A Consideration of Federal Preemption in the Context of State and Local Environmental Regulation

I.
INTRODUCTION

This article will discuss the rights of states and localities to regulate environmentally degrading projects on federal lands. When the federal government has enacted legislation affecting federally owned land within state boundaries, what rights do state and local governments have to enforce their own environmentally protective laws? This note will also examine preemption issues in the context of the National Environmental Policy Act ("NEPA").[1]

The Sierra Club Legal Defense Fund is currently litigating a case[2] that will help illustrate a typical conflict between local and federal environmental laws. A Colorado county denied a permit for a water project that had been proposed for construction on federal lands located within the county. At the time the permit was denied, the developers of the project had already received the appropriate federal permits pursuant to the Federal Water Pollution Control Act of 1972[3] ("the Clean Water Act"), and the Federal Land Policy & Management Act ("FLPMA").[4] The developers had also completed an Environmental Impact Statement, which is required under NEPA. The developers are now arguing that the federal statutes and approvals preempt the county's own permit process, thus depriving the county of the power to disapprove the project. One part of their argument may be that NEPA itself either conflicts with the state law giving the county the power to assess environmental effects of the proposed project, or completely occupies the field being regulated.

To determine whether or not the developers have a successful claim, and more generally, whether state or local environmental

1. 42 U.S.C. §§ 4321-4370 (1982).
2. City of Colorado Springs and City of Aurora v. Board of County Comm'rs, No. 88CV142 (District Court for Eagle County, Colorado) (addendum to brief in support of plaintiff's motion for summary judgment filed Feb. 12, 1990).
3. 33 U.S.C. §§ 1251-1376 (1982).
4. 43 U.S.C. §§ 1701-1784 (1982).

regulation of federal lands is preempted by federal law, it is necessary to examine principles of preemption as applied in federal environmental legislation.

II.

PREEMPTION AND ENVIRONMENTAL LEGISLATION IN THE UNITED STATES SUPREME COURT

In the opinion of one commentator, "[w]hen dealing with federal preemption issues, each case becomes a separate problem involving the unique history, terms, purpose and effects of the particular federal legislation under review, and such cases have minor precedential value outside of the specific area under consideration."[5] Nonetheless, two modern Supreme Court cases have had significant precedential value. Cited repeatedly in opinions deciding issues of federal preemption, these landmark cases are *Kleppe v. New Mexico*[6] and *California Coastal Comm'n v. Granite Rock Co.*[7]

At issue in *Kleppe* was the constitutionality of the Wild Free-Roaming Horses and Burros Act,[8] which Congress enacted to protect "unbranded and unclaimed horses and burros" on federal lands.[9] The New Mexico state government challenged the power of the federal government to control the animals, and announced its intention under the New Mexico Estray Law[10] to take possession of those animals found on public lands.[11]

The Supreme Court, however, found that the Constitution, in the Property Clause, granted Congress authority to regulate federal lands. The Property Clause provides that "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."[12] The Court found that Congress has plenary power to regulate federal lands under the Property Clause, "[a]nd when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."[13] The Court concluded

5. Shapiro, *Energy Development on the Public Domain: Federal/State Cooperation and Conflict Regarding Environmental Land Use Control*, 9 NAT. RESOURCES LAW. 397, 426 (1976).

6. 426 U.S. 529 (1976).

7. 480 U.S. 572 (1987).

8. 16 U.S.C. §§ 1331-1340 (1988).

9. 16 U.S.C. § 1332(b).

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

11. Kleppe v. New Mexico, 426 U.S. 529, 533 (1976).

12. U.S. CONST., art. IV, § 3, cl. 2.

13. "This Constitution, and the Laws of the United States which shall be made in

that the State retained extensive regulatory powers over federal lands within its jurisdiction, but that "those powers exist only 'in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution.' "[14]

As one authority suggests, "[q]uestions of ultimate federal power appear to have been conclusively resolved in *Kleppe*. Congress can preempt state authority on the public lands. The more frequent and vexing question is whether, in particular contexts, Congress intended to do so."[15]

To help answer questions about whether Congress intended to preempt state law, the Court has outlined a standard preemption analysis:

