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NOT CARVED IN GRANITE: STATE AND LOCAL EFFORTS TO REGULATE NATURAL RESOURCES PROJECTS ON FEDERAL LANDS

Edward S. Geldermann [FN1]
U.S. Department of Justice
Washington, D.C.

Barbara B. Fugate [FN2]
U.S. Department of the Interior
Washington, D.C.

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Edward S. “Jay” Geldermann is a Senior Trial Attorney in the Natural Resources Section, Environment and Natural Resources Division, U.S. Department of Justice. He has been with the Justice Department since 1999 practicing natural resources, energy and environmental law in cases involving the Minerals Management Service, Bureau of Land Management, USDA Forest Service, Department of Defense, and National Park Service. He has defended those agencies in a wide range of cases arising under (or implicating) the hardrock mining laws, Territorial Submerged Lands Act, OCSLA, FLPMA, Materials Act of 1947, Coastal Zone Management Act, Park Service Organic Act, Quiet Title Act, and the National Environmental Policy Act (NEPA).
From 1991 through 1999, Mr. Geldermann was an Appellate Attorney in the Solicitor's Office of the Federal Energy Regulatory Commission, defending FERC's electric, natural gas, oil, and hydropower licensing, ratemaking and rulemaking orders in the U.S. courts of appeals, primarily the D.C. Circuit.
Barbara B. Fugate is an attorney in the Branch of Onshore Minerals of the Division of Mineral Resources in the Office of the Solicitor, U.S. Department of the Interior, Washington, D.C. Ms. Fugate works in the areas of mineral materials, the Mining Law, and cost recovery.
She has a B.A. degree from Wellesley College. She received her J.D. degree from Boalt Hall School of Law, University of California, Berkeley, in 1982.
Ms. Fugate clerked for Judge Patel in the Northern District of California. She worked for a number of years at the Washington, D.C., Civilian Complaint Review Board before joining the Solicitor's Office in 1995.

I. INTRODUCTION

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"[T]he Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them ...."' Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). "The police power of the state extends over the federal public domain, at least when there is no legislation by Congress on the subject." Omaechevarria v. Idaho, 243 U.S. 343, 346 (1918). There is nothing in the General Mining Law, FLPMA, the Forest Service Organic Act, or the Coastal Zone Management Act, that preempts the states from imposing at least reasonable environmental regulation over hardrock projects or from exercising that regulatory authority through a permit requirement. California Coastal Comm'n v. Granite Rock Co., 482 U.S. 572 (1987).

Can these principles be reconciled and applied to the federal government's proprietary natural resource development programs, to the same extent as the Supreme Court has applied them to hardrock mining on federal lands where the federal government's role is primarily regulatory in nature? Can state licensing authority over (at least) the environmental aspects of federal oil and gas leasing, timber sales, grazing rights, and mineral material sales coexist with federal control over those programs? Can years of potential state environmental review of a federal lease or sale of natural resource commodities so interfere with the efficacy of those programs and the marketability of those commodities as to trigger federal preemption of state environmental licensing requirements?

These questions all became apparent immediately in the wake of the Supreme Court's Granite Rock decision in 1987. Surprisingly, in terms of litigation, they lay dormant for 15 years until brought to the fore in CEMEX v. County of Los Angeles, California, an action in which a contractor authorized by the U.S. Dept. of the Interior's Bureau of Land Management ("BLM") to mine sand and gravel on a federal mineral estate, and the United States, both sued to preempt the County of Los Angeles (which by then had spent at least 11 years processing the contractor's local permit application, and had begun revisiting issues it had earlier resolved) from exercising any further control over BLM's mineral materials sale to the contractor. The CEMEX action recently culminated in a consent decree (requiring the County to issue a permit within 60 days) to which one party, the City of Santa Clarita, has objected and appealed to the Ninth Circuit. If the Consent Decree is sustained, it is unclear when the courts will have the next opportunity to resolve these important issues.

The Granite Rock case raised far more questions than it resolved. How broad is its applicability? Is Granite Rock limited simply to state authority over hardrock mining? Does it apply to federal proprietary programs such as mineral resource leasing and sales? Does it alter the intergovernmental immunity analysis that usually results in immunity of federal functions from state licensing authority? Is Granite Rock's holding that the states may exercise permitting authority over mining projects a greater threat to the federal mineral resource sales programs than a requirement that would only subject those programs to state environmental standards? Federal agencies are now struggling with these questions as their natural resource sales and leasing programs encounter interference by state permitting authorities.

This paper examines the history of federal-state regulatory conflicts involving natural resource development projects on public lands, the holdings of Granite Rock, legal commentators' reac-

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tion to Granite Rock, the recent case of CEMEX, Inc. v. Los Angeles County, and the potential limits of Granite Rock as precedent for state regulation of federal leases or sales of natural resource commodities owned by the United States. It concludes that the Granite Rock ruling does not render the doctrine of intergovernmental immunity inapplicable to federal proprietary, revenue-producing natural resource commodity programs and, alternatively, that federal agencies have authority, by regulation, to preempt state and local regulation of federal mineral resource leases or sales to the extent states attempt to obstruct or delay the implementation of such sales or leases by means of time-consuming state or local permitting processes or by imposing unreasonable conditions.

II. FEDERAL CASE LAW PRECEDING GRANITE ROCK

One of the earliest battles over dueling federal and state permitting authorities came to a head in 1946 when the Supreme Court decided First Iowa Hydro-Electric Coop. v. Federal Power Comm'n. [FN3] In that case, the FPC (predecessor to the Federal Energy Regulatory Commission) issued a hydropower license authorizing the licensee to divert virtually all of the flow of the Cedar River between two townships in Iowa. The State of Iowa intervened and claimed that a state permit was needed for the licensee's construction of the hydropower dam and diversion of flow. Without referencing preemption or the Supremacy Clause of the U.S. Constitution, [FN4] the Supreme Court ruled that the state assertion of permitting authority over the dam construction and flow diversion was invalid. The Court stated that a "dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable." [FN5] As the Court explained:

> [t]he securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements. [FN6]

First Iowa involved the federal government's authority to trump state authority over water by virtue of its plenary jurisdiction over navigation. That the federal government had plenary authority to displace state regulation of public lands based on the Property and Supremacy Clauses was made clear in Federal Power Commission ["FPC"] v. Oregon [FN7] and Kleppe v. New Mexico. [FN8] In FPC v. Oregon, a state challenged the FPC's issuance of a hydropower permit on federal lands withdrawn from entry under the public land laws and reserved for power purposes without finding that the affected waters were, in fact, navigable and without requiring the licensee to obtain a state permit. Finding that Congress had ample authority pursuant to the Property Clause to reserve the public lands in question for hydropower purposes, regardless of the navigability of the affected river, [FN9] the Court ruled that "allow[ing] Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision." [FN10] In Kleppe, the Supreme Court rejected New Mexico's claim that Congress lacked authority to prohibit, by statute, the capture of unclaimed horses and burros on public lands contrary to

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state law authorizing control and capture of such animals unless the state assented to the federal prohibition. The Kleppe court, ruling that the Property and Supremacy Clauses sustained the challenged federal legislation, stated:

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. [FN11]

The Ninth Circuit applied the First Iowa, FPC v. Oregon, and Kleppe principles to invalidate an ordinance requiring an oil lessee to obtain a local government permit before developing a lease issued by BLM. In Ventura County v. Gulf Oil Corp., [FN12] BLM issued leases, and the U.S. Geological Survey and the U.S. Forest Service ("Forest Service") issued permits, authorizing the lessee to drill wells on land within the Los Padres National Forest to explore for and develop oil. The government of Ventura County, California, notified the assignee of the lessee, Gulf Oil, that it must obtain an "open space" permit pursuant to a local zoning ordinance that prohibited exploration and drilling without a permit on land zoned as open space. Gulf refused to comply with the permit requirement, and the County sought an injunction in state court. Upon removal, the federal court dismissed, ruling that the permit requirement violated the Supremacy Clause. The Ninth Circuit affirmed, ruling that the County ordinance requiring Gulf to obtain an open space permit impermissibly conflicted with the Mineral Lands Leasing Act of 1920 because it would have vested in the state ultimate control of the federal government's lessee, and thus stood as an obstacle to accomplishing the full purposes and objectives of Congress in that Act. The Supreme Court summarily affirmed.

In the early 1980s, a triad of cases decided by two circuit courts applied the doctrine of intergovernmental immunity (a close relative of preemption under the Supremacy Clause) to exempt federal power marketing agencies from state laws requiring a state permit for the installation of transmission lines traversing public lands. In Columbia Basin Land Protection Ass'n v. Schlesinger, [FN13] the Ninth Circuit ruled that the Bonneville Power Administration ("BPA"), a power marketing agency within the Department of the Interior (at the time of the challenged final agency action), was not required by section 505 of the Federal Land Policy and Management Act ("FLPMA") to obtain a state permit as a condition of being granted a right of way across federally owned lands for the purpose of constructing electric power transmission facilities. Section 505 of FLPMA provides, in pertinent part:

> Each right-of-way shall contain (a) terms and conditions which will . . . (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards . . . . [FN14]

Although the court determined that BPA was required by the foregoing language of Section 505 of FLPMA to satisfy the applicable substantive standards of state environmental law, it was not required to obtain a state permit. As the court explained:

> to require the BPA to receive a state certificate would imply that the state could deny the

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> application, which would give them a veto power over the federal project. This clearly cannot be the meaning that Congress intended. Much stronger language would be needed for us to conclude that Congress was delegating so much power from the federal government to the states. Congress would not delegate such an important function as the decision of whether and where to distribute electric power from federal facilities to total state control in such a brief statement. [FN15]

The Ninth Circuit adhered to this position in State of Montana v. Johnson. [FN16] The Eighth Circuit reached the same result in a challenge to the siting of transmission facilities by the Western Area Power Administration, another federal power marketing agency, in Citizens and Landowners Against the Miles City/New Underwood Pipeline v. Secretary of Energy. [FN17]

III. THE GRANITE ROCK CASE

The federal government's presumptive role as the sole licensing authority for federal statutory developmental projects and activities on public lands underwent a dramatic change in California Coastal Comm'n v. Granite Rock Co., [FN18] in which the Supreme Court ruled that the federal government has no inherent preemptive authority over at least the environmental aspects of hardrock mining activities on federally owned lands. Granite Rock, a mining company, possessed unpatented mining claims under the Mining Law of 1872 ("Mining Law") [FN19] containing chemical and pharmaceutical grade white limestone, a hardrock mineral, on land owned by the federal government at Mount Pico Blanco in the Big Sur region of Los Padres National Forest, an area of great scenic beauty. From 1959 to 1980, Granite Rock removed relatively small samples of limestone for mineral analysis. It began more expansive mining of the claim in 1981 after the Forest Service approved its five-year plan of operations, which authorized activities that included blasting, opening a quarry, constructing and improving roads, building a bridge, boring test holes, conducting core drilling, improving a water storage system, and dumping rock waste in a disposal area. [FN20]

