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I. INTRODUCTION

The development and management of our natural resources are sources of conflict between state, local, and federal governments. Private mining activity on public lands often exemplifies the conflicts that arise among government agencies. The Mining Act of 1872[1] is the starting point for the acquisition of hardrock minerals on federal public lands. Through the enactment of this Act, Congress gave its approval to the basic rules and customs of the local mining districts.[2] Despite the emergence of new legislation, the policy behind mineral development—to foster and encourage private enterprise in the development of mineral resources[3]—remains unchanged since the Mining Act of 1872.

Mineral development is seen as vital to the country's national growth and development, yet which government regulates the manner of development remains a continuing debate. A multitude of inseparable factors may lead to inconsistent results. Two recent cases addressing the regulation of private mining activity on public lands, *Granite Rock Co. v. California Coastal Commission*[4] and *Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission*,[5] exemplify these different results.[6] Consistency is needed in this area so that state and local policies are not frustrated.

This comment first addresses three of the factors involved in determining which government regulates private mining activity on federal public lands. Parts II, III, and IV address the development of the property clause, the effects of federalism on mining regulation, and the application of the preemption doctrine. Part V then surveys recent cases with a special emphasis on *Granite Rock Co.* and *Gulf Oil Corp.*

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1. Act of May 10, 1872, 17 Stat. 91-96 (codified as amended in scattered sections of 30 U.S.C.).
2. 1 AMERICAN LAW OF MINING § 4.11(1) (2d ed. 1984).
3. Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1982).
4. 590 F. Supp. 1361 (N.D. Cal. 1984), *rev'd*, 768 F.2d 1077 (9th Cir. 1985), *appeal granted*, 54 U.S.L.W 3644 (U.S. March 31, 1986) (No. 85-1200).
5. 693 P.2d 227 (Wyo. 1985).
6. *See infra* notes 117-56 and accompanying text.

II. THE PROPERTY CLAUSE — A HISTORICAL PERSPECTIVE

The United States' Constitution, under the authority of article IV,[7] grants the federal government power over "[t]he Territory or other Property belonging to the United States."[8] Article IV property includes all federal public lands within a state's boundaries that are not classified as article I property. Article I,[9] a jurisdictional clause, applies to federal enclaves such as military bases and some national parks. The source of federal power separates these two classifications of federal property. Article I property includes lands initially held by the states and subsequently acquired by the federal government; thus the federal government's powers are derived from the states. On the other hand, the United States' sovereign powers allows it control over article IV property.[10] Debates over which government's regulations govern private mining activities on public lands centers on article IV property.

Two divergent views exist on the proper interpretation of the article IV property clause.[11] One view, adopted by the United States Supreme Court, states that article IV gives Congress unlimited power over federal public lands.[12] The other view, commonly known as the classic property clause doctrine,[13] demands a more narrow reading of article IV. The latter view, which limits the federal government's rights over article IV property, is less well known and thus is more fully explained in the following discussion.

The classic property clause doctrine developed in the early nineteenth century.[14] The article IV element of the classic property clause doctrine proclaims that the states have general governmental jurisdiction over the federal public lands.[15] Under the classic property clause doctrine, the United States' rights over article IV property is limited similarly to that of

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7. U.S. CONST. art. IV, § 3, cl. 2 ("[C]ongress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .")

8. *Id.*

9. U.S. CONST. art. I, § 8, cl. 17 ("The Congress shall have Power . . . to exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .")

10. *See* G. COGGINS, C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW, 144-45 (1981).

11. *Id.* at 145.

12. *See* Kleppe v. New Mexico, 426 U.S. 529, 539-43 (1976).

13. For an elaborate discussion of the classic property clause doctrine see Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976).

14. *Id.* at 288-300.

15. *Id.* at 296. The other basic element of the classic property clause doctrine states that the United States has exclusive jurisdiction over federal property covered by article I. *Id.*

a proprietor.[16]

An early United States Supreme Court decision, *Pollard's Lessee v. Hagan*,[17] articulated the article IV element of the classic property clause doctrine.[18] *Pollard* addressed the question of the states' authority over the bed and banks of a navigable river within a state's boundaries.[19] In *Pollard*, the Court reasoned that lands in the territories acquired from foreign powers and lands ceded by the states were held in trust by the United States.[20] Once a new state formed within the territory, the title to and jurisdiction of lands invested with a public use[21] transferred from the United States to the newly created state. No specific grant or cession by the United States was required; title and jurisdiction vested automatically in the new state.[22]

The reasons for the basic position articulated in *Pollard* were twofold. The first reason, known as the equal footing doctrine, stated that all new states shall be admitted into the Union on the same footing as the existing states. A new state would not be on equal footing with the existing states if the United States retained jurisdiction over the public domain within a new state's boundaries.[23] The second reason, based on the doctrine of enumerated powers,[24] stated that only article I specified the property over which the federal government could exercise general governmental jurisdiction.[25]

Although the Court's holding in *Pollard* applied only to those lands invested with a public use, commentators contend that the Court's rationale carried implications for the entire public domain.[26] In *Pollard*,

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16. *Id.*

17. 44 U.S. (3 How.) 212 (1845).

