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Public Land Law: Preemption of State Regulation of Mineral Development on the Public Domian, Ventura County v. Gulf Oil Corp.

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PUBLIC LAND LAW: PREEMPTION OF STATE REGULATION OF MINERAL DEVELOPMENT ON THE PUBLIC DOMAIN, *VENTURA COUNTY v. GULF OIL CORP.*

I. INTRODUCTION

The United States Supreme Court has recognized a state's right to regulate mineral development as a valid exercise of its police power[1] and that the state's police power extends to the public domain.[2] Despite these two propositions, the United States Court of Appeals for the Ninth Circuit in *Ventura County v. Gulf Oil Corp.*[3] held that a state[4] cannot exercise its police power to regulate mineral development on the public domain when the state regulations "impermissibly conflict"[5]

1. *See, e.g.*, Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

> The police power, which is implicitly recognized in the tenth amendment to the Constitution, entails the broad authority possessed by a sovereignty to legislate in furtherance of the health, safety, morals, and general welfare of its citizenry . . . .
>
> One of the strongest justifications for the state regulation in the energy area is public safety . . . . Most energy-related regulations, however, are justified as promotive of the general welare.

Mills and Woodson, *Energy Policy: A Test for Federalism*, 18 ARIZ. L. REV. 405, 414-15 (1976) (footnotes omitted). Another commentator elaborates:

> In general, the constitutionality of state regulations for the conservation, production and use of oil and gas has been supported on three grounds. They are that it is within the police power of the state to enact and enforce legislation to protect the correlative rights of owners of land within a common source of supply of oil and gas, to safeguard the public interest in oil and gas as a natural resource of the state, and to prevent or abate surface nuisances resulting from the operation of oil and gas wells.

Shapiro, *Energy Development on the Public Domain: Federal/State Cooperation and Conflict Regarding Environmental Land Use Control*, 9 NAT. RESOURCES LAW. 397, 416 (1976) (footnote omitted).

2. *See, e.g.*, McKelvey v. United States, 260 U.S. 353 (1922); Bacon v. Walker, 204 U.S. 311 (1907); Texas Oil & Gas Corp. v. Phillips Petro. Co., 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969). *Cf.* Wallis v. Pan Am. Petro. Corp., 384 U.S. 63 (1966) (state law governs the dealings of private parties who claim to have property interests in the public domain when state law is sufficient to handle the dispute). *But see* notes 19-31 *infra* and accompanying text.

3. 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 100 S. Ct. 1593 (1980).

4. While, *Ventura* involves a county regulation instead of a state regulation, this does not matter "[s]ince local governments are political subdivisions of the state, [and] conflicts between federal and local land use controls are simply federal/state conflicts and may be resolved under the same principles . . . ." White and Barry, *Energy Development in the West: Conflict and Coordination of Governmental Decision-Making*, 52 N.D. L. REV. 451, 506 (1976). For facility, *Ventura* will be discussed in terms of a relationship between the federal and state governments.

5. 601 F.2d at 1082. *See* note 68 *infra* and accompanying text.

with the Mineral Lands Leasing Act of 1920.[6] This note will examine the *Ventura* decision. It is the thesis of this note that the *Ventura* court erred in its holding because it is contrary to an explicit congressional intent not to make the Mineral Leasing Act preemptive of state regulation. Given the pressing energy problem in the United States, the *Ventura* decision is significant because it greatly diminishes the police power states once had to regulate the nation's energy resources.[7]

II. THE *VENTURA* FACTS

On April 1, 1974, Gulf Oil Corporation became the federal government's lessee of 120 acres located within the Los Padres National Forest in the county of Ventura, California. Gulf's proposed oil exploration and drilling activities were subject to extensive federal regulation.[8] Gulf began drilling on April 28, 1976. On May 5, 1976, Ventura advised Gulf that the county's zoning ordinance prohibited oil exploration and extraction until an Open Space Permit was obtained from the county planning commission. The Open Space Use Permits are issued with discretion and contain eleven mandatory conditions and any number of additional conditions which the planning board may mandate. Gulf decided to continue drilling operations without obtaining the required permit.

Ventura petitioned the California Superior Court to order Gulf to comply with Ventura's zoning ordinance. The case was removed to the District Court for the Central District of California where Ventura moved for a preliminary injunction. The District Court denied the injunction and dismissed the action. Ventura unsuccessfully appealed to

6. 30 U.S.C. § 181 (1971). The Mineral Lands Leasing Act of 1920 is popularly known as the Mineral Leasing Act. Even though, technically, it is improper to refer categorically to all land covered by the act as the public domain, public lands, or federal lands, these terms are employed interchangeably thoroughout the text of this article to mean those lands covered by the Act, unless noted otherwise.

