

# REGULATION OF ENERGY DEVELOPMENTS IN THE GREEN MOUNTAIN NATIONAL FOREST: IS VERMONT LAW PREEMPTED?

## INTRODUCTION

As a result of the "energy crisis" the development of new domestic energy sources has become a national priority.<sup>1</sup> Part of this effort has focused on the development of alternative energy sources, such as solar energy, as a means for decreasing our dependence on imported oil.<sup>2</sup> The federal government has aided the development of alternative energy sources by directly participating in energy projects<sup>3</sup> and also by indirectly providing economic incentives for their development.<sup>4</sup> Under the Reagan administration, however, active federal participation in energy projects has been questioned, and in some cases terminated.<sup>5</sup> In any event, no substantive federal energy laws have yet been repealed, and it is very likely that the federal government will remain a major influence in this nation's energy future.

Concurrent with this increased federal activity in the energy field is a growing sentiment that the states' rights doctrine, which was unsuccessfully used in the courts to block economic reforms in the 1930's,<sup>6</sup> has a valid application in the energy field.<sup>7</sup> This sentiment is particularly acute in the western states, where large tracts

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1. See Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901, 5902 (1976 & Supp. III, 1979).

2. *Id.* See also Stobaugh & Yergin, *Conclusion: Toward a Balanced Energy Program in ENERGY FUTURE: REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL*. 216 (Stobaugh & Yergin ed. 1979).

3. See Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§5902-5920 (1976 & Supp. III 1979) (Authorizes federal/private ventures for the development of alternative power sources and fuels).

4. See Public Utilities Regulatory Act (PURPA) 16 U.S.C. §§ 2601-2645 (Supp. III 1978) (creates financial incentives for small power production by requiring utilities to purchase power from small producers).

5. The Reagan administration has called for the abolition of the Department of Energy, which supervises most of the federal involvement in energy developments. It is by no means certain, however, that Congress will agree to this proposal. *N.Y. Times*, Jan. 30, 1981, at 1, col. 6. In any event, the federal government has already terminated its \$80 million dollar wind turbine project. *Burlington Free Press*, April 24, 1981 at 1, col. 2.

6. See, e.g., *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Federal government has the authority to regulate local labor relations of an interstate corporation); *United States v. Darby*, 312 U.S. 100 (1941) (Federal government can regulate minimum wages and maximum hours of workers).

7. See *Energy & States Rights*, *NATION* Sept. 11, 1976 at 208.

of federal lands contain enormous reserves of coal, gas and oil.<sup>8</sup>

This note will focus on a small manifestation of this controversy in Vermont. The controversy stems from a proposal by the Green Mt. Power Corporation to construct a meteorological measuring tower on Lincoln Ridge. This tower is intended to gather meteorological data which will be used to study the feasibility of constructing a large electrical generating wind turbine on Lincoln Ridge. A group of citizens concerned with the environmental impact of a wind turbine has involved a states' rights argument in legal proceedings designed to block construction of the meteorological tower.

### A. *Factual Background*

The Lincoln Ridge project has a complicated background. The meteorological tower itself is to be built on a site located at an elevation of 3930 feet.<sup>9</sup> The site, on Lincoln Ridge, is within the Green Mt. National Forest, which is federal land administered by the United States Forest Service.<sup>10</sup> Green Mt. Power has received a permit from the Forest Service to install the tower.<sup>11</sup>

A group of citizens formed an organization called the Save Lincoln Mountain Committee (SLMC) to oppose the installation of the tower. This group feels that any benefits from the tower are outweighed by environmental, social, and aesthetic considerations.<sup>12</sup> Moreover, SLMC is worried that once one tower is constructed, others will follow, possibly including wind turbines.<sup>13</sup>

Initially, the Department of Energy entered into an agreement with Green Mt. Power governing the construction and use of the tower.<sup>14</sup> Under this agreement, the Department of Energy was to buy the tower and pay for its construction.<sup>15</sup> Green Mt. Power was to provide access, security, and collection of the meteorological

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8. See Barry, *Reclamation of Strip-Mined Federal Land: Preemptive Capability of Federal Standards Over State Controls*, 18 ARIZ. L. REV. 385, 385-87 (1976).

9. *In re Green Mt. Power Corp. and U.S. Dep't of Energy*, Declaratory Ruling 120, at 1 (Vt. Env'tl. Bd., Nov. 14, 1980).

10. *Id.*, at 1-2.

11. U.S. Forest Service, Special Use Permit, User No. 4827 (Aug. 17, 1981).

12. The Times Argus, August 18, 1981 at 1, 8 col. 2.

13. Rutland Herald, Sept. 19, 1981, at 11, col. 1.

14. *In re Green Mt. Power Corp. and U.S. Dep't of Energy*, Declaratory Ruling 120, at 1-2 (Vt. Env'tl. Bd., Nov. 14, 1980).

