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Chapter 13A

STATE SURFACE OWNER PROTECTION LAWS: TALES OF PREEMPTION, FEDERALISM, AND A CHANGING WEST

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I. INTRODUCTION

As oil and gas development has accelerated in the Rockies, many states are enacting new surface use laws to address public concern over the pace and location of development. The issue is heightened when oil and gas development occurs on split estate lands - where the surface is severed from the oil and gas estate.[1] Several states that have enacted surface owner protections have either asserted that these state laws govern federal mineral development or have left ambiguous whether or how these new requirements apply to federal lands and minerals. Some argue that these state surface owner protection laws are preempted by federal law. Yet, the federal government has hesitated to assert preemption in these instances. This paper focuses on the preemption question as it arises on split estates where the mineral estate is under federal ownership and the surface estate is under private ownership.

Federal land grant acts created split estates by granting surface rights, only, to homesteaders while reserving minerals to the federal government. These acts codified a right of access over the surface estate to the minerals. Congress recognized, and the U.S. Supreme Court has held, that valuable mineral resources must remain accessible to the mineral developer to allow the United States to control this federal resource which is vital to the nation's economy and security.[2] This type of split estate is particularly common in the West -- where some 58 million acres of subsurface mineral estate with non-federal surface are managed by the Bureau of Land Management ("BLM").[3]

Conflicts between federal mineral developers and private surface owners are increasing as oil and gas development in the region intensifies.[4] The Rockies contain the only basins in the United States where natural gas production is increasing, and these fields are predicted to be the domestic energy industry's biggest source of growth over the next decade.[5] Much of the natural gas being developed is unconventional -- coalbed methane and tight sands -- and more frequently requires dense drilling to extract the resource. At the same time, the population of western states has increased significantly and this population growth is sprawling out towards public lands and national forests. Federal mineral development that was once "out of sight, out of mind" is now in the backyards of these western landowners and impacting their open space, wildlife, and recreation amenities. New residents frequently lack basic knowledge of split estates and the respective property rights of mineral and surface owners. Many are shocked to

learn that they do not own the minerals and that they have little say-so as to their development.[6]

Thus, despite long-standing recognition for mineral access, over the last thirty-five years, state judicial decisions, state surface owner protection laws and federal policy are modifying the relative burdens of the two estates in response to new public views on land use.[7]

Wyoming, Colorado, and New Mexico are among the states whose legislatures have recently passed laws that protect surface owners on split estates by implementing heightened notice provisions, required surface use agreements, and increased surface damage bonds. In Congress, citizen groups and their allies have repeatedly sought legislative change to the limited surface owner federal protections in the oil and gas context. At the Department of the Interior ("DOI"), new rules and guidance emphasize the need for cooperation and agreement between the two estates.

Some have argued that federal law plainly preempts these state surface owner protection laws as applied to federal mineral estates with private surface estates. Regardless, whether this position may be correct under a purely academic legal analysis, the reality is that the federal government appears unlikely to bring a legal challenge to state surface protection laws except in the most extreme cases. There is a desire to work with states as partners in managing the effects of mineral development.

With this context in mind, this paper will analyze the question of federal preemption of surface owner protection laws recently enacted by several Rocky Mountain states, including Wyoming, Colorado, and New Mexico. This paper will also address the policy issues surrounding federal preemption of state surface owner protection laws on split estates. To lay the groundwork for the preemption analysis, the next section covers the legal context that created federal mineral-private surface split estates.

II. THE FEDERAL LAND GRANT STATUTES

The common law history of split estates is an instructive backdrop against which to view the land grant statutes that created modern contemporary split estates. Specifically, the practical policy considerations that led to the creation of the common law doctrine of mineral dominance over the surface have continuing relevance today. In England, minerals were owned by the Crown to provide it with the ability to carry out essential governmental functions: coining money and defending the country.[8] Both of these essential functions required mineral resources -- gold and silver for coining money, and saltpeter for making gunpowder for military use.[9] The Crown's ability to access its minerals, to assert dominance over the surface estate, was inherent in its ownership of the minerals, as a mineral estate that the sovereign could not freely access impeded the essential national functions for which the mineral estate was reserved.

This common law doctrine of mineral dominance over the surface estate formed the basis for the creation of the severed federal mineral estates in the United States At the turn of the last century, a young, rapidly industrializing and expanding nation was concerned about ensuring the availability of energy and minerals to fuel that growth. A coal shortage at the turn of the Twentieth Century, along with pressure from Western interests to release federal land for homesteading, spurred the United States to begin issuing limited patents that would sever the surface from the mineral estate and allow for the separate disposal of each.[10]

Thus, the land grant statutes of the early Twentieth Century created split estates by granting surface rights to homesteaders while reserving minerals to the federal government. These land grant statutes include the Coal Lands Acts of 1909 and 1910,[11] the Stock Raising Homestead Act of 1916 ("SRHA"),[12] and the Agricultural Entry Act of 1914.[13] Each of these statutes includes similar provisions protecting the interests of surface owners -- requiring notification and bonding, and providing for certain limited damages -- that provide an important context for answering the question of whether similar or conflicting state surface owner protection laws are preempted.

The Coal Lands Acts of 1909 and 1910 were the first to issue limited land patents reserving coal to the United States and permitting the surface to be patented by homesteaders.[14] The Coal Lands Acts reserve "all coal in said lands, and the right to prospect for, mine, and remove the same."[15] However, the Coal Lands Acts limited the common law precept of the mineral estate's dominance by stating that in the absence of surface owner consent, the mineral developer may only enter after posting a bond for damages to "crops and improvements."[16]

The SRHA is the most comprehensive source of federal mineral-private surface split estates. Under the SRHA, the United States granted surface patents to homesteaders but reserved "coal and other minerals" to itself.[17] Thus, under the SRHA, mineral developers with federal leases "have the right at all times to enter upon the lands entered or patented . . . for the purpose of prospecting for coal or other mineral therein" and "may reenter and occupy so much of the surface thereof as may be required for all purposes *reasonably incident* to the mining or removal of the coal or other minerals."[18] (Emphasis added). This provision reflects the SRHA statutory mineral estate dominance provision but requires the developer to use only those lands reasonably necessary for the development of the federal minerals.[19] The mineral developer's right to enter and prospect for minerals is further conditioned on the requirement that the developer seek the consent of the surface owner, that "he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting".[20] The SRHA's damages provision is limited. The terms "crops" and "improvements" are "strictly construed by courts to exclude natural vegetation relied upon by ranchers, non-agricultural buildings and improvements, and general loss of value of lands."[21]

The Agricultural Entry Act of 1914, also known as the Non-Mineral Entry Act, also reserved oil, gas, and other specified minerals to the federal government.[22] Under that act, federal mineral interest holders "may re-enter and occupy so much of the surface thereof as may be required

for all purposes reasonably incident to the mining and removal of the minerals therefrom."[23] However, mineral rights holders may enter the property only after the Secretary of the Interior has approved a bond as security for the "payment of all damages to the crops and improvements of such lands by reason of such prospecting."[24]