18. A few of the other cases relied upon by Engdahl to develop the classic property clause doctrine include Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836), Wilson v. Cook, 327 U.S. 474 (1946), Colorado v. Toll, 268 U.S. 228 (1925), Omaechevarrie v. Idaho, 246 U.S. 343 (1918), Bacon v. Walker, 204 U.S. 311 (1907), Ward v. Race Horse, 163 U.S. 504 (1896), and Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525 (1885). *See generally* Engdahl, *supra* note 13, at 288-348.

19. 44 U.S. (3 How.) at 213.

20. *Id.* at 222-24.

21. Prior to the United States' acquisition of lands within the Louisana Purchase, certain lands, held by the Kings of France and Spain but dedicated to public use, were known as "common" lands. These comon lands, acquired by the United States from foreign powers, were equated with the common lands in the territories which had been ceded by the states of the Union. In both instances the court in *Pollard* reasoned that the United States held these common lands in trust for new states formed within these territories. *Id. See also* Engdahl, *supra* note 13, at 293-94.

22. 44 U.S. (3 How.) at 223.

23. *Id.* at 223, 228-29.

24. The doctrine of enumerated powers encompasses the idea that the central government has only those enumerated powers explicitly delegated by the Constitution; all other powers are reserved by the states and the people. J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 121-22 (1983).

25. 44 U.S. (3 How.) at 223-24.

26. Engdahl, *supra* note 13, at 295. The lands invested with a public use, also known as the common lands, comprised a very small percentage of the lands in which the United States obtained title

the Court stated that title to lands not invested with a public use would be retained by the United States.[27] Stressing the Court's rationale of equal footing and enumerated powers, commentators point out that the retention of title must be distinguished from governmental jurisdiction.[28] Under the classic property clause doctrine, the federal government retains title over article IV property but lacks the constitutional power to exercise general governmental jurisdiction over these lands. Lacking constitutional authority, the federal government does not have the power to override, or preempt, the state's laws when issues occur involving article IV property.[29]

Another aspect of the classic property clause doctrine is the United States' proprietary role over article IV property.[30] The United States as a proprietor has the same rights as any private landowner. Since state law defines and limits proprietor's rights, the United States is also subject to these state laws. The United States' policies as a proprietor were often executed through federal legislation; yet under the classic property clause doctrine, these policies affecting article IV property do not necessarily take precedence over state law.[31] The proprietary rights differ from the United States' powers as a government. Governmentally, the United States has all the powers which allows it to function as a sovereign and which do not inherently include general governmental jursidiction over federal public lands. The United States' sovereign powers are not restricted by state laws.[32]

These characteristics of the classic property clause doctrine allow the states broad authority over the public domain located within their boundaries. During the past 120 years, however, the accumulation of a series of independent events caused the gradual erosion of the classic property clause doctrine.[33] Confusion and uncertainty developed around the respective state and federal powers over the federal public lands. *Kleppe v. New Mexico*,[34] a United States' Supreme Court decision, ended the uncertainty. The *Kleppe* Court, after examining a line of precedent,[35]

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through the acquisition of the territories. *Id.*

27. 44 U.S. (3 How.) at 223.

28. Engdahl, *supra* note 13, at 295.

29. *See generally id.* at 288-300.

30. *Id.* at 296.

31. *Id.* at 308-09.

32. *Id.* at 309-10.

33. Events cited as causing the gradual erosion of the classic property clause doctrine include the merging of the article I and article IV traditional property concepts, the uncertainty found in some lower courts' decisions, misconstruction of the Supreme Court's dicta, and the failure of attorneys and judges to adequately assess the precedents. *Id.* at 339-41, 351-52.

34. 426 U.S. 529 (1976).

35. Some of the cases the *Kleppe* Court relied upon in reaching its decision include Camfield v. United States, 167 U.S. 518 (1897), United States v. San Francisco, 310 U.S. 16 (1940), Utah Power

held that under article IV Congress has the complete power to enact legislation affecting the public lands.[36] Since the supremacy clause[37] allows the federal government power to override conflicting state legislation, the Court held that the outer boundaries of the federal government's power under the article IV property clause was not yet known.[38]

The Court in *Kleppe* drastically undermined the classic property clause doctrine by interpreting article IV as giving Congress complete power over the federal public lands. Subsequent decisions have erased any initial doubts about the validity of the *Kleppe* holding.[39] Although the Court in *Kleppe* clearly stated that Congress has complete power over the federal public lands, the different views on the proper interpretation of the property clause remain. These different views may be one source which have contributed to the continuing conflict between the respective state and federal powers over federal public lands.

III. FEDERALISM — ITS EFFECTS ON THE REGULATION OF MINING

Federalism, the division of power between federal and state governments, constitutes a cornerstone on which our government was built. The purpose of federalism, along with the separation of powers, is to maintain a check on the growth of centralized power.[40] The precise balance among the different levels of government remains elusive and controversial as our perceptions of the proper balance evolves through time.

