STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF VALLES CALDERA TRUST TO DENY APPLICATIONS OF GEOPRODUCTS OF NEW MEXICO, INC. FOR PERMITS TO RE-ENTER ABANDONED GEOTHERMAL WELLS ("APDs"), SANDOVAL COUNTY, NEW MEXICO

CASE 13215

APPLICATION OF VALLES CALDERA TRUST FOR REHEARING ON JURISDICTIONAL MATTER

The Valles Caldera Trust, by its counsel, applies for rehearing concerning Order No. R-12093-A entered on February 12, 2004 as to certain matter decided by that Order.[1]

I. PRELIMINARY STATEMENT

The Order of February 12, 2004 correctly granted relief sought by the Applicant in that two APDs filed by GeoProducts of New Mexico, Inc. ("GeoProducts") were denied.

Rehearing is hereby requested pursuant to NMSA Section 71-5-18A for only certain matter set out in Order R-12093-A which spoke to the jurisdiction of the Commission (and Division) to entertain and issue permits for development of geothermal wells on federal land within the Valles Caldera Preservation. The surface of

[1] The style on the Order incorrectly names the Trust as "Valdes Caldera," instead of Valles Caldera.

the Preserve and seven-eights of the subsurface is federally owned property managed by the Trust and by the United States Forest Service.

This Application for Rehearing requests that "Finds" paragraphs Nos. 7 through 14 and No. 19 of the subject Order be reconsidered and on such reconsideration be withdrawn. Relief sought by the Trust's original Application – denial of the APDs – has been granted. The portions of the Order that are the subject of this request for rehearing were (a) not necessary to the decision and (b) legally erroneous.

II. ANALYSIS AND AUTHORITIES

A. The Challenged Content is Surplusage.

Paragraphs 7 through 14 contain a discussion of and conclusions concerning the law of federal preemption of state law, specifically the authority of the Division to grant permits to GeoProducts to conduct geothermal development on federal land. Paragraph 19 refers to the common law right of a mineral owner to have reasonable use of the surface (but not federally controlled surface) to develop the minerals. All of that content of the Order is wholly unnecessary to the Commission's correct conclusion that issuance of APDs should be preceded by a showing that GeoProducts has obtained surface use authorization from the Forest Service for its desired geothermal well reworking. The language is what a court calls *dictum.* "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of adjudication." *Black's Law Dictionary*, 5th Ed. p. 409.

Had the permits been denied due to preemption of the state agency's authority pursuant to a legally valid analysis the subject would be meaningful. Essentially,

however, this Commission said the GeoProducts APDs were premature. Thus, the preemption issue will only need be addressed by a Commission when ever, if ever, GeoProducts can present a Forest Service approved surface use plan when it files for permits. That Commission should not be hamstrung by legal conclusions in Order R-12093-A that are *dictum* and unnecessary to the result.

The subject findings should be deleted and thereby be covered within the Order's final finding, to wit:

> 25. Because the above conclusions are sufficient to dispose of the matter presently before the Commission, it is not necessary at this time to address other issues raised in the briefs. Order at 6.

B. The Legal Conclusions Are Wrong.

The legal analysis is off on the wrong foot at the outset when it comments (Para. 7) that neither the Preservation Act nor the Mineral Leasing Act ("MLA") expressly preempts state authority and quotes as support from the savings clause in Section 189 of the MLA (30 U.S.C. § 189).[2] Of course, "express" Congressional preemption does not end the inquiry about federal displacement of state authority, as discussed fully below. The cited Section 189 provision of the MLA only reserves to the states "any rights which they may have," it does not give a state any authority it does not already possess. *Ventura County v. Gulf Oil Corporation*, 601 F.2d 1080, 1086 (9th Cir. 1979); *Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122, 1126 (10th Cir. 1982) (state communitization order cannot bind federally owned property or extend leases of such property within unit). *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404, 37 S. Ct. 387 (1917) (state jurisdiction over federal land "does not extend to any matter that is

[2] "[N]othing in this Act shall . . . affect the rights of the state. . . to exercise any rights which they may have. . ."

not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.") The notion that the cited Section 189 phrase of the MLA provides authority for the Commission to issue permission to a party to use federal land is simply contrary to the entire body of law on the subject.