7. For another note discussing *Ventura see* Note, *State and Local Control of Energy Development on Federal Lands*, 32 STAN. L. REV. 373 (1980).

8. First, the land was leased by the Department of the Interior, Bureau of Land Management, and assigned to Gulf for oil exploration and development pursuant to the Mineral Leasing Act. "The basic lease . . . contains approximately 45 paragraphs including requirements of diligence and protection of the environment . . . ." 601 F.2d at 1083. Because the leased land lies within a National Forest, Gulf's activity was also subjected to Department of Agriculture conditions and permit approval. Finally, Gulf also obtained a required drilling permit from the Department of the Interior, Geological Survey. The Geological Survey, which follows the guidelines of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1976), subjected Gulf's lease to ten more conditions. In addition to acquiring required federal permits, Gulf obtained approval from the California Resources Agency, Division of Oil and Gas. Thus, while Gulf had both federal and state approval, it had not obtained county approval.

both the United States Court of Appeals, Ninth Circuit,[9] and the United States Supreme Court.[10]

III. *VENTURA* ANALYSIS

The Ninth Circuit, in *Ventura*, defined a five-way relationship between the property clause,[11] the supremacy clause,[12] the state's police power, the Mineral Leasing Act, and the preemption doctrine. This note will analyze the court's view of that relationship by examining each of the three interrelated major issues. They are:

(1) whether, in enacting the Mineral Leasing Act, Congress had the *power* to preempt state police power regulation of mineral development on the federal public domain;
(2) whether, in enacting the Mineral Leasing Act, Congress had the *intent* to preempt state police power regulation of mineral development on the federal public domain; and
(3) whether the Mineral Leasing Act *can preempt* a state from using its police power to regulate mineral development on the federal public domain.

The third issue makes *Ventura* most notable. Theoretically, that issue cannot be resolved until it is determined whether Congress had both the power and intent to preempt a state's police power.[13] The power to preempt is worthless unless there is an accompanying intent to invoke that power to preempt.[14] The reverse is also true.[15] There-

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

10. 100 S. Ct. 1593 (1980).

11. U.S. CONST. art. 4, § 3, cl. 2. The property clause reads: "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 . . . ." For a discussion of the property clause see, Engdahl, *Symposium, Federalism and Energy: State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Landstorm, *State and Local Governmental Regulation of Private Land Using Activities on Federal Lands*, 7 NAT. RESOURCES LAW. 77, 77-80 (1974); Hubbard, *The Application of State Conservation Laws to Oil and Gas Operations on the Public Domain*, 32 ROCKY MTN. L. REV. 109, 263-67 (1960).

12. U.S. CONST. art. 6, cl. 2. The supremacy clause reads: "the Laws of the United States . . . shall be the supreme Law of the Land . . . Laws of any State to the Contrary notwithstanding." The supremacy clause makes a law enacted pursuant to an enumerated power the controlling law. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Perez v. Campbell, 402 U.S. 637 (1971).

13. *See generally* Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973).

14. *See, e.g.*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); First Iowa Hydro-Electric Coop. v. Federal Power Comm., 328 U.S. 152 (1946). *See generally* Engdahl, *supra* note 13.

15. *Id.*

fore before a court can find that the Mineral Leasing Act has preemptive capability[16] it would first have to find the necessary congressional power and intent. Once the court finds this preemptive capability it must next determine whether Ventura's regulations are preempted since the preemption doctrine only operates where there is conflict.[17]

A. *Preemptive Power: The Weighing of the Property and Supremacy Clauses Against the State's Police Power*

The Constitution's property clause, coupled with the supremacy clause, granted Congress preemptive power in *Ventura*. The Ninth Circuit, relying heavily on *Kleppe v. New Mexico*,[18] held that the Mineral Leasing Act was a valid enactment under the property clause based on *Kleppe*'s ruling that the property clause grants the federal government unlimited power to regulate federal property.[19] In 1976 the United States Supreme Court held in *Kleppe* that the New Mexico Estray Law,[20] which allowed state authorities to round up and manage stray burros and horses, was preempted by the federal Wild Free-Roaming Horses and Burros Act "which was passed . . . to protect wild horses and burros on the public lands of the United States."[21] The *Ventura* court agreed with *Kleppe* that:

> Absent consent or cession a State, undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause . . . . A different rule would place the public domain of the United States completely at the mercy of state legislation.[22]

Ventura agreed with *Kleppe* that the property clause power is "without limitations."[23]

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16. Preemptive capability is simply the ability to preempt. *See generally* Engdahl, *supra* note 13; notes 64-78 *infra* and accompanying text.