Since the beginning of our country's history, the overwhelming trend has been the expansion of the federal government through the increased centralization of power, rules, and regulations.[41] Recent efforts to reduce the federal government's increased power includes President Ronald Reagan's "New Federalism"[42] and Western politicians' attempts to expand states' rights in the West by organizing the Sagebrush Rebellion.[43]

& Light Co. v. United States, 243 U.S. 389 (1917), Light v. United States, 220 U.S. 523 (1911), Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958), United States v. California, 332 U.S. 19 (1947), Gibson v. Chouteau, 80 U.S. (13 Wall.) 92 (1871), and United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

36. 426 U.S. at 539-41.

37. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .")

38. 426 U.S. at 539.

39. *See, e.g.*, Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985), Citizens for a Better Henderson v. Hodel, 768 F.2d 1051 (9th Cir. 1985).

40. Lyons, *Federalism and Resource Development: A New Role for States?*, 12 ENVTL. L. 931, 931-32 (1982).

41. *Id.* at 932-33.

42. State of the Union Address, 128 CONG. REC. H51-55 (daily ed. Jan. 26, 1982).

43. The Sagebrush Rebellion stems from the dissatisfaction of those living in the Western states

The "New Federalism" focuses on reducing federal activity in domestic matters and increasing the power of local and state governments.[44] The Sagebrush Rebels advocated a proposal to decrease centralization of federal power and its bureaucracy by transferring the federal lands to state ownership. Despite these recent efforts, the federal government retains primary control.

Increased centralization of power in the federal government is a double-edged sword. On the one hand, the growing federal government arguably fails to adequately address local needs and concerns.[45] The environmental and energy programs are especially illustrative of the need for local control.[46] Commentators stress that states are becoming "[v]estigial governments . . . mere agents of the federal bureaucracy."[47] On the other hand, some commentators conclude that the federal government is best suited, at least at the present time, to protect the quality of our lives, our liberty, and our environment.[48]

The question remains as to which government is the better steward of our natural resources. Cooperative federalism emphasizes the return of responsibility to the states and local governments where they can exercise local options. At the same time, cooperative federalism stresses the practical, working relationship between state, local, and federal governments.[49] Recent court decisions[50] and state and federal legislation[51]

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with Congress' policy to retain public lands. The proponents of the Rebellion argue that Westerners have no control over the decisionmaking process that directly affects them, federally imposed standards and regulations bear little relation to Western needs, and large federal holdings within a state adversely affects the states' economy. Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505, 509-12.

44. McGinley, *Federalism Lives! Reflections on the Vitality of the Federal System in the Context of Natural Resource Regulation*, 32 U. OF KAN. L. REV. 147, 148 (1983).

45. Some of the factors cited as evidence of the federal government's inability to adequately address local needs include the size of the federal government, inflexible federal requirements, and the goal of achieving uniformity at the expense of unique local conditions. Harris, *Redefining the State Regulatory Role*, 12 ENVTL. L. 921, 921-22 (1982).

46. *Id.* at 921.

47. Lyons, *supra* note 40, at 931 (citing Lyons, *Federalism and the Regulation of Surface Mining: Cooperation or Coercion?* in COUNCIL OF STATE GOVERNMENTS' SYMPOSIUM OF SURFACE MINING (1980)).

48. The inability or refusal of the states to effectively protect against the deterioration of our lands, waters, and air and the ability of special interest groups to influence the state and local legislative bodies to the detriment of our natural resources are two of the factors which have lead commentators to conclude that the federal government is better suited to protect the federal public lands. McGinley, *supra* note 44, at 159-60. *See also* Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863, 888-91 (1982).

49. Lyons, *supra* note 40, at 934.

50. *See, e.g.*, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

51. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982 & Supp. II 1984) (note especially § 1535), Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. I 1983) (note especially

demonstrate the incorporation of cooperative federalism.

Commonwealth Edison Co. v. Montana,[52] a United States Supreme Court decision pertaining to minerals taxation, evidences the use of cooperative federalism. In *Commonwealth Edison Co.*, the Court allowed the state government to guard against the cost of the development and the problems arising with eventual resource depletion by upholding Montana's 30% coal severance tax.[53] The Supreme Court held that (1) Montana's severance tax did not violate the commerce clause[54] and (2) the tax did not conflict with the supremacy clause by being inconsistent with the Mineral Leasing Act of 1920[55] as amended.[56] State control over the coal severance tax allows state governments to address local needs and thus illustrates the effective cooperation that can exist between the different levels of government.

The Surface Mining Control and Reclamation Act[57] (SMCRA), exemplifies the principle of cooperative federalism in federal legislation. Initially, SMCRA did not allow the states an opportunity to develop or operate regulatory programs. The disastrous effect of that practice soon became apparent.[58] Land management practices which effectively balance environmental protection and mining activities in one part of the country are not workable in other parts of the country.[59] The states' ability to develop workable remedies for unique, local problems was soon seen as crucial to the success of SMCRA. At present, SMCRA demands a strong state role.[60] The flexibility already built into SMCRA allows the states to tailor national environmental protection requirements to unique local conditions. The Office of Surface Mining has relegated itself to a secondary role in which it "[m]onitors and assists states to assure that they can and do perform as required by the Act and that sound environmental protection is achieved."[61]

Other areas of federal land management, besides mining, have also incorporated the principle of cooperative federalism. The Coastal Zone Management Act (CZMA) of 1972[62] provides for a significant state role in decisions concerning our national resources in coastal zones. Under the

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§§ 1315, 1319, 1342(b)).

