environmental air and atmospheric, water resource, and archeological values, and where appropriate, preserve and protect certain public lands in their natural condition and provide food and habitat for fish and wildlife and domestic animals, and provide for outdoor recreation and human occupancy and use.

### C. *Objectives in Collision*

The new trends conflicted, in the eyes of many, with the tradition of the 1872 Mining Law. The statement of the Public Resource Foundation submitted at an oversight hearing held June 23, 1987 by the U.S. House of Representatives Subcommittee on Mining and Natural Resources of the Interior Committee presented the problem squarely:

The 1872 Mining Law is the last of the 19th Century public land disposal laws remaining on the books today—putting it fundamentally at odds with contemporary federal land policy, expressed in FLPMA, favoring retention of the public lands and federal ownership.<sup>17</sup>

The Foundation stated further:

It is little wonder that somewhere between 40 and 50 percent of the public domain has been withdrawn from appropriation under the mining law. Because its terms are absolute, with no provision at all for circumstances where mining could feasibly be a subordinate or conditional use, the 1872 Mining Law threatens the rationality of federal land planning and management, and even some areas that might otherwise be most promising for mining.<sup>18</sup>

Most of the groups favoring changes in the 1872 Mining Law who appeared at the Oversight Hearing shared the opinion that the 1872 law afforded land management agencies too little discretion to control the environmental effects of mining and insure the compatibility of mining with other public land uses. They favored a federal land leasing policy as an alternative.<sup>19</sup>

The miners felt that the 1872 law worked well to encourage the production of minerals to supply the domestic economy and prevent dangerous dependence on unstable foreign sources. Noting that minerals can only be mined where economic deposits are found, they argued that

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16. *Id.* § 1271.

17. 133 Cong. Rec. D868 (1987).

18. *Id.*

19. Blackstone, Rocky Mountain News, July 1987.

increased discretion for land managers would mean the demise of mining on such lands. Miners pointed to federal coal leasing as an example of a program hopelessly mired in Congress, and to bureaucratic bungling causing repeated leasing suspensions even as the nation was trying to increase coal production to reduce dependence on foreign oil.

These divergent views formed the backdrop as Congress proceeded to consider the FLPMA bill. Many diverse concerns including minerals, food, timber, fiber, recreation, critical environmental concern, and solitude all received attention in the ultimate Act. These considerations, in some cases, were made possible by the federal treasury through a provision "to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation."<sup>20</sup> A reading of the special definitions in 43 U.S.C. § 1701 (areas of critical environmental concerns, multiple use, public lands, withdrawal, and principal and major uses) shows the influence of various lobbyists who had their say as this bill moved on to its adoption.

## II. ARENAS OF CONFLICT

Passage of FLPMA did not, by any means, resolve the conflicts between those who defended the old and those who espoused the new. It and its "new wave" brethren instead have provided the arena for continuing debate. FLPMA provides that, except as provided in other specified sections of the Act, no provision of FLPMA "shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress."<sup>21</sup> FLPMA further provided that "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."<sup>22</sup> As can be seen, the section contains the seeds of internal conflict. It and other sections produced controversy from the date of enactment.

### A. *The Recordation of Mining Claims with the BLM*

One of the first controversies concerned the section of FLPMA which provides for the recordation of mining claims.<sup>23</sup> It stated that within a three year period following the date of approval of the Act, the owners of unpatented lode or placer mining claims were to file instruments with the BLM required by the Act. After that, these owners were required, prior to

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20. 43 U.S.C. § 1701(a)(13).

21. *Id.* § 1732(b).

22. *Id.*

23. *Id.* § 1744.

December 31st of each year, to file notices of assessment work or intention to hold their claims with the appropriate BLM state office. The penalty for failure was an irrebuttable presumption of abandonment, and there were no exceptions provided.<sup>24</sup>

In a case in which the authors were involved,<sup>25</sup> the court found the irrebuttable presumption of abandonment provision unconstitutional on the grounds it destroyed a valuable property right without hearing. The claim owner in this case had failed to send BLM an exact photocopy of his notices of location prior to the deadline.<sup>26</sup> Despite the fact he had sent BLM all of the information on the notices, together with all other material required by FLPMA, the BLM took the position that, unless the actual notice was furnished, the claims were deemed abandoned.<sup>27</sup> The court found that the claim holder's efforts "substantially complied with the law" but, had it not found the conclusive presumption unconstitutional, would have been required to find the claim holder's efforts unavailing, in view of the wording of the Act.<sup>28</sup> Apparently the United States did not want to challenge the court's conclusion regarding the constitutional issue at that time, because it did not appeal the case.