> [S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. (Citations omitted.) If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law (citation omitted), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[16]

Contrary to its decision in *Kleppe*, the Supreme Court in *California Coastal Comm'n v. Granite Rock Co.*[17] decided that the state regulation at issue was not preempted by federal legislation. This case was brought by Granite Rock Company, which acquired mining rights pursuant to the Mining Act of 1872[18] in a national forest located along the California coastline. The California Coastal Commission ("the Commission") informed the company that it was subject to a California statute requiring anyone mining in a designated coastal zone to obtain a permit from the Commission. Granite Rock filed suit, alleging that the Commission's permit requirement was preempted by federal law.

Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2.

14. *Kleppe*, 426 U.S. at 545 (quoting Geer v. Connecticut, 161 U.S. 519, 528 (1896)).

15. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 182 (1981).

16. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987) (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)).

17. 480 U.S. 572 (1987).

18. 30 U.S.C. §§ 22-54 (1988).

In holding that the local permit requirement was not preempted, the Supreme Court found the question presented to be:

> merely whether the state can regulate uses rather than prohibit them. Put another way, the state is not seeking to determine basic uses of federal land; rather it is seeking to regulate a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion.[19]

Thus, the Court determined that, unlike the *Kleppe* situation, there was no direct conflict between federal and state law, but rather that the state statute was merely supplemental regulation. Further, the Court found express language in the federal statutes at issue indicating that federal approval had been conditioned upon expectations of Granite Rock's compliance with state regulations.[20]

III.

PREEMPTION AND ENVIRONMENTAL LEGISLATION IN THE STATE AND FEDERAL COURTS

In *Kleppe*, *Granite Rock*, and similar cases, the Supreme Court established guidelines for determining whether state or local environmental legislation is preempted by federal law. An examination of cases that have brought related issues before state and federal courts provides an indication of how the courts have interpreted these guidelines. These cases should prove valuable in assessing when federal legislation will preempt state law.

A. *Cases in which courts determined that state or local regulation was preempted*

In *Ventura County v. Gulf Oil Corp.*,[21] the County of Ventura claimed it had authority to require Gulf Oil to obtain a county permit before beginning local oil exploration activities. The oil company had already received a lease and drilling permits from the federal government pursuant to the Mineral Leasing Act of 1920 ("the Act").[22] Analogizing this case to *Kleppe*, the Ninth Circuit found that the local ordinances directly conflicted with federal regu-

19. 480 U.S. at 587 (quoting Plaintiff's Motion for Summary Judgment in No. C-83-5137 (N.D. Cal.), pp. 41-42) (emphasis omitted).

20. *Id.* at 583 (Forest Service regulations "also provide that pending federal approval of the plan of operations, the Forest Service officer with authority to approve plans of operation 'will approve such operations as may be necessary for timely compliance with the requirements of Federal and State laws . . . . ' " *Id.* (emphasis omitted)).

21. 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980).

22. 30 U.S.C. §§ 181-193 (1988).

lation concerning use of government land, and thus were preempted.[23]

The court cited several grounds for its decision. First, it pointed to the extensive federal regulation of oil exploration and leasing under the Act. Gulf's lease was granted subject to numerous environmental protection and mitigation requirements imposed by the Departments of Agriculture and Interior as well as the Forest Service and the Geological Survey.[24] Because of this, the court found that "[t]he federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress."[25]

The court also examined the statutory language of the Act and ruled that it did not allow for concurrent jurisdiction over land use planning.[26] The court found that application of NEPA in conjunction with the Mineral Leasing Act ensured that potential local environmental impacts were adequately considered by the federal government.[27] The opinion suggests that counties should resort to NEPA remedies rather than impermissibly attempting to exercise "local veto power" as an " 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[28]

In a similar ruling based on somewhat different grounds, the Eighth Circuit Court of Appeals in *Northern States Power Co. v. Minnesota*[29] also held that a state regulation was preempted by federal law. The issue here was whether the federal government, through the U.S. Atomic Energy Commission ("AEC"), had sole authority to regulate radioactive waste material released from nuclear power plants.