Where state law or regulation conflict with federal legislation enacted pursuant to the Property Clause "the law is clear: The state laws must recede." *Kleppe v. New Mexico*, 426 U.S. 529, 543, 96 S. Ct. 2285, 2293-2294 (1976); *ANR Pipeline Company v. Iowa State Commerce Commission*, 828 F.2d 466, 471 (8th Cir. 1987); *South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998) ("The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the Congressional purposes and objectives. . .") The New Mexico Court of Appeals has articulated the rule that not only federal law but also federal regulation can displace state authority.

> It is well established that state laws may be preempted by properly promulgated federal regulations as well as through duly enacted laws. "Federal regulations have no less pre-emptive effect than federal statutes." Citing, *Fidelity Fed. Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014 (1982).

Stoneking v. Bank of America, 2002 NMCA 42[8], 132 N.M. 79, 43 P.3d 1089.

For the Order to state that the Preservation Act does not evidence "a congressional purpose to preclude geothermal development of the Baca Ranch until such time as the outstanding mineral interest is acquired" (Para. 12) is more than just error, it is illogical. First, it would mean Congress intended a minority mineral interest to have the option to intentionally hold back, refuse to be acquired and wreck the Preserve

with well drilling activity. Second, it would mean that "geothermal development of the Baca Ranch" coincides with the Congressional purposes and objectives in acquiring the ranch as a pristine preserve. One only needs to read the plain language of the Preserve Act to understand both premises are wrong.

The sole mention of the outstanding minority mineral interest appears in Section 2 (16 U.S.C. § 689v-2) of the Act. That section concerns "Acquisition of lands." The express **Congressional intent is not that the mineral interests be developed; it is that they be purchased** for fair market value. The land use purposes and management objectives of the Act appear in Section 6 (Section 698v-6). There is nothing in that section that even hints at a Congressional objective of geothermal development; everything there as well as in the Findings and Purposes (Section 689v) portion of the Act expressed Congressional intent that eschews mineral development (e.g. "The purposes . . . to protect and preserve for future generations the scientific, scenic, historic and natural values of the Baca Ranch . . .").

Finally, the Order makes a fleeting mention of *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572 (1987) (Para. 10) floating the idea that decision may have reduced the authoritative value of *Ventura County*. That 1987 Supreme Court decision is commonly referred to as "Granite Rock." It was a five to four decision of the court. Had the decision been closely researched the author of the Order would have found literarily hundreds of law review articles in which *"Granite Rock"* has been discussed. The fact is that *Granite Rock* has absolutely nothing to do with the issues here. Nor did it have any negative effect on the rule in *Ventura County* and the multitude of preemption cases following *Ventura County*, such as *ANR Pipeline, supra*, *Granite*

Rock laid out a fine distinction that saves state jurisdiction where the federal legislation is directed to federal land use (like the Preservation Act) and the state authority is directed to **environmental protection** (unlike the Division's well permitting). "Congress' treatment of environmental regulation and land use planning as generally distinguishable calls for this Court to treat them as distinct until an actual overlap between the two is demonstrated in a particular case." *Granite* Rock, 480 U.S. 588.

Legions of cases since *Granite Rock* have readily understood the land use versus environmental protection distinction, which clearly does not come into play here where New Mexico's geothermal Resources Act and the Valles Caldera Preservation Act both address land use. "Thus, in *California Coastal*, the Court drew a distinction between environmental and land use regulation, and found that state environmental regulation of mining operations on federal land was not preempted by federal land use legislation . . .". *ANR Pipeline*, 828 F.2d at 471. Indeed, *Granite Rock* restated the principle that should control here: "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," it is preempted. 480 U.S. 581.