However, as is now universally known, in the later case of *United States v. Locke*,<sup>29</sup> the miner did not fare so well. There, the claim owners, after allegedly receiving misleading information from a BLM employee, filed the annual notice of intent to hold or proof of assessment work on December 31, rather than "prior to December 31" as is required by the statute.<sup>30</sup> This failure was held to work a forfeiture of the claims. Specifically, the Supreme Court held that FLPMA met the three standards laid down in *Texaco, Inc. v. Short*,<sup>31</sup> for the imposition of new regulatory restraints on existing property rights. The Court said the following:

[I]n the regulation of private property rights, the Constitution offers the courts no warrant to inquire into whether some other scheme might be more rational or desirable than the one chosen by Congress; as long as the legislative scheme is a rational way of reaching Congress' objectives, the efficacy of alternative routes is for Congress alone to consider. "It is enough to say that the Act approaches the problem of [developing a national recording

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24. *Id.*

25. *Rogers v. U.S.*, 575 F. Supp. 4 (D. Mont. 1982).

26. *Id.* at 6.

27. *Id.*

28. *Id.* at 9-11.

29. 471 U.S. 84 (1985).

30. *Id.* at 88-91.

31. 454 U.S. 516 (1982).

system] rationally; whether a [different notice scheme] would have been wiser or more practical under the circumstances is not a question of constitution dimension."<sup>32</sup>

B. *The Bureau of Land Management Wilderness Studies, 43 U.S.C. § 1782*

Another provision of FLPMA which insured a clash between mineral development and conservation advocates was that which provided for a wilderness inventory.<sup>33</sup> The wilderness inventory was to include mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, present in those roadless areas of 5,000 acres or more, and roadless "islands" of public lands identified during the inventory.<sup>34</sup> In the meantime, those areas were to be managed "so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted" on the date of approval of the Act.<sup>35</sup> The Secretary of the Interior could, by regulation or otherwise, "take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."<sup>36</sup>

A similar provision referring specifically to the California Desert Conservation Area stated that "[s]ubject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the California Desert Conservation Area, except. . . [those] measures as may be reasonable to protect. . . against undue impairment. . . ."<sup>37</sup> The question presented by both sections was whether the undue impairment and unnecessary degradation standards were absolute.

In *Utah v. Andrus*,<sup>38</sup> the court approved BLM regulations which did not permanently deprive the claimant of access to its claims, stating that: BLM's authority is, however, limited to preventing *permanent* impairment of potential wilderness values. Although it is not explicitly provided for in FLPMA, it is consistent with Congress's attempts to balance competing interests and with the Wilderness Act which provides the legislative backdrop for Section 603 to find that if a given activity will have only a

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32. *Locke*, 471 U.S. at 109.

33. 43 U.S.C. § 1782.

34. *Id.* § 1782(a).

35. *Id.* § 1782(c).

36. *Id.*

37. *Id.* § 1781(f).

38. 486 F. Supp. 995 (D. Utah 1979).



temporary effect on wilderness characteristics and will not foreclose potential wilderness designation then that activity should be allowed to proceed.<sup>39</sup>

Under this case, mining, in the final analysis, was deemed to be a temporary disturbance.

In the case of oil and gas lessees, somewhat the same result was achieved. In *Rocky Mountain Oil and Gas Assoc. v. Andrus*,<sup>40</sup> also known as *RMOGA I*, an association of lessees contended that the BLM regulations effectively prevented development of their leasehold interests. The court, after reviewing Sections 603(c) and 701(h) of FLPMA and comparing them to the Wilderness Act of 1964 found that balanced multiple use was the underlying Congressional mandate of FLPMA and interpreted the Act's introductory sections to require one use should not suffer for the benefit of another.<sup>41</sup> The court held further that a Department of Interior solicitor's opinion in 1979 which effectively limited the use of wilderness study areas was contrary to the statute and therefore the Congressional intent, and would not be upheld.<sup>42</sup>

This decision went much further than *Utah v. Andrus*<sup>43</sup> which had left open the possibility that as long as multiple uses were fairly equivalent Congressional intent was being carried out. *RMOGA I* distinguished *Utah v. Andrus* as involving access rights and not mineral lease development rights.<sup>44</sup> In October 1981, however, the solicitor of the Department of the Interior issued a supplementary opinion to the 1979 opinion. The opinion addressed directly the problem raised by *RMOGA I*. The solicitor stated he did not necessarily agree with the court's method of reaching its conclusion and, although expressing the intention to follow *RMOGA I*, the solicitor stated that *RMOGA I* went too far in finding that post-FLPMA leases should be uninhibited by the nonimpairment standard and advised lessees that their leases were only granted by the Secretary with the limited rights inherent in Section 603(c) of FLPMA.<sup>45</sup> Leases not so affected, according to the solicitor, were those covered by the grandfather clause in FLPMA.<sup>46</sup> The solicitor then called for a review of each oil and gas lease in light of the nonimpairment standard.<sup>47</sup>

On appeal (*RMOGA II*),<sup>48</sup> the Court of Appeals for the Tenth Circuit

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39. *Id.* at 1007.