The state of Minnesota wanted to impose conditions on the granting of a waste disposal permit more stringent than those required by federal law. The state asserted a number of arguments: (1) that regulation of radioactive waste fell within states' powers under the Tenth Amendment,[30] (2) that the Atomic Energy Act of

23. 601 F.2d at 1084.
24. *Id.* at 1083-84.
25. *Id.* at 1084.
26. *Id.* at 1085.
27. *Id.* at 1086.
28. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
29. 447 F.2d 1143 (8th Cir. 1971), *aff'd* 405 U.S. 1035 (1972).
30. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

1954[31] ("AEA") did not expressly or impliedly preempt state authority to regulate radioactive waste, and (3) that even if Congress did intend preemption, concomitant state regulation was not necessarily precluded.[32]

The Eighth Circuit disagreed with all of these arguments. The court held, instead, that the state's permit requirement was preempted on several grounds. First, clear statutory language in the federal act demonstrated congressional intent to give AEC exclusive authority to regulate nuclear waste.[33]

Second, the legislative history made clear that "[the legislation] is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials."[34]

Third, the court acknowledged that the AEC's interpretation of the AEA deserved "respectful consideration" as a factor in construing the Act.[35] The Commission's "interpretation" of the Act as construed from its regulations was that states have no authority to regulate the discharge from nuclear power plants.[36]

In addition to its finding of express congressional intent to occupy the field, the court also found an implied intent to preempt because of: (1) the "pervasiveness of the federal regulatory scheme,"[37] and (2) the "nature of the subject matter regulated and the need for uniform controls in order to effectuate the objectives of Congress . . . . "[38]

Northern Border Pipeline Co. v. Jackson Cty., Minnesota[39] is another preemption case that arose in the state of Minnesota. A pipeline company sought to build an interstate natural gas pipeline, which was subject to the Natural Gas Pipeline Safety Act of 1968.[40] Jackson county, through which the pipeline would pass, granted the company a construction permit on the condition that it bury the lines at least six feet underground. The county contended that it had the power to pass environmental safety measures under NEPA.

31. 42 U.S.C. §§ 2011-2296 (1988).
32. 447 F.2d at 1145.
33. *Id.* at 1149.
34. *Id.* at 1151 (quoting *Hearings Before the Joint Committee on Atomic Energy*, 86th Cong., 1st Sess. 290-91 (1959) (statement of John S. Graham, Commissioner AEC)).
35. *Id.* at 1152.
36. 10 C.F.R. § 8.4 (1989).
37. 447 F.2d at 1152.
38. *Id.* at 1153.
39. 512 F. Supp. 1261 (D. Minn. 1981).
40. 49 U.S.C. app. §§ 1671-1686 (1988).

However, the court found that the text and legislative history of the Natural Gas Safety Act clearly demonstrated congressional intent to preempt the field of gas pipeline safety.[41] The court also rejected the county's argument that the Natural Gas Safety Act was subject to the environmental policy considerations mandated by NEPA.[42] It found that environmental impact issues had already been considered by Congress at the outset of the gas pipeline project.[43] The court concluded: "[w]here Congress has 'unmistakenly [sic] ordained' a field for exclusive federal regulation there is no room for any state regulation be it consistent with, or more or less stringent than the federal legislation."[44]

The Supreme Court of Colorado also found a county permit requirement preempted by federal law in *Brubaker v. Board of Cty. Comm'rs, El Paso Cty.*[45] This action was instituted by holders of unpatented mining claims on federal lands located within El Paso County. The claim holders had already received federal approval under the Mining Law of 1872[46] to conduct test drilling, but were denied a permit by the El Paso County Board of Commissioners. The court concluded that "the Board has applied its zoning ordinances so as to prohibit a use of federal property that has been authorized by federal law, with the result that the Board's action violated the preemption doctrine . . . ."[47]

The court determined that the "underlying purpose" of the federal law at issue was to encourage "exploration for and development of mineral resources on public lands."[48] Comparing this case to *Ventura County v. Gulf Oil Corp.*,[49] the court found that in denying appellants a drilling permit, the Board had sought "not merely to supplement the federal scheme, but to prohibit the very activities contemplated and authorized by federal law."[50]