In 1983, the California Coastal Commission ("CCC") notified Granite Rock that the California Coastal Act ("CCA"), a state statute designed to implement the federal Coastal Zone Management Act ("CZMA"), [FN21] required Granite Rock to obtain a state permit to continue its mining operations. Soon thereafter, Granite Rock filed a lawsuit in federal district court to enjoin the state officials from requiring a state permit. The district court ruled that the federal land on which Granite Rock's limestone claim was located was within the State of California's "coastal zone" and, on that basis, was subject to state land-use regulation. [FN22] The district court then proceeded to examine whether, notwithstanding the inclusion of the land subject to Granite Rock's mining claim in the coastal zone, state regulation of its limestone mining activity was preempted by the Mining Law and Forest Service regulations. The court ruled that Granite Rock's mining operations on federal land did not convert Granite Rock into a federal instrumentality, and therefore, the intergovernmental immunity doctrine applied in Hancock v. Train [FN23] did not preclude state regulation of Granite Rock's mining activities. The district court also ruled that the CCA did not conflict with, or stand as an obstacle to, the accomplishment and execution of the Mining Law, because it did not seek to prohibit or "veto" Granite Rock's limestone activity, but only to regulate that activity in accordance with the detailed requirements of the state coastal statute. It thus ruled that the CCA was not preempted by the

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Mining Law. [FN24] Finally, the court concluded that the state permitting requirement of the CCA was not preempted by Forest Service regulations governing mining activities (including the environmental effects of such activities) on National Forest System lands.

On appeal, the Ninth Circuit reversed. [FN25] Although the court agreed that the Mining Law, as a statute with "a general federal purpose to encourage a particular activity does not automatically preempt state environmental regulation that incidentally discourages the activity," [FN26] it found that the California Coastal Act went too far and thus was preempted because it prohibited a federally authorized activity (here, mining) unless the miner obtained a state permit to carry on that same activity. In so ruling, the Ninth Circuit relied on First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, [FN27] Sperry v. Florida, [FN28] and Ventura County v. Gulf Oil Corp., [FN29] for the proposition that states may not, under the Supremacy Clause, prohibit a congressionally authorized or federally licensed activity by requiring a permit from a state or local government before allowing the activity to occur. The Ninth Circuit found that Forest Service regulations "mandate that the power to prohibit the initiation or continuation of mining in national forests for failure to abide by applicable environmental requirements lies with the Forest Service." [FN30] Finding that the CCA's permit requirement intruded into the Forest Service's sphere of authority, the circuit court concluded that "an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is preempted." [FN31]

The State of California sought and was granted certiorari by the U.S. Supreme Court. The Supreme Court, in a 5-4 majority opinion, [FN32] reversed the Ninth Circuit's holding that the state permit requirement was preempted by federal law. Initially, the Court observed that because Granite Rock's lawsuit represented a facial preemption challenge to the Coastal Commission's permit requirement, and because the CCC had not yet imposed any particular conditions on the issuance of a state Coastal Act permit, Granite Rock was in the unenviable position of having to show that there was no possible set of conditions the CCC could place on its permit that would not conflict with federal law, and, conversely, that any state permit requirement was per se preempted. The Court concluded that Granite Rock could not make that showing because federal land management statutes such as FLPMA and the National Forest Management Act ("NFMA"), the CZMA, and Forest Service regulations did not purport to preempt states from exercising at least some reasonable environmental regulatory authority over Granite Rock's mining claim, and because Granite Rock had sued to invalidate the state permit requirement before ever affording the state an opportunity to impose permit conditions that might not conflict with federal law.

The Court began its preemption analysis by reaffirming the broad supremacy of federal law over state law concerning federally owned lands recognized in Kleppe v. New Mexico. Similarly, the Court agreed with Granite Rock's argument that

> the Property Clause gives Congress plenary power to legislate the use of the federal land on which Granite Rock holds its unpatented mining claim. The question in this case, however, is whether Congress has enacted legislation respecting this federal land that would pre-empt any requirement that Granite Rock obtain a California Coastal Commission permit. [FN33]

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As stated above, the Court answered the question negatively. In reaching that conclusion, the Court examined the Forest Service's scheme for environmental regulation of mining claims within national forests and found no federal government intent to occupy the field of environmental regulation. The Court acknowledged that the Forest Service had issued a series of regulations designed to minimize the adverse environmental effects of mining operations within National Forest System lands, and could have preempted state environmental regulation of such operations. Upon examining the Forest Service's environmental regulations, however, the Court found that they were not only "devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations will comply with state laws." [FN34] To illustrate the point, the Court cited specific Forest Service regulations requiring mining operators within national forests to comply with state air and water quality standards, and state standards for the treatment and disposal of solid wastes. The Court implicitly found that Forest Service regulations were designed to accommodate state environmental permitting schemes by providing that the Forest Service would approve operating plans as complying with the Forest Service's environmental protection regulations when state agencies have certified that the operators have complied with state law requirements "similar or parallel" to the federal environmental requirements. [FN35]

The Court also examined the congressional schemes (under FLPMA and NFMA) for land-use regulation of federally owned lands and determined that they did not evince a federal intent to preempt state exercise of reasonable environmental authority, as opposed to land-use authority, over mining operations on federal lands. Although the Court did not take exception to Granite Rock's assertion that NFMA and FLPMA collectively preempt the extension of state land use plans onto unpatented mining claims in national forest lands, [FN36] it nonetheless concluded that there can be enough of a distinction made between environmental regulation and land-use regulation to differentiate them as spheres of regulatory authority. As the Court explained:

> The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. [FN37]

According to the Court, Congress itself "indicated its understanding of land use planning and environmental regulation as distinct activities," as evidenced by Congress' differentiation of the criteria governing the Secretary of the Interior's exercise of federal land-use authority in FLPMA (requiring due federal consideration of, but not rigid adherence to, state land-use plans in formulating federal land management plans) from the FLPMA criteria for environmental regulation (requiring compliance of federal land-use plans with state pollution control laws). [FN38] The Court ultimately determined that the permit requirement of the California Coastal Act was not facially preempted because, although that Act included land-use control among the subjects that the CCC could regulate, the state statute also imbued the CCC with discretion to regulate only the environmental aspects of mining projects on federally owned

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lands. [FN39] Because the Court determined that the state commission was not preempted from exerting reasonable environmental control over mining on federal property, the requirement in the CCA that Granite Rock apply for a state environmental permit was likewise not facially preempted. The Court reasoned: "if reasonable state environmental regulation is not pre-empted, then the use of a permit requirement to impose the state regulation does not create a conflict with federal law where none previously existed. The permit requirement itself is not talismanic." [FN40]

Finally, the Court in Granite Rock took pains to emphasize the narrow scope of its rulings. It explained that "Granite Rock's challenge to the California Coastal Commission's permit requirement was broad and absolute; our rejection of that challenge is correspondingly narrow." [FN41] The Court further cautioned that

> Contrary to the assertion . . . that the Court today gives States power to impose regulations that 'conflict with the views of the Forest Service,' we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme. [FN42]

IV. POST - GRANITE ROCK

Perhaps surprisingly, in light of the Court's emphasis on the narrow nature of its ruling, some commentators immediately interpreted the Granite Rock decision as far-reaching, asserting that it was likely to have broad implications for other federalism conflicts as well: "[T]he Court seemed to provide general instruction for resolving mining disputes on BLM lands and similar federalism conflicts involving mineral leasing, grazing, and timber harvesting." [FN43] "[B]ecause the Supreme Court's decision was rooted in the generic land and resource planning mandate of the Forest Service (and, by implication, of the Bureau of Land Management as well), it has a potentially much broader application." [FN44] While these commentators may have anticipated an extension of the dual federal-state permitting regime from hardrock mining to other federal natural resource commodity sales and leasing contexts because the Granite Rock majority opinion did not suggest that its holding was limited to cases arising under the Mining Law, the combination of the "slipperiness" [FN45] of the distinctions that the Court drew, the lack of analysis of relevant and conflicting lower court cases, [FN46] and the warnings by the dissent that the decision represented an unprecedented abdication of federal control over the use of federal land [FN47] lend weight to the Court's own caution against broader application of the decision. [FN48]

Indeed, implicitly recognizing that there are risks in relying on Granite Rock too broadly, the same commentators acknowledged the difficulties inherent in applying the Court's distinction between state "environmental" and "land use" regulations. They posited concrete hypotheticals to illustrate the hard cases that the Court's decision left unanswered, such as circumstances in which "state environmental regulation [could be] so severe that a particular land use would become commercially impracticable." [FN49] Thus, as Professor Freyfogle explained:

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> Many statutes, for example, prohibit mining in and around urban areas, but allow a wide range of other uses. Is a statute of this type a land use statute, or is it merely an environmental rule because it allows a wide range of uses and prohibits only a few? And what of the statute that prohibits mining in stream beds or along stream banks? Is this a land use planning rule? In steep mountainous areas a state could impose a rule that allowed timber harvesting only if the harvesting generated no soil erosion. Is this statute an environmental regulation if nonerosive harvesting in fact is impossible? Similarly, can a state effectively ban mining under this distinction with a statute that bars the noise, air, and water pollution that mining almost inevitably creates? [FN50]

Or, suppose the state were "to require, as a condition of [a] permit, that the company backfill and reclaim its open pit after mining," possibly making "the cost ... so prohibitive as to forestall any mining in the first place"? [FN51]

The prescience of these concerns about potential preemption was confirmed by subsequent case law developments. In 1998, the Eighth Circuit answered in the negative the question whether a state or local prohibition of one type of mining on federal land that effectively precluded economical mining operations but left the land open to many other uses was countenanced under Granite Rock. South Dakota Mining Ass'n v. Lawrence County [FN52] also arose under the Mining Law, but the regulation at issue was a county ordinance that prohibited issuance of any new or amended permits for surface metal mining in one area. Ninety percent of the lands in the area affected were within a national forest, and were open to mining. The lands were subject to unpatented mining claims on which five companies had conducted active surface mining operations over the previous 15 years. Because surface mining was "the only practical way any of the plaintiffs [could] actually mine the valuable mineral deposits located on federal land in the area," the ordinance acted as a de facto ban on mining. [FN53] The appeals court, affirming the district court, found that the ban was a clear obstacle to Congress' encouragement of exploration and mining through the Mining Law.