40. 500 F. Supp. 1338 (D. Wyo. 1980).

41. *Id.* at 1344.

42. *Id.* at 1345-6.

43. 486 F. Supp. 995.

44. *RMOGA I*, 500 F. Supp. at 1344.

45. 88 I.D. 909 (1981).

46. *Id.* at 910.

47. *Id.* at 912-14.

48. *Rocky Mtn. Oil and Gas Ass'n. v. Watt*, 696 F.2d 734 (10th Cir. 1982).

reasserted the rules of statutory construction and stated where the language of a statute is unclear, deference should be given to the controlling agencies' interpretation so long as reasonable.<sup>49</sup> The court declared the lower court's interpretation illogical as it would give preference to mineral leasing activities over mining and grazing uses.<sup>50</sup> Adopting the 1981 solicitor's opinion, the court said that the non-impairment standard remains the norm with respect to all mineral leases regardless of their date of issuance.<sup>51</sup> The *RMOGA II* case left the question of the effect of the grandfather clause in Section 701(h) for subsequent litigation.

The question remains unresolved as to whether the pro-wilderness language of Section 603(c) and the pro-development language of Section 701(h) have actually been harmonized. One writer finds a flaw in the 1981 solicitor's opinion because the Mineral Lands Leasing Act<sup>52</sup> granted the Secretary of the Interior authority "in the interest of conservation" to direct and assent to the "suspension of operations and productions under any lease granted."<sup>53</sup>

### III. GOVERNMENTS IN COLLISION

The debate over national policy regarding mineral development is reenacted in every state with any significant amount of public (federal) land, and to the extent the state's policies may differ from federal policy, another arena for conflict is created. Western states, with large areas of public lands, find themselves in the spotlight in this arena. The United States derives authority regarding public lands from various portions of the U.S. Constitution, both as sovereign and as proprietor of public lands. The Property Clause,<sup>54</sup> the Supremacy Clause,<sup>55</sup> and the Tenth Amendment<sup>56</sup> are the essential constitutional provisions involved.

#### A. *The Property Clause*

The Property Clause simply provides:

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. . . .<sup>57</sup>

Congress's authority is broad and plainly expressed as to public lands.

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49. *Id.* at 746-9.

50. *Id.* at 746.

51. *Id.* at 750.

52. 30 U.S.C. §§ 181-287 (1982).

53. Hiscock, *supra* note 5, at 139.

54. U.S. CONST. art. IV, § 3, cl. 2.

55. U.S. CONST. art. VI, cl. 2.

56. U.S. CONST. amend. X.

57. U.S. CONST. art. IV, § 3, cl. 2.

The questions which have posed problems have been the extent to which Congress may, under the Property Clause, legislate so as to effect non-public property, and the extent to which, if at all, the Tenth Amendment is a limit upon Congress's powers under the Property Clause.

In *Camfield v. United States*,<sup>58</sup> which involved an act of Congress that declared all enclosures of public lands to be unlawful, defendant had erected, entirely on private land, a fence which surrounded 20,000 acres of public lands. The Court found the act constitutional because the United States, in addition to its sovereign rights, has the rights of an ordinary proprietor, and by exercising its proprietary rights could bring an action to abate the fence.

In *Kleppe v. New Mexico*,<sup>59</sup> the state challenged the Wild Free-Roaming Horses and Burros Act<sup>60</sup> relying upon the *Camfield* case. The state contended the Act was not directed to the protection of the public lands and therefore was enacted in excess of Congress's authority under the Property Clause. The Court stated *Camfield* affirmed congressional power to regulate activities on private lands that affect public lands, and found that Congress had clear power over public lands to regulate and protect wild life living there.

In *Minnesota By Alexander v. Block*,<sup>61</sup> the court held that the power of Congress under the Property Clause extended to the regulation of conduct, whether taking place on federal or private land, which threatens the designated purpose of federal lands. The court found this to be a necessary incident of the power Congress has to dedicate federal lands for particular purposes. Ernest Baynard in his book *Public Land Law and Procedure*<sup>62</sup> states that if the Tenth Amendment is to retain any vestige of meaning, it should at least be applicable where Congress is using the Property Clause to regulate activities taking place off federal lands. A collision in this "penumbra" area has not yet clearly occurred, but the possibility is always there.