When Congress enacted the Agricultural Entry Act, it contemplated surface entry only for agricultural purposes and related activities. Thus, in *Kinney-Coastal Oil*, the United States Supreme Court held that the minerals are not included in the homestead patent so that the surface owner "suffers no taking and is entitled to no compensation for neither the minerals taken nor the use of the surface" - the only compensation is for "damages caused by the oil and gas operation and those are limited by statue to crops and agricultural improvements."[25] The Court held that the concept of mineral estate dominance was built into the federal surface entry acts.[26] The Court also recognized that the policy of the federal surface entry acts is to allow the United States to "realize, through the separate leasing, a proper return from the extraction and removal of the minerals."[27]

These land grant statutes and their surface damages provisions form the context in which the analysis of state law preemption takes place. Before turning to the preemption analysis, however, discussion of the fundamentals of the preemption doctrine and current federal regulation of surface use is warranted.

III. FUNDAMENTALS OF THE PREEMPTION DOCTRINE

Federal preemption doctrine is based in the Supremacy Clause of the Constitution, which states that federal law shall be the supreme law of the land.[28] "The Supremacy Clause of Article VI of the United States Constitution grants Congress the power to preempt state or local law."[29] Thus, any state law that infringes upon this supremacy is invalid. The touchstone for determining whether federal law preempts state law is congressional intent.[30] Preemption inquiries are "*ad hoc* investigations" and depend on "the language, policy and context of the federal and state statutes."

Where state regulation of federal property is concerned, as is the case in state surface owner protection laws, the Property Clause informs the context of the preemption question. The Property Clause of the United States Constitution vests authority in the federal government over federal property.[31] The Supreme Court has described the scope of this federal authority as "plenary"[32] and "without limitations."[33] Even so, the Property Clause does not in and of itself completely withdraw federal property from state jurisdiction.[34] Congressional power over federal lands is only the starting point for determining respective federal and state jurisdiction. In our governmental system of dual federal and state authority, "[f]or many purposes, a state has civil and criminal jurisdiction over lands within its limits belonging to the United States."[35]

Given the broad scope of federal authority over public lands, however, state jurisdiction over federal property is limited and "does not extend to any matter that is not consistent with the full power of the United States to protect its lands, to control their use, and to prescribe in what

manner others may acquire rights to them."[36] While the Property Clause, standing alone, does not determine preemption questions, it informs the analysis with a kind of "constitutional common law" that guides questions of federalism and competing state and federal claims to regulatory authority on federal property.[37] The result of the tension between federal plenary power over federal land and notions of federalism is the concept of cooperative federalism, in which the federal and state governments share responsibility for regulating private activities.[38]

There are two types of preemption: express preemption, which arises where Congress expressly states in legislation that state law in a particular sphere is preempted; and implied preemption, which arises where Congress made no express statement but appears to have nonetheless intended the preemption of state law. Neither the federal land grant statutes, the Mineral Leasing Act of 1920 ("MLA"),[39]which governs oil and gas leasing on federal lands, nor the Federal Land Policy Management Act ("FLPMA")[40] contain express statements of preemption, so an inquiry into whether implied preemption applies is necessary.

Implied preemption may occur in two types of cases. The first is where there is evidence that Congress intended to "occupy the field" in a particular regulatory regime such that there is no room for concurrent state regulation, known as "field preemption."[41] The United States Supreme Court held that:

Congress' intent to supersede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same object, or because the object sought to be obtained by the federal law and character and obligations imposed by it may reveal the same purpose.[42]

Field preemption does not appear to apply in the context of state surface owner protection laws because the regulation of the impacts of mineral development has a long history of being a joint effort between the federal government and state governments.[43] Indeed, the MLA provides that lease terms must comply with state law[44] and that states have the right "to exercise any rights they may have."[45] FLPMA contains several provisions directing federal recognition of state laws and planning.[46]

The second type of implied preemption is known as "conflict preemption." Conflict preemption arises where the state law actually conflicts with federal law.[47] An actual conflict exists "when compliance with both federal and state regulations is a physical impossibility",[48] or when the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[49] In the context of federal mineral development on public land, interference with the accomplishment of a federal purpose is the preemption argument that most frequently arises.[50]

Courts applying the conflict preemption test on federal lands where a federal regulatory scheme exists have generally found that state law that is essentially a land use control that

prohibits federally-sanctioned activities on federal land is preempted under the analysis in*Ventura County v. Gulf Oil Corp*.[51] On the other hand, reasonable environmental regulation is not preempted under the reasoning of*California Coastal Commission v. Granite Rock*.[52] Although upon close examination, the land use control and environmental regulation distinction may prove to be a distinction without a difference, the facts of each case provide some guidance on the preemption analysis.

In *Gulf Oil*, the Ninth Circuit held that a county does not have the authority to require a special permit under its zoning code for activities on federal land located within the county because "the states and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a congressionally approved use of federal lands."[53] The federal regulatory scheme at issue in *Gulf Oil* was the MLA, which includes "extensive regulation" of oil and gas development.[54] The court found that the conflict in this case was clear by focusing on the extent of the federal permitting scheme, reasoning that "[t]he federal Government has authorized a specific use of federal lands, and Ventura [County] cannot prohibit that use ... in an attempt to substitute its judgment for that of Congress."[55] Courts in subsequent cases, however, found the *Gulf Oil* court's reasoning difficult to apply and in *Granite Rock* it was scarcely mentioned.[56]

The United States Supreme Court changed course without expressly overruling *Gulf Oil* in *California Coastal Comm'n v. Granite Rock*, holding in a facial challenge that the State of California could require a separate state permit for mining on federal land.[57] At issue in this case was the state coastal zone permitting requirement as it would apply to a limestone mining proposal on national forest land.[58] The federal laws that the Court considered in its preemption analysis included the Coastal Zone Management Act,[59] the Mining Act of 1872,[60]the National Forest Management Act,[61] and the Federal Land Policy and Management Act,[62] as well as the federal regulations promulgated under each statute.[63] The Court found that even this extensive federal regulatory scheme leaves room for state regulation for environmental protection, distinguishing such regulations from those dictating federal land use.[64] The dissent and partial concurrence of Justices Powell and Stevens, however, would have found the state permit preempted because by its duplication of federal regulation it inherently conflicts with federal law.[65] The Court majority recognized, however, that state regulations that are "so severe that a particular land use would become commercially impracticable" are preempted.[66]