The Lawrence County court's conclusion was made easier by the nature of the ordinance, which was "prohibitory, not regulatory, in its fundamental character." [FN54] In this respect, the drafters of the ordinance [FN55] failed to take advantage of the considerable latitude in characterization afforded by the Granite Rock Court's "environmental" versus "land use" distinction. As pointed out early on, "[t]he slipperiness of the distinction offers a substantial opportunity to state and local governments, especially those who are willing to review and, if necessary, recharacterize their regulatory processes to shade them toward environmental regulation." [FN56]

It is noteworthy that even the blunt prohibitory Lawrence County ordinance gave rise to litigation that reached as far as the court of appeals. This is another consequence of Granite Rock: it ultimately shifted to the courts much of the burden of deciding whether a particular mining operation could move forward on the public lands. "[T]he miner who wants to argue that stringent state regulation has been preempted, but who also wants to proceed with mining while the issue is litigated, will now be obliged either to comply with the state requirements, or to seek a stay of their enforcement from the court." [FN57] And because "these cases almost inevitably involve a careful sifting of fact, statutes and regulations," [FN58] seeking relief in the

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courts is likely to substantially delay an operation, as well as incur steep litigation costs.

Moreover, the very vagueness of the Granite Rock standards has handed non-federal regulators perhaps a greater share of power than the Court intended:

> [L]egal vagueness [can] be used by a regulator to advantage. When the limits on state and local power are unclear, regulators willing to take risks can assert broad authority in hopes that the parties regulated will submit to the regulation, or at least fail to challenge it judicially. [FN59]

Indeed, as Professors Coggins and Glicksman observed (clearly writing when the Granite Rock case was still ongoing on remand):

> Granite Rock deprives resource developers of a valuable procedural advantage. It remains eminently possible that, following the Court's decision, the conditions actually imposed by the CCC on Granite Rock's operations would be invalidated as impermissible land use controls. The difference between such an outcome and the result in Ventura County is that Granite Rock would have to go through the state or local regulatory process before it could get judicial review of the conditions. Applicants who obtain a state permit will be less inclined to litigate further than would a developer trying to avoid the state application process altogether. Often, when the developer has run the gauntlet of state review, it will decided that living with the conditions -- assuming that the CCC does not prohibit mining altogether -- is the better part of litigative valor. [FN60]

As Professors Coggins and Glicksman suggested, resource developers on federal lands are likely to attempt first to comply with any non-federal regulatory system that is not outright prohibitory, with the result that long delays may occur even before litigation is initiated. [FN61] This situation is well illustrated by the CEMEX case, discussed below. And, it is not only regulators who have taken advantage of the legal vagueness of the Granite Rock decision. In Lawrence County, as in CEMEX, the county regulators deemed the case resolved at the district court level, but it proceeded to the court of appeals through a party-in-intervention not directly involved in either regulation or mining. [FN62]

From this discussion, it is apparent that the Granite Rock Court's attempt to cut the regulatory baby in half, allocating some portion of licensing authority to the states and some portion to the federal government, is so imprecise that it opens the door to outright abuse at the state and local levels. As people move into areas that only a decade or two ago were isolated, and uncontroversial for mineral development, pressure grows on local governments to use regulation under Granite Rock as a tool not only to regulate, but also to curtail or halt mining on federal lands. Cumulatively, these local attempts to prevent mining can disrupt entire federal programs. The possibility that increasing attempts at local control might eventually lead to a reevaluation of Granite Rock was not lost on those advocating a broad interpretation of the decision, as Professor Leshy [FN63] made clear:

> [F]or nearly all federal constitutional purposes, including application of the Supremacy Clause, local governments are regarded merely as units of state government.... Nevertheless, there is a risk if the states and local governments push this idea too vigorously. It is

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> probably natural to expect that the Forest Service, the BLM, and the Congress will be more willing to allow state regulation on federal lands than to tolerate regulation by every county, village, or special governmental district. At some point in this spiral downward through governmental layers, these agencies and Congress might feel compelled to intervene and aggressively invoke a national interest in how these lands are managed. And if that happens, there is a risk that, from the states' perspective, the baby (state regulation) might be thrown out with the bathwater (local regulation). [FN64]

Even when local governmental entities apply state laws, as in CEMEX, they may have great latitude under those laws to address purely local concerns:

> [S]tate substantive law is often vague or nonexistent, and the involvement of the state permit-granting agency is essential to carry out the state regulatory scheme. In many cases state schemes are set up so that an agency has broad authority to establish the terms on which permits will issue. [FN65]

Although not apparently the author's intent, this description of the state permitting process highlights the concern that, under Granite Rock, operations on federal lands could be held hostage to the subjective discretion of state permitting agencies. As discussed infra, that concern became more than abstract when CEMEX, Inc. submitted to BLM the winning bid to purchase sand and gravel from a federally owned mineral estate in Southern California, and then sought a permit from Los Angeles County to perform its sand and gravel contracts with BLM.

V. THE CEMEX CASE: CEMEX, INC. V. COUNTY OF LOS ANGELES, CALIFORNIA, NO. CV-02-747 DT (FMOX) (C.D. CAL.) [FN66]

This was an action filed by CEMEX, Inc., a concrete mix company, seeking declaratory relief, injunctive relief, and damages against the County of Los Angeles, California ("County") to prevent the County from further interference with contracts executed between BLM and CEMEX for the sale of 56 million tons of sand and gravel on a federally owned mineral estate underlying privately owned surface land near Soledad Canyon, located in Los Angeles County approximately 30 miles north of the City of Los Angeles, California. As explained below, the United States joined CEMEX in this action as plaintiff-intervenor, alleging that the County's delay in processing, and ultimate denial of, CEMEX's application for a state permit to conduct the mining associated with the BLM sand and gravel sale is preempted by the Materials Act of 1947 [FN67] and FLPMA.

A. Applicable Federal and State Statutory Schemes

BLM's authority to offer sand and gravel for sale to the public is governed by the Materials Act of 1947, as amended, and regulations implementing that statute, [FN68] not the Mining Law. The 1955 amendments to the Materials Act essentially amended the Mining Law by removing common varieties of minerals (including sand and gravel) from operation of the mining laws and subjecting them to competitive bidding and sales provisions. Salable minerals include petrified wood and common varieties of sand, stone, gravel, pumice, pumicite, cinders, and clay. [FN69] Under regulations implementing the Materials Act, BLM conducts competit-

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ive sales of mineral materials, requires purchasers to file mining and reclamation plans, and conducts environmental review of materials sales. BLM sand and gravel contracts awarded pursuant to the Materials Act grant the purchaser the legal right to "extract, remove, process, and stockpile the material until the contract terminates," and to "use and occupy the described lands to the extent necessary for fulfillment of the contract or permit." [FN70] In making such sales, it is BLM's policy to "protect public land resources and the environment and minimize damage to public health and safety during the exploration for and the removal of such minerals." [FN71] Moreover, a BLM regulation provides that "BLM will not dispose of mineral materials if we determine that the aggregate damage to public lands and resources would exceed the public benefits that BLM expects from the proposed disposition." [FN72] BLM's mineral materials sales are also subject to the National Environmental Policy Act ("NEPA"), [FN73] pursuant to which BLM prepares an environmental assessment or environmental impact statement ("EIS") for each competitive sale. Mineral materials purchasers must also comply with other federal environmental laws such as the Clean Air Act, Clean Water Act, and Endangered Species Act. Nothing in the Materials Act or in BLM's regulations implementing that Act require the mineral materials purchaser to obtain a state permit to conduct the extraction and removal operations contemplated by BLM mineral materials contracts or otherwise comply with state environmental standards applicable to mining in performing those operations.

BLM's award of sand and gravel contracts to CEMEX grew out of a trespass action filed by the United States against a former owner of the surface estate at Soledad Canyon who was mining sand and gravel without a contract from BLM. [FN74] As part of the settlement of that action, BLM agreed to put out for bid two ten-year contracts that would collectively allow the successful bidder to mine up to 100 million tons from the Soledad Canyon mineral estate. [FN75] Both the former operator, who purchased the surface estate, and CEMEX [FN76] submitted bids. CEMEX's offer of $.50 per ton became the winning bid, and BLM awarded the contracts to CEMEX. Under the contracts, CEMEX is required to pay the federal government a minimum of $28 million in royalties. The contracts specified that, among other things, CEMEX "must comply with the State of California Mining and Reclamation Act" ("SMARA"). [FN77]

The State of California deems all mining activities on federally owned land (or mineral estates) to be governed by SMARA. [FN78] As relevant here, SMARA provides that "no person shall conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by, the lead agency . . . ." [FN79] SMARA also provides that "[e]very lead agency shall adopt ordinances in accordance with state policy which establish procedures for the review and approval of reclamation plans and financial assurances and the issuance of a permit to conduct surface mining operations . . . ." [FN80] SMARA contains no special permitting procedures confining review of mining pursuant to federal mineral materials contracts to the kind of limited, reasonable environmental standards contemplated by the Granite Rock Court, or requiring the environmental permits to be issued by the state as opposed to local governments (as was the case in Granite Rock). Under SMARA, Los Angeles County is the lead agency designated to exercise state authority over the mining activities on federally owned land located within the County.

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Pursuant to SMARA, Los Angeles County has adopted what it refers to as the "Zoning Ordinance," [FN81] which imposes licensing requirements, reclamation requirements, and financial assurance requirements that, like SMARA, purport to apply equally to all mining operations in the County regardless of whether such operations are conducted on federally owned land. In particular, the Zoning Ordinance imposes on applicants for surface mining permits the burden of establishing:

> A. That the requested surface mining operation conducted at the location proposed will not adversely affect the health, safety or welfare of persons residing in the surrounding area or otherwise endanger or constitute a menace to the public health, safety or general welfare; and
>
> B. That adverse ecological effects resulting from surface mining operations will be prevented or minimized; and
>
> C. That the proposed site is adequately served by streets or highways of sufficient width and improved as necessary to facilitate the kind and quantity of traffic surface-mining operations will or could generate; and
>
> D. That the proposed site for surface mining operations is consistent with the General Plan for Los Angeles County. [FN82]

B. CEMEX's Surface Mining Permit Application and the County's Denial

CEMEX applied to Los Angeles County for a state surface mining permit in 1990, shortly after it was awarded the sand and gravel contracts by BLM. Under the California Environmental Quality Act ("CEQA"), before issuing a permit for an activity that will have a significant effect on the environment, lead agencies must cause to be prepared an Environmental Impact Report ("EIR") containing "detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." [FN83] Los Angeles County's review of CEMEX's surface mining permit application was thus also subject to CEQA.

