

One theme in environmental law and policy over the past two years has been an increasing conflict between states and the federal government – with a range of states (particularly those with Democratic governors and legislatures) challenging the federal government on environmental matters and seeking to be more aggressive in protecting the environment.

One flashpoint for this conflict has been in the context of public lands, and there have been enough recent, important developments that I wanted to do an assessment of where we are and where we might go in terms of the legal space states may have to operate. More details after the jump, details which get fairly deep into the legal weeds.

The basic driver of the disputes has been between states wanting to provide stricter environmental regulation for activities on federal public lands (or even prohibiting certain activities on those lands), and the Trump Administration's desire to increase development on those lands, particularly energy development.

In theory the framework for resolving these disputes when it comes to federal public lands is fairly simple. At the most fundamental level, if the federal government wants to do something with its lands, the states cannot prevent that from happening, based on the Supremacy Clause of the Constitution (which makes federal law supreme over state law). However, the Supreme Court long ago held that so long as federal law is silent, states usually have regulatory authority over activities on federal lands. *Omaecheverria v. Idaho*, 246 U.S. 343 (1918). More generally, state law will apply on federal land unless federal law preempts the operation of state law – either through explicit language in the relevant federal statute, or because federal law broadly occupies the relevant field of law, or because federal law conflicts with state law on a particular provision or in a particular situation.

That still leaves a lot of room for discussion – for instance, what does it mean for state law to conflict with federal law? There is a lot of room for maneuver for courts in particular cases. That is where three recent cases provide some insights – two of which point towards in favor of broader state authority, and one in the other direction.

First is *Bohmker v. Oregon* – a case in which Oregon sought to regulate certain forms of gold mining in streams within the state. Much of that gold mining occurs on streams on federal lands, and is regulated on federal lands by federal law, the Mining Act of 1872. The miners argued that the state law was preempted by the federal law. The issue had also come up in California, where the state had passed a similar law – that law was [upheld](#) by the California Supreme Court against a preemption challenge. Likewise, the Ninth Circuit had upheld the Oregon law in *Bohmker* against a preemption challenge. At the end of April, the

US Supreme Court [denied certiorari](#). I [have previously stated](#) that I thought that if the Court was likely to consider the question of preemption here, it was most likely to do that by granting review in *Bohmker*. The fact that the Court didn't is, I think, a fairly strong signal that the Court will be taking a hands-off approach to claims that federal law preempts state law as it operates on federal lands.

Second is a US Supreme Court case that isn't, on the surface, about public lands at all – but in fact may have a major impact on preemption claims with respect to public lands. The case is [Virginia Uranium v. Warren](#), a challenge by a uranium mining company to a Virginia state law banning uranium mining in the state; the company argued that the state law was preempted by federal law that regulates nuclear safety. The company's preemption argument was fairly aggressive, given that the federal law does not regulate uranium mining on private lands – thus any preemption claim had to be an implicit one, based on either federal regulation occupying the field or a conflict between state and federal law. The Supreme Court rejected the preemption argument, but for our purposes what matters is the opinion authored by the three of the more conservative justices. That opinion, authored by Justice Gorsuch, rejected the company's preemption argument. In so doing, Gorsuch also appeared to call for significantly greater skepticism by federal courts of conflict preemption arguments based on an alleged conflict between the state law and the purposes of the federal law, and for a renewed focus on the text of the federal law as driving preemption. Overall, this approach [may well lead to courts being less willing to find preemption of state law on conflict grounds](#). And this matters in the context of federal public lands because most federal public lands statutes do not have provisions explicitly preempting state laws – so preemption is primarily driven by implicit preemption, either occupy the field or conflict preemption. Indeed, given the outcome in *Virginia Uranium*, it is now less surprising to me that the Court denied cert in the *Bohmker* case.