Under the reasoning of *Granite Rock*, state environmental regulations on federal lands are generally upheld unless they contain outright prohibitions.[67] Several state cases are instructive here. In 1985 (two years before *Granite Rock* was decided, but applying similar reasoning), the Wyoming Supreme Court held that the Wyoming Oil and Gas Conservation Commission's ("WOGCC") requirement that an oil company refrain from using its preferred access route through a small town and, instead, use an alternate, less visible route, a condition the WOGCC placed on a permit to drill an oil and gas well on national forest land, was not preempted by federal mineral and environmental protection laws.[68] In so holding, the court considered the potential preemptive effect of the MLA,[69] National Environmental Policy Act ("NEPA"),[70] and the implementing regulations of those statutes.[71] The court found that under these statutes,

"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."[72] In applying actual conflict analysis, the court noted that state "mining permit requirements designed to safeguard the environment have received favorable treatment in the courts" because they are "legitimate means of guiding mineral development without prohibiting it."[73] The court concluded that the WOGCC's requirement that the oil company relocate its access road did not conflict with federal laws and objectives.[74]

In 2004, a Nevada district court similarly held that Washoe County's denial of Oil-Dri's clay mining special use permit on BLM land was not preempted under BLM's mining regulations, applying the reasoning from *Granite Rock*.[75] The court reasoned that "there is no express declaration of preemptive effect in the regulatory framework from mining on federal lands," and that "relevant BLM regulations are not so broad as to preclude any State regulation."[76] Further, the court stated that "Washoe County's decision was based solely on the impacts from [Oil-Dri's] proposal, not the location" such that "[n]othing in Washoe County's action could be construed to be a *per se* ban on all mining operations on the public land part of Oil-Dri's Special Use Permit Application."[77] Significantly, the court found that Washoe County's regulation of the mining operation's environmental impacts was not preempted even though BLM had already authorized the operation and had issued a final environmental impact statement.[78]

In 2006, the Colorado Court of Appeals held that federal law does not preempt county regulations governing oil and gas production impacts on water quality, soil erosion, wildlife, livestock, wildfires, and recreational activities.[79] The oil company contended that Congress impliedly preempted local regulation of oil and gas activities by enacting a comprehensive regulatory scheme governing these areas.[80] The court disagreed with this contention based on *Granite Rock*, reasoning that "[t]he Supreme Court concluded that Forest Service regulations implemented under the MLA did not constitute an attempt to preempt state law, but instead appeared to assume that those submitting plans of operation would comply with state laws."[81]

Thus, whether state regulation of federal mineral-private surface split estates is preempted depends upon the specific provisions in a given statutory scheme. While some surface owner protection laws may be considered to be reasonable environmental regulation under*Granite Rock*, others may cross the line into preempted *Gulf Oil* "land use planning" that prohibits the use of federal property, or otherwise interfere with the accomplishment of federal purposes by costly requirements. Where this line is drawn varies with time and circumstance. The only clear answer is that state law that results in a prohibition of otherwise lawful federal actions is preempted -- all else appears to fall in a grey area requiring a close look at the intent of the state and federal laws, federal policy and the unique circumstances of the challenged state requirement.

IV. FEDERAL REGULATION OF SURFACE USE

In order to determine whether state surface owner protection laws are preempted, the federal regulatory scheme for protecting surface interests overlying federal minerals should be

considered. In addition to the federal laws discussed above, over the last few years the BLM has promulgated new regulations, guidance and policies that direct or encourage operators to take actions to cooperate with surface owners and mitigate surface impacts. Congress has also considered altering the relationship between the surface and oil and gas mineral estate on federal lands.

A. On-Shore Order No. 1

The Department of the Interior ("DOI") revised Onshore Order No. 1 in 2007 to replace the original order published in 1983.[82] Onshore Order No. 1 is a regulation that sets out the requirements for the approval of all proposed oil and gas wells for all federal onshore oil and gas leases.[83] Major changes affecting split estate surface owners were made. These include a requirement for three certifications by the operator concerning split estate owners prior to an Application for Permit to Drill ("APD") being considered complete - a) a good faith effort to notify surface owner prior to entry; b) a good faith effort to reach a surface access agreement and notification to BLM whether the agreement was reached; and c) a good faith effort to provide the surface owner with a copy of the Surface Use Plan of Operations ("SUPO") and any conditions of approval that are attached to the APD.[84] The final rule also clarifies BLM's authority to require two bonds, a lease bond, and a separate surface owner protection bond, for *all* split estate lands, not just SRHA lands.[85]

B. Best Management Practices

Environmental "BMPs" are mitigation measures designed to minimize environmental impacts while allowing for safe and efficient operations.[86] Onshore Order No. 1 encourages, but does not require, the inclusion of BMPs in APDs.[87] Typical BMPs include reducing the footprint of roads and well heads by choosing the smallest safe standard and best location for facilities, and by employing interim reclamation; selecting a color, shape, size, and location for facilities that reduces visibility; reducing wildlife disturbance by centralizing or automating production facilities to reduce the number of trips to each well head; and using common utility corridors or burying flowlines in roadways or rights-of-way.[88]

C. Split Estate Surface Use Brochure

In 2007, BLM published a brochure titled "Split Estate: Rights, Responsibilities, and Opportunities."[89] This brochure is intended to educate surface owners and mineral rights holders about their respective roles on the split estate, and on BLM's role in overseeing mineral development.[90] In accord with the SRHA and revised On-Shore Order No. 1, the brochure specifies that the mineral lessee or operator is responsible for making a good faith effort to work with the surface owner on issues such as access, provide the surface owner with the SUPO, and notify the surface owner before entry, and attempt to reach a surface use agreement with the surface owner.[91] The mineral lessee or operator must also submit a performance bond and, if good faith efforts to reach a surface use agreement failed, a damages

bond (at a minimum of $1,000) for the benefit of the surface owner to cover surface damages.[92]

D. Surface Mining Control and Reclamation Act and EPACT § 1835

In an informative contrast to oil and gas split estates, surface owners on coal-bearing split estates are protected by Surface Mining Control and Reclamation Act (1977)("SMCRA").[93] Congress, in response to the concerns of split estate agricultural interests in Montana and Wyoming, dramatically altered the relationship between the surface and the coal mineral estate. Most significantly, SMCRA provides a qualified surface owner with the right to withhold his or her consent to entry for surface coal mining.[94]

Congress recently considered making SMCRA-like surface owner consent provisions applicable to oil and gas leases. In Section 1835 of the Energy Policy Act of 2005 (EPACT), Congress asked BLM to prepare recommendations that would address a similar consent provision for oil and gas split estates.[95] In its 2006 Report to Congress, BLM rejected this concept, finding that "given the lesser intensity of oil and gas development on a parcel of ground in comparison to coal development and the provisions in place to involve surface owners in oil and gas development negotiations to address surface impacts."[96] To date, Congress has taken no action on this Report. Nonetheless, SMCRA is an object lesson on how statutory federal mineral dominance can be fundamentally altered by an Act of Congress in response to surface owner complaints.