In May 1991, CEMEX submitted to the County an application for a surface mining permit and approval of a reclamation plan pursuant to SMARA. By 1993, CEMEX completed an internal draft EIR for the project in accordance with CEQA and submitted it to the County Department of Regional Planning ("Planning Staff") for review. According to uncontested declarations filed in the CEMEX case, BLM was aware that CEMEX was coordinating with the County to prepare a draft EIR pursuant to CEQA, but did not initiate a formal NEPA review process at that time, because it had anticipated working with the County to prepare a joint NEPA-CEQA environmental impact statement/environmental impact report ("EIS/EIR"). After CEMEX completed the initial internal EIR, BLM and CEMEX on a number of occasions asked the County to participate with BLM in a joint NEPA-CEQA EIS/EIR that would involve synchronized and coordinated federal and state environmental reviews. The County refused all such requests.

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In October 1995, after BLM officials recognized that the County would not agree to participate in a joint environmental review, BLM initiated the process for preparing a federal EIS under NEPA to analyze the potential environmental impacts of the proposed action for the project. After consultation with the U.S. Fish and Wildlife Service ("FWS") about the potential effects on endangered species (which culminated in a 1998 Biological Opinion finding no jeopardy for endangered species), BLM in May 1999 issued a draft EIS for public comment. In June 2000, BLM released its final EIS for the project. In August 2000, BLM issued a record of decision ("ROD") approving the project subject to CEMEX's compliance with a myriad of mitigation and monitoring conditions. The City of Santa Clarita, Michael Antonovich, the Los Angeles County Supervisor representing the County's 5th District (the district where the project site is located), and 20 other parties filed administrative appeals of BLM's ROD to the Interior Board of Land Appeals ("IBLA"). On January 8, 2002, the IBLA issued a decision rejecting the appeals and affirming the ROD. To date, the legal adequacy of BLM's NEPA analysis has never been challenged in the courts.

In the meantime, once the County had made clear in 1995 that it would not conduct joint environmental reviews with BLM, CEMEX continued pursuing a surface mining permit from the County on an entirely separate track. As it turned out, that process was anything but streamlined. From 1994 through 1998, the County entertained at least two proposals for the construction of manufactured homes in an area that overlapped CEMEX's mining project. The County also conducted formal environmental reviews for these manufactured home proposals even though they were incompatible with BLM's land-use plan, federal ownership of the mineral estate, and state land-use planning for the area. The County's determination to allow public comment and hearing processes for these manufactured home proposals required BLM to divert its staff resources from its environmental reviews of CEMEX's mining project to the filing of comments and participation in County meetings to express the BLM's position that the residential development proposal was incompatible with land already zoned for mining uses, and to express BLM's opposition to the encroachment of the proposed manufactured home projects onto lands overlying the federal mineral estate at Soledad Canyon. The County ultimately took each project off calendar, but, to date, has not formally rejected the proposals.

In 1995, Planning Staff completed a review of the internal draft EIR submitted by CEMEX in 1993. This included a review by the County's traffic specialists, the Department of Public Works ("DPW"), of traffic impacts in the vicinity of the project. In 1998, Planning Staff conducted a second review of CEMEX's draft EIR during which they modified the traffic impact study to conform the traffic analysis to then-current changes in County guidelines and assessment methodologies for traffic. In February 1999, the County circulated the draft EIR for public review and comment.

Under the County's SMARA procedures, CEMEX's permit application was reviewed by the County's Regional Planning Commission, its land-use planning arm, with a right of appeal to the County Board of Supervisors. The Planning Commission first scheduled the project for a hearing on April 21, 1999. The Planning Commission at the April 21 meeting granted a motion to continue its hearing on the project, and extend the period for public comment on the draft EIR for approximately two months. The Commission did essentially the same thing five times during the next eight months. In late 1999, the Planning Commission voted to deny CE-

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MEX's permit application, finding, among other things, that “the proposed site for surface mining operations is inconsistent with the General Plan for Los Angeles County” and that CEMEX had “failed to establish that the proposed project will be compatible with existing land uses in the vicinity of project property.” CEMEX then appealed the Planning Commission's order denying its permit application to the Los Angeles County Board of Supervisors.

While the appeal was pending, Planning Staff made changes to the project proposal and recirculated for public comment a new draft EIR that incorporated the modifications. In early 2001, the County Supervisors held a meeting to consider CEMEX's appeal. Due to constituent opposition to the project, the County Supervisors asked a CEMEX representative whether CEMEX would be willing to meet with the community to discuss mitigation measures that could affect the size, scope, and rate of proposed mining. After CEMEX agreed to do so, the County Supervisors continued the hearing on CEMEX's appeal until April 2001, and directed Planning Staff to complete a final EIR that incorporated public comments on the revised draft EIR. In April, the County Supervisors resumed the hearing on CEMEX's appeal. Citing continuing concerns about health, air quality, water quality, biotic resources, visual impacts, impacts on school children, and traffic impacts, the Board of Supervisors voted to deny CEMEX's permit application. The Supervisors concluded that, even with the additional mitigation measures recommended by Planning Staff and/or agreed to by CEMEX, the project posed unacceptable environmental risks and that more, yet unspecified, mitigation measures would have to be identified.

A hearing scheduled for June 2001 was continued to August 28, 2001, because a biologist hired by the City of Santa Clarita, a diehard opponent of the project, discovered the presence of Arroyo Toad tadpoles, an endangered species, in a stretch of the Santa Clara River running across the southeast corner of the project site. BLM referred the matter to the FWS for a Biological Opinion about the project's effect on the Arroyo Toad. The hearing was again continued for another 90 days, until late November 2001, to allow the County to analyze the FWS's anticipated opinion. In October 2001, the FWS issued a Biological Opinion concluding that, with eight additional mitigation measures proposed by BLM and CEMEX, the project was not likely to jeopardize the continued existence of the Arroyo Toad. BLM subsequently directed CEMEX to adopt the mitigation measures referenced in the Biological Opinion.

In a November 2001 report, Planning Staff recommended that the Supervisors approve the project subject to certain mitigation conditions. BLM believed that some of those recommended mitigation measures (which imposed operating hour restrictions, annual production restrictions, and a 24-hour monitoring program) would render the project economically infeasible, were contrary to the federal contracts and federal law, and were unduly burdensome and unnecessary, and advised the County of these concerns. In late November 2001, the County Supervisors met to vote on the project. On the eve of the hearing, County staff informed the Supervisors that the traffic analysis that had already been reviewed twice in the past (in 1995 and again in 1998) and had already been the subject of public comment was methodologically flawed, and needed to be revised and recirculated for public comment under CEQA. Based on these last-minute traffic concerns, the County Supervisors declined to vote on the project, but elected to continue the hearing until February 26, 2002. In the meantime, the County demanded that CEMEX provide staff with a revised traffic study. CEMEX declined, taking the posi-

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tion that there was nothing wrong with the previous traffic studies. It nonetheless offered to reimburse the County for the cost of the study. County staff then conducted a revised traffic analysis, which determined that, contrary to earlier findings, the impact of the project on traffic would, absent further mitigation, be significant.

C. CEMEX's and the United States' Preemption Challenges To The County's Permit Denial

In January 2002, while the traffic controversy was raging, CEMEX filed a lawsuit in federal district court alleging that the County's actions in delaying approval of its surface mining permit were preempted by federal law, and sought a court order directing the County to complete its SMARA review and issue a permit within 60 days or, alternatively, to preempt the County's SMARA process in its entirety. [FN84] At a February 2002 Board of Supervisors' meeting, a representative of CEMEX informed the Board that, notwithstanding its disagreement with staff's revised methodology for assessing traffic impacts from the proposed project, it would agree to accept the new mitigation measures that DPW, in its revised traffic analysis, had identified as being appropriate to fully mitigate project traffic impacts on Soledad Canyon Road (including restrictions on truck trips during morning and afternoon peak hours and payment of a proportional share in the cost of widening portions of Soledad Canyon Road). The County insisted that any changes in the traffic methodology become the subject of a new draft EIR circulated for another round of public comment and further hearings.

Notwithstanding CEMEX's agreement to accept the new mitigation conditions recommended by staff, the County Supervisors voted to deny a permit to CEMEX to operate the project, citing, among other things, CEMEX's failure to provide assistance in producing the requested revised traffic analysis or in completing an environmental analysis based on the new traffic analysis. CEMEX amended its federal court complaint to cite the County's denial of its permit application as an additional ground for federal preemption.

CEMEX then appealed the County Supervisors' denial of its permit application to the California State Mining & Geology Board ("SMGB"). The SMGB issued an order dismissing CEMEX's appeal for lack of jurisdiction, reasoning that "the issue of jurisdictional relationship between the Federal government and the County currently is under consideration by the United States District Court . . . , and therefore the SMGB is preempted from considering the County's actions to deny until the federal court has made its decision." In its order, however, the SMGB went on to express dissatisfaction with the County's processing of CEMEX's surface mining permit application, declaring that:

> the public record demonstrates delay and indecision by Los Angeles County in its processing of this surface mining application. The County's conduct in this area is surprising given the surface mining infrastructure already developed and surface mining history of the mineral lands in question, and given that the State, and the County through its Mineral Resource Management Policies incorporated into its General Plan, sought since 15 years ago to protect these identified important mineral resources from permanent loss due to encroaching urbanization.

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In July 2002, the United States applied for, and was granted, intervention in CEMEX's action against the County, raising similar federal preemption challenges. After initial disclosures and some document production, the U.S. district judge deferred the deposition process until the parties had completed 24 hours of private mediation. After eight full days of mediation spanning most of 2003, the parties agreed to settle the case by means of a Consent Decree requiring the County to complete its SMARA and CEQA review, and to issue CEMEX a surface mining permit, under a tight timetable.

D. The Consent Decree

The Consent Decree deems further Los Angeles County environmental review of the project to be preempted by federal law and enjoins the County from conducting further environmental review for the project. It also directs the County, within 60 days after court entry of the Consent Decree, to complete the environmental review process pursuant to the provisions of CEQA, including certification of a final EIR. The Decree also enjoins the County from "further delaying, frustrating or otherwise interfering" with the implementation of the BLM's mineral materials sale to CEMEX "including through delays," and it orders the County, within 60 days, to issue a surface mining permit for the project.