52. 453 U.S. 609 (1981).
53. *Id.* at 636-37.
54. *Id.* at 614-29.
55. 30 U.S.C. §§ 181-287 (1982 & Supp. I 1983).
56. 453 U.S. at 632-33.
57. 30 U.S.C. §§ 1201-1328 (1982 & Supp. I 1983).
58. Harris, *supra* note 45, at 923-24.
59. Lyons, *supra* note 40, at 935.
60. Harris, *supra* note 45, at 926.
61. *Id.* at 930.
62. 16 U.S.C. §§ 1451-1464 (1982 & Supp. II 1984).

CZMA, once a state's coastal management plan has been approved by Washington, the consistency clause[63] provides that all proposed federal activities must be consistent with the state's plan. Although the CZMA recognizes the importance of national policies, the states have considerable leverage over decisions concerning land use activities.[64]

Another example where states are allowed some degree of control is in the area of nuclear regulation. In *Silkwood v. Kerr-McGee Corp.*,[65] an Oklahoma state law[66] provided remedies for those injured by a nuclear plant's safety violations.[67] The United States Supreme Court held that the Oklahoma state law was not preempted by federal statutes.[68]

Despite the federal government's dominant control over the management of natural resources on public lands, the states are now becoming equipped with proper legislation to address local needs and concerns. When national requirements are flexible, states are able to adapt the national standards to meet local concerns. At the same time, states must guard against enacting statutes that conflict with federal statutes and regulations since federal law will prevail when a conflict occurs.

IV. JURISDICTION OVER THE PUBLIC LANDS AND THE ROLE OF THE PREEMPTION DOCTRINE

Properly applying the preemption doctrine is paramount in determining the balance between state and federal regulatory control on public lands. When Congress has the authority to act, the preemption doctrine provides that the federal legislation shall override conflicting state legislation.[69] In the absence of conflicting federal legislation, the states' police powers extend to public lands and thus states' rules and regulations are enforceable.[70]

Lack of a unified approach to the doctrine's application has caused confusion and uncertainty in determining when state legislation is preempted by federal legislation and when there is concurrent jurisdiction.[71]

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63. 16 U.S.C. § 1456(c)(2) (1982) ("Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.")

64. Finnell, *Intergovernmental Relationships in Coastal Land Management*, 25 NAT. RES. J. 31, 32 (1985).

65. 464 U.S. 238 (1984).

66. OKLA. STAT. tit., 23 § 9 (1981) provides for an award of punitive damages "[i]n any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed."

67. 464 U.S. at 246.

68. *Id.* at 257-58.

69. NOWAK, ROTUNDA, YOUNG, *supra* note 24, at 292-96.

70. *See generally id.*

71. Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of*

The vacillation of the doctrine's application is often attributed to prevailing concepts of federalism.[72] Despite the inconsistency of application, general principles are recognized in applying the preemption doctrine.

Recent decisions embrace a two-step inquiry.[73] The threshold inquiry is whether Congress intended its legislation to occupy the field in question.[74] If no intent to occupy the field is found, the courts move to the second step: whether state law conflicts with federal law.[75]

In addressing the threshold question, the courts first look for an explicit or implicit intent by Congress to occupy the field by considering several factors. First, the United States Supreme Court notes that the preemption doctrine is not to be applied lightly.[76] The assumption is that the federal legislation must exhibit a "clear and manifest" purpose to supercede the states' police power before there is preemption.[77] Furthermore, any doubts about Congressional purpose should favor the states.[78]

Second, a significant consideration in determining federal preemption is the area of law. Preemption is more likely found in areas such as foreign affairs and labor relations where the emphasis is upon the national interest. In other areas, such as consumer protection and environmental regulation, there is less likelihood of preemption since the emphasis is on protecting the states' interest and promoting cooperative federalism.[79]

Third, legislative history is frequently examined to determine whether there is Congressional intent to have a joint federal-state regulation of the area. Where joint federal-state regulation or state enforcement of stricter standards exists, an implicit federal intent to occupy the field is less likely found. Environmental regulation is one of the areas in which Congress has allowed states to enforce stricter standards.[80]

Finally, the courts examine the comprehensiveness of the federal legislation. Courts reject any conclusion that comprehensiveness alone demonstrates a federal intent to occupy the entire field.[81] Complex areas of

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Analysis, 127 U. OF PA. L. REV. 197, 199 (1978).

72. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626 (1975).

73. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984), Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 486 (9th Cir. 1984).

74. "To occupy the field" is a term frequently used by the courts to identify when the federal government has claimed exclusive jurisdiction of a particular area so that state action is no longer permitted. BLACK'S LAW DICTIONARY 558 (5th ed. 1983).

75. *Silkwood*, 464 U.S. at 257, Chevron U.S.A., Inc. v. Hammond, 726 F.2d at 495.