V. PREEMPTION OF STATE SURFACE OWNER PROTECTION LAWS

With the federal regulatory scheme in mind, this section analyzes the preemption issue in the context of the state surface owner protection laws of Wyoming, Colorado, and New Mexico. The starting point for this analysis is the state accommodation doctrine, which forms the basis for state surface owner protection laws.

The traditional rule adopted under state common law is the doctrine of reasonable necessity. Under the rule of reasonable necessity, "a mineral lessee is entitled to possess that portion of the surface estate `reasonably necessary' to the production and storage of the mineral."[97] The accommodation doctrine was developed by some state courts to enhance protection of surface owners by further defining what constitutes "reasonableness". Under this doctrine, "[i]f the mineral owner proposes to use a mining method that will interfere with an existing surface use, the accommodation doctrine compels the mineral owner to utilize reasonable alternative mining methods, if such methods exist."[98]

States with surface owner protection laws include North Dakota,[99] Oklahoma,[100] Montana,[101] South Dakota,[102] West Virginia,[103] Tennessee,[104] Illinois,[105] Indiana,[106] Kentucky,[107] Wyoming,[108] Colorado,[109] and New Mexico.[110] Common elements included in these laws are requirements that the mineral developer provide notice of proposed drilling operations to the surface owner, required negotiations to determine the amount of surface damages owed and in some cases

definitions of what constitutes compensable surface damages or “lost land value”; and bonding provisions and procedures. Some states have appraisal and judicial mechanisms for resolving disputes on damage issues.

There is no federal judicial recognition of an accommodation doctrine and to date, no case has applied the state judicial accommodation doctrine to federal split estates. There are serious constitutional questions on whether it could be applied to federal minerals. The application of state surface damage legislation to federal minerals, and whether such legislation unconstitutionally interferes with the management of the federal mineral estate, likewise raises serious legal questions. The specific provisions of surface owner protection laws in Wyoming, Colorado, and New Mexico are discussed below.

A. Wyoming

Wyoming placed itself at the center of the preemption debate in 2005 when the WOGCC determined that Wyoming's new Split Estates Act (the “Wyoming Act”) applies to federal minerals.[111] In response to proposed rules applying the Wyoming Act[112] to federal minerals, BLM submitted comments in opposition, asserting that the WOGCC's rules should only apply to state and private minerals.[113] In response to BLM's comments, the Wyoming Attorney General challenged BLM to sue the state if it wanted to assert a preemption argument.[114]

The Wyoming Act became effective on July 1, 2005. The state legislature intended the Act to serve as a codification of the judicially-adopted accommodation doctrine, for oil and gas only, such that the Act would “allow the oil and gas operator to conduct its oil and gas operations in a manner that is reasonable and necessary, while taking into account what is necessary to accommodate the needs and rights of the surface owner.”[115] The Wyoming Act, however, goes further than merely codifying the accommodation doctrine. For example, the surfaces damages provision provides for a significantly broader range of damages than allowed under either the judicially-adopted accommodation doctrine or federal statutory schemes. Specifically, the oil and gas operator must pay the surface owner compensation for loss of production and income, loss of value and loss of value of improvements caused by oil and gas operations -- damages are not limited to agricultural operations.[116] One commentator has noted that “[t]his new legislation enacts a fundamental shift in the common law rights of the mineral estate owner by effectively eliminating the mineral developer's right to use the surface without compensating the surface owner.”[117]

Under the Wyoming Act, prior to drilling, mineral developers must now provide written notice, enter into negotiations for a surface use agreement with each surface owner.[118] If the parties cannot agree on the terms of the surface use agreement, then the mineral developer must post a bond to cover damages before accessing the mineral estate.[119] The surety bond must be at least $2,000 per well site.[120] In addition, the WOGCC's rules provide that the operator must carry on all operations in a safe and workmanlike manner having due regard for the preservation and conservation of the property.[121] A violation of the WOGCC's regulations is evidence of negligence under the Wyoming Act.[122]

The applicability of the Wyoming Act to federal mineral estates raises the conflict preemption question. As surface lands granted under the SRHA comprise 92 percent of the split estate lands in Wyoming, the SRHA is the starting point for the preemption analysis regarding the Wyoming Act.[123] The SRHA requires mineral developers to either reach a damages agreement with the surface owner or post a damages bond prior to entry.[124] Additionally, federal oil and gas developers must comply with the surface protection provisions in Onshore Order No. 1, including making a good faith effort to reach an agreement, provide the surface owner with a copy of the SUPO and any conditions of approval that are attached to the APD.[125] Operators are also encouraged to use BMPs when developing their APDs.[126] Thus, the relevant question in any conflict preemption analysis is whether Wyoming's additional notification, damages and bonding requirements impermissibly conflict with the above-described federal scheme, either by making compliance with both federal and state requirements a physical impossibility, or by interfering with the full purpose and objectives of the SRHA.[127]

Under *Granite Rock*, reasonable state environmental regulation is not preempted as long as it does not prohibit a federally-sanctioned use of federal property, including a functional prohibition by making the use economically infeasible.[128] Wyoming's regulations, on their face, do not prohibit the development of federal minerals. Nor do they make compliance with federal and state law a physical impossibility; a federal mineral developer could, in theory, comply with both the federal and state notice and bonding requirements even though it may create some duplication. Whether Wyoming's additional surface owner protection provisions cross the line into preemption territory by making federal mineral development cost-prohibitive or interfering with the accomplishment of federal purposes would be a fact-intensive inquiry that would most likely need to be determined on an "as applied" basis. To date, no one has challenged the application of the Wyoming Act.

B. Colorado

The Colorado General Assembly passed state surface owner accommodation legislation in 2007 (the "Colorado Act").[129] As with the Wyoming legislation, the General Assembly's intent was to codify the judicially-adopted accommodation doctrine as applied to oil and gas.[130] In passing this law, the General Assembly noted that clarification of the legal relationship between surface owners and oil and gas operators is in the public interest because of "substantial increases in the amount of oil and gas operations and the number of rural residents" and the resulting "numerous conflicts between surface owners and oil and gas operators."[131] The Colorado Act requires that mineral developers "minimize intrusion upon and damage to the surface" by "selecting alternative locations for wells, roads, pipelines, or production facilities, or employing alternative means of operation" to reduce or mitigate surface impacts where such alternatives are "technologically sound, economically practicable, and reasonably available to the operator."[132] The statute allows surface owners to seek compensatory damages from mineral developers who fail to meet this standard of conduct.[133] At this time, neither the statute nor the State of Colorado have asserted that it applies to federal minerals.