The factual underpinnings for the preemption determination are set forth in the Decree, which recites that, on multiple occasions before 1996, the County was invited to join with BLM to conduct a coordinated federal-state environmental review, and the County declined all such invitations; that the County has already conducted lengthy review of the CEMEX project pursuant to the requirements of CEQA and SMARA; that there have been over thirteen months of public review and comment on the project, and nineteen County public hearing sessions on the project; that the County's environmental review has spanned a decade, including an EIR process that generated a 2000+ page, eight-volume proposed Final EIR, no less than two public circulations for comment of different iterations of the EIR, substantial delay, and extraordinary costs for CEMEX, all in addition to the United States' approved Final EIS issued in June 2000.

The Decree goes on to provide that CEMEX and the United States take the position that this review process by the County, including the extensive public review and numerous public hearings, already far exceeds what is reasonable environmental regulation in the context of the federally-approved project. The Decree includes a judicial endorsement of CEMEX's and the United States' position (a position not expressly joined by the County) that the surface mining permit review process conducted by the County to date, which included three County government denials of CEMEX's surface mining permit application, amounts to unreasonable state environmental regulation of a federal project that is preempted by federal law. The Decree further recites that, at a minimum, all parties, including the County, agree and acknowledge that further environmental review by the County, above and beyond that already conducted, would exceed reasonable environmental regulation and thus would be preempted under any applicable legal standard. Accordingly, the Consent Decree finds that "further County environmental process," including recirculation for public comment in a draft EIR an entirely new methodology for assessing traffic impacts, would "thwart the federal determination" to grant mineral materials contracts to CEMEX, and is therefore, preempted.

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In the Consent Decree, the parties did not agree on the applicable legal standard that imposes limits on the County's authority to impose regulation on CEMEX's mineral materials purchase from BLM. The Decree acknowledges that it was the County's position that BLM's mineral materials sale to CEMEX is governed by the preemption analysis of Granite Rock, and that the County is entitled to impose reasonable environmental and "resource protective" regulation on the Project pursuant to SMARA and CEQA. In contrast, the United States and CEMEX in the Decree take the position that the County has no land-use authority over the project, and that the preemption principles applied to hardrock mining in Granite Rock do not necessarily apply to BLM mineral materials sales. The United States and CEMEX stipulated in the Decree that they were not waiving the right, in any subsequent litigation involving the CEMEX mineral materials purchase from BLM, to argue that the County has no authority to regulate BLM's mineral materials sales under the Materials Act. In the final analysis, the Decree determines that it is unnecessary for the Court to decide whether the preemption principles of the Granite Rock opinion apply to this case, because all parties were able to agree that, at a minimum, any County regulation of the project that goes beyond the imposition of reasonable environmental conditions in a timely manner is preempted by federal law under any applicable legal standard. Because the Decree finds that the County has exceeded its alleged authority to impose reasonable environmental regulation of the CEMEX mineral materials purchase, the Decree declares that the County is preempted from further regulation of the Project, except as outlined in the Consent Decree.

Although the Consent Decree finds that further County environmental review and process is preempted, it does allow the County to impose reasonable environmental regulation in the form of County-imposed project conditions that the parties negotiated in the course of reaching a settlement. To ensure that the substantial CEQA review process conducted by the County prior to entry of the Consent Decree would not be wasted, the Consent Decree required the County to complete the CEQA process by certifying the EIR and by issuing CEQA findings in support of the certification. The Decree also authorizes the County to regulate CEMEX's ongoing mining activities in accordance with the project conditions and a mitigation monitoring and reporting plan negotiated by the parties in the mediation process.

E. The CEMEX Consent Decree: Is It Final?

The County has already complied with the provisions of the Consent Decree requiring it to certify the final EIR, adopt CEQA and project findings, and issue CEMEX a surface mining permit for the project. This does not necessarily end the case. While the parties' motion for entry of the consent decree was pending, the U.S. Court of Appeals for the Ninth Circuit granted the City of Santa Clarita's motion to intervene. The City filed an opposition to the entry of the Consent Decree. Notwithstanding the City's opposition, the district court approved the consent decree by order dated May 5, 2004. The City has since appealed the consent decree to the Ninth Circuit, and that appeal is currently being briefed. [FN85] The City also filed a writ of mandate action in California state court against Los Angeles County alleging CEQA violations for issuing a surface mining permit without recirculating the EIR for public comment on the EIR's analysis of traffic impacts. [FN86] The City has named CEMEX and the U.S Department of the Interior as real parties in interest in that state action. CEMEX still needs other air and water quality permits before it may commence operating. [FN87]

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VI. ANALYSIS

The CEMEX case brings into sharp relief the obstacles that a local government can place in the path of an operator on federal lands through a permit process when local government officials, and/or a critical mass of their constituents, are determined to prevent mining. As commentators foresaw in the 1980s, local governments "willing to take risks can assert broad authority" [FN88] under the preemption principles of Granite Rock, as long as they characterize their actions as "environmental regulation." But such assertions of broad authority over federal proprietary natural resources programs raise the question of just how far the Granite Rock decision extends. There are notable distinctions between the programs administered by BLM under the Mining Law and under the Materials Act which make a state permitting requirement more intrusive and thus more easily preempted when BLM is making sales of federally owned minerals from the public domain. These same distinctions also make a stronger case for the application of intergovernmental immunity principles to BLM's issuance of mineral materials contracts than for the application of those principles to the public's self-initiated prospecting and mining operations pursuant to the Mining Law.

The Mining Law is essentially a public land grant statute, which grants property interests on a self-initiated basis. It authorizes the public to enter upon public lands to prospect and explore for minerals, stake claims, and possess and use the land for purposes incident to mining operations if the claimant has made a discovery of a valuable mineral deposit. [FN89] It also authorizes patenting (i.e., a grant of fee title to the surface of the claim as well as the minerals after the discovery of a valuable mineral deposit and payment of a nominal fee). [FN90]

BLM's role in managing lands subject to a mining claim is of a different nature than its proprietary role for mineral materials sales contracts. In a nutshell, BLM's administrative and regulatory responsibilities under the Mining Law and related authorities involve ensuring that the lands are open to entry, that there is no reason to question the validity of an asserted mining claim, that the claimant has done the annual assessment work (or paid annual maintenance fees), that the claimant's use of the land is reasonably incident to mining operations, and that the mining operation on an unpatented mining claim is otherwise in compliance with a BLM-approved plan of operations designed to prevent unnecessary or undue degradation to the public domain. There are no proceeds from sale of federal property, or revenue or royalty paid to the United States, when minerals are removed from the public domain under the Mining Law, as there is when BLM makes a sale of mineral materials.

The Materials Act, on the other hand, is not a public land grant statute. It establishes a federal revenue-generating program for the disposition of specific kinds of minerals, which Congress specifically removed from the purview of the Mining Law and thus made unavailable for acquisition except under the terms of the Materials Act. The Act expressly provides:

> The Secretary, [FN91] under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) . . . on public lands of the United States . . . if the disposal of such mineral. . . materials (1) is not otherwise expressly authorized by law, including . . .the United States mining laws, and (2) is not expressly prohibited by

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> laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of . . . upon the payment of adequate compensation therefor, to be determined by the Secretary. [FN92]

Unlike the Mining Law, there is no right granted to the public to enter upon public lands for the purpose of prospecting for mineral materials. [FN93] In making a mineral materials sale, BLM is performing several federal functions: 1) designating tracts of public land from which a sale of mineral materials is to be made; [FN94] 2) entering into negotiated or competitive sales (depending on the volume of material to be sold); 3) issuing contracts; 4) requiring performance bonds to guarantee the financial security of its mineral materials contractor; 5) verifying volumes of materials extracted and removed pursuant to a sale; 6) collecting payments for mineral materials removed (for remission to the U.S Treasury); 7) determining whether to approve assignments of mineral materials contracts by the contractor; and 8) requiring contractors to maintain records relating to mineral materials extraction for up to six years to enable BLM to determine the contractor's compliance with the contracts and relevant federal law. Thus, Congress has, through the Materials Act, vested in the Department of the Interior the exclusive jurisdiction to determine the quantity of minerals to be sold, the location of the minerals to be sold, the reclamation responsibilities, and the financial security and suitability of the contractor in a federal mineral materials sale.

Under these circumstances, there is a strong argument that BLM's mineral materials sales program is immune from state licensing, reclamation, and financial assurances regulations imposed by state laws such as SMARA. When applied to BLM mineral materials sales, state mining statutes such as SMARA are not akin to other state laws, deemed constitutional, which impose a tax or price controls on those who render services to the federal government. Cf. Penn Dairies v. Milk Control Comm'n of Pennsylvania [FN95] and State of Alabama v. King & Boozer. [FN96] Rather, statutes such as SMARA directly regulate an inseparable component of BLM's mineral materials sale itself -- the extraction process and other operations on federal lands by which purchasers take delivery of the materials. Arguably, statutes such as SMARA interject state regulation into the very core of BLM's mineral materials sales process, which is already subject to stringent federal environmental protection requirements (under NEPA, [FN97] the federal Clean Air Act [FN98] and Clean Water Act, [FN99] and 43 C.F.R. §§ 3601.11 and 3601.40), by enabling local governments to second-guess the environmental and reclamation conditions of BLM's contracts and to deny BLM's contractor a local permit unless the contractor satisfies local land-use and zoning standards. In the final analysis, there may be enough differences between the characteristics of BLM's regulatory oversight of the Mining Law program (which led the Granite Rock Court to conclude that state permitting of mining under the Mining Law was not facially preempted) and BLM's functions in administering the mineral materials contracting process to justify a court to rule that BLM's mineral materials contracts are immune from state regulation under the doctrine of inter governmental immunity, without ever needing to reach the question whether a state's actual exercise of permitting authority over a BLM mineral materials contract is preempted as impermissible land-use regulation or unreasonable environmental regulation under Granite Rock.

The most basic premise of the intergovernmental immunity doctrine under the Supremacy Clause is that states are prohibited from regulating the United States. For example, states can-

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not directly tax the United States or its instrumentalities [FN100] or levy fees on activities carried out directly by the federal government. [FN101] States also cannot directly regulate federal installations. [FN102] But how far does the immunity doctrine extend when the United States selects a contractor to carry out its program, as it does under the Materials Act?