The third case is a federal district court case out of California, *US v. California* – where the federal government challenged the constitutionality of SB 50, a California state law that would have required people who acquired lands from the federal government to demonstrate that they had offered the state a right of first refusal to purchase the property. Otherwise, the landowner would not be able to record in the county land office the transaction where they acquired the land from the federal government – a crucial step to being able to use or develop the land commercially.

I had written before about how I thought there were plausible arguments that SB 50 [was not preempted by federal law](#) (either federal statutes on land management, or by the Property Clause of the federal Constitution). However, the district court struck down the statute on the grounds that it violated intergovernmental immunity – a constitutional

doctrine that generally prohibits states from regulating the federal government without permission from the federal government. The court held that because SB 50 regulates parties who do business with the government (parties who take property from the government) it effectively regulates the government itself.

There are a couple of problems with the district court analysis, however. First, there are a range of federal statutes that explicitly require the federal government to follow state laws or policies when disposing of federal land, including the Federal Land Policy and Management Act (FLPMA), 42 USC 1718. Those statutes could be understood as granting permission for state regulation by requiring federal land management agencies to comply with state laws regarding disposal of federal lands. But Supreme Court caselaw holds that only clear and unambiguous language will be understood as granting permission for state regulation. *EPA v. California*, 426 U.S. 200 (1976).

That, however, leads to the more fundamental problem with the district court analysis. Most any state regulation of activities on federal public lands can be understood as the state regulating the federal government, and therefore analyzed through the framework of intergovernmental immunity, requiring a clear and unambiguous statement of Congressional approval for state regulation. But that standard is inconsistent with the traditional standard for preemption of state law operating on federal lands – where silence by the federal government permits state regulation – a standard that is based on long-established precedent like *Omaecheverria*, and more recent Supreme Court decisions like *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987).

Indeed, the tension is clear by comparing the facts of the SB 50 case with those of *Granite Rock*. In the SB 50 case, the district court held it was improper to regulate a private party's recording of a land transfer from the federal government, since that was effectively regulation of the original transaction between the federal government and the private party. *Granite Rock* involved the question of whether the state could require environmental permits for mining activities by a private party on federal lands, where the mining activity occurred on an unpatented mining claim, a special form of easement transferred under the Mining Act to the private party by the federal government for mining purposes. In other words, both cases involved regulation of a private parties activities associated with land transfers from the federal government. This tension raises real questions about the way the district court applied intergovernmental immunity in the context of federal public lands management.

Finally, the district court decision in *US v. California* might well be overbroad. The court struck down the statute in its entirety as an unconstitutional regulation of federal

government activities. But as noted above, a range of federal laws (including some of the most relevant ones for disposal of protected federal lands, the kinds of lands the state was most concerned about) require the federal government to comply with state law when disposing of federal lands, see, e.g., 43 U.S.C. 1718. That language might (or might not) be enough to find congressional permission for federal regulation under intergovernmental immunity doctrine – for instance, it might not support direct regulation/permitting by the state of the relevant land transactions, but nonetheless require the federal government on its own to comply with the state requirements (such as offering a right of first refusal). See *EPA v. California*; *Hancock v. Train*, 426 U.S. 167 (1976) (cases finding that the Clean Air and Clean Water Acts do not authorize state permitting of air and water emissions from federal facilities, but do require those federal facilities to meet state standards). In other words, SB 50 may well be constitutional as applied to a range of land transactions, or for purposes of setting a regulatory standard that the federal government must meet. Alternatively, the state legislature could enact a new version of the statute that simply sets a regulatory standard that the federal government must meet under its own statutes, giving the state the right to acquire the lands if it wishes.

Overall, the tea leaves we have so far from the preemption cases indicate greater willingness by the Supreme Court to support state efforts to protect environmental resources on federal public lands. But one important question is whether the federal government tries to leverage the decision in *US v. California* into a broader attack on the use of preemption doctrine in this context, replacing it with an intergovernmental immunity analysis that is more hostile to state involvement in federal public lands management.