Even though the State of Colorado has not stated an intent to apply the Colorado Act to federal oil and gas, the State is claiming that on-going changes to state regulation of oil and gas apply to federal oil and gas. Regulatory efforts, as directed by the Legislature, are underway in Colorado to further protect public health, welfare and wildlife resource. Specifically, the Colorado Oil and Gas Conservation Commission ("COGCC") is currently undergoing a rulemaking process to implement the requirements of two 2007 House Bills, HB 1298 and HB 1341. HB 1298 directs the COGCC to promulgate rules by July 1, 2008, that establish standards to minimize the impacts of oil and gas development on wildlife resources and to ensure reclamation of wildlife habitat.[134] HB 1341 directs the COGCC to promulgate rules in consultation with the Colorado Department of Public Health and Environment ("CDPHE") that provide a procedure for the CDPHE to provide comments during the COGCC's decision-making process in reviewing applications for a permit to drill to better balance oil and gas production with the protection of public health and the environment.[135] In its Initial Pre-Draft Rulemaking Proposal, the COGCC asserts that these rules will apply to oil and gas activities occurring on both private and federal land.[136] The COGCC asserts that "the procedures for activities on federal land may be modified to avoid regulatory duplication or inefficiency" but does not describe how this will be achieved.

The Colorado Act raises fewer preemption concerns for several reasons. The statute does not state that it applies to federal minerals, nor have Colorado officials asserted federal applicability, and the statute comes closer to merely codifying the accommodation doctrine. The COGCC's proposed surface protection rules, however, may raise greater preemption issues if the COGCC continues to assert that they are applicable on federal land. Federal statutes, including MLA, FLPMA, NEPA, the Clean Air Act,[137] the Clean Water Act,[138] the Endangered Species Act,[139] and the National Historic Preservation Act,[140] already govern the environmental impacts of federal oil and gas development and determine the appropriate surface location for such activities. This fact alone, however, does not preclude Colorado from requiring additional environmental regulation under the reasoning of *Granite Rock*. The *Oil-Dri* court, for example, held that a county's denial of a special use permit for clay mining is not preempted even though BLM and other federal and state agencies had already permitted and approved the mining and issued a final environmental impact statement under NEPA.[141] Further, given the Colorado state court decision in *BDS International*, where the court held that federal law does not preempt local regulation of a broad range of environmental impacts,[142] it is unclear whether the COGCC rule would be facially preempted. However, in an "as applied," fact-specific instance where access to federal minerals is effectively prohibited or the federal purpose grossly interfered with, the result could be different.

C. New Mexico

The New Mexico legislature enacted the Surface Owners Protection Act in 2007 ("New Mexico Act").[143] The New Mexico Act applies to "private fee surface land" and "leasehold interests in *any* land on which oil and gas operations are conducted when the tenant incurs damages to leasehold improvements as a result of oil and gas operations."[144] The Act does not specify

whether it applies to mineral estates under federal control, but the provision stating that it applies to "any land" suggests that federal minerals are covered.

The New Mexico Act requires compensation to surface owners for a broad range of damages, including loss of agricultural production and income, lost land value, lost use of land or access to land, and lost value of improvements caused by oil and gas operations.[145] The New Mexico Act also contains provisions requiring notice to surface owners prior to mineral development[146] and a requirement that the mineral developer post bond, in the amount of $10,000 per well, if the surface owner and mineral developer cannot reach an agreement.[147] For leased surface estates, the mineral developer is liable to the surface tenant for damages to cover the cost to repair or replace any of the tenant's improvements that are damaged as a result of the operator's oil and gas operations.[148]

New Mexico's law, on its face, does not prohibit the development of federal minerals and does not make compliance with federal and state law a physical impossibility. It creates additional notification, bonding and a broader range of compensable damages. The $10,000 bonding requirement per well in New Mexico, however, creates a stronger preemption argument because this high bond amount is more likely to make federal mineral development cost-prohibitive. Although as in *Granite Rock,* a facial preemption challenge may be difficult to win, an "as-applied" challenge may well result in a finding of preemption.

Whether or not these state surface owner protection laws would be preempted under *Granite Rock* is a question that may never have a definitive answer. Unless a federal lessee, with or without the support of the federal government, chooses to bring a preemption challenge to any of these laws, no court will have the opportunity to examine this question in an "as applied" fact rich context. Thus far, the federal government has seemed reluctant to bring preemption challenges because of its desire to work with states as partners in regulating the development of federal minerals and operators have apparently elected to work within these additional state requirements and avoid the costs and uncertainty of a challenge to state law.

VI. THE NEED FOR COOPERATIVE FEDERALISM

Regardless of the potential legal grounds that may support a preemption argument to the application of state surface use laws, generally, the policy of the federal government is to work with state regulation unless the state regulation is overly burdensome. This is in recognition that cooperative federalism may be a better way to achieve effective regulation of mineral development on split estates. Three recent federal policy initiatives provide some evidence of this intent. First, President Bush signed an executive order in 2004 to facilitate cooperative conservation as a general federal policy. Second, pursuant to the Energy Policy Act of 2005, BLM prepared a report to Congress recommending policies for managing mineral estate development on split estates that involve federal and state cooperation. Third, as discussed above in Part IV, in its 2007 revision to Onshore Order Number 1, DOI clarified federal policy regarding approval of oil and gas leases, including consent, surface use agreements and

bonding requirements. In so doing, DOI preserved the authority of states to establish supplementary surface owner protection provisions that do not conflict with federal law.

President Bush signed Executive Order 13352, Facilitation of Cooperative Conservation, in order to ensure that federal agencies, including DOI and the Department of Agriculture "implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation."[149] To achieve the purpose of this order, federal agencies are required to carry out their respective programs to accommodate local participation and collaboration in federal decision making.[150]

Carrying out the general policy of Executive Order 13352, BLM's Energy Policy Act of 2005 Report to Congress makes several recommendations that implicate state involvement.[151] BLM recommends that BLM and states work together to develop a consistent set of outreach tools to inform surface owners and operators of BLM's leasing and development program.[152] To that end, BLM recommends that state governments require sellers to disclose outstanding mineral reservations and the terms to purchases prior to the sale of a property.[153] BLM also recommends that BLM, with the help of cooperating agencies and local governments, increase notice to private surface owners on BLM's land use planning process.[154] Local government cooperators should facilitate and encourage the involvement of surface owners in the land use planning process.[155] BLM also recommends that local forums be used to explain the federal leasing process and identify areas proposed for leasing.[156]

In promulgating the revised Onshore Order No. 1, DOI expressly avoided preempting state surface owner protection laws. In its responses to comments, DOI repeatedly stated that "the authority of states with respect to reserved Federal minerals is established in statutes dating back to the early twentieth century and is not altered by this Order."[157] DOI stated that "the Order would only impact state law or private [surface owner] agreements to the extent that they conflict with Federal obligations."[158] DOI refused to comply with the request of some commentators who suggested that BLM intervene into the states' implementation of their surface owner protection acts so that courts may resolve the issue of federal preemption of the state statutes, reasoning that "[n]o intervention by the BLM on this subject is necessary" because "[t]he final rule implements existing law, it does not change its interpretation."[159] DOI recognized that operators may have to comply with federal and state bonding requirements, but noted that BLM may consider state bonds in setting federal bond amounts.[160] Each of these policy initiatives recognize the important role that state regulation of federal lands can play in cooperative federalism. None of these policies, however, has obviated the federal government's authority under the Constitution to manage federal oil and gas for the benefit of the nation, as a whole. When state law interferes with that federal purpose, the preemption doctrine can be used to override state law.