As already mentioned, the Supreme Court has allowed states to tax federal contractors or enforce price controls, even though such regulation imposes a greater economic burden on the federal government than it would bear without the tax or price control. But the Court has consistently ruled that state laws that give a state the power of review over federal determinations violate the Supremacy Clause, even when the federal government program is carried out by a contractor. In Leslie Miller, Inc. v. Arkansas, [FN103] the United States had selected the appellant as the high bidder for construction of facilities at an Air Force base in Arkansas. After work had begun, the state accused, and later convicted, the appellant of violating a state statute requiring that a contractor obtain a license from a state board before working in Arkansas. The Court held that the state license requirement conflicted with federal law and would frustrate the federal policy of selecting the lowest responsible bidder, by giving the state board a power of review over the federal determination: "Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." [FN104]

Two years after Leslie Miller, in Public Utilities Comm'n v. United States, [FN105] the Court declared a California statute unconstitutional insofar as it prohibited carriers from transporting federal property at rates other than those approved by a state commission. The Court asked "whether the United States can be subjected to the discretionary authority of a state agency for the terms on which, by grace, it can make arrangements for services to be rendered it." [FN106] The Court noted the high volume of military traffic between points in California, and found that the comprehensive statutory and regulatory federal procurement provisions sanctioned the policy of negotiating shipment rates. [FN107] The Court further found that, under the California statute, "this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves." [FN108] It characterized this regulation of a contractor as placing a prohibition on the federal government and found a clear conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates.

A case that did not involve a federal contractor per se, but did implicate whether a state could enforce state requirements against one who was authorized to act under federal law was Sperry v. Florida. [FN109] In Sperry, petitioner had been authorized to practice before the U.S. Patent Office, but had not been admitted to practice law in Florida or any other state. In a case instituted by the Florida Bar, the Supreme Court of Florida held that the State could enjoin petitioner's Patent Office practice under a state law prohibiting the unauthorized practice of law. The U.S. Supreme Court reversed, noting that the federal statute expressly permitted the Commissioner of Patents to authorize practice before the Patent Office by nonlawyers:

> If the authorization is unqualified, then, by virtue of the Supremacy clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions

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> within the scope of the federal authority. A state may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions [citing Leslie Miller] or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. [FN110]

The Court rejected respondent's argument that it must "read into the authorization conferred by the federal statute and regulations the condition that such practice not be inconsistent with state law . . . ." [FN111]

In Goodyear Atomic Corp. v. Miller, the Court addressed the question of whether operation of a federal facility by a private contractor, rather than directly by the United States, changed the basic immunity analysis and found that it did not: " Hancock thus establishes that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation." [FN112]

The Court continues to cite the Leslie Miller line of cases approvingly. [FN113] The decision in North Dakota v. United States illustrates the level of difficulty courts sometimes have in clearly distinguishing between the two Supremacy Clause doctrines of preemption and immunity. The issue in North Dakota was whether the State could impose a labeling requirement on liquor purchased out-of-state by the United States for use on federal military installations in North Dakota. [FN114] The four-member plurality [FN115] cited both Leslie Miller and Public Utilities Comm'n for the proposition that claims to immunity from the operation of state laws that do not regulate the United States directly or discriminate against the federal government "must be resolved under principles of congressional pre-emption." [FN116] The plurality reasoned that those cases had "invalidated state regulations that prohibited what federal law required." [FN117] The four-person dissent also attested to the continuing vitality of these cases, but characterized them as considering whether a state obligation "interfere[d] with federal operations as part of [a] federal immunity analysis." [FN118] The plurality and the dissent agreed that Leslie Miller and Public Utilities Comm'n stand for the proposition that the Supremacy Clause prohibits state action that obstructs federal law. Under its preemption analysis, however, the plurality did not find that the obstruction in North Dakota rose to the level it deemed necessary to invalidate the state law, explaining that "[i]t is one thing ... to say that the State may not pass regulations which directly obstruct federal law; it is quite another to say that they cannot pass regulations which incidentally raise the costs to the military." [FN119] Thus, the plurality inNorth Dakota viewed the state law as one that at its core simply had the effect of increasing costs to the government. The outcome in North Dakota indicates that when a state law can be characterized as having no more than a moderate economic effect, it will be difficult to convince a court to invalidate it under the Supremacy Clause.

Both the Fourth and Ninth Circuits have applied Leslie Miller to hold that states could not enforce licensing requirements against federal contractors. In United States v. Virginia, [FN120] the court held that "Supreme Court precedent precludes the application of Virginia's licensing and registration requirements to private investigators working solely for the FBI in [its back-

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ground investigation program] ....” The court concluded that “ Leslie Miller compels the conclusion that -- by adding to the qualifications necessary for an investigator to do background checks for the FBI -- the Virginia regulatory scheme frustrates the objectives of the federal procurement laws by allowing the state to ‘second-guess' the FBI's responsibility determination and by giving the state licensing board ‘a virtual power of review over the federal determination of ‘responsibility.’”' [FN121]

In Gartrell Constr., Inc. v. Aubry, a case involving a general construction contractor performing work for the Department of the Navy, the Ninth Circuit relied on Leslie Miller to hold that “[b]ecause the federal government made a direct determination of Gartrell's responsibility, California may not exercise a power of review by requiring Gartrell to obtain state licenses. To hold otherwise would interfere with federal government functions and would frustrate the federal policy of selecting the lowest responsible bidder.” [FN122] The state had argued that its licensing statute was distinguishable from that in Leslie Miller because the California law did not require the bidding contractor to comply with the licensing provisions until after it had been awarded the federal contract, “thus leaving the federal government free to shop for the most favorable bidder.” [FN123] The court rejected this argument, finding that in Leslie Miller the

> Court did not focus on the distinction between bidding and performance but on the state's interference with the federal government's responsibility determination. That interference occurs when, as here, the state requires a contractor with the federal government to comply with its licensing laws even if that requirement is not enforced until after performance has begun. [FN124]

As this review of intergovernmental immunity case law shows, courts are willing to apply the immunity doctrine when the federal government selects a contractor to carry out its program if the state law interference with federal government functions is strong enough. There is a good argument to be made that federal proprietary natural resource programs fall into this category. The federal government's interest in controlling the disposal of its natural resources is strong, both in terms of supplying resources for the needs of the country and in terms of ensuring a fair economic return to the Treasury when selling United States property. The interference, as we have seen in the CEMEX case, can be severe, adding years of delay and expense, not only to commencement of the project, but to the federal process as well. When federal reviewers are deprived of important state input and must duplicate environmental or other studies, when federal employees must be pulled away from addressing the agency's workload to respond to state or local diversionary tactics, such as patently unacceptable and incompatible alternative land-use proposals, the federal process is being abused. When a federal contractor or lessee faces years of continued hearings, of revisions and recirculations and rehashing of already-settled issues, or is pressured to accept and comply with local land-use requirements such as highway improvements, open space fund donations, or purchases of conservation easements in order to avoid litigation, the federal government is no longer in control of its program. And when a locality is able to achieve this level of interference with a federal function to serve purely local interests, such as the “not in my backyard” attitude of constituents, the balance of power between the federal and non-federal governments needs to be reexamined.

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It is, of course, unpredictable how a court would respond to an intergovernmental immunity argument in the context of federal revenue-generating natural resource programs in which the resources are developed by federal contractors or lessees. But if a court were to accept such an argument, where would that leave state environmental concerns? As already noted, BLM's natural resources sales and leases are subject to federal environmental reviews under NEPA. In most cases, federal and state regulators work cooperatively on a joint environmental review, a process that has been shown to work well. Although state regulators would no longer have the last say if the doctrine of intergovernmental immunity were recognized as applying to these federal actions, the federal-state cooperation in this area would continue, and could be strengthened. State and local officials would, at the beginning of the federal review process, present all information and arguments pertaining to a proposed operation, and federal regulators would thus have an early opportunity to tailor the project to address state and local concerns.

Professor Freyfogle, in his commentary on the Granite Rock decision, suggested an approach that would also place the responsibility for deciding what local regulatory measures should be incorporated into a project on local federal regulators. [FN125] He noted that such an approach would

> increase[] power and responsibility at the local agency level, and power and responsibility at times are poorly used. But the potential for a tailored, sensitive federal response is nonetheless clear. Moreover, as noted below, federal planners often can ease their own work loads by requiring compliance with nonfederal regulatory schemes that fulfill federal aims. [FN126]

If local regulations already take into account local conditions and concerns and do not conflict with federal aims, federal regulators have the flexibility to incorporate them into the required project conditions.

If, on the other hand, courts do not accept that the doctrine of intergovernmental immunity applied in this context, what else might the federal government do to counter the disruption to federal natural resource programs threatened by local abuse of the principles of Granite Rock? Congress' attention might be drawn to the possibility that if the problems that BLM faced in the CEMEX case repeat themselves in other cases, it could deal a crippling blow to the efficacy of not just the mineral materials sales program, but also the federal government's oil, gas, coal, and timber programs, and all other revenue-generating natural resource marketing programs. [FN127] The prospect that BLM's sales or leases of mineral resources could be tied up in litigation for many years might prompt congressional action. To deal with this problem, Congress could, of course, enact legislation pursuant to the Property and Commerce Clauses providing the Department of the Interior with exclusive regulatory jurisdiction over leases or sales of mineral resources, thereby preempting states from exercising any control over these functions, as it has done in the field of hydropower regulation on public lands. Alternatively, Congress could require BLM and other natural resource marketing agencies to comply with state environmental standards, while exempting the federal agencies (and their contractors/lessees) from any requirement of obtaining a state environmental permit. Examples of this may be found in Section 505 of FLPMA [FN128] and Sections 121(d)(2)(A) and 121(e) of CERCLA.

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[FN129] Still another alternative would be to allow states to exercise environmental permit authority, but only within a limited period of time, beyond which a state would be deemed to have waived its right to require a permit. Examples of this may be found in Section 307(c)(3)(A) of the Coastal Zone Management Act (certification presumed if no action within 6 months) [FN130] and Section 401(a)(1) of the Clean Water Act (certification requirement waived if no action within one year). [FN131]

In the absence of congressional action, federal natural resource marketing agencies are not powerless to deal with process-related threats to their marketing programs from state or local governments. In addition to filing preemption challenges in federal court, as the United States did in CEMEX, agencies would have the authority to preempt state assertions of open-ended permitting authority over federal leases or sales of mineral resources through an exercise of rulemaking. While concluding that the State of California's assertion of permitting authority over limestone mining in Los Padres National Forest was not facially preempted by Forest Service regulations, the Supreme Court in Granite Rock nonetheless acknowledged that federal agencies have authority to preempt state law through rulemaking so long as the agency's intent in the regulations (or accompanying preambles) is manifested explicitly. [FN132] There are a wide range of conditions that federal natural resource marketing agencies could, through rulemaking, impose on state governments that may serve to reduce the time it takes states to exercise any environmental permitting authority they may have over federal mineral resource sales, including requirements: that the state or local governments complete their review of the permit application within a prescribed amount of time; that the federal and state agencies conduct coordinated and synchronized environmental review processes; that appeals from the state exercise of permitting authority be filed with the federal agency, not in state court; and that enforcement of state permitting requirements placed on federal contracts and leases be accomplished through the state's petition to the federal agency rather than through direct state enforcement disrupting the federal sale or lease. This would spare the project applicant from having to pursue remedies in state court to vindicate what is essentially state interference with rights conferred by a federal contract or lease, and provide for a final administrative resolution at the federal agency level, with a right of review under the Administrative Procedure Act ("APA") [FN133] in federal court.