17. *See* notes 68-82 *infra* and accompanying text. Logically, the court's finding that the Mineral Leasing Act has preemptive capability is not determinative of another issue—whether the Mineral Leasing Act in a particular case operates to preempt a state from using its police power to regulate mineral development on the federal public domain. However, the *Ventura* opinion does not reflect an explicit delineation between that issue and the third issue.

18. 426 U.S. 529 (1976).

19. *Id.* at 542-43.

20. N.M. STAT. ANN. §§ 77-13-1 to -13-10 (1978).

21. 601 F.2d at 1083.

22. *Id.*

23. *Id.*

Ventura is also in accord with *Kleppe* that the property clause grants Congress significant legislative power over federal land. However, the question should not be whether the court misused or misinterpreted *Kleppe*,[24] but rather, whether *Kleppe* itself was justified. One commentator suggests that every case cited in *Kleppe* was either "misconstrued or misapplied"[25] and that "the Supreme Court for the first time in its history adopted as its ground of decision a proposition contradictory to the cardinal thesis of the classic article IV property clause doctrine."[26]

1. The Pro-federal Property Clause Series

Kleppe was not the first case in which the Supreme Court broadly interpreted the property clause in favor of the federal government. *Utah Power and Light Co. v. United States*,[27] a 1916 case on which *Kleppe* relied, was one of the most notable cases in which the Court advocated significant federal power over federal lands pursuant to the property clause.[28] In *Utah Power and Light*, the defendant public utility company occupied lands in forest reservations in Utah by building dams, reservoirs, and other structures necessary to generate electrical power. This occupation was without the permission of the United States as required by a federal act.[29] The issue presented was whether the federal government had legal control over land located within Utah's borders. In an affirmative response the Court stated "that the inclusions within a State of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe the conditions upon which others can obtain rights in them."[30] Again, the judicial source of this power was the property clause.

Though *Utah Power and Light* is the most notable case prior to *Kleppe*, the pro-federal power argument was made as early as 1871 in *Gibson v. Chouteau*.[31] In *Gibson*, the Court held that a state's statute of

24. In abstract terms, the Mineral Leasing Act does what the federal Wild Free-Roaming Horses and Burros Act does. Both acts regulate activity on federal land in subject matter where the states have traditionally exercised their police powers.

25. Engdahl, *supra* note 11, at 351.

26. *Id.* at 349.

27. 243 U.S. 389 (1916).

28. *See* note 30 *infra* and accompanying text.

29. Act of May 14, 1896, ch. 179, § 4944, 29 Stat. 120.

30. 243 U.S. 389, 405 (1916).

31. 80 U.S. (13 Wall.) 92 (1871). Other cases in the series include United States v. San Fran-

limitations, coupled with the doctrine of relation,[32] cannot be used to affect ownership rights obtained by a private party under a federal conveyance of public land. The significance of *Gibson* is displayed by its reasoning and view that the property clause grants Congress power to dispose of and regulate the public domain without limitation and cannot be undermined by state legislation.[33]

2. The Pro-state Property Clause Series

There is a second line of cases advocating a contrary viewpoint on the amount of federal power emanating from the property clause. This line of cases originated in 1845 with *Pollard v. Hagan*.[34] The United States Supreme Court in *Pollard* stated that the federal government lost its power over public lands within Alabama once Alabama had become a state because to allow federal control over that land would have put Alabama on a different footing than the original states.[35] The federal government retained no dispositive power over public land within other states and thus, the Court reasoned that it would be unfair to treat Alabama differently.[36] This equal footing doctrine provides the justification for all the cases in the pro-state power series. *Pollard* is not mentioned in *Kleppe*, but, *Kleppe* discusses several cases which followed *Pollard*. In its discussion of those cases *Kleppe* strictly limited their holdings.[37]

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cisco, 310 U.S. 16 (1940), and Hunt v. United States, 278 U.S. 96 (1928). The Court in *Kleppe* relied upon *Gibson*.

32. The doctrine of relation is often called the relation back doctrine. Under this fiction an act or event, such as the transfer of title to real property, is treated as if it had occurred earlier.

33. 80 U.S. 13 Wall. at 99-100.

34. 44 U.S. (3 How.) 391 (1844). *See, also*, Bacon v. Walker, 204 U.S. 311 (1907); Ward v. Race Horse, 163 U.S. 504 (1896).

35. 44 U.S. (3 How.) at 401-07.

36. *Id.*

37. For example, the Court in *Kleppe* dismissed *Colorado v. Toll*, 268 U.S. 228 (1925) by stating that in that case "the Court found that Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause." 426 U.S. at 544. However, the Court in *Kleppe* neglected to point out that the Court in *Colorado v. Toll* indicated that had the Congressional act not given the state power over the park the Court would have had to decide whether Colorado had ceded its power over that property to the federal government since the United States Government can only get exclusive jurisdiction over the public lands if the state ceded that jurisdiction. 268 U.S. at 230.