II. CONCLUSIONS

For the grounds stated the Commission should rehear Order R-12093-A in part and thereupon issue an amended Order removing Findings 7 through 14 and 19 and, by the way, correcting the Trust name (Valles not Valdes).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Application of Valles Caldera Trust for Rehearing on Jurisdictional Matter to be served on this 9th day of February, 2004, to the following counsel of record in the manner shown:

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STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURALRESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF THE VALLES CALDERA TRUST TO DENY APPLICATIONS OF GEOPRODUCTS OF NEW MEXICO, INC. FOR PERMITS TO RE-ENTER ABANDONED GEOTHERMAL WELLS ("APDS"), SANDOVAL COUNTY, NEW MEXICO

Case No. 13215

GeoProducts of New Mexico, Inc.'s Joint
Motion for Reconsideration of Order No. R-12093-A
of the Oil Conservation Commission
and
Response to the Application of Valles Caldera Trust
for Rehearing on the Jurisdictional Matter

COMES NOW GeoProducts of New Mexico, Inc. ("GeoProducts"), by and through its attorneys of record, Hinkle, Hensley, Shanor & Martin, L.L.P. (Andrew J. Cloutier and Lucas M. Williams), and James Bruce, Attorney at Law (James Bruce), and in support of its Motion for Reconsideration states:

On February 12, 2004, the Oil Conservation Commission entered its Order No. R-12093-A making the following findings and conclusions:

1. The Oil Conservation Commission has jurisdiction over Applications for Permits to Drill fee mineral interests on the Baca Ranch;[1]

2. A co-tenant has the right to produce minerals from co-owned property without the consent of the non-joining co-tenant subject to the requirement that it account to the non-joining co-tenant for its share of the proceeds;[2]

3. A mineral lessee has a right under New Mexico law to use so much of the surface as is reasonably necessary to extract minerals;[3]

[1] Order No. R-12093-A at Findings ¶ 14.
[2] Id. at ¶¶ 17-18.
[3] Id. at ¶ 19.

4. Both parties agree exploration can only begin after approval by the United States Forest Service of a reasonable use of the federally owned surface based on an operating plan submitted by GeoProducts;[4]

5. [T]hat the Forest Service authorization process should proceed first, before APDs are approved;[5] and

6. The APDs filed by GeoProducts for re-entry of the subject wells are denied.[6]

I. RECONSIDERATION. DRILLING MAY BEGIN UPON THE FOREST SERVICE'S APPROVAL OF A REASONABLE SURFACE USE PLAN OR UPON THE FOREST SERVICE'S REFUSAL OR UNDUE DELAY IN APPROVING A REASONABLE SURFACE USE PLAN

Paragraph 21 of the Order states that "both parties agree exploration can only begin after approval by the United States Forest Service of a reasonable use of the federally owned surface based on an operating plan submitted by GeoProducts." Although GeoProduct's Response states that "exploration can only begin upon the commission's issuance of an APD, submission of an operating plan based upon the APD, and subsequent approval of the reasonable use of the surface estate by the Forest Service based upon that submission,"[7] the Duncan Energy cases,[8] discussed both in the brief and the response prior to issuance of this order, state that the Forest Service is subject to state law and was vested with the authority only to determine the reasonable use of the Federal surface. Simultaneously, however, as is clear from GeoProducts' submissions and authority, the Forest Service does not have "veto authority" over the mineral development. The Eighth Circuit Court of Appeals, affirming a portion of the underlying district court decision, held that "the Forest Service has limited authority to approve reasonable use of the Federal surface; a mineral developer must file a proposed surface use plan with the Forest Service prior to development of the mineral estate; the Forest Service's authority must be exercised in an expeditious manner . . .; approval could not be

[4] Id. at ¶ 21.
[5] Id. at ¶ 24.
[6] Id. at Order ¶ 1.
[7] Response at 5.
[8] Duncan Energy Co. v. United States Forest Service (Duncan III), 109 F.3d 497, 499 (8th Cir. 1997); Duncan Energy Co. v. United States Forest Service (Duncan II), 50 F.3d 584, 589 (8th Cir. 1997); Duncan Energy Co. v. United States Forest Service (Duncan I), 1993 WL 664644 (D.N.D. 1993).

withheld if the effect of denying approval was the prohibition of mineral development, nor could it unreasonably restrict the exercise of rights associated with the mineral estate . . . ."[9]