76. Schwartz v. Texas, 344 U.S. 199, 203 (1952).

77. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

78. Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

79. Morseburg v. Balyon, 621 F.2d 972, 976-77 (9th Cir. 1980). *See also* Note, *supra* note 72, at 638-39.

80. *Chevron U.S.A., Inc.*, 726 F.2d 483, 489-90 (9th Cir. 1984).

81. *Id.* at 491. *See also* New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 415

law, such as nuclear energy regulations or federal marine environmental regulations, require complex and comprehensive regulations to govern the area sufficiently; yet this factor alone does not necessitate federal preemption.[82]

If courts find no intent to occupy the field, they next examine whether the state law conflicts with the federal law by using one of two standards: the "actual" conflict or the "potential" conflict standard. The disposition of the preemption challenge often hinges upon which standard courts employ.[83] The actual conflict standard requires that there be "[s]uch conflict between the two schemes of regulation that both cannot stand in the same area. . . ."[84] Requiring actual conflict operates in favor of the validity of the state statutes.[85] Application of the potential conflict standard is more difficult. It may involve a "determination that the state law frustrates an implied congressional intent"[86] or stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[87] Potential conflict may also simply involve finding a "danger of conflict."[88] The use of the potential conflict standard favors federal preemption.[89]

In determining whether there is a conflict, the courts look to the goals and objectives of both federal and state statutes as well as to the facts of each case.[90] The apparent trend is that when there is merely a potential conflict, the courts will not apply the preemption doctrine.[91] The rationale behind requiring more than a potential conflict is that there is time to consider statutory conflicts when they actually occur. This trend is consistent with the principles of cooperative federalism since under cooperative federalism courts do not conclude that federal law preempts state regulatory authority unless absolutely necessary.

V. A Survey of Recent Cases and a Harmonizing Principle

The divergent views on the historical development of the property clause, the ever changing views of federalism, and the inconsistent application of the preemption doctrine have all contributed to the confu-

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(1973).

82. *Dublino*, 413 U.S. at 415.
83. Comment, *supra* note 71, at 203-04.
84. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).
85. Comment, *supra* note 71, at 204.
86. *Id.* (citing Ray v. Atlantic Richfield Co., 435 U.S. 151, 165-68 (1978)).
87. Comment, *supra* note 71, at 204 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
88. Comment, *supra* note 71, at 204 (citing Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956)).
89. Comment, *supra* note 71, at 204.
90. *See generally* Note, *supra* note 72, at 628-39.
91. *Id.* at 653.

sion of determining when state or federal law or both control private mining activity on federal public lands. At first, case law appears split on whether to allow states to regulate private mining activity on federal lands, but a "harmonizing principle" has emerged. This harmonizing principle suggests that if state and local laws regulate rather than *determine* federal land uses they may not be preempted by federal laws.[92] Additionally, as long as state and local governments do not prohibit federally authorized actions, states are allowed to apply more stringent regulations to federal mining leases and hard rock mining developments than what is required under federal legislation.[93] Under this harmonizing principle, state and local governments are allowed to adequately consider and provide for unique environmental conditions. Case law appears to follow this principle.

A. *Case Law Prior to 1985*

The Idaho Supreme Court in *State ex rel. Andrus v. Click*[94] upheld a state law requiring miners to obtain state permits which required compliance with Idaho's environmental regulations before being allowed to dredge mine on the federal public lands.[95] The court found no explicit or implicit congressional intent in federal mining law to preempt state regulation of dredge mining.[96] In determining whether a conflict existed between state and federal laws the court noted that use of more stringent state law did not make it impossible for the miners to exercise the rights granted by the federal mining laws. Thus, the court held that the state law was a constitutional exercise of state power and found no preemption of the state law.[97] Furthermore, the court noted that environmental regulation is particularly suited to state control.[98] The miners appealed to the United States Supreme Court but were denied certiorari.[99]

Likewise, in *State of Oregon ex rel. Cox v. Hibbard*,[100] miners appealed a decree enjoining them from removing material from Forest Creek in Oregon without first obtaining a state permit.[101] The Oregon Court of Appeals, finding neither congressional intent to occupy the field nor a conflict between state and federal laws, held that neither the United

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92. Note, *State and Local Control of Energy Development on Federal Lands*, 32 STAN. L. REV. 373, 386 (1980).

93. *Id.*

94. 97 Idaho 791, 554 P.2d 969 (1976).

95. *Id.* at 799, 554 P.2d at 977.

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

97. *Id.* at 796, 804, 554 P.2d at 974, 982.

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

99. 102 Idaho 443, 631 P.2d 614 (1981), *cert. denied sub nom.* Click v. Idaho ex rel. Evans, 457 U.S. 1116 (1982).

100. 31 Or. App. 269, 570 P.2d 1190 (1977).

101. *Id.* at ___, 570 P.2d at 1191-92.

States Constitution nor the federal mining laws preempted the state's authority requiring miners to obtain state permits.[102]

The courts in *Click* and *Hibbard* allowed separate state permitting processes as a means to enforce environmental regulations. The courts allowed stricter standards than required by federal law as long as the state regulations did not prohibit the authorized activity.