Kleppe also dismissed *Wilson v. Cook*, 327 U.S. 474 (1945), which held that

> Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states (Act of June 15, 1836, c. 100, 5 Stat. 50), the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States . . . [through consent of the state or cession of the jurisdiction by the state].

3. Summary

The *Kleppe* court attempted to avoid the inevitable conclusion that the two series of cases are irreconcilable.[38] *Kleppe* was not an attempt to advance a new proposition. Had the Court in *Kleppe* decided in favor of New Mexico it would have had the total support of the pro-state power series.[39]

Kleppe should have addressed the question of which line of cases is correct. To answer this question the Court would need to go beyond mere policy arguments and examine the constitutionality of each line of cases.[40] Without a probe into the constitutional foundation of the property clause the two pronged series remains at a standstill.

B. *Preemptive Intent: Congressional Intent Behind the Mineral Leasing Act*

The Ninth Circuit Court of Appeals found preemptive intent in the Mineral Leasing Act despite Ventura's opposing contentions. Ventura argued that two clauses in the Mineral Leasing Act provide explicit evidence of a nonpreemptive intent. First, Ventura asserted no preemptive intent based on a savings clause in section 187. It was argued that section provides for state regulation of mineral development without preemption by the Mineral Leasing Act.[41] The court re-

Id. at 487. *Kleppe* dismissed *Wilson* because, unlike *Kleppe*, there was no federal statute involved. 426 U.S. at 544. However, *Wilson* defines the limitations of federal power over the public domain which is why *Kleppe* is significant.

For a discussion of the cases relied upon by the Supreme Court in *Kleppe see* Engdahl, *supra* note 11, at 351-58.

38. However, there are other cases which fall between the two extremes. The rule advanced in those cases is that a state can exercise its police power over the public domain, at least when there is no federal legislation on the subject. Omaechevarria v. Idaho, 246 U.S. 343 (1918). *See, also* McKelvey v. United States, 260 U.S. 353 (1922); Texas Oil & Gas Corp. v. Phillips Petro. Co., 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969).

39. *See* notes 34-36 *supra* and accompanying text.

40. *See* notes 22 and 35-36 *supra* and accompanying text for a discussion of policy arguments.

41. Section 187 reads in full:

> No lease issued under the authority of this chapter shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the

sponded to Ventura's contention by stating that the savings clause in section 187

> relates only to the provisions of the preceding sentence. These provisions relate to employment practices, prevention of undue waste and monopoly, and diligence requirements. [The provisions which Ventura argues should be protected by the savings clause are land use controls and] [t]here is no mention of land use controls. Moreover, the proviso assures only that the Secretary of the Interior shall observe state standards in drafting the lease's terms. It is not a recognition of concurrent state jurisdiction.[42]

Next, the court rejected Ventura's contention that a second proviso, in section 189, prevents state law from being undermined. Section 189 of the Mineral Leasing Act provides that:

> Nothing in this chapter shall be construed or held to affect the rights of the states or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines or other rights, property, or assets of any lessee of the United States.[43]

The court stated that "the proviso cannot give authority to the state which it does not already possess."[44] and concluded that under the Mineral Leasing Act a state does not have the authority to impose stricter standards on government lessees than those imposed by the fed-

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employment of any child under the age of sixteen in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare. *None of such provisions shall be in conflict with the laws of the State in which the leased property is situated.*

30 U.S.C. § 187 (Supp. 1980) (emphasis added). The functions of the Secretary of the Interior have been transferred to the Secretary of Energy by the Department of Energy Organization Act of 1977, Pub. L. No. 95-91; 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7152(b)).

42. 601 F.2d at 1085.

43. Section 189 reads in full:

> The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. *Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.*

30 U.S.C. § 189 (Supp. 1980) (emphasis added).

44. 601 F.2d at 1086.

eral government.[45]

The court's holding on the issue of preemptive intent is marked by circular reasoning and an incomplete analysis. Congressional history clearly shows that both sections 187 and 189 were not intended to preempt state regulation of mineral development.[46]

1. Section 187

In the brief discussion of section 187[47] the Ninth Circuit reasoned that even if the proviso in section 187 is a savings clause, it refers only to the immediately preceding provisions of section 187 which do not mention land use planning controls, such as the Ventura regulations. This reasoning can be analyzed along three lines.