The Colorado Supreme Court rejected the lower court's rationale that the Board's action did not conflict with congressional purposes because the objectives of the Mining Act of 1872 were now balanced

41. 512 F. Supp. at 1264-65.
42. *Id.* at 1265-66.
43. *Id.* at 1265.
44. *Id.* (quoting Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).
45. 652 P.2d 1050 (Colo. 1982).
46. 30 U.S.C. §§ 21-54 (1982).
47. 652 P.2d at 1056.
48. *Id.* at 1056.
49. 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980).
50. 652 P.2d at 1056.

with the environmental policy considerations of NEPA. Acknowledging that the goals of the Mining Act and NEPA were at odds, the court nevertheless reiterated that "NEPA was not intended to repeal by implication any other statute . . . . Indeed, where there is an unavoidable conflict between NEPA and other federal authority, it is NEPA that must give way."[51]

In each of the preceding cases in which state or local environmental regulations were preempted by federal law, the courts interpreted and expanded on the preemption guidelines outlined in *Granite Rock*.[52] A review of these cases reveals that local statutes will be found preempted by federal law when: (1) Congress intended to occupy the field of regulation, as evidenced by an extensive regulatory scheme, statutory language, or legislative history, (2) the laws directly conflict, or (3) the local law impedes the full accomplishment of congressional objectives. In addition to the basic preemption analysis, courts consider the *Ventura* test. If a court finds that the local regulation supplements the federal regulatory scheme, it will uphold it. However, if the regulation prohibits certain uses of land already authorized by the federal government, the court will probably find the state or local law is preempted.

B. *Cases in which courts determined that local regulation was not preempted*

One of the most frequently cited cases recognizing a state's ability to impose its own environmental regulations upon federal lands is *Gulf Oil Corp. v. Wyoming Oil and Gas Conservation Comm'n*.[53] The issue in *Gulf Oil* was whether a Wyoming state commission had the authority to impose environmentally protective conditions on Gulf's drilling activities on federal lands.

Gulf argued that extensive federal regulation demonstrated that Congress intended exclusive federal jurisdiction over the regulation of environmental effects of drilling activities on federal lands.[54] The court, however, declared: "[o]ur examination of the federal legislation cited by Gulf compels a contrary conclusion. We find that Congress, far 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."[55]

51. *Id.* at 1059-60 (quoting United States v. SCRAP, 412 U.S. 669, 694 (1973)).
52. 480 U.S. at 572, 581 (1987).
53. 693 P.2d 227 (Wyo. 1985).
54. *Id.* at 234-35.
55. *Id.* at 235.

In addition to noting specific provisions in the Mineral Lands Leasing Act which demonstrate a lack of intent to ensure exclusive federal control,[56] the court pointed out that NEPA and the Environmental Quality Act of 1970[57] "expressly designate state and local governments as the principal protectors of environmental values."[58] " 'Indeed, the preservation of the environmental quality of its lands is a subject particularly suited to administration by the states. Congress has recognized that even where extensive federal environmental legislation exists, the primary responsibility for implementing environmental policy rests with the state and local governments.' "[59]

After determining that the federal laws at issue were not intended to exclude state regulation, the court proceeded with the standard preemption analysis and found that the Wyoming commission's permit requirement did not conflict with federal law. In contrast to *Ventura County*[60] and *Brubaker*,[61] where the county zoning ordinances prohibited federally approved activities, the court found that the mining permit requirements at issue constituted a "legitimate means of guiding mineral development without prohibiting it."[62]

A fair summary of the court's position is as follows:

> the mere fact that federal legislation sets low standards of compliance does not imply that the federal legislation grants a right to an absence of further regulation. On the other hand, where a right is granted by federal legislation, state regulation which rendered it impossible to exercise that right would be in conflict.[63]

People ex rel. Deukmejian v. County of Mendocino[64] is another case in which the court determined that a local ordinance was not preempted. The case involved a county ordinance prohibiting the aerial spraying of certain pesticides (phenoxy herbicides) within the county. Intervenor California Forest Protective Association ("the Association") claimed that the county ordinance was invalid because it conflicted with federal law. The Association argued that

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56. *Id.*

57. 42 U.S.C. §§ 4371-74 (1988).