VII. CONCLUSION

Preemption, particularly when considered in the context of federalism, is not an area of law for simple rules and clear answers.[161] In the context of dual federal and state jurisdiction over

federal lands, the preemption question is particularly complex and the analysis has evolved over time. Policy considerations are impossible to ignore. There is tension between the strong policy reasons to preempt state regulation of federal minerals -- to ensure a steady and reliable supply of domestic energy -- and the equally strong policy reasons why state regulation should be permitted given federalism principles and the changing values in the West as reflected by state legislatures. In any case, the reality is that the federal government is hesitant to pull the preemption trigger on state surface use laws from an apparent concern over impeding federal-state cooperation in the regulation of mineral development.

FOOTNOTES

[1]*See e.g. Jim Robbins*, "Candy Magnate Loses Bid to Bar Drilling on Ranch," *New York Times* (Jan. 10, 2008)("The problem has led to changes in the access law in some states, though land owners say it is too soon to tell how those changes are working.")

[2]*See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 46-47 (1983) (reasoning that Congress "sought to ensure that valuable subsurface resources would remain subject to disposition by the United States" and "did not wish to entrust the development of subsurface resources to ranchers and farmers," in holding that gravel is a mineral reserved to the United States under the SRHA).

[3]U.S. Dep't of Interior, Bureau of Land Management, *Energy Policy Act of 2005 - Section 1835, Split Estate Federal Oil and Gas Leasing and Development Practices, A Report to Congress* at 4 (Dec. 2006).

[4]*See, e.g.*, "Beyond the Boom, Rewards of Energy Exploration Come at a Loss to State's Splendor," *Rocky Mtn. News* (Dec. 11, 2007); Steve Lipsher, "Grand County Drill Lease Halted," *Denver Post*, B01 (Oct. 31, 2007) (reporting on BLM's withdrawal of twenty-three oil and gas lease sales "after residents protested what they considered an unwarranted intrusion into unmarred country").

[5]J. Alex Tarquin, "There's a Light at the End of the Energy Pipeline," *New York Times*, § 3 at 35 (Feb. 26, 2006).

[6]Phaedra Haywood, "Oil and Gas Development: What Lies Beneath," *Santa Fe New Mexican* (Dec. 23, 2007) (reporting on the shock of discovery of split estates in Santa Fe County); Gargi Chakrabarty, "Energy Rush Creates Haves and Have-Nots," *Rocky Mtn. News* (Dec. 12, 2007).

[7]*Cf*. John F. Welborn, "Changing Concepts in the Dominance of the Mineral Estate," *Mineral Development and Land Use* 3-3 (Rocky Mtn. Min. L. Fdn. 1995) (noting in 1995 that "[t]he traditional relationship between the federal mineral owner and the private surface owner is ... changing"); Charles L. Kaiser and Charles A. Breer, "Legal Issues Presented by Checkerboard, Inholding and Split Estates Lands," *Id*. at 3-9 (noting "[over] the past two decades the traditional mineral owner's dominance has slowly eroded to the point where the relationship in many states is now one of accommodation, or may even favor the surface owner").

[8]William Blackstone, *Commentaries* 18-19 (William D. Lewis ed. 1992).

[9]*Id.*; *Queen v. The Earl of Northumberland* ("The Case of Mines"), 75 Eng. Rep. 472, 475 (ex. 1567); *The Case of the King's Prerogative in Saltpetre*, 12 Coke 12, 77 Eng. Rep. 1294, 1295 (K.B. 1606) ("inasmuch as this concerns the necessary defense of the realm [the King] shall not be driven to buy [saltpeter] in foreign parts; and foreign princes may restrain it at their pleasure").

[10]*Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 49 (1983) (*quoting* Special Message to Congress, 15 Messages and Papers of the President's 7266 (Jan. 22, 1909)). This policy marked a change from early land grant statutes that provided homesteading incentives only for lands that were classified non-mineral in character and conveyed both surface and minerals.

[11]30 U.S.C. §§ 81, 83.

[12]43 U.S.C. §§ 291-301.

[13]30 U.S.C. §§ 121-123.

[14]30 U.S.C. §§ 81-85.

[15]30 U.S.C. § 81.

[16]30 U.S.C. § 85.

[17]43 U.S.C. § 299(a).

[18]This provision of the SRHA further states:
All entries made and patents issued under the provisions of this subchapter shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands . . . together with the right to prospect for, mine, and remove the same .... Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands ... for the purposes of prospecting for coal or other minerals therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior ....
43 U.S.C. § 299(a).

[19]*See e.g., Kinney-Coastal Oil Company v. Kieffer*, 277 U.S.488, 505 (1927) ("if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability."); *Vest v. Exxon Corp.*, 752 F.2d 959 (5th Cir. 1985)(As long as proper industry methods are followed, the mineral lessee has the right to use the surface).

[20]*Id*.

[21]Keith G. Bauerle, "Reaping the Whirlwind: Federal Oil and Gas Development on Private Lands in the Rocky Mountain West," 83 *Denv. U. L. Rev*. 1083, 1085 (2006).

[22]30 U.S.C. §§ 121-123.

[23]30 U.S.C. §122.

[24]*Id*.

[25]*Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 505 (1928).

[26]*Id*. at 504 (reasoning that the Agricultural Entry Act of 1914 and the Mineral Leasing Act of 1920 should be read together to divide oil and gas lands into surface and mineral estates, and to make the surface estate the servient estate, "which would be suggested by their physical relation and relative values").

[27]*Id*.

[28]The Supremacy Clause states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.

[29]*Olympic Pipeline Co. v. City of Seattle*, 437 F3d. 872, 877 (9th Cir. 2006).

[30]*See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983).

[31]*E.g., Light v. United States*, 220 U.S. 523, 536-37 (1917) ("The United States can prohibit absolutely or fix the terms on which its property may be used.... These are the rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.");*Camfield v. United States*, 167 U.S. 518, 525-26 (1897) ("The general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.... A different rule would place the public domain of the United States completely at the mercy of state legislation.").

[32]*California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987).

[33]*Kleppe v. New Mexico*, 426 U.S. 529, 529 (1976).

[34]*Wyoming v. United States*, 279 F.3d 1214, 1226-27 (10th Cir. 2002). ("The Property Clause simply empowers Congress to exercise jurisdiction over federal land within a State if Congress so chooses.")

[35]*Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917).

[36]*Wyoming v. United States*, 279 F.3d at 1227 (*quoting Utah Power & Light*, 243 U.S. at 404).

[37]John D. Leshy, "Constitutional Conflicts on Public Lands," 75 *U. Colo. L. Rev*. 1101, 1104-05 (2004).