### B. *The Supremacy Clause, Basis of the Preemption Doctrine*

The Supremacy Clause provides:

This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be

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58. 167 U.S. 518 (1897).

59. 426 U.S. 529 (1976).

60. 16 U.S.C. §§ 1331-1340 (1982).

61. 660 F.2d 1240 (8th Cir. 1981).

62. E. BAYNARD, PUBLIC LAND LAW AND PROCEDURE 27 (1986).

bound thereby, anything in the constitution or laws of any state to contrary notwithstanding.<sup>63</sup>

This provides the basis of preemption under the Property Clause discussed in *Kleppe v. New Mexico*.<sup>64</sup> Where there is actual conflict with federal law, the Supremacy Clause forces state law to give way and allows the federal law to prevail.

The preemption doctrine applies as a matter of course when compliance with the state and federal laws is impossible. The more difficult situation occurs when there is not actual and necessary conflict between the federal and state laws involved. In these instances, the courts must determine Congress's intent to occupy a given field or "preempt" state law in that field.<sup>65</sup> The following factors are used to determine whether preemption will occur: (1) the subject matter of the law and whether or not it falls within an area that has traditionally been regulated by Congress; (2) whether it is in a field that demands broad national authority; (3) the scope and extent of the federal regulatory scheme; (4) whether the federal statute deals with areas that have traditionally been regulated by the states; (5) the extent to which the federal regulatory scheme seeks to protect the same amenities that the state statutes seek to protect.<sup>66</sup>

In *Ventura County v. Gulf Oil Corp.*,<sup>67</sup> a preemption case decided after *Kleppe*, the BLM had issued an oil and gas lease on 120 acres in the Los Padres National Forest. A drilling permit was issued by the Geological Survey and a required Forest Service permit had been obtained.<sup>68</sup> In addition, the California Resources Agency, Division of Oil and Gas, had approved the exploration.<sup>69</sup> After drilling operations were commenced in April 1976, the Ventura County Planning Commission advised Gulf it had to obtain an open space use permit under the Ventura zoning regulations if it wished to continue its drilling operations.<sup>70</sup> Gulf refused and Ventura County brought suit. The court found preemption, stating:

Although we recognize that federal incursions upon the historic police power of the states are not found without good cause (citing authorities), we must affirm because "under the circumstances of this particular case, [the local ordinances] stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (citing authorities) "[W]here those state laws conflict. . .with other legislation passed pursu-

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63. U.S. CONST. art. VI, cl. 2.

64. 426 U.S. 529.

65. BAYNARD, *supra* note 62, at 30.

66. *Id.* at 31.

67. 601 F.2d 1080 (9th Cir. 1979).

68. *Id.* at 1082.

69. *Id.*

70. *Id.*

ant to the Property Clause, the law is clear: the state laws must recede.” (citing *Kleppe*)<sup>71</sup>

C. *Granite Rock v. California Coastal Commission: Application of the Preemption Doctrine—Balancing of Interests*

The *Granite Rock* saga is important because it involves a good modern treatment of the balancing of government interests. In *Granite Rock*,<sup>72</sup> the California Coastal Commission attempted to require limestone miners on Forest Service lands to obtain permits under state rules to protect the ecologically fragile coastal zone. The Court of Appeals for the Ninth Circuit relied upon a 1984 U.S. Supreme Court decision, *Silkwood v. Kerr-McGee Corp.*,<sup>73</sup> and said:

State law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. (citations omitted) If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, (citation omitted), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. . . (citation omitted)(quoting *Silkwood*).<sup>74</sup>

The case presented a situation arising under the mining laws and the court talked about the prohibition—regulation distinction, i.e., whether the state regulations can prohibit mining altogether. Using *Ventura County* as a point of departure, the court said the state could not prohibit federally authorized use either temporarily or permanently.<sup>75</sup>

However, on March 24, 1987, the U.S. Supreme Court reversed the Ninth Circuit's *Granite Rock* decision.<sup>76</sup> The Court held that the federal and state laws were not in actual conflict, and that since *Granite Rock* had not sought a permit from the Coastal Commission there were no facts to indicate what terms and conditions the Commission would impose, and therefore the Court was unwilling to assume the Commission would exceed its power or impose unlawful restrictions.<sup>77</sup> In effect, the decision was so narrow that it did little to clarify the issue of a state's power to regulate private activity on federal land. The Court held only that California could

71. *Id.* at 1086.