First, assuming that the savings clause is limited to the immediate preceding provisions, it is arguable that the specific provisions to which the savings clause refers are similar enough to land use control provisions so that state power over federal land should not be undermined merely because the exact words "land use control" do not appear in the statute.[48]

Second, the court's holding was not in accord with other cases[49] which have examined congressional preemptive intent under the Mineral Leasing Act.[50] The Tenth Circuit, in *Texas Oil and Gas Corp. v. Phillips Petroluem Co.*,[51] discusses both sections 187 and 189, but the *Ventura* court ignored that court's discussion of section 187. *Texas Oil* held that the language of section 187 "leave[s] to the States the power to exercise state police power over Federal oil and gas leases."[52] Relying on the language of section 187, *Texas Oil* upheld Oklahoma's right

45. *Id.*

46. *See* notes 50-51 and 59-62 *infra* and accompanying text.

47. *See* text accompanying note 42 *supra*.

48. One commentator stated:

> [T]here is the . . . problem of determining the proper interpretation of a general saving clause . . . . The court must begin its analysis of a general saving clause by recognizing that Congress is not able to anticipate all of the preemptive problems which may arise in the broad field covered by the clause. Accordingly, the court should infer that a literal application of the clause would not serve the statutory purpose.

Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 540-41.

49. *See* notes 51-52, 58 *infra* and accompanying text.

50. As will be shown, the cases do not conflict with congressional intent as ascertained from a debate in the House of Representatives.

51. 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969). This is the only case in which a federal court discusses congressional intent behind the specific language being scrutinized in § 187.

52. 277 F. Supp. at 369. *Accord*, Wallis v. Pan Am. Petro. Corp., 384 US. 63 (1966). While not discussing § 187 specifically, *Wallis* may be read to hold that state law regulating mineral

to use its police power to order forced pooling on the public domain.[53] *Texas Oil* supports Ventura's contention that the savings clause in section 187 is not restricted to the provisions in the immediately preceding sentence which relate to diligence, skill, care, safety, welfare requirements, employment practices, and the prevention of monopolies.

Third, the *Ventura* court failed to note that sections 187 and 189 are contained within the section of the Mineral Leasing Act devoted to "General Provisions". A reasonable inference may be drawn that the content of such a section is likely to be broad in scope and generally relate to all other sections of the act, unless otherwise indicated by unambiguous terms. This is just one additional factor which the court should have considerd before it reached its conclusions on preemptive treatment.

The lack of preemptive intent is readily apparent from congressional hearings. Debate indicates that Congress did not intend the Mineral Leasing Act to have preemptive effect on state legislation. The following are excerpts from a debate which preceded an unsuccessful motion to delete the savings clause from section 187:

> Representative Mondell: [The] intent [of the proviso in §187], I assume, is to prevent the Federal Government from putting in these leases any provision which would be contrary to the salutary provisions of State laws, and if that language is striken out it would be possible for the Secretary of the Interior to insert conditions in the lease of a character that flew squarely in the face of the most necessary, essential, and salutary provisions of the laws of the States.
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> . . . .
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> Evans: The United States, by the terms of the lease that is to be made under this provision, is empowered and authorized to put into that lease provisions which [for example,] make the safety of the people paramount; not that the State shall not make those laws still stronger, but that it shall not make them less so.
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> . . . .
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> If the State makes a law which is stronger than the provision which the Secretary of the Interior incorporates into the

development may be superior to federal regulation even though "the leases are issued by the United States and concern Federal Lands." *Id.* at 70-71.

53. The court also relied on the language of § 189; *see* text accompanying note 57 *infra*.

lease, that law will apply.[54]

All the congressmen who expressed views on the preemptive effect of the savings clause in section 187 agreed that stricter state laws would not be preempted by the Mineral Leasing Act.[55] With this premise, and since Ventura's regulations are stricter in that they require the lessee to meet at least eleven mandatory conditions not imposed by the Mineral Leasing Act, the *Ventura* court should have held that the stricter Ventura regulations are not preempted by the federal regulations.

2. Section 189

The court did not logically present its reasoning on the effect of section 189. It stated that section 189 of the Mineral Leasing Act "cannot give authority to the state which it does not already possess."[56] Next, the court concluded that section 189 does not undermine any federal power to preempt state regulation. There was no explanation why the language of section 189, alleged by Ventura to be a broad savings clause, was not so broad. While the court noted that section 189 "is an express recognition of the right of the states to tax activities of the Government's lessee pursuant to its lease . . . and has been relied upon in part to uphold [state promulgated] forced pooling and well spacing of federal mineral lessee operations . . ."[57] it never explained why the right to regulate mineral development was not included as a right which a state has and therefore protected by the savings clause in section 189.

Ventura County's argument is supported by a 1925 United States Supreme Court decision which interpreted section 189. The Court in

54. 58 CONG. REC. 7644-45 (1919). This is the only notable source discussing §§ 187 and 189.