[38]*See Wyoming v. United States*, 279 F.3d at 1231-32 (discussing cooperative federalism).

[39]30 U.S.C. §§184-287.

[40]43 U.S.C. §§1701-1785 (1976).

[41]*Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1240 (10th Cir. 2004); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987).

[42]*Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983), *quoted in Skull Valley Band of Goshute Indians,* 376 F.3d at 1240.

[43]*See, e.g., Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 510 (1989) (holding that the federal government has not occupied the field of natural gas production); *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905) (holding that states may regulate the location of mining claims); *South Dakota Mining Ass'n v. Lawrence County*, 977 F. Supp. 1396, 1403 (D.S.D. 1997) (noting that "[i]t is established that state or local regulation supplementing the [federal] mining laws is permissible"); *Bd. of County Comm'rs v. BDS Internat'l*, 159 P.3d 773, 783-85 (Colo. App. 2006) (holding that the Congress left room for state and local regulation of oil and gas under the Mineral Leasing Act); *Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n,* 693 P.2d 227, 236 (Wyo. 1985) ("We have found no cases striking down state regulations on the ground that Congress by enacting mining and environmental protection laws intended to occupy the field of environmental regulation of mineral development on federal land."); *but see Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd without opinion*, 445 U.S. 947 (1980)(which appears to conclude that a federal permitting scheme alone precludes state regulation).

[44]30 U.S.C. §181.

[45]30 U.S.C. §189.

[46]*See e.g.,* 43 U.S.C.§§1712(c)8;(c)9; 1720; 1732; and 1765.

[47]*Skull Valley Band of Goshute Indians*, 376 F.3d at 1240 (*citing Pacific Gas*, 461 U.S. at 204).

[48]The Tenth Circuit found actual conflict preemption in *Wyoming v. United States*, in holding that Wyoming's authority to vaccinate elk on a National Elk Refuge is preempted where the U.S. Fish & Wildlife Service refuses to give the state a permit because of an actual conflict with federal law. 279 F.3d 1214 (10th Cir. 2002).

[49]*Skull Valley Band of Goshute Indians*, 376 F.3d at 1240 (quotation omitted).

[50]George C. Coggins and Robert L. Glicksman, *Public Natural Resources Law*, §5:23 (2007).

[51]601 F.2d 1080 (9th Cir. 1979), *aff'd without opinion*, 445 U.S. 947 (1980). For an example of a case applying the reasoning of *Gulf Oil, see South Dakota Mining Ass'n v. Lawrence County,* 977 F. Supp. 1396, 1403 (D.S.D. 1997) (holding that a county may not prohibit surface mining in an attempt to implement land use policy contradictory to federal law); *Brubaker v. Bd. of County Comm'rs*, 652 P.2d 1050 (Colo. 1982) (holding that a county's denial of a special use permit for hardrock mining in a national forest was preempted under the reasoning of *Gulf Oil*).

[52]480 U.S. at 587. For an example of a case applying the reasoning of *Granite Rock, see Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 936 (9th Cir. 1988) (holding that state dredging and water quality permit requirements are environmental regulations that are not preempted under *Granite Rock*).*See also* Theodore Worcester, "Land Use Planning and Regulation After Granite Rock: State and Local Control of Operations on Federal Lands," 36*Rocky Mtn. Min. L. Inst*. 19-1 (1990).

[53]*Gulf Oil*, 601 F.2d at 1086.

[54]*Id*. at 1083.

[55]*Id*. at 1084.

[56]*See, e.g., Brubaker,* 652 P.2d 1050 (reasoning, contrary to the apparent holding of *Gulf Oil*, that state permit systems are not *per se* preempted); *Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n*, 693 P.2d 227 (Wyo. 1985) (same).

[57]480 U.S. at 594. A facial challenge is a difficult case to win. A facial challenge asserts that the statute is always, in any set of circumstances, unconstitutional. If the court can conceive of any one circumstance in which the law would be permitted, the facial challenge must fail. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[58]*Id*. at 575-76.

[59]16 U.S.C. §§1451-1466.

[60]30 U.S.C. §22 *et seq*.

[61]16 U.S.C. §§1600-1614.

[62]43 U.S.C. §§1701-1785 (1976).

[63]*Id*. at 582-93.

[64]*Id*. at 587.

[65]*See id*. at 606 (Powell, J., concurring and dissenting).

[66]*Id. at 587*.

[67]*See* Coggins & Glicksman, *Public Natural Resources Law, supra* note 50, § 5:28 (noting that "*Granite Rock* may be seen as part of a more general trend in Supreme Court federalism decisions to uphold state regulatory initiatives when possible.").

[68]*Gulf Oil Corp. v. Wyo. Oil & Gas Conservation Comm'n*, 693 P.2d 227, 238 (Wyo. 1985).

[69]30 U.S.C. §§184-287

[70]42 U.S.C. §§4321-4370f

[71]*Id*. at 234-35.

[72]*Id*. at 235.

[73]*Id*. at 237.

[74]*Id*. at 238.

[75]*Oil-Dri Corp. v. Washoe County, slip op.*, no. CV02-02196, at 4 (Nev. 2d Jud. Dist. Dec. 30, 2004). The Department of Justice submitted at the request of Interior, an amicus curiae brief asserting that the county establishing regulation of mining activity on federal land was preempted. *See* "Judge Rules, Community Wins in Kitty-Litter Mine Decision," *Bristlecone* (Winter 2005).

[76]*Oil-Dri Corp.*, no. CV02-02196, at 4.

[77]*Id*.

[78]*Id*. at 1-2.

[79]*Bd. of County Comm'rs v. BDS International, LLC*, 159 P.3d 773, 782 (Colo. App. 2006).

[80]*Id*. at 783.

[81]*Id*. at 785.

[82]"Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval and Operations; Final Rule," 72 *Fed. Reg*. 10308 (Mar. 7, 2007). For more information on the procedures for implementing Onshore Order No. 1, *see* U.S. Dep't of Interior, Bureau of Land Management & U.S. Dep't of Agric. Forest Serv., *Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development: The Gold Book* (4th ed. 2007) (*hereinafter, "The Gold Book"*; and http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/Onshore_Order_nol.html (last visited January 6, 2008).

[83]72 *Fed. Reg*. 10308.

[84]72 *Fed. Reg*. at 10310 (preamble); *see also* United States Department of the Interior, Bureau of Land Management, IM No. 2007-115 (May 2, 2007).

[85]*See also* United States Department of the Interior, Bureau of Land Management, IM No. 2003-131 (April 2, 2003) (describing and initially implementing this bonding clarification).

[86]*The Gold Book* at 2.

[87]72 *Fed. Reg*. at 10310.

[88]U.S. Dep't of Interior, Bureau of Land Management, BMP General Information, http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices/general_information.html (last visited Jan. 4, 2008).