72. *Granite Rock Co. v. Calif. Coastal Comm.*, 590 F. Supp. 1361 (N.D. Cal. 1984), *rev'd*, 768 F.2d 1077 (9th Cir. 1985), *rev'd*, 94 L. Ed.2d 577 (1987).

73. 464 U.S. 238 (1984).

74. *Granite Rock*, 768 F.2d at 1080.

75. *Id.* at 1082.

76. 94 L. Ed. 2d 577.

77. *Id.*

impose reasonable environmental regulations on private miners and that a permit process was an appropriate way to gauge this regulation. The Court also discussed the fact that the Forest Service regulations contained no evidence of an intent to preempt. It is entirely possible the Court would have reached a finding of preemption had the Forest Service regulations contained an express statement to that effect.

#### IV. CURRENT AREAS OF INTEREST

There are several areas of current interest to those concerned with mineral development on public lands in which the conflicting philosophies and federal-state issues discussed above may come into play.

##### A. *Wilderness Act and Mining Activities*

The Wilderness Act special provisions,<sup>78</sup> allowed until midnight, December 31, 1983, for location of new mining claims in areas designated as wilderness. As of January 1, 1984, minerals in lands designated as wilderness were withdrawn from all forms of appropriation under the mining laws and also from disposition under the laws pertaining to mineral leasing and all amendments thereto.<sup>79</sup> The prime question is what rights accrue to a mining claim located within a wilderness area prior to the January 1, 1984 cutoff? The Act provided that:

Mining locations lying within the boundaries of said wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this chapter as wilderness areas shall convey title to the mineral deposits within the claim. . .but each such patent shall reserve to the United States all title in or to the surface of the lands. . .and no use of the surface. . .not reasonably required for. . .mining or prospecting shall be allowed except as otherwise expressly provided in this chapter. . .<sup>80</sup>

One of the key terms used is "valid existing rights."<sup>81</sup> The restrictions of wilderness designation as to use, patent, and withdrawal of nonlocated lands, are subject to valid existing rights. The phrase is rife with unanswered questions: To what extent are the rights traditionally thought to have been conferred by the 1872 Mining Law subject to reasonable regulation? Do miners have a "valid existing right" to locate additional

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78. 16 U.S.C. § 1133(d) (1982).

79. *Id.* § 1133(d)(3).

80. *Id.*

81. This phrase is carried forth into the legislation to designate specific wilderness areas in Montana. *See* S. 2751, 100th Cong., 2d Sess. § 3(c) (1988).

claims around a core area of claims to provide for an economic mining operation?

With regard to determining the validity of mining claims, the Department of the Interior has adopted a fairly evenhanded policy with respect to the evaluation of nonwilderness mining claims, which we must assume will also be applicable to those claims within wilderness areas. Prior to 1983, the BLM and Forest Service had been fashioning some strict marketability concepts based upon present market conditions, the effect of which was to make it far more difficult to hold a claim against government challenge or to patent. In 1983, however, in *In Re Pacific Coast Molybdenum Co.*,<sup>82</sup> the Interior Board of Land Appeals rejected the idea that inquiry into present marketability tied a mineral to a particular price or to a particular cost on a particular day:

“Present marketability” has never encompassed examination of either cost or price factors as of a specific, finite moment of time, without reference to other economic factors. Rather, the question of whether something is “presently marketable at a profit” simply means that a mining claimant must show that, as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success. . . .<sup>83</sup>

### B. *Regulation by Agency Rule*

Since FLPMA, comprehensive new surface management regulations applicable to mining operations have been enacted by the two agencies now responsible for the bulk of public domain lands, the BLM and the Forest Service. While both sets of regulations specifically acknowledge the statutory right of access, they also clearly state that exercise of access rights will (if the surface is disturbed as the result of the exercise of the right) be subject to the general management rules. The potential for conflict between the statutory access right and the agency's surface management rules is clear.

The BLM's authority to create rules for surface management is found in various sections of FLPMA.<sup>84</sup> The regulations follow a stair step approach to regulation, based upon level of disturbance. For casual use and

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82. 75 IBLA 16 (1983).

83. *Id.* at 29.