55. 58 CONG. REC. 7643-45 (1919). Federal regulations (here) include specific provisions in the Mineral Leasing Act and regulations promulgated by the Secretary of the Interior. All of the congressmen, except one, agreed further that state laws *contrary* to the federal act preempt the federal act. *Cf.* Shapiro, *supra* note 1, at 428 ([A]s between federal and state conservation requirements for the public domain, the more stringent ones would apply.) and 439 ([S]tate requirements [which are more stringent than federal requirements] may be enforced when compatible with federal energy development goals.).

56. 601 F.2d at 1086.

57. *Id.* The *Ventura* court cited Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949) for the first proposition. However, reliance on this on this case is questionable since the Mineral Leasing Act was not the federal mineral act involved. A case on which the court should have relied is Mid-Northern Oil Co. v. Montana, 268 U.S. 45 (1925). The case referred to for the other propositions is Texas Oil & Gas Corp. v. Phillips Petro. Co., 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969).

Mid-Northern Oil Co. v. Montana[58] upheld a state license tax on all mineral producing lands within the state's borders. The Court stated "we find nothing in the body of the act which, by any stretch of meaning, purports to detract from or render less certain any such preexisting rights; and, in that view, the theory [that "existing rights" means laws enacted prior to the Act's passage] . . . fails for want of material on which to operate."[59] Existing rights, then, are those powers which have been allocated to the states under the Constitution. "Existing rights" are not synonymous with state laws enacted before the Mineral Leasing Act.

There seems to be only two possible reasons why the *Ventura* court found that the right to regulate mineral development on federal land was not a right protected by the savings clause in section 189. These reasons are that the court did not classify Ventura's regulations as "existing rights" within the meaning of section 189 and thus they did not merit protection, or alternatively, that the court construed section 189 as limited to the protection of tax regulations only. If the reason was the former, then according to the Supreme Court in *Mid-Northern*, the *Ventura* contention concerning section 189 must fail. Since a state always had the police power to regulate mineral development[60] Ventura's police power was an existing right within the meaning of section 189.

In the alternative, if the Ninth Circuit's unstated reason why Ventura cannot regulate mineral development on federal land is because Ventura's regulation is not a tax regulation, then the court failed to explain how it could confine section 189 only to the right to tax, especially when the court pointed out that the clause was used in *Texas Oil* to uphold state forced pooling regulations which are unrelated to taxing.[61] Moreover, the Supreme Court in *Mid-Northern* never limited the "rights" to only taxation rights.[62]

Congressional discussion of section 189 is helpful in deriving legislative intent. Shortly after the House of Representatives defeated the proposed deletion of the savings clause of section 187,[63] it was proposed that the savings clause language of section 189[64] be deleted. The debate, which led to another defeated amendment, concerned taxation

58. 268 U.S. 45 (1925).
59. *Id.* at 48.
60. *See* note 1 *supra* and accompanying text.
61. 601 F.2d at 1086. Compare this discussion with Hubbard, *supra* note 11, at 272-77.
62. 268 U.S. 45, 48 (1925).
63. 58 CONG. REC. 7643-45 (1919).
64. *See* text accompanying note 43 *supra* for the controversial provision.

rights only. It can be inferred from this discussion that *Mid-Northern's* definition of "existing rights" is an accurate interpretation of Congressional intent.[65] Moreover, a conference report reveals that the savings clause in section 189 had been specifically amended so that its scope would not be limited to state tax regulations.[66] In summation, based both on case law and legislative history, the savings clauses in sections 187 and 189 should have operated to Ventura's benefit.[67]

C. *The Preemptive Capability of the Mineral Leasing Act*

Once the court determined Congress had preemptive intent in passing the Mineral Leasing Act it became necessary to determine what would trigger its preemptive capability.[68] Merely because there are both federal and state regulations of mineral development on the public domain does not mean the state regulations are preempted.[69] The following analysis examines how this preemptive capability is triggered.

Preemption, basically, is the unenforceability of one law because it is contrary to another law.[70] This is one of the many ways the word has been defined.[71] No single test has been used consistently to define the

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65. *See* 58 CONG. REC. 7646-47 (1919).

66. CONFERENCE REP. on S. 2812, H.R. REP. No. 1138, 65th Cong., 3d Sess. 16 (1919). This is found also in H.R. REP. No. 1059, 65th Cong., 3d Sess. 18 (1919). The phrase *including the right* was inserted into the original proposal so that the savings clause in § 189 today reads:

> Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, *including the right* to levy and collect taxes. . . .

67. According to the foregoing analysis, either clause would have been sufficient to protect Ventura's interest. The two provisos differ only to the extent that § 187, according to its language, is aimed at protecting state *laws* whereas § 189 protects state *rights*.