The federal regulations could also be tailored to deal with potential overreaching by the state and local governments with respect to substantive conditions placed on a federal mineral resource project by a state or local permit, such as state imposition of land-use conditions on a project under the guise of "environmental" regulation. The regulations could reserve authority in the federal agency to review the state permit sua sponte and declare particular conditions in a state permit unreasonable or unduly burdensome (and thus preempted) in light of environmentally protective measures already imposed on the project by the federal agency. [FN134] Such a declaration would nullify the unreasonable condition unless and until the state successfully challenged the federal determination under the APA.

VII. CONCLUSION

Although much has been left unresolved by the Granite Rock decision, the CEMEX case illustrates the potential ills of subjecting federal mineral resource sales and leasing programs to

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state licensing jurisdiction. Federal agencies have an interest in state substantive requirements and state process imposed upon federal lessees or mineral materials contractors. If states or localities aggressively seek to expand their assumed authority over federal mineral resource dispositions, the federal government, of course, may respond to such actions by filing preemption actions (as the United States did by intervening in CEMEX) to protect the integrity of its programs and the marketable value of those resources, which may involve substantial revenues to the federal government. In such cases, federal agencies naturally will consider how their programs differ from the Mining Law regime at issue in Granite Rock. Federal proprietary, revenue-producing natural resource commodity programs may be exempt from state licensing under the doctrine of intergovernmental immunity. At the least, federal agencies should not automatically conclude that Granite Rock's Mining Law-based no-preemption doctrine applies to programs governed by different federal statutes and regulations.

[FN1]. Edward S. Geldermann is a Senior Trial Attorney in the Natural Resources Section, Environment and Natural Resources Division, at the U.S. Department of Justice, Washington, D.C. He served as lead counsel for the United States in the case of CEMEX, Inc. v. County of Los Angeles, California, No. CV- 02-747 DT (FMOx) (C.D. Cal.), now on appeal to the Ninth Circuit, which is discussed in this paper. The views expressed in this paper are those of the authors and do not necessarily represent the views of the Department of Justice or the Department of the Interior.

[FN2]. Barbara B. Fugate is an attorney in the Branch of Onshore Minerals, Division of Mineral Resources, in the Office of the Solicitor at the U.S. Department of the Interior, Washington, D.C. She has acted as a liaison between the Department of Justice and the Department of the Interior Solicitor's Office Headquarters in the case of CEMEX, Inc. v. County of Los Angeles, California, No. CV- 02-747 DT (FMOx) (C.D. Cal.), now on appeal to the Ninth Circuit, which is discussed in this paper. The views expressed in this paper are those of the authors and do not necessarily represent the views of the Department of the Interior or the Department of Justice.

[FN3]. 328 U.S. 152 (1946).

[FN4]. "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. Constitution, Art. VI, cl. 2.

[FN5]. 328 U.S. at 168.

[FN6]. Id. at 170.

[FN7]. 349 U.S. 435 (1955).

[FN8]. 426 U.S. 529 (1976).

[FN9]. The Court observed that, in First Iowa, "the jurisdiction of the Commission turned almost entirely upon the navigability of the waters of the United States to which the license ap-

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plied. Here, the jurisdiction turns upon the ownership or control by the United States of the reserved lands on which the licensed project is to be located. The authority to issue licenses in relation to navigable waters of the United States springs from the Commerce Clause of the Constitution. The authority to do so in relation to public lands and reservations of the United States springs from the Property Clause -- 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .'" 349 U.S. at 441- 43.

[FN10]. Id. at 445.

[FN11]. 426 U.S. at 539.

[FN12]. 601 F.2d 1080 (9th Cir. 1979)

[FN13]. 643 F.2d 585 (9th Cir. 1981).

[FN14]. 43 U.S.C. § 1765.

[FN15]. 643 F.2d at 605.

[FN16]. 738 F.2d 1074, 1077 (9th Cir. 1984).

[FN17]. 683 F.2d 1171, 1179 (8th Cir. 1982).

[FN18]. 480 U.S. 572 (1987).

[FN19]. 30 U.S.C. § 21 et seq. The Mining Law, which now pertains only to minerals such as gold, silver, copper, lead, etc. (sometimes referred to as "hardrock" minerals) provides that a claimant may locate claims for, and mine, such minerals on public lands open to operation of the Mining Law if the claimant has made a discovery of a valuable mineral deposit, even though the United States retains title to the land. The law also provides a process for the claimant to secure a patent to the land upon payment of a nominal fee, which passes legal title of the land to the claimant.

[FN20]. Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361, 1366 (1984).

[FN21]. 16 U.S.C. §§ 1451-1465.

[FN22]. 590 F. Supp. 1361, 1367 (1984).

[FN23]. 426 U.S. 167, 179 (1976).

[FN24]. The district court relied on two state cases, State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969, 974 (1976), and Brubaker v. Board of County Comm'rs, 652 P.2d 1050, 1059 (Col. 1982) for the proposition that state and local laws that merely impose reasonable conditions upon the use of federal lands may be enforceable, particularly where they are directed to environmental protection concerns. 590 F. Supp. at 1372 - 74.

[FN25]. Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985).

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[FN26]. Id. at 1081.

[FN27]. 328 U.S. 152 (1946).

[FN28]. 373 U.S. 379 (1963). As discussed infra, in Sperry, the Supreme Court enjoined the State of Florida from enforcing a state statute prohibiting the practice of law without a state bar license against an attorney practicing patent law in Florida under a license issued by the U.S. Patent Office pursuant to a federal statute.

[FN29]. 601 F.2d 1080 (9th Cir. 1979).

[FN30]. 768 F.2d at 1083 (citing 36 C.F.R. §§ 228.4-.5 (1984)).

[FN31]. Id.

[FN32]. 480 U.S. 572 (1987).

[FN33]. Id. at 581.

[FN34]. Id. at 583.

[FN35]. Id.

[FN36]. "For purposes of this discussion and without deciding this issue, we may assume that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands." Id. at 585.

[FN37]. Id. at 587.

[FN38]. Id. at 587-88.

[FN39]. Id. at 586. The Court's opinion also appeared to rely on assurances from the State's counsel (at oral argument) that the CCC would use permit conditions only to impose environmental regulation. Id. at n.2.

[FN40]. Id. at 589. The Court went on to find that regardless of whether Granite Rock's mining claims were situated within the "coastal zone," as defined by the CZMA, a question the Court saw no need to address, there was nothing in the CZMA that preempted state environmental regulation of mining on federal land. Id. at 593.

[FN41]. Id. at 593.

[FN42]. Id. at 594.

[FN43]. Eric T. Freyfogle, Granite Rock: Institutional Competence and the State Role in Federal Land Planning, 59 U. Colo. L. Rev. 475, 476 (Summer 1988) (hereinafter "Freyfogle").

[FN44]. John D. Leshy, Granite Rock and the States' Influence Over Federal Land Use, 18 Envtl. L. 99, 100 (Fall 1987) (hereinafter "Leshy").

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[FN45]. Id. at 103.

[FN46]. "Another noteworthy feature of the decision is the almost complete absence of citation to precedent in any of the opinions. This disregard is curious because a number of modern courts have confronted exactly the same issue ...." Id. at 101.

[FN47]. 480 U.S. at 604 (Powell, J., dissenting).

[FN48]. Indeed, other commentators appear to view the expansiveness of Granite Rock somewhat differently:
[T]he test for preemption will still vary by system and by resource. Neither the National Park Service nor the Fish and Wildlife Service are subject to the provisions of the NFMA and the FLPMA deemed dispositive in Granite Rock . . . . [T]he assumed preemptive effect of the FLPMA planning command could well lead courts to find preemption more readily on those lands. Further, preemption law will likely continue to be affected by the resource-by-resource traditions in public natural resources law. Given those traditions and differences in statutes applicable to several resources, the hardrock mineral holding of Granite Rock is not necessarily transferable to, say, a water or timber case.
1 George C. Coggins & Robert L. Glicksman, Public Natural Resources Law § 5.03 [1][d][v] at 5-33 (West Group 2000) (hereinafter "Coggins & Glicksman"). The same could be said of oil, gas, and mineral materials sold or leased by the United States.

[FN49]. 480 U.S. at 587.

[FN50]. Freyfogle at 487.

[FN51]. Leshy at 104. The State of California, perhaps in response to this suggestion, recently enacted a law and promulgated regulations that in fact require backfilling and reclamation of open pits resulting from hardrock mining under the Mining Law, at least in certain situations. Cal. Sen. Bill No. 22, enacted April 7, 2003 as 2003 Cal. Stat. Ch. 3; 14 Cal. Code Regs. § 3704.1. Although the stated purpose was to make at least one mining operation (the Glamis Imperial project) economically unprofitable (Press Release, Office of the Governor, Governor Davis Signs Legislation to Stop Proposed Gold Mine Near "Trail of Dreams" Sacred Site (April 7, 2003) (on file with BLM California State Office)), State officials characterized the regulations and law as environmental. See, e.g., Cal. State Mining & Geology Bd. Executive Officer's Report (December 12, 2002); Governor's Signing Message for Cal. Sen. Bill No. 483, To the Members of the California State Senate (September 30, 2002). While the state clearly intended that these requirements apply to operations on federal lands, the requirements have not been tested in court. The requirements do not apply to mineral materials (e.g., sand and gravel) operations.

[FN52]. 155 F.3d 1005 (8th Cir. 1998).

[FN53]. Id. at 1011.

[FN54]. Id. The ordinance read: "No new permits or amendments to existing permits may be issued for surface metal mining extractive industry projects in the Spearfish Canyon area." Id.

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at 1007.

[FN55]. The Lawrence County ordinance was not drafted by the County Commissioners, but was an initiated ordinance that became law when it was approved by voters. Id. at 1007 n.2.

[FN56]. Leshy at 103.

[FN57]. Id.

[FN58]. Id. at 103-104.

[FN59]. Freyfogle at 489 n. 52.

[FN60]. Coggins & Glicksman, § 5.03[1][d][v] at p. 5-32.2.

[FN61]. "[A]s a practical matter, most often the easiest (and cheapest) response to a potential jurisdictional dispute is to apply for the permit and consider litigating preemption issues only if the permit conditions are deemed unacceptable." Leshy at 108.