84. *See, e.g.*, 43 U.S.C. §§ 1732, 1733 and 1740. The BLM rules are found at 43 C.F.R. part 3800. Subpart 3802 contains rules applicable to lands within the wilderness review program. Subpart 3809 sets forth the rules for surface management in public domain lands generally. Prior to FLPMA, there was no express statutory authority for such rules. However, interestingly, despite the lack of authority the surface management rules were in draft form prior to the passage of FLPMA.

negligible disturbance, no notification of BLM is required.<sup>85</sup> Operators whose operations, including access across federal lands, cause a cumulative disturbance of five acres or less during a calendar year must notify the BLM, giving basis information regarding the plans.<sup>86</sup> Operations which will exceed disturbance of five acres require submission and approval of a plan of operations.<sup>87</sup> Bonding may be required for an operator under an approved plan of operation.<sup>88</sup>

The access provision starts out by acknowledging an operator is entitled to access to his operations consistent with provisions of the mining laws.<sup>89</sup> It goes on to provide that where a notice of plan of operations is required, the location of the access route must be specified.<sup>90</sup> The rules provide that the BLM officer may require the operator to use existing roads to minimize the number of access routes and, if practicable, to construct access roads within a designated transportation or utility corridor.<sup>91</sup> When commercial hauling is involved and the use of an existing road is required, the BLM officer may require the operator to make appropriate arrangements for use and maintenance.<sup>92</sup>

The rules applicable to lands within the wilderness review program, so far as access is concerned, again acknowledge an operator's statutory right to access under the mining laws. The regulation provides that an operator is entitled to nonexclusive access to his mining operations consistent with the provisions of the United States mining laws and departmental regulations.<sup>93</sup> It further provides that

[i]n approving access as part of a plan of operations, the authorized officer shall specify the location of the access route, the design, construction, operation and maintenance standards, means of transportation, and other conditions necessary to prevent impairment of wilderness suitability, protect the environment, the public health or safety, federal property and economic interests, and the interests of other lawful users of adjacent lands or lands traversed by the access route.<sup>94</sup>

The Forest Service's surface management rules are apparently founded upon the Forest Service's Organic Administration Act of 1897.<sup>95</sup>

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85. 43 C.F.R. § 3809.1-2 (1985).

86. *Id.* § 3809.1-3.

87. *Id.* § 3809.1-4.

88. *Id.* § 3809.1-9.

89. *Id.* § 3809.3-3.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* § 3802.4-2.

94. *Id.*

95. 16 U.S.C. §§ 473-482, 551 (1982). The rules are found at 36 C.F.R. part 228.



The Forest Service's rules are somewhat similar to the BLM rules with regard to a stair step approach to regulation. Generally, a notice of intention to operate is required from any person proposing to cause surface disturbance.<sup>96</sup> Upon reviewing the notice, if the district ranger determines the operations will likely cause "significant disturbance of surface resources," the operator is required to submit a proposed plan of operations to the district ranger, and give more detailed operations.<sup>97</sup>

The access provisions, again, begin by acknowledging an operator is entitled to access in connection with operations.<sup>98</sup> However, no road, trail, bridge, landing area, or the like, may be constructed or improved, nor may any other means of access, including off-road vehicles, be used until the operator receives approval of an operating plan when one is required.<sup>99</sup> In approving a means of access as part of a plan of operations, the Forest Service can specify the location of the access route, design standards, means of transportation, and other conditions reasonably necessary to protect the environment and forest surface resources, including measures to protect scenic values and to ensure against erosion and water or air pollution.<sup>100</sup>

Considering the surface management regulations, the question which is posed is the extent to which the right of access is still a right.

### C. *Leo Sheep Company v. United States*

The access right referred to in the surface management regulations is the right created by the "mining law," a reference to, basically, the 1872 Mining Law. There is, however, a unique, nonstatutory theory for access inherent in the decision of the Supreme Court in *Leo Sheep Co. v. United States*,<sup>101</sup> which involved an attempt by the United States to gain access across railroad lands in Wyoming using the doctrine of "implied right-of-way of necessity." The Supreme Court denied access to the United States on the ground that, because the United States as the sovereign possessed the power of eminent domain across private land, it did not need to assert an implied right-of-way.<sup>102</sup> However, discussion in the case suggested that private parties may well have an implied right-of-way of necessity across federal lands to reach mining properties.<sup>103</sup>

Federal law grants the right of location and patent to the mineral

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96. 36 C.F.R. § 228.4 (1986).

97. *Id.*

98. *Id.* § 228.12.

99. *Id.*

100. *Id.*

101. 440 U.S. 668 (1979).

102. *Id.* at 679-82.

103. *Id.*

locator. The doctrine of implied right-of-way provides that one who obtains a small tract in the middle of a larger tract is entitled to reasonable access across the larger tract, from the grantor. The duty to grant such an implied right-of-way is a duty incumbent on the United States acting in its proprietary capacity, and it may be argued that the right of access to mining property surrounded by other public lands is not merely at the sufferance of the United States, but exists by virtue of the common law doctrine of implied right-of-way of necessity.