It is interesting how the court read the savings clauses in §§ 187 and 189 since many commentators who have discussed either or both of the provisions did not see the limitations found by the court in *Ventura*. *See, e.g.*, Hubbard, *supra* note 11 at 267-80 "Congress did not, by passing the Mineral Leasing Act of 1920, intend to prevent the states from applying their own conservation laws to operations on the public domain . . . ." *Id.* at 275; Shapiro, *supra* note 1, at 416-18, 426-33 "[T]he Mineral Leasing Act explicitly preserves the police power authority of the states." *Id.* at 427; 5 Public Land Law Review Commission, *Energy Fuel Mineral Resources of the Public Lands*, 274-77 (revised ed. 1970). "[N]o lease conditions shall conflict with state laws . . ." *Id.* at 277.

68. The preemption doctrine has been discussed in numerous articles. It is too complex to discuss in depth in this note. *See generally*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); Engdahl, *supra* note 13; Hirsch, *supra* note 48; Note, *Federal Preemption of State Laws: The Effect of Regulatory Agency Attitudes on Judicial Decisionmaking*, 50 IND. L.J. 848 (1975).

69. *Cf.* Askew v. American Waterway Operators, Inc., 411 U.S. 325 (1973) (Federal Water Quality Improvement Act does not preempt a Florida oil spill act); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (see text accompanying notes 77-80 *infra*).

70. *See, e.g.*, Hirsch, *supra* note 48, at 516.

71. *See* note 68 *supra* and note 72 *infra* and accompanying text.

term. "Over the years the court has generated a variety of expressions which it has used as tests of preemption: 'conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference.' "[72] *Ventura* utilized the "impermissible conflict" test[73] and found impermissible conflict because of extensive federal regulation[74] and because the Ventura-federal government clash involved a vertical power struggle.[75] The court's reasoning is weak because extensive federal regulation does not necessarily mean there is conflict.[76] The reasoning appears circular because the power struggle would terminate once the court determines whether the Mineral Leasing Act can preempt state regulation. *Ventura* never explicitly defined "impermissible conflict."

Ventura County argued that *Huron Portland Cement Co. v. Detroit*[77] held that what Gulf considered to be a conflict was, in fact, not a conflict. In *Huron Portland Cement* a local ordinance, aimed at eliminating air pollution, prevented a federally licensed ship from travelling in interstate commerce. The federal statute, which permitted the ship to travel, was aimed at the seaworthiness of the vessel and thus, the purposes of the two laws did not conflict. The United States Supreme Court in *Huron Portland Cement* concluded that since there was no "overlap . . . [in purpose, that to find conflict] would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists."[78] It appears that the *Huron* court placed itself in Congress' position to determine if Congress would have wanted the local regulation to yield to the federal statute had Congress thought about that possibility before it enacted the legislation.[79] In this light, Ventura's contention that there was no conflict would be correct since legislative history

72. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
73. 601 F.2d at 1082.
74. *Id.* at 1083-84.
75. *Id.*
76. *See, e.g.*, Askew v. American Waterway Operators, Inc., 411 U.S. 325 (1973); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).
77. 362 U.S. 440 (1960).
78. *Id.* at 446. *Compare Huron Portland Cement with* Kesler v. Department of Public Safety, 369 U.S. 153 (1962). *But see* Perez v. Campbell, 402 U.S. 637 (1971); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) ("The test . . . is . . . not whether [the acts] . . . are aimed at similiar or different objectives." *Id.* at 142.).
79. "Questions of the relation of the federal law to existing and potential state laws are seldom considered in detail in the drafting of legislation. Consequently, many federal acts are adopted without serious consideration of their impact on state laws dealing directly with the same subject matter." Hirsch, *supra* note 48, at 542.

reveals that Congress did not intend for the Mineral Leasing Act to preempt state legislation.[80]

Ventura's definition of preemption is that a federal act preempts a state act only when the state act "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[81] This proposition restates the rule that a court should follow congressional intent when determining if there is preemption. Thus, preemptive capability can only be triggered into preemption when congressional intent, either explicit or implicit, can be found in statutory language or is ascertainable from legislative history.[82]

IV. THE EXTENT OF PREEMPTIVE CAPABILITY UNDER THE MINERAL LEASING ACT

The Ninth Circuit interpreted the Mineral Leasing Act to possess extensive preemptive capability. The court held that the Mineral Leasing Act will preempt state regulation of mineral development on the public domain whenever a state regulation imposes stricter standards than those imposed by the Mineral Leasing Act. Therefore, the court found that in the *Ventura* fact pattern, where state law is stricter than federal law, the Mineral Leasing Act will preempt state law. It is possible that a state regulation, though not contrary to any provision of the Mineral Leasing Act, may be construed as a stricter state requirement if it imposes an additional standard which the lessee must meet. Thus, *Ventura* may also stand for the proposition that the Mineral Leasing Act prohibits a state from extending any mineral regulations to the public domain.[83]

Although *Ventura* marks the first time the Supreme Court has passed judgment on the savings clauses of both sections 187 and 189, the central issue presented in *Ventura* has been examined by the Tenth Circuit Court of Appeals,[84] commentators,[85] agencies,[86] and govern-

80. *See* notes 54-55, 63-66 *supra* and accompanying text.

