## § 16.05 Federal and State Regulatory Overlap[79]

### [1] Introduction

Under the Supremacy Clause of the U.S. Constitution, the federal government could exercise plenary regulatory authority over federal lands if it were to choose to do so.[80] Even when Congress has not expressly preempted state regulation, the courts have developed several tests or approaches for dealing with state regulation as it applies to federal interests. The Mineral Leasing Act itself contains no express preemption language. In fact, the following language appears in Section 30 of the Mineral Leasing Act: "That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated."[81] The development of the proper preemption analysis to apply in these situations has been somewhat uneven, although recent cases have attempted to apply a uniform test.

In *Ventura County v. Gulf Oil Corp.*,[82] Gulf, the federal lessee, had agreed to provisions in its lease requiring substantial efforts to minimize the negative environmental effects of the drilling within the boundaries of a national forest. It had received all of the necessary permits to drill a well and had actually drilled a producing well within the boundaries of the national forest. Ventura County had enacted a zoning ordinance that placed the national forest in its Open Space (O-S) category. In the O-S zone, no oil exploration or production activities were allowed without a special use permit granted by the County Planning Commission. The county informed Gulf that it would have to obtain a special use permit, and Gulf declined the invitation. The county then sued, seeking declaratory relief that would subject Gulf to county permit authority.

Relying on *Kleppe v. New Mexico*,[83] the Ninth Circuit concluded the

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[79] A complete discussion of the problems of federal power over state conservation statutes is presented in §§ 24.03, 24.04 *below*. This section gives a limited view of preemption as it applies to the relationship between the Mineral Leasing Act, (primarily exploratory unit and communitization agreements) and state conservation regulation.

[80] The Supremacy Clause reads as follows: "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 bound thereby, any thing in the Constitution of laws of any state to the contrary notwithstanding." U.S. Const. art VI, cl. 2.

[81] 30 U.S.C. § 187 (1982).

[82] Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 64 O.&G.R. 19 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 907, 65 O.&G.R. 169 (1980). The effect of the affirmance by memorandum is unclear, although it is normally treated as a decision on the merits. *See, e.g.*, Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. Rev. 373 (1972).

[83] Kleppe v. New Mexico, 426 U.S. 529, *reh'g denied*, 429 U.S. 873 (1976).

The court had an opportunity to avoid the preemption challenge that had made, because in the interim period between the commission order the Supreme Court decision, the federal government had issued a pe to drill, conditioned on access being achieved through a northern route. court essentially found that the issues were not moot because Gulf sought lease extensions and suspensions of operating and producing rec ments, which had been granted. Thus, although the time to directly a the federal permit had expired, the court felt that the issue of acces been left open for later consideration.[88]

On the federal preemption issue, Gulf argued that the extensive fe regulation of drilling and development, specifically as it applied t environmental impact of such activities, preempted any state atte likewise regulate the environmental impact of the actions of a fede and gas lessee. The court rejected Gulf's contention that the pervasiv of the federal environmental regulations showed an intent to preem occupying the entire field of environmental regulation.[89] The court re that argument, looking at the language of the Mineral Leasing A suggested an intent to share and not preempt regulatory power. The stated:

> Our examination of the federal legislation cited by Gulf com contrary conclusion. We find that Congress, far from excludin participation, has prescribed a significant role for local gover in the regulation of the environmental impact of mineral develo on federal land.[90]

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"The owner shall not pollute streams, underground water, or unreasonably damage the of the leased premises or other lands." Gulf Oil Corp. v. Wyoming Oil & Gas Cons Comm'n, 693 P.2d 227, 230, 84 O.&G.R. 579 (Wyo. 1985). Rule 326 was pro pursuant to general enabling authority for conservation regulation. An unanswered that was raised by the dissenting opinion was whether Rule 326 was ultra vires sin primarily concerned with environmental issues and not the conservation of oil a the prevention of waste. 693 P.2d at 241 (Rooney, J. dissenting). *See also* Professor Discussion Notes, 84 O.&G.R. 607.

[88] The reason Gulf cited for the need for an extension and suspension of leasehol tions under the exploratory unit plan was the lack of reasonable access to operate the drillsite. It still looks like a collateral attack on the federal permit decision to lim to the northern route, but the Wyoming Supreme Court felt that the access route still open to change in the future. Gulf Oil Corp. v. Wyoming Oil & Gas Cons Comm'n, 693 P.2d 227, 233, 84 O.&G.R. 579 (Wyo. 1985).