Therefore, GeoProducts requests the Commission to modify paragraph twenty-one of the Order as follows:

> In this case, the Trust agrees that exploration can only begin after approval by the United States Forest Service of a reasonable use of the federally owned surface based on an operating plan submitted by GeoProducts. GeoProducts agrees that, upon submission of an operating plan to the United States Forest Service and/or the Valles Caldera Trust, exploration may begin
>
> (1) after approval of the operating plan by the United States Forest Service and/or the Valles Caldera Trust, or
>
> (2) after the United States Forest Service and/or Valles Caldera Trust has not approved an operating plan in a timely manner.
>
> It is also undisputed that GeoProducts has neither obtained nor applied for a surface use authorization from the Forest Service for its proposed operation. Accordingly, the Commission concludes that approval of APDs for re-entry of the subject wells at this time would be improvident.

II. RESPONSE. THE COMMISSION'S JURISDICTIONAL FINDINGS ARE PROPER, NECESSARY AND CORRECT BASED UPON THE UNIQUE FACTS UNDERLYING THE PROCEEDING AND THE TRUST'S CHALLENGE TO THE COMMISSION'S JURISDICTION

The Commission's findings regarding jurisdiction were required based upon the Valles Caldera Trust's attack on the Commission's jurisdiction over fee mineral interests within the State of New Mexico. In the Trust's Brief-In-Chief in Support of Its Application, pages five through eight challenged the Commission's jurisdiction under the doctrines of preemption,[10] frustration of federal purpose[11] and force pooling.[12] The Commission's findings necessarily and correctly held that these legal conclusions were incorrect under the language of the Valles Caldera Preservation Act. The Trust invited rulings on these issues. However, having lost on the issues on which it sought rulings,

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[9] Duncan III, 109 F.3d at 499.
[10] Trust Brief-In-Chief at 5-6.
[11] Id. at 6-7.
[12] Id. at 7-8.

the Trust now complains that the rulings were unnecessary. The mere fact that the Commission exercised prudence in temporarily denying GeoProduct's APDs under the extraordinary circumstances of this case, pending approval of a reasonable surface use plan by the Forest Service or the Valles Caldera Trust, does not make the findings "surplusage." Instead, the findings both narrowed the issues that will inevitably come before the Commission when GeoProducts resubmits its APDs and explained why the Commission took the rare step of declining to exercise its jurisdiction.

The Commission's conclusions of law were correct based on at least three predicates. **First**, the Valles Caldera Preservation Act authorized and directed the Secretary to negotiate the purchase of the outstanding mineral interest on a willing seller basis,[13] something the Secretary failed to do. **Second**, the mineral interests underlying the Valles Caldera will not be withdrawn until the Secretary has acquired all interests in the minerals, including those at issue today.[14] **Third**, under *California Coastal Commission v. Granite Rock Co.*,[15] the Valles Caldera Preservation Act does not evidence a congressional purpose to preclude geothermal development of fee lands.[16] To the contrary, the Act specifically made "acquisition of the Baca Ranch . . . subject to all outstanding valid existing mineral interests."[17]

Because the Commission was required to make jurisdictional findings based on the Trust's assertion that the State of New Mexico has no jurisdiction over New Mexico fee minerals, and because those findings were correct as a matter of law, the Trust's Application for Rehearing should be denied.

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[13] Order No. R-12093-A at Findings ¶ 4(e).
[14] Id. at ¶ 4(f).
[15] 480 U.S. 572 (1987).
[16] Order No. R-12093-A at Findings ¶ 12.
[17] 16 U.S.C. § 698v-2(e) (2000).

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of GEOPRODUCTS OF NEW MEXICO, INC.'S JOINT MOTION FOR RECONSIDERATION OF ORDER NO. R-12093-A OF THE OIL CONSERVATION COMMISSION AND RESPONSE TO THE APPLICATION OF VALLES CALDERA TRUST FOR REHEARING ON THE JURISDICTIONAL MATTER was faxed this 2nd day of March, 2004, to the following counsel of record:

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