81. 601 F.2d at 1086.

82. *See* Note, *supra* note 68. "The clear intent requirement for occupation found a correlative in the actual conflict standard." *Id.* at 627 (footnote omitted); Engdahl, *supra* note 13, at 52-55.

83. A state might promulgate mineral development legislation with the intent that it will be applicable to all land within its borders. However, the law established in *Ventura* would prevent the applicability of that legislation to any public domain located within the state.

84. Texas Oil & Gas Corp. v. Phillips Petro. Co., 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969).

85. *See* notes 1, 55 *supra*.

86. In a Colorado case (similar to *Ventura*) the Department of the Interior said that "county

mental administrators.[87] Most conclusions are similar to the one in this note that the savings clauses in sections 187 and 189 protect state mineral regulations from preemption. According to the Tenth Circuit, in *Texas Oil*,[88] the only two powers of the Mineral Leasing Act, which cannot be undermined by state law, are, that (1) "a federal mineral lessee may not assign his lease without the consent of the Federal Government"[89] and (2) "a pooling or communitization agreement involving federal and non-federal lands must be approved by the Federal Government."[90]

The holding in *Ventura* should have been that, under the Mineral Leasing Act, the federal government can only fill in the gaps left open by state regulation and that stricter state regulative standards will prevail over more lenient federal standards.

V. CONCLUSION

The *Ventura* decision illuminates a false congressional intent respecting the Mineral Leasing Act. The decision reflects the judiciary's failure to scrutinize the constitutional bases for the two series of property clause cases in order to end the existing dichotomy. *Ventura* is notable for several reasons. It is most significant because it grants the federal government both the power over and responsibility of the development of mineral resources on the public domain. Nearly one

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zoning was not 'applicable' to federal lands and would, as a result, have no effect on the lessees' activities."

However, another federal agency, the Office of Technology Assessment took an opposite view. It stated that, "The legislative history of [sections 187 and 189] clearly indicates congressional intent to let state police power govern the operations of federal mineral lessees, even to the extent of overriding contrary regulations promulgated by the Secretary of the Interior." Note, *State and Local Energy Development*, *supra* note 7, at 378-79 n.40.

87. Two exceptions to this lack of legal opinion concerning state jurisdiction over federal lands are two Attorney Genreal's opinions, one from Wyoming [[1941-47] OPINIONS OF WYO. ATTY GEN 979], and one from New Mexico [[1935-36] REP. OF N.M. ATT'Y GEN. 75, No. 1110]. The Wyoming opinion seems to conclude that the right to regulate for conservation purposes is clearly in the states, although some of the language indicates this conclusion would have been made with more hesitation if a federal statute or regulation concerning specific subject matter of the inquiry had been found. The New Mexico opinion indicates that even more caution was warranted, however, due to certain provisions of the Federal Mineral Leasing act.

Hubbard, *supra* note 11, at 126-27 (footnotes omitted).

In an opinion by the Attorney General, 152 OP. OHIO ATT'Y GEN. at 23 (1951), "[i]t was held . . . that the State could not require a license or payment of a licensing fee for mining on the Federal land." Landstrom, *supra* note 11, at 81, 81 n.22.

88. *See* note 84 *supra*.

89. 277 F. Supp. at 369 (referring to one proviso in § 187).

90. *Id.* (referring to 30 U.S.C. § 226(j) (1976). *See also* Kirkpatrick Oil & Gas Co., 15 Interior Board of Land Appeals 216, 81 Interior Decisions 162 (1974).

third of the nation's land is public domain land and the bulk of this is located in the western states. Furthermore, a sustantial percentage of the nation's mineral resources are contained in the public domain.[91]

Unsurprisingly, the western states are against federal control over these lands and resources. The interests of the federal and state governments in these lands differ. "To the federal government the energy issue involves balance of payments, foreign relations, and national security. To state and local governments, on the other hand, the focus is pragmatic and localized, the welfare of the state and its citizens being the primary concern."[92] Whichever government controls these mineral resources possesses a great interest and a crucial power.

As a result of *Ventura*, the public domain states have lost the power which they may have had to regulate mineral development on the public domain and the individual concerns of the western states respecting mineral development must yield to the concerns of the nation as a whole.

Scott J. Preble

91. See 1 Public Land Law Review Commission, *Energy Fuel Mineral Resources of the Public Lands*, 14 (revised ed. 1970).

92. Mills and Woodson, *supra* note 1 at 405.