Cases involving permits which prohibit rather than regulate federally authorized uses of the public domain are consistent with this harmonizing principle. In *Ventura County v. Gulf Oil Corp.*,[103] the Ninth Circuit Court of Appeals held that the Mineral Lands Leasing Act[104] preempted the county's power to require a lessee of the United States to obtain a county permit before drilling on federal public lands.[105] The court held that since Congress had specifically authorized drilling of oil on federal lands, the county could not *prohibit* the activity either permanently or temporarily.[106]

In *Elliot v. Oregon International Mining Co.*,[107] the Oregon Court of Appeals held that Congress had specifically authorized mineral claimants to enter land for purposes of mining and removing valuable mineral deposits and thus the county could not prohibit the action by a county ordinance.[108] The court distinguished *Hibbard* by noting that the county ordinances in *Elliot* completely prohibited a mineral claimant from conducting surface mining on patented land, whereas in *Hibbard*, local regulations merely supplemented federal mining law.[109]

Brubaker v. Board of County Commissioners[110] is another case that supports this harmonizing principle. In *Brubaker*, holders of unpatented mining claims located on federal lands sought to conduct limited test

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102. *Id.* at ____, 570 P.2d at 1195.

103. 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980).

104. 30 U.S.C. §§ 181-287 (1982 & Supp. I 1983).

105. 601 F.2d at 1086.

106. *Id.* at 1084-86. Commentators have criticized the *Ventura* decision and have stated that as a result of the decision the states have lost the power to regulate mineral development on federal public lands. *See e.g.*, Note, *Public Land Law: Preemption of State Regulation of Mineral Development on the Public Domain, Ventura County v. Gulf Oil Corp.*, 16 TULSA L.J. 317, 333 (1980). Yet when narrowly read, the *Ventura* decision is consistent with the harmonizing principle. While this article does not address the propriety of the *Ventura* decision, the court in *Ventura* did determine that Ventura County sought to prohibit an authorized activity. *Id.* at 1084. Although the boundaries between regulating, strictly regulating, and prohibiting an activity are vague, they are not synonymous forms of regulating. Thus the courts should carefully determine the degree of regulations enacted by the local and state governments before determining whether the regulations prohibit a federally authorized activity.

107. 60 Or. App. 474, 654 P.2d 663 (1982).

108. *Id.* at ____, 654 P.2d at 668.

109. *Id.* at ____, 654 P.2d at 667-68.

110. ____ Colo. ____, 652 P.2d 1050 (1982).

drilling. After receiving federal approval, the holders applied for a special permit to conduct the drilling from the El Paso County Board of County Commissioners. The Commissioners denied the permit.[111] The Colorado Supreme Court held that the preemption doctrine prohibited the Commissioners from barring mining activities on federal public lands that are specifically authorized by federal statutes.[112] The court did concede that although local statutes cannot prohibit federally authorized activities, they can supplement the federal scheme by placing reasonable regulations on the use of federal lands.[113] The court noted that reasonable state regulations are more likely upheld if they are for environmental protection.[114]

The court in *Brubaker* distinguished its decision from *State ex rel. Andrus v. Click* on two grounds. First, *Click* involved placing reasonable conditions on the issuance of a mining permit and did not involve the power to prohibit mining on federal lands. Second, the miners in *Click* had not actually applied for a permit.[115] Thus, the question of whether the state could deny the actual permit was not before the court.[116]

Thus, a survey of the cases through 1984 reveals a harmonizing principle: if the state merely regulates rather than determines the federal land uses, the state may not be preempted by federal law. In the next sections, two 1985 decisions, *Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission* and *Granite Rock Co. v. California Coastal Commission*, are examined to determine whether they are in concert with this harmonizing principle.

B. *Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission*

In *Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Commission*,[117] Gulf Oil Corporation (Gulf) complied with Wyoming's statutes and rules[118] by applying to the Wyoming Oil and Gas Conservation Commission (Commission) for permission to drill in the Granite Ridge Field of Sheridan County.[119] Gulf had proposed an access road, an extension of the county road, which traversed national forest land as well as

111. *Id.* at ____, 652 P.2d at 1052.
112. *Id.* at ____, 652 P.2d at 1052, 1059-60.
113. *Id.* at ____, 652 P.2d at 1059.
114. *Id.*
115. *Id.* at ____, 652 P.2d at 1058-59.
116. The court in *Click* did note that the permit would be enforceable if it rendered mining impossible on federal lands. *Click*, 97 Idaho at 796, 554 P.2d at 974.
117. 693 P.2d 227 (Wyo. 1985).
118. §§ 30-5-101 to 126, W.S. 1977, and rules promulgated by the Wyoming Oil and Gas Conservation Commission pursuant to § 30-5-104(c), W.S. 1977.
119. 693 P.2d at 230.

lands owned jointly by Gulf and Texaco, Inc.[120]

The Commission and citizens from Story, Wyoming contended that the drilling and related activities would violate the Commission's rules and regulations. A hearing was conducted. Testimony and evidence were presented as to the feasibility and environmental consequences of the proposed access to the site.[121] Based upon information obtained at the hearing, the Commission approved Gulf's application for a permit to drill on the condition that a different access route be selected.[122] Gulf filed a petition with the district court for judicial review of the Commission's decision. The district court certified the matter to the Wyoming Supreme Court.[123]