[89] The court accepted the sovereignty argument made by the United States Supre in Kleppe v. New Mexico, 426 U.S. 529, 96 S. Ct. 2240, 49 L.Ed.2d 34, *reh'g de* U.S. 873 (1976), but read *Kleppe* as allowing state police power regulation over on federal lands unless the federal statutes evince an intent to preempt.

[90] Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n, 693 P.2d 22 O.&G.R. 579 (Wyo. 1985).

*Granite Rock Co.,*[93] reversed field somewhat and took a far less expansive view of federal preemption. Although *Granite Rock* involved the Mining Act of 1872,[94] rather than the Mineral Leasing Act, the issues were almost identical to those faced by the Ninth Circuit in *Ventura County.* Granite Rock held some unpatented mining claims on federally owned lands within a national forest. Following the procedures of the Mining Act, Granite Rock sought and was given permission to mine by the Forest Service, pursuant to its five-year plan of operations. The permit application went through the environmental assessment procedures of the Forest Service. The lands were located within the jurisdiction of the California Coastal Commission, which, like the County, sought to impose its regulatory requirements on the federal permittee. Granite Rock again refused the invitation and instituted litigation seeking to prevent the commission from interfering with its operations on federal lands.

Because the majority opinion did not even cite *Ventura County,* it is difficult to reconcile the two opinions. The major factual distinction may be that there is more language in the federal statutes that were applicable in *Granite Rock* which showed more of an accommodation to state regulation than was apparent in the language of the Mineral Leasing Act. However, that is a slender thread upon which to differentiate the two results. There are several important themes that are developed in *Granite Rock* which clearly suggest that *Ventura County* has been *sub silentio* overruled.[95] One major theme relates to the so-called regulation/prohibition dichotomy. *Ventura County* emphasized the fact that a state permit system would by clear implication enjoy a veto power over activities conducted on federal lands by federal licensees. If a federal licensee had to apply for a permit, it could be denied or onerous conditions could be placed on its issuance. In *Granite Rock,* Justice O'Conner carefully noted that the California Coastal Commission had specifically conceded that it did not seek to deny the federal licensee a permit, but merely sought to impose reasonable conditions on the licensee's activities within the coastal zone. The Court stated:

> Since the state statute does not detail exactly what state standards will and will not apply in connection with various federal activities, the

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[93] California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987).

[94] 17 Stat. 91 (1872), codified at 30 U.S.C. § 22 *et seq.* (1982).

[95] There are two excellent commentaries on *Granite Rock* which analyze the opinion in great detail and provide the historical background for the opinion. *See,* Freyfogle, *Granite Rock: Institutional Competence and the State Role in Federal Land Use Planning,* 59 U. Colo. L. Rev. 475 (1988); Leshy, *Granite Rock and the States' Influence Over Federal Land Use, 18 Envtl. L. 99 (1987).*

is preempted. The court could find no conflict, in part because of the different labels it attached: namely, federal land use controls and state environmental controls. Second, if it is impossible to comply with both federal and state regulations the state statute must fall. The court found no impossibility, in part because the commission had not as yet exercised its regulatory powers over Granite Rock. Finally, if the state law stands in the way of attaining the full congressional purposes or objectives the state law must fall. Again the court could not see any barriers to the federal purpose given the Coastal Commission's concession that it would not deny the permit. The dissenting judges point out, however, that the federal laws encourage mineral development, which would be frustrated by the imposition of additional conditions on the licensee.

*Granite Rock* certainly suggests that state regulation over federal lands and federal permittees is not preempted in many circumstances. Individual exercises of state regulatory power may frustrate federal power and may be struck down, but the mere existence of a concurrent regulatory permit program, accompanied by a state denial of a veto or a prohibitory powers, is not invalid under a Supremacy Clause.[100]

As a basic proposition, even if BLM wanted to delegate responsibility to regulate resource development on Indian lands to state conservation agencies, such a delegation would not be upheld. In *Assiniboine & Sioux Tribes v. Board of Oil and Gas,*[100.1] the court, in rejecting the view that state conservation rules apply to Indian lands without BLM and tribal consent, concluded:

> the Secretary's role as fiduciary, the [state] Board's clear lack of jurisdiction over tribal leases, and the legislative silence about

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[100] 480 U.S. 593–594. The court summarized its basic position as follows:

> Granite Rock's challenge to the California Coastal Commission's permit requirement was broad and absolute; our rejection of that challenge is correspondingly narrow. Granite Rock argued that any state permit requirement, whatever its condition, was *per se* pre-empted by federal law. To defeat Granite Rock's facial challenge, the Coastal Commission needed merely to identify a possible set of permit conditions not in conflict with federal law. . . . Rather than evidencing an intent to pre-empt such state regulation, the Forest Service regulations appear to assume compliance with state laws. Federal land use statutes and regulations, while arguably expressing an intent to pre-empt state land use planning, distinguish environmental regulation from land use planning. . . . We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme. *Id.*

[100.1] Assiniboine & Sioux Tribes v. Board of Oil and Gas, 792 F.2d 782 (9th Cir. 1986).

### [2] Preemption in the Context of State Conservation Regulations and Unit and Communitization Agreements

There are several situations that have provided some problems for federal unit operations and lessees as they have tried to comply with their federal obligations and state conservation regulations.[101]

*(Text continued on page 16-35)*

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[101] For a discussion of these problems *see* Cox, *Unitization and Communitization,* Law of Federal Oil & Gas Leases, § 18.12 (Matthew Bender); Ebner, *State and Local Regulation of Activities on Federal Oil and Gas Leases,* Law of Federal Oil and Gas Leases, § 24.01 *et seq.* (Matthew Bender); Gee, *Comparative Study of Compulsory Pooling—Enforcement Against Owners of Divided Interests in the Spaced Tract,* 3 Rocky Mtn Min. L. Inst. 241 (1957); Gray & Schaefer, *Conflict Between Pooling Agreements and State Spacing and Pooling Orders,* 27B Rocky Mtn. Min. L. Inst. 1517 (1982); Hubbard, *The Application of State Conservation Laws to Oil and Gas Operations on the Public Domain,* 32 Rocky Mtn Min. L. Rev. 109 (1960). Williams, *Relationship Between State and Federal Government with Respect to Oil and Gas Matters,* 19 Sw. Legal Fdn Oil & Gas Inst. 239 (1968).

This issue of consent was critical to the court's decision in *Kirkpatrick Oil & Gas Co. v. United States.*[106] The plaintiff was a federal lessee whose primary term expired on December 31, 1975. There was no production from the federal leasehold estate, but there was production from a well located within a state spacing unit that included the federal lands. The plaintiff claimed that under Oklahoma law the state spacing order force-pooled all interests within the unit, and therefore there was production from the unit well. The Secretary of the Interior had never approved any communitization agreement covering the lands in question. The Tenth Circuit rejected the plaintiff's argument that *Texas Oil & Gas* should be read as implying concurrent state/federal authority over federal leases. While there was no preemption of state spacing rules, the federal government had not acceded to state regulation without its consent. Since no consent had been given, there could be no attribution of production from the unit well to the federal lands.[107] The result is consistent with *Texas Oil & Gas* and *Granite Rock* in that all avoid vesting the state with veto powers over federal oil and gas development decisions. As the *Kirkpatrick* court stated:

> If compulsory state pooling orders were applied to federally owned lands over the Secretary's objection, a state could impose acreage requirements and unit boundaries which conflict with the Secretary's judgment of the best standards for conservation purposes.[footnote omitted][108]

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[106] Kirkpatrick Oil & Gas Co. v. United States, 675 F.2d 1122, 73 O.&G.R. 351 (10th Cir. 1982).

[107] The court reviewed at the language of the statute dealing with communitization agreements and concluded that state forced-pooling orders should not be binding on the federal government without its approval. The court said:

> In a number of paragraphs section 226(j) [now 30 U.S.C. 226(m)] delegates to the Secretary's discretion the power to approve, in order to promote conservation, modifications to federal mineral leases, unit or cooperative plans, and operating, drilling or development contracts. To be consistent with the rest of section 226(j), Congress must have intended that the Secretary have approval authority over any communitization of federal lands, and that no state-ordered force pooling would bind the government without the Secretary's consent. [footnotes omitted]

675 F.2d at 1125.

[108] 675 F.2d at 1126.

For a case reaching a similar result relating to the communitization of Indian tribal lands, *see* Samedan Oil Corp. v. Cotton Petroleum Corp., 466 F. Supp. 521, 64 O.&G.R. 519 (W.D. Okla. 1978). The problem in *Samedan* was that the primary term of the underlying lease expired after the state forced-pooling order was entered but prior to the receipt of approval by the appropriate federal official of the communitization agreement. The well was producing