[FN62]. Lawrence County, whose Commissioners, as previously noted, did not draft the challenged ordinance, did not appeal the district court's decision finding the ordinance preempted by federal law, and in fact argued in the appeals court in support of the district court's order. 155 F.3d at 1008 n.3. The intervenor who appealed was a private landowner in the affected area. Id. at 1008.

[FN63]. John D. Leshy served as Solicitor of the U.S. Department of the Interior from 1993 to 2001.

[FN64]. Leshy at 112.

[FN65]. Freyfogle at 502 n. 98.

[FN66]. The authors appreciate the assistance of Kerry Shapiro, partner at Jeffer, Mangels, Butler, & Marmaro, LLP (and lead counsel for CEMEX in CEMEX, Inc. v. County of Los Angeles), for providing some of the background information in this section of the paper.

[FN67]. 30 U.S.C. §§ 601 et seq.

[FN68]. See 43 C.F.R. Part 3600.

[FN69]. 43 C.F.R. § 3601.5. Although subject to disposition pursuant to the Materials Act beginning in 1947, these types of minerals were not removed from the Mining Law until the enactment of the Surface Resources and Multiple Use Mining Act of 1955, 30 U.S.C. §§ 611-615, which amended the Materials Act.

[FN70]. 43 C.F.R. §§ 3601.21(a)(1) and (2).

[FN71]. 43 C.F.R. § 3601.6(d).

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[FN72]. 43 C.F.R. § 3601.11.

[FN73]. 42 U.S.C. § 4321 et seq.

[FN74]. Sand and gravel mining operations had been conducted on the land pursuant to a state permit continuously since 1972. After the Supreme Court's 1983 ruling in Watt v. Western Nuclear, 462 U.S. 36 (1983), that sand and gravel is reserved to the federal mineral estate under the Stock-Raising Homestead Act, 43 U.S.C. § 299, the United States sued the mining operator for trespass to the mineral estate.

[FN75]. BLM manages the mineral estate at Soledad Canyon pursuant to its "multiple use" land-use authority under FLPMA. BLM's land management plan for this area, i.e., the "South Coast Resource Management Plan," determined that continued aggregate mining is an appropriate land-use activity in the Soledad Canyon area.

[FN76]. The bid was submitted by CEMEX's predecessor-in-interest, Transit Mixed Concrete Co., (TMC). For simplicity, we will use the name "CEMEX" to refer to all of CEMEX's predecessors-in-interest in these transactions.

[FN77]. As previously stated, this was not a requirement imposed by the Materials Act or 43 C.F.R. Part 3600, BLM's regulations implementing that Act. It was based on a "memorandum of understanding" between BLM and the State of California reflecting BLM's policy that it would require its mineral materials contractors to comply with SMARA.

[FN78]. See 1977 WL 24872, *5 (Cal. A.G.) ("that the Legislature intended the SMARA to apply to mining operations on federal land" is clear from Public Resources Code section 2714 which "exempts surface mining operations conducted solely to protect a federal mining claim. Since one can only stake a federal mining claim on federal land, the inference is clear that the [SMARA] is intended to reach mining operations on federal land other than those minor activities conducted solely to protect federal mining claims.")

[FN79]. Cal. Pub. Res. Code § 2770.

[FN80]. Id. at § 2774.

[FN81]. Los Angeles County Code § 22.56.1270 et seq.

[FN82]. Id. at § 22.56.1300 (emphasis added).

[FN83]. Cal. Pub. Res. Code § 21061.

[FN84]. CEMEX, Inc. v. County of Los Angeles, No. CV-02-747 DT (FMOx) (C.D. Cal.), filed January 2002.

[FN85]. The City filed a second appeal to the California State Mining & Geology Board seeking to overturn the County's issuance of the surface mining permit pursuant to the Consent Decree. By order dated July 16, 2004, the SMGB denied, concluding that the "City has not raised any substantial issues with respect to the action taken by the lead agency [County] to

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approve . . . the permit to conduct surface mining operations."

[FN86]. City of Santa Clarita v. Los Angeles County Bd. of Supervisors, No. BSO91566 (Cal. Sup. Ct., filed July 30, 2004).

[FN87]. In late April 2004, the FWS proposed to designate a portion of the CEMEX project site as critical habitat for the Arroyo Toad, a federally listed endangered species under the Endangered Species Act. 69 Fed. Reg. 23254 (Apr. 28, 2004). The FWS was granted an extension of time, until March 2005, to make its designation of critical habitat for the Arroyo Toad. It remains to be seen whether this proposed listing will have any effect on CEMEX's authorized activities at the project site.

[FN88]. Freyfogle at 489 n.52.

[FN89]. The relationship of the Mining Law to state and local regulation has been noted: "the six-score year history of the federal Mining Law ... exudes state authority over Mining Law activities on federal land." Leshy at 101. See also, John D. Leshy, The Mining Law: A Study in Perpetual Motion 184 (Resources for the Future 1987): "[R]atification of [mining district and state and local government] regulations was one of the purposes uppermost in the mind of Congress when it adopted the federal mining law . . . ."

[FN90]. Since 1994, Congress has suspended the patenting process under the Mining Law, except for certain claims grandfathered as of that date.

[FN91]. The statute specifies that "Secretary" means the Secretary of the Interior, except regarding lands administered by the Secretary of Agriculture, in which case it refers to the Secretary of Agriculture. 30 U.S.C. § 601.

[FN92]. 30 U.S.C. § 601. The Act further provides for disposal to the highest responsible qualified bidder after public notice. 30 U.S.C. § 602.

[FN93]. This does not mean that BLM-designated tracts of public lands from which mineral materials sales are made are not otherwise open to entry under the Mining Law and other federal public land-use laws. BLM's mineral materials regulations provide that a contractual right to remove mineral materials from BLM mineral materials contract site "does not prevent other uses or segregate the land from the operation of the public land laws, including the mining and mineral leasing laws. However, such subsequent uses must not interfere with the extraction of mineral materials." 43 C.F.R. § 3602.12(c).

[FN94]. "When BLM designates tracts for competitive or noncompetitive sale of mineral materials, and notes the designation in the public land records, it creates a right to remove the materials superior to any subsequent claim, entry, or other conflicting use of the land, including subsequent mining claim locations." 43 C.F.R. §3602.12(a).

[FN95]. 318 U.S. 261, 284 (1943).

[FN96]. 314 U.S. 1, 13 (1941).

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[FN97]. 42 U.S.C. § 4321 et seq.

[FN98]. 42 U.S.C. § 7401 et seq.

[FN99]. 33 U.S.C. § 1251 et seq.

[FN100]. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819) (state cannot tax Bank of United States operations).

[FN101]. See Mayo v. United States, 319 U.S. 441 (1943) (state cannot collect inspection fees for fertilizer sold by Department of Agriculture).

[FN102]. See Hancock v. Train, 426 U.S. 167 (1976), and companion case, EPA v. State Water Res. Control Bd., 426 U.S. 200 (1976) (state cannot require permits for federal installations even when Congress has directed that those installations must comply substantively with the state regulations).

[FN103]. 352 U.S. 187 (1956) (per curiam).

[FN104]. Id. at 188-90.

[FN105]. 355 U.S. 534, 542-544 (1958).

[FN106]. Id. at 539.

[FN107]. Id. at 542-43.

[FN108]. Id. at 543.

[FN109]. 373 U.S. 379 (1963).

[FN110]. Id. at 385 (footnotes omitted).

[FN111]. Id.

[FN112]. 486 U.S. 174, 180 (1988) (emphasis added).

[FN113]. See Jefferson County v. Acker, 527 U.S. 423, 440 (1999); North Dakota v. United States, 495 U.S. 423, 435, 440 (1990).

[FN114]. A reporting requirement that was also at issue was found lawful by both the plurality and the dissent.

[FN115]. The swing vote in the case was Justice Scalia, who voted for the same result as the plurality opinion, but solely on Twenty-first Amendment grounds. 495 U.S. at 444.

[FN116]. Id. at 435 and n.7.

[FN117]. Id. at 440.

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[FN118]. Id. at 452.

[FN119]. Id. at 441.

[FN120]. 139 F.3d 984, 987 (4th Cir. 1998).

[FN121]. Id. at 989. The court added a footnote noting that the Supreme Court's decision in North Dakota confirmed the correctness of its holding: "In reaffirming Leslie Miller in the face of its holding that the North Dakota liquor control laws were a valid exercise of the state's power, the Court undoubtedly recognized the significant differences between North Dakota's laws and Arkansas' laws, insofar as their effects upon the decisional processes of the federal government are concerned. While the North Dakota regulations may have effectively altered the attractiveness of the bids placed by different suppliers through forced price increases, the regulations did not attempt to alter the criteria under which the federal government made its decision. Nor did those regulations prevent the federal government from selecting the bid it believed was most competitive or otherwise enable the state to second-guess the federal government's judgment as to who should supply the federal enclave. The contrast between the incidental effect of the North Dakota regulations on the federal government's decisional processes and the direct interference of the Arkansas regulations in Leslie Miller (and the Virginia regulations in the present case) with those processes is stark indeed." Id. at 990 n.7.

[FN122]. 940 F.2d 437, 441 (9th Cir. 1991).

[FN123]. Id. at 439.

[FN124]. Id. at 440.

[FN125]. Professor Freyfogle's approach would have local federal agency officials examine non-federal rules and determine whether to preempt them after "considering the potential detrimental consequences of their enforcement." Freyfogle at 496.

[FN126]. Id.

[FN127]. In just the CEMEX case alone, BLM stood to lose a minimum of $28 million in revenue had Los Angeles County's alleged delay and denial of CEMEX's permit application caused CEMEX to abandon its purchase. If state and local governments, through the permitting process, succeed in slowing down these programs, it may not be long before the cement industry, and other industries that depend on natural resource commodities, begin to factor the costs of state-permitting delays, the need to litigate state imposition of unreasonable state permit conditions, and/or the need to pay land-use exaction fees and other unreasonable expenses of doing business before state and local zoning commissions into their bids for such commodities, thereby devaluing the natural resources owned by the United States.

[FN128]. 43 U.S.C. § 1765.

[FN129]. Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9621(d)(2)(A), 9621(e).

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[FN130]. 16 U.S.C. § 1456(c)(3)(A).

[FN131]. 33 U.S.C. § 1341(a)(1).

[FN132]. See Granite Rock, 480 U.S. at 583 ("it is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity") (citing Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 718 (1985) ("Because agencies normally address problems in a detailed manner and can speak through a variety of means, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive")).

[FN133]. 5 U.S.C. §§ 701 et seq.

[FN134]. This would be similar to Professor Freyfogle's suggested approach. See n.125 supra.
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