58. 693 P.2d at 235-36.

59. *Id.* at 236 (quoting State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976)).

60. 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980).

61. 652 P.2d 1050 (1980).

62. 693 P.2d at 237.

63. *Id.* (quoting State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969, 974-75 (1976)).

64. 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984).

the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")[65] permits state regulation, but prohibits local regulation.[66]

The California Supreme Court rejected this argument. It found no provisions in FIFRA that expressly prohibit local government agencies from regulating pesticide use. Indeed, the court found that FIFRA allowed for additional regulation of pesticides by the states: "A State may regulate the sale or use of any federally registered pesticide or device in the [s]tate, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."[67]

The court also held that the legislative history did not demonstrate a "clear congressional intent to preempt traditional local police powers to regulate the use of pesticides or to preempt state power to distribute its regulatory authority between itself and its political subdivisions."[68] Thus the court refused to presume that Congress, through FIFRA, intended to supersede such power.[69]

State ex rel. Cox v. Hibbard[70] is another case, like *Gulf Oil*, in which a litigant claimed federal mining law preempted state environmental regulation. Defendants, holders of permits to mine on federal lands, challenged the imposition of an Oregon state permit requirement, arguing that their mining claims were subject only to federal laws.

Following the reasoning of the Idaho Supreme Court in *State ex rel. Andrus v. Click*,[71] the court rejected the defendants' preemption claim. In its opinion, the court clearly identifies the conditions under which federal law does not preempt state and local environmental regulation: (1) no statutory language or legislative history indicating intent to preempt state regulation, (2) no pervasive regulatory scheme, (3) nothing about the subject matter regulated that requires uniform, exclusively federal control, and (4) no conflict between the federal mining laws and the state environmental regulation. The *Cox* court also distinguished *Ventura County*, on the same grounds as the *Gulf Oil* court: "There the county by its zoning ordinance was attempting to prohibit Gulf Oil from conducting

65. 7 U.S.C. § 136 (1988).
66. 36 Cal. 3d 476, 683 P.2d 1150, 1157, 204 Cal. Rptr. 897, 904-05.
67. 36 Cal. 3d 476, 683 P.2d 1150, 1160, 204 Cal. Rptr. 897, 907 (quoting 7 U.S.C. § 136v(a) (1982)).
68. *Id.*
69. *Id.*
70. 31 Or. App. 269, 570 P.2d 1190 (1977).
71. 97 Idaho 791, 554 P.2d 969 (1976).

any and all oil exploration and extraction activities. Requiring the holder of a permit to mine on federal lands to obtain a permit under a state environmental protection law as in the case at bar is not the same as the banning of all mining activity as was the case in *Ventura*."[72]

Finally, as one authority concludes:

> When does a state permitting requirement impermissibly interfere with a federal permitting scheme? Apparently a state permit requirement does not interfere simply because it incidentally discourages a federally approved activity. Where Congress intended certain regulatory decisions to rest with the federal government, however, state regulations which interfere with those decisions violate the supremacy clause.[73]

IV.
THE NEPA QUESTION

In order to determine whether NEPA has a preemptive effect on state and local environmental regulation, the same kind of preemption analysis must be applied to this federal law as was applied to the statutes in the preceding cases. It would appear that NEPA does not preempt state or local environmental regulation because: (1) the procedural nature of the statute prohibits NEPA from authorizing any particular project, which makes it impossible for a local law to impermissibly "veto" a NEPA-authorized use of federal lands, (2) NEPA's text expresses Congress' intention to involve local governments in environmental protection, and (3) local laws preventing environmental degradation could hardly be perceived as impeding or conflicting with NEPA's goal of protecting the environment.

The U.S. Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[74] stated that " 'NEPA does not repeal by implication any other statute.' "[75] The Court added: "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. [Citations omitted.] It is to insure a fully informed and well-

72. 570 P.2d at 1195.