The Supreme Court of Wyoming upheld the state's statute which allowed the Commission to condition federally authorized drilling activities in order to safeguard environmental values.[124] The court applied the two-step approach in determining whether there was federal preemption. First, the court found no intent by Congress to exclude states from regulating mining activities, stating that Congress, "[f]ar from excluding state participation, has prescribed a significant role for local governments in the regulation of the environmental impact of mineral development on federal land."[125] Second, the court found no conflict between the state statute and the federal mining and environmental laws.[126]

Gulf Oil is in concert with the harmonizing principle. The Commission did not prohibit mining activity on federal lands, but did enact restrictions so as to safeguard environmental values. The safeguarding of environmental values by local and state governments has repeatedly been approved by the United States Supreme Court.[127] Decisions such as *Gulf Oil* advance cooperative federalism by allowing local and state governments to address local needs and concerns.

C. *Granite Rock Co. v. California Coastal Commission*

Granite Rock Co. v. California Coastal Commission,[128] a recent Ninth Circuit Court of Appeals decision, brings the issue of whether states

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120. *Id.*
121. *Id.* at 230-31.
122. *Id.* at 232.
123. *Id.*
124. *Id.* at 238.
125. *Id.* at 235.
126. *Id.* at 238.
127. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 164 (1978); Askew v. American Waterways Operators, Inc., 411 U.S. 325, 328-29 (1973).
128. 590 F. Supp. 1361 (N.D. Cal. 1984), *rev'd*, 768 F.2d 1077 (9th Cir. 1985), *appeal granted*, 54 U.S.L.W. 3644 (U.S. March 31, 1986) (No. 85-1200).

have concurrent legislative power to regulate private mining activities on federal lands to a head. Granite Rock Company (Granite Rock) engages in commercial mining of chemical grade white limestone. The mining operation is located on and around Mount Pico Blanco in the Big Sur region of Los Padres National Forest along the coast of California.[129] Granite Rock's planned mining activities included "blasting and opening a quarry, constructing and improving roads, building a bridge, boring test holes and conducting core drilling, improving a water storage system, and sumping rock waste in a disposal area."[130]

Granite Rock submitted a five-year plan to the United States Forest Service as required by federal law.[131] The plan was approved and Granite Rock began mining in 1981. In 1983, the California Coastal Commission informed Granite Rock that it must apply for a state permit to continue its mining activities in the Big Sur area.[132] The California Coastal Commission based its authority on state law which was enacted pursuant to the Coastal Zone Management Act (CZMA) of 1972[133] and approved by the Secretary of Commerce. The CZMA encourages state regulation of the coastal zones.[134] The "coastal zone" as defined by the CZMA and California Coastal Commission includes Granite Rock's mining operation in the Big Sur region.[135]

The state law[136] specifies that anyone seeking to develop resources within the coastal zone must secure a permit from the California Coastal Commission or a local commission.[137] The state law mandates that the permit shall be issued if the proposed development meets the statutory requirements, which necessitates a consideration of marine and land resources, scenic and visual qualities, and ocean access.[138]

Granite Rock brought an action to enjoin the California Coastal Commission from compelling it to comply with local permit requirements.[139] The district court applied the two-step approach in determining

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129. 768 F.2d at 1079.

130. 590 F. Supp. at 1366.

131. 36 C.F.R. § 228.4 (1985).

132. 768 F.2d at 1079.

133. 16 U.S.C. §§ 1451-1464 (1982 & Supp. II 1984).

134. 768 F.2d at 1079. *See* 16 U.S.C. § 1452(2) ("to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development. . . .")

135. 16 U.S.C. § 1453(1) (1982).

136. CAL. PUB. RES. CODE §§ 30000-30900 (West 1977 & Supp. 1986).

137. *Id.* at § 30600.

138. *Id.* at §§ 30200-30255.

139. 590 F. Supp. at 1364.

whether there was federal preemption. First, the court concluded that Congress intended there to be "collaborative federal/state efforts" to protect public lands and that this intent would be circumvented by invalidating the state's permit.[140] Second, the court held that there was no conflict between the federal and state regulations.[141] The district court denied Granite Rock's motion for summary judgment and dismissed the action.[142]

The Ninth Circuit Court of Appeals reversed the district court's decision and held that "[a]n independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is preempted."[143] In reaching this holding the court relied on a 1946 United States Supreme Court decision, *First Iowa Hydro-Electric Coop. v. Federal Power Commission.*[144]

In *First Iowa*, a decision involving navigable waters of the United States and interstate commerce,[145] the Court focused on whether the State of Iowa could require a cooperative association to obtain a state permit to construct and operate a dam, reservoir and hydro-electric power plant on the Cedar River near Moscow, Iowa. The Federal Power Commission determined that the cooperative's plan for the dam, reservoir, and hydro-electric plant had met the requirements of the Federal Power Act.[146] The State of Iowa, however, alleged that the cooperative must comply with the state statutory requirements[147] as well as the federal requirements for the dam project.[148] The United States Supreme Court held that the state law was preempted because Congress had determined that the Federal Power Commission and not the states had control of the project's requirements.[149]