#### D. Regulation—Prohibition

It has become increasingly clear that the rights which miners have traditionally felt were granted by the 1872 Mining Law will be subjected to more and more regulation. One question in which both miners and conservationists have a keen interest is what happens when regulation reaches the point of being de facto prohibition?<sup>104</sup>

A case in which the issue of prohibition was raised is *State ex rel Andrus v. Click*,<sup>105</sup> which considered the application of a state environmental protection statute to an unpatented mining claim. Under consideration was an Idaho statute which authorized the Board of Land Commissioners to deny a mining permit if the proposed operation "would not be in the public interest, giving consideration to economic factors, recreational use for such lands, fish and wildlife habitat and other factors which in the judgment of the State Land Board may be pertinent."<sup>106</sup> As a result of *Kleppe*, it was clear that the Idaho dredge mining statute applied to the unpatented claim unless Congress or some federal agency had, by statute or regulation, preempted the statute. The Idaho Supreme Court addressed the preemption controversy and concluded that the federal statutes left room for a state environmental protection permit requirement, so long as the state law did not prohibit or render impossible all the mining activities on the unpatented claim.<sup>107</sup> The court recognized that a valid placer claim is a valuable property right. The court asked two questions: (1) Did Congress in the particular instance evidence an intent to occupy the legislative field so that all state law within the field is preempted? (2) Does the state law actually conflict with federal law so that compliance with both laws is impossible or the state law stands as an obstacle to the accomplishment to the full purpose and objectives of Congress?<sup>108</sup>

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104. See Freyfogle, *Federal Lands and Local Communities*, 27 ARIZ. L. REV. 653 (1985), reprinted in 24 PUB. LAND. & RESOURCES L. DIG. 90 (1987).

105. 97 Idaho 791, 554 P.2d 969 (1976).

106. *Id.* at 796, 554 P.2d at 974 (quoting IDAHO CODE § 47-1317(h)).

107. *Id.* at 798, 554 P.2d at 976.

108. *Id.* at 796-97, 554 P.2d at 974-75.

After concluding that nothing in the language or history of the mining laws reflected congressional intent to occupy entirely the field of mining regulation, the court assumed that a state statute that rendered mining impossible always conflicts with the federal mining laws.<sup>109</sup> The question, the court said, was not whether compliance with both statutes was in any way possible, but whether the mining claimant could comply with both statutes.<sup>110</sup> The court did not address the constitutional significance of a permit denial because this possibility was not raised by the facts in the case. Instead the court concluded that a permit denial which renders mining operations impossible generates an actual impermissible conflict between the federal and state schemes.<sup>111</sup>

In searching for actual federal-state conflict to satisfy the second prong of its test, the court noted that it was hope of economic development that prompted the Mining Law of 1872 in the first instance.<sup>112</sup> The court quoted at length from the 1970 pro-mining policy statements set forth by the Congress in the Mining and Minerals Policy Act.<sup>113</sup> Clearly, the court presumed, without discussing the evidence, that mining is the dominant, essential federal objective.<sup>114</sup>

The cases seem to indicate that no one, not the miners or conservationists, or either the federal or state governments, wants to directly confront the problem of permit denial. In both *Click* and *Granite Rock*, the courts find pathways to avoid the problems presented by permit denial, with the concomitant constitutional "taking" issues.

### E. Taking Issues

Hovering in the background in every case in which the distinction between regulation and prohibition is in issue is the question whether there has been a "taking" in violation of the constitutional prohibition against taking private property for public use without just compensation.<sup>115</sup>

When may there be a taking? It is a question without simple answers, but at least since the spring and summer of 1987, property owners can take heart. Three cases were decided by the Supreme Court dealing with the issue: *Keystone Bituminous Coal Association v. Pennsylvania Depart-*

109. *Id.* at 796, 554 P.2d at 974.

110. *Id.* at 797, 554 P.2d at 975.

111. *Id.*

112. *Id.* at 798, 554 P.2d at 976.

113. *Id.* at 799, 554 P.2d at 977; *see*, 30 U.S.C. § 21(a) (1982).

114. In a recent decision, *Montana Talc Co. v. Cyprus Mines Corp.*, \_\_\_\_\_ Mont. \_\_\_\_\_, 748 P.2d 444 (1987), the Montana Supreme Court made a similar finding, i.e., mining a dominant objective of legislation. *Accord* *Brubaker v. Bd. of County Commissioners*, 652 P.2d 1050 (Colo. 1982).