73. Burling, *Local Control of Mining Activities on Federal Lands*, 21 LAND & WATER L. REV. 33, 53 (1986).

74. 435 U.S. 519, 548 (1978).

75. *Id.* at 548 (quoting Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 319 (1975)).

considered decision . . . . "[76]

In *City of New York v. United States Dept. of Transportation*[77] the court further developed the Supreme Court's view of the essentially procedural nature of NEPA. It declared, "in NEPA Congress sought to channel administrative decisionmaking to ensure that judgments affecting the human environment are informed by full and thoughtful evaluation of the potential environmental impact of proposed federal actions."[78]

These opinions are a reminder that whereas NEPA requires federal agencies to consider a range of environmental effects and alternatives, it does not dictate any particular result. Because the purpose of NEPA is to "promote efforts which will prevent or eliminate damage to the environment,"[79] state environmental legislation that supplements federal law towards achieving this end is probably not an obstacle to the accomplishment of Congressional objectives. Unless a local law attempted to prohibit consideration of environmental impacts on federal land within its jurisdiction, local environmental regulation would hardly ever "directly conflict" with the goals of NEPA.

The district court in *City & County of Denver v. Bergland*[80] examined the text of NEPA and found that:

> NEPA requires that in the environmental assessment of projects which will have an impact upon the environment the federal government must, "in cooperation with State and local governments . . . use all practicable means and measures . . ." to protect the environment. 42 U.S.C. § 4331(a). Federal regulations implementing NEPA equally mandate involvement of state and local authorities.[81]

As such, it is apparent that the express intent of NEPA is not to exclude state environmental regulation, but to encourage cooperation with local governments to achieve the Congressional goal of environmental protection.

Thus, all that remains of the preemption analysis as it pertains to NEPA is the *Ventura* issue: does the state legislation prohibit a specific use of federal lands which the federal government has already authorized? As illustrated in the preemption cases, the answer to this question depends upon whether one views the

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76. *Id.* at 558 (emphasis added).

77. 539 F. Supp. 1237 (S.D.N.Y. 1982), *rev'd on other grounds*, 715 F.2d 732 (2d Cir. 1983).

78. *Id.* at 1260.

79. 42 U.S.C. § 4321 (1988).

80. 517 F. Supp. 155 (D. Colo. 1981), *modified*, 695 F.2d 465 (10th Cir. 1982).

81. 517 F. Supp. at 203.

regulation as banning the authorized federal activity or merely supplementing the federal law.

Because of the procedural nature of NEPA, the statute does not actually authorize or prohibit any particular use of federal land, but instead requires only that decisionmakers take a "hard look" at environmental effects before proceeding with any project.[82] Therefore, it appears that the *Ventura* test is simply not applicable to the NEPA preemption issue.

V.
CONCLUSION

Since it is now clear under *Kleppe* that federal legislation can preempt state and local environmental regulation, the question left to the courts is whether Congress intended to do so in particular cases. In order to make a finding about congressional intent, courts have relied chiefly upon the standard preemption analysis outlined in *Granite Rock*.

The preemption question is particularly delicate in environmental cases because of the interplay between national and local needs for environmental protection. Congress necessarily fashions broad environmental statutes meant to cover the nation as a whole, whereas the states and localities face specific environmentally degrading projects that may be better regulated at the local level. The states and localities are probably better acquainted than federal lawmakers with the peculiar environmental problems on their own land. The courts' attempt to balance this conflict has produced the *Ventura* test, which at least allows for the possibility of local regulation as long as it supplements federal law without prohibiting it.

When the courts find that Congress either specifically encouraged particular uses of federal land or already comprehensively considered environmental issues, states and localities will have a difficult time demonstrating that their regulation is "supplemental." But if NEPA is the only federal statute at issue, strict laws at the local level will probably not be preempted. The very purpose of NEPA is to encourage administrative decisionmaking based on thorough consideration of environmental issues. More stringent environmental laws then actually further congressional objectives in the NEPA context. It is thus unlikely that the developers in the pending Sierra Club Legal Defense Fund case will be able to persuade the court

82. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

that local environmental laws providing further safeguards should be preempted by NEPA.

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