The Ninth Circuit, by concluding that the state permitting process intrudes into the Forest Service's power to prohibit or restrict mining for failure to abide by its environmental regulations, determined that the *First Iowa* doctrine should apply to the *Granite Rock Co.* litigation.[150] The court first concluded that under federal regulations,[151] the Forest Service had the authority to regulate mining on national forest land and to assure that the

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140. *Id.* at 1374.
141. *Id.*
142. *Id.* at 1375.
143. 768 F.2d at 1083.
144. 328 U.S. 152 (1946).
145. *Id.* at 163.
146. *Id.* at 159-60.
147. IOWA CODE §§ 7767-7796.1 (1939).
148. 328 U.S. at 161.
149. *Id.* at 168-71.
150. 768 F.2d at 1083.
151. 36 C.F.R. §§ 228.4-.5 (1985).

environmental requirements were met.[152] Asking next whether the state's authority to request a permit from Granite Rock *intruded* into the Forest Service's sphere of authority, the court held that "[a]n independent state permit system to enforce state environmental standards would *undermine* the Forest Service's own permit authority and thus is preempted."[153] The Ninth Circuit also noted that the Court in *First Iowa* did not inquire into the reasonableness of the state's conditions for issuing or denying the permit.[154]

The Ninth Circuit's reasoning in *Granite Rock Co.* and its reliance on the *First Iowa* doctrine is misplaced in the wake of more recent decisions and developments. The court in *Granite Rock Co.* did not apply the two-step approach endorsed by the United States Supreme Court in determining whether there is federal preemption. The first step in the inquiry, whether Congress intended to occupy the field, was not examined by the court. There was no examination to determine whether the Forest Service's regulations or the Mining Act had a "clear and manifest" purpose to supercede the state's police power. Nor was the area of law and the legislative history examined to determine congressional intent.

The court in *Granite Rock Co.* also did not address the second step of the preemption doctrine; the determination of whether there is a conflict between the state and federal regulations such that both could not be applied to the same area. Although the court determined that the state's permitting authority *undermined* the Forest Service's authority, there was no determination that the two statutes actually conflicted. If the court had applied the two-step approach in *Granite Rock Co.*, a different result may have occurred.

Instead of applying the two-step approach which is endorsed by the United States Supreme Court, the court in *Granite Rock Co.* asked whether there was an *intrusion* by state authority upon the federal authority. Exactly what constitutes an "intrusion" is a source of difficulty. The United States Supreme Court in *Florida Avocado Growers v. Paul*[155] held that "[t]he test of whether both federal and state regulations may operate, or [whether] the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."[156] Thus, although a state's regulation may have the same purpose and thus may be said to intrude upon the federally authorized activities, it

152. 768 F.2d at 1083.
153. *Id.* (emphasis added).
154. *Id.* at 1082.
155. 373 U.S. 132 (1963).
156. *Id.* at 142.

is not necessarily a basis for preemption.

In *Granite Rock Co.* the balance that exists between state, local, and federal governments is weighted heavily in favor of the federal government. There was not a careful analysis of federal preemption and further, the court did not consider the benefits of cooperative federalism. As a result, the decision erodes the harmonizing principle that is developing in this area of law. *Granite Rock Co.* is a step backward in the attempt to clarify the conditions under which state or federal governments, or both, can regulate private mining activities on federal public lands.

VI. CONCLUSION

The precise balance between state, local, and federal regulation of private mining activities on public lands has a long and complex history. The fluctuation found within this area of law is not surprising considering the many intervening factors. The different interpretations of the property clause sets the stage by interjecting confusion and uncertainty into issues of governmental jurisdiction on public lands. Although *Kleppe* reduced the uncertainty, the trend toward cooperative federalism and the inconsistent application of the preemption doctrine have kept the area in flux. There is no single correct answer that can be applied in every case, yet recognition of the benefits of cooperative federalism and consistent use of the two-step approach in applying the preemption doctrine will lead to less confusion in determining the balance between federal, state, and local regulation of public lands.

The emergence of a harmonizing principle appears as a workable solution to the balance between the powers asserted by federal, state, and local governments. The harmonizing principle allows the state and local governments to exercise local controls in accordance with their needs. At the same time, as long as the state or local government does not prohibit, but merely regulates the private mining interest, the policy of the United States to foster and encourage private mining interest is not harmed.

The *Granite Rock Co.* decision conflicts with this harmonizing principle. Besides not applying the two-step approach of the preemption doctrine, the court did not consider the benefits of cooperative federalism when addressing environmental issues. *Granite Rock Co.* adds to the confusion in this area and further frustrates state and local governments in their development of policies to safeguard the natural resources located on federal public lands. Through federal legislation, such as the Surface Mining Control and Reclamation Act and the Coastal Zone Management Act of 1972, Congress has adopted national policies while allowing the states a strong regulatory role. Courts should not circumvent this type of cooperative relationship that is developing between state, local, and federal governments.