115. U.S. CONST. amend. V.

ment of Environmental Resources,<sup>116</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,<sup>117</sup> and *Nollan v. California Coastal Commission*.<sup>118</sup> In *Keystone*, Pennsylvania's Coal Subsidence Act was determined not to create a taking even though it prevented mining of substantial quantities of coal, because it was found that the business could still be profitably operated without the coal which was denied by the Act.<sup>119</sup> *First Lutheran* decided that land regulation can be a taking even for a temporary period of time for which just compensation is due directly under the 5th and 14th Amendments.<sup>120</sup> This case filled the gap left by *Agins v. City of Tiburon*,<sup>121</sup> which avoided confronting the zoning issue as not "ripe" because a development proposal had not been submitted to the city for action.

Finally, *Nollan* found a "development exaction" to be a taking which is both regulatory and physical.<sup>122</sup> A development exaction is a condition placed upon a building permit by a regulatory authority which may or may not prevent the development from being applied for. The Court specifically held the condition attached to a building permit was a taking, in that the condition was not directly connected to a substantial advancement of a legitimate government interest.<sup>123</sup> The Court also stated that higher scrutiny of government action was required under the Takings Clause, as opposed to the mere "rational" standard previously used in due process or equal protection challenges.<sup>124</sup>

#### F. Agency Discretion

No discussion of the effect of FLPMA and other various recent federal enactments concerning uses of public lands is complete without mention of agency discretion. The BLM and the Forest Service, on the federal level, and various state agencies under state enactments, have been vested with huge amounts of discretion.

With regard to location of claims, federal lands not withdrawn from location are open for entry without the need for prior agency clearance. However, nearly all operations on the claims, once located, become

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116. 94 L. Ed.2d 472 (1987).

117. 96 L. Ed.2d 250 (1987).

118. 97 L. Ed.2d 677 (1987).

119. *Keystone*, 94 L. Ed.2d at 498.

120. *First Lutheran*, 96 L. Ed.2d at 258.

121. 447 U.S. 255 (1980).

122. *Nollan*, 97 L. Ed.2d at 689.

123. *Id.*

124. *Id.* An exhaustive treatment of this can be found in the proceedings of the 1987 Land Use Institute in Reno, Nevada, sponsored by the Florida-Atlantic University/Florida International University Joint Center for Environmental and Urban Problems (FAU/FIU).

involved with discretionary agency decision making. In the case of mineral leasing, the BLM has complete discretionary power to decide whether public lands under its jurisdiction should be open for lease applications. The Forest Service has broad discretion under the National Forest Management Act,<sup>125</sup> although the Act limits the use of certain harvesting techniques and requires the protection of marginally productive timberlands and places certain substantive limits on Forest Service flexibility.<sup>126</sup> Grazing on federal range is also subject to broad agency discretion to commit rangeland to alternative uses and, in the case of timberlands, grazing activities are governed by recent legislation that restrains agency discretion by mandating greater concerns for land conservation and for the maintenance of long-term land productivity.<sup>127</sup>

Basically, Congress has given responsible agencies a very difficult multiple use mandate by determining that wilderness is consistent with multiple use<sup>128</sup> and by letting stand mining and mineral leasing laws that authorize additional competing land uses. It is up to the agencies, through exercise of the discretion they have been given, to make sense out of the situation.

## V. SUMMARY AND CONCLUSION

The Mining and Minerals Policy Act of 1970,<sup>129</sup> reflects a Congress benevolent toward the mining industry and understanding of the problems of the industry. The statute states, in part:

It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section. For this purpose the Secretary of the Interior shall include in his annual report to Congress a report on the state of the domestic mining, minerals, and mineral reclamation industries, including a statement in the trend in utilization and depletion of these resources, together with such recommendations for legislative programs as may be necessary to implement the policy of this section.<sup>130</sup>

Contrast this statement with Congress's statement in the Wilderness Act:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area

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125. 16 U.S.C. §§ 1600-1687 (1982).

126. *Id.* §§ 1604(g)(3)(E) and (m).

127. 43 U.S.C. § 1712(c)(3) (1982).

128. 16 U.S.C. § 529 (1982).

129. 30 U.S.C. § 21(a) (1982).

130. *Id.*

where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.<sup>131</sup>

Also:

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition. . .there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress. . .<sup>132</sup>

Very clearly, these statements are very difficult to reconcile. The role of FLPMA may best be summarized as a tool to assist in the reconciliation. It tends to recognize both perspectives and attempts to provide enough direction, together with delegated authority, to allow the responsible agencies to deal with the continuing and evolving problems of reconciling the old with the new.

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131. 16 U.S.C. § 1131(c) (1982).

132. *Id.* § 1131(a).