[89]Bureau of Land Management, *Split Estate: Rights, Responsibilities, and Opportunities* (2007), *available at*http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices/split_estate.html (last visited Jan. 4, 2008).

[90]*Id*.

[91]*Id*.

[92]*Id*.

[93]30 U.S.C. §§ 1201-1328.

[94]30 U.S.C. § 1304(c); 43 C.F.R. Subpart 3427 (2007).

[95]Energy Policy Act of 2005, H.R. 6, § 1835.

[96]U.S. Dep't of Interior, Bureau of Land Management, *Energy Policy Act of 2005 - Section 1835 Split Estate Federal Oil and Gas Leasing and Development Practices: A Report to Congress* at 20 (Dec. 2006).

[97]*Sanford v. Arjay Oil Co.*, 686 P.2d 566 (Wyo. 1984); *see also, WYMO Fuels, Inc. v. Edwards*, 723 P.2d 566 (Wyo. 1986); *Mingo Oil Producers v. Kamp Cattle Co.,* 776 P.2d 736 (Wyo. 1989).

[98]Michelle Andrea Wenzel, "The Model Surface Use and Mineral Development Accommodation Act: Easy Easement for Mining Interests," 42 *Am. U. L. Rev*. 607, 630 (1992). The leading case applying the accommodation doctrine is *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).

[99]N.D. Cent. Code §§ 38-11.1-01 to 38-11.1-10.

[100]52 Okla. Stat. tit. 52 §§ 318.2 to 319.9.

[101]Mont. Code Ann. §§ 82-10-501 to -511.

[102]S.D. Codified Laws §§ 45-5a-1 to 45-5a-11 (Michie 1997).

[103]W. Va. Code §§ 22-7-1 to -8.

[104]Tenn. Code Ann. §§ 60-1-601 to -608.

[105]765 Ill. Comp. Stat. §§ 530/1 to 530/7.

[106]Ind. Code § 32-5-7-2(c).

[107]Ky. Rev. Stat. Ann. §§ 353.595 to 353.597.

[108]Wyo. Stat. §§ 30-5-401 to -410.

[109]Colo. Rev. Stat. § 34-60-127.

[110]New Mexico Surface Owners Protection Act, H.B. 827 (2007).

[111]*See* Dustin Bleizefer, "State Stands Behind Split Estate Law," *Casper Star-Tribune* (Jul. 20, 2005).

[112]Wyo. Stat. §§30-5-402-410 (2005).

[113]Matt Micheli, "Showdown at the OK Corral - Wyoming's Challenge to U.S. Supremacy on Federal Split Estate Lands," 6 *Wyo. L. Rev*. 31, 34 (2006) (citing letter from Kathleen Clarke to Don J. Likwartz (Jun. 13, 2005)).

[114]Associated Press, "BLM Disputes Wyoming Split Estate Law," *Billings Gazette* (Jun. 22, 2005).

[115]Final Report of the Joint-Executive-Legislative Committee on Split Estates (Wyo. 2005).

[116]Wyo. Stat. Ann. § 30-5-405(a).

[117]Micheli, *supra* note 113, at 34.

[118]Wyo. Stat. Ann. § 30-5-402(c)(ii).

[119]Wyo. Stat. Ann. § 30-5-402(c)(iv).

[120]Wyo. Stat. Ann. § 30-5-404(b); 30-5-402(c)(i)-(iv).

[121]WOGC Regs. Ch. 4, §4 (2005).

[122]*Natural Gas Processing Co. v. Hull,* 886 P.2d 1181 (Wyo. 1994).

[123]Micheli, *supra* note 113, at 32

[124]43 U.S.C. § 299(a).

[125]72 *Fed. Reg*. at 10310.

[126]72 Fed. Reg. at 10310.

[127]*See, supra* note 113, at 38 (arguing that the duplicative nature of Wyoming's law results in preemption because it impermissibly conflicts with federal policy).

[128]480 U.S. at 581.

[129]HB 07-1252, effective Sept. 1, 2007.

[130]The Colorado Supreme Court adopted the reasonable accommodation doctrine in *Gerrity v. Magness*, 946 P.2d 913 (Colo. 1997)("...both estates are mutually dominant and mutually servient because each is burdened with the rights of the other.").

[131]HB 07-1252, (1)(a)-(b).

[132]Colo. Rev. Stat. § 34-60-127(1)(b) (2007).

[133]Colo. Rev. Stat. § 34-60-127(2).

[134]Colo. Rev. Stat. § 34-60-128(3)(d).

[135]Colo. Rev. Stat. § 34-60-106(11)(a)(II).

[136]COGCC, Initial Pre-Draft Rulemaking Proposal to Implement HB 1298 and HB 1341, at 4 (Nov. 27, 2007).

[137]42 U.S.C.A. 7401-7671q.

[138]33 U.S.C.A. 1251-1387.

[139]16 U.S.C.A. 21211531-1599.

[140]16 U.S.C. 470 *et seq*.

[141]*Oil-Dri Corp. v. Washoe County, slip op.,* no CV02-02196, at 1-2 (Nev. 2d Jud. Dist. Dec. 30, 2004).

[142]*Bd. of County Comm'rs v. BDS International, LLC*, 159 P.3d 773, 782 (Colo. App. 2006).

[143]New Mexico Surface Owners Protection Act, H.B. 827 (2007).

[144]New Mexico Surface Owner Protection Act § 2 (emphasis added).

[145]*Id*. § 4(A).

[146]*Id*. § 5.

[147]*Id*. § 6.

[148]*Id*. § 4(B).

[149]E.O. 13352, 69 *Fed. Reg*. 52989 (Aug. 30, 2004). *See also* Robert D. Comer, "Constitutional Conflicts on Public Lands," 75 *U. Colo. L. Rev*. 1133 (2004) (discussing Executive Order 13352).

[150]69 *Fed. Reg*. 52989.

[151]U.S. Dep't of Interior, Bureau of Land Management, *Energy Policy Act of 2005 - Section 1835 Split Estate Federal Oil and Gas Leasing and Development Practices: A Report to Congress* (Dec. 2006); *see also* United States Department of the Interior, Bureau of Land Management, IM No. 2007-165 (July 26, 2007) (implementation of the EPACT Split Estate Report recommendations).

[152]U.S. Dep't of Interior, Bureau of Land Management, *Energy Policy Act of 2005 - Section 1835 Split Estate Federal Oil and Gas Leasing and Development Practices: A Report to Congress* at 12 (Dec. 2006)

[153]*Id*. at 13.

[154]*Id*.

[155]*Id*.

[156]*Id*. at 13-14.

[157]72 *Fed. Reg*. at 10312, 10323.

[158]72 *Fed. Reg*. at 10311.

[159]72 *Fed. Reg*. at 10312.

[160]72 *Fed. Reg*. at 10320.

[161]Coggins & Glicksman, Public Natural Resources Law, *supra, at* §5-13.