15. *Id.*

data.<sup>16</sup> Under the Reagan administration, however, funding for wind generation has been cut, which means that the Department of Energy will not fund either the meteorological tower, or any possible wind generator.<sup>17</sup> In spite of this withdrawal of federal support, Green Mt. Power still intends to construct the meteorological tower and study the feasibility of constructing a wind turbine.<sup>18</sup>

### B. *Legal Background*

On July 15, 1980, SLMC petitioned for a declaratory ruling from the Vermont Environmental Board,<sup>19</sup> contending that Green Mt. Power could not begin any work before it had secured an Act 250<sup>20</sup> permit. Under Act 250, certain state administered criteria must be met by all projects constructed at elevations of more than 2500 feet.<sup>21</sup> The criteria are designed to reduce the environmental and social impacts of such projects.<sup>22</sup> Since the proposed site for the meteorological tower is at an altitude greater than 2500 feet, SLMC contended that the project must pass muster under Act 250.

The Environmental Board, however, declined to exercise jurisdiction over the project.<sup>23</sup> The Board characterized Green Mt. Power's involvement as "relatively minor,"<sup>24</sup> and concluded that the project was essentially a federal affair, since it involved federal money and land.<sup>25</sup> The Board continued by stating that the scope of state jurisdiction over projects within federal lands is limited, at least where the use of land is by the federal government.<sup>26</sup> The Board concluded that the supremacy<sup>27</sup> and property clauses<sup>28</sup> of

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16. *Id.*

17. Burlington Free Press, April 24, 1981 at 1, col. 2.

18. *Id.*

19. Green Mt. Power Corp. and U.S. Dep't of Energy, Declaratory Ruling 120, at 1 (Vt. Env'tl. Bd., Nov. 14, 1980). See Rutland Herald, August 27, 1980, at 1.

20. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1973 & Supp. 1981).

21. *Id.* § 6001.

22. See *id.* § 6086. The criteria relate to a variety of subjects, including air and water pollution, traffic generation, soil erosion, ability of localities to provide services, and conformance with local or regional plans.

23. *In re* Green Mt. Power Corp. and U.S. Dep't of Energy, Declaratory Ruling 120, at 4 (Vt. Env'tl. Bd., Nov. 14, 1980).

24. *Id.*, at 2.

25. *Id.*

26. *Id.*, at 3.

27. U.S. CONST. art. VI, cl. 2.

28. *Id.*, art. IV, § 3, cl. 2.

the United States Constitution establish the principle of federal control of federal programs and facilities, and as such, preempt conflicting state regulations.<sup>29</sup> On this basis, the Board held that an Act 250 permit was not necessary.

It is important to stress that at the time of the Board's decision, the Department of Energy had not withdrawn from the project. The fact that the Department of Energy has subsequently withdrawn is very significant to the legal issues involved. The only remaining federal involvement is that the project is to take place on federal land. Green Mt. Power will be paying for, erecting, and maintaining the meteorological tower. Thus, the project has now evolved from a federal affair on federal lands, with limited private involvement, to a private project occurring on federal land.

These facts raise the legal issue of the extent of state jurisdiction over private projects occurring on federal lands. The first aspect of this analysis is the extent of state and federal authority over federal lands under the property clause of the United States Constitution.<sup>30</sup> Closely related to this inquiry is the scope of state authority under a federal statute, enacted pursuant to the property clause, under which the United States Forest Service issued a federal land use permit to Green Mt. Power.<sup>31</sup>

The latter half of this note is devoted to an analysis of the legal issues which would have arisen if the Department of Energy had not withdrawn from the project. This aspect was addressed to an extent by the Environmental Board in its declaratory ruling, since at that time the Department of Energy was involved. However, the Board did not clearly delineate between the federal lands issue and the issue of Department of Energy involvement. Rather the Board appeared to view these two aspects of federal activity as cumulative; thus, the project was considered to be an entirely federal activity. In fact, the federal lands issue is separate from the Department of Energy's involvement. The former issue stems from the property clause, which governs the scope of state and federal authority over federal lands. The issue of the Department of Energy's involvement stems from the supremacy clause, and would involve the same analysis regardless of whether the project oc-

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29. *In re Green Mt. Power Corp. and U.S. Dep't of Energy, Declaratory Ruling 120*, at 3-4 (Vt. Env'tl. Bd., Nov. 14, 1980).

30. See *infra* text accompanying notes 37-76.

31. See *infra* text accompanying notes 77-88.

curred on federal lands.<sup>32</sup> The Department of Energy, prior to its withdrawal, was acting under a federal statute which does not derive its constitutional mandate from the property clause.<sup>33</sup>

There are two portions to the supremacy clause analysis of the Department of Energy's involvement. First, there is the issue of whether the statute under which the Department of Energy acted preempts conflicting state regulations.<sup>34</sup> Second, there is the issue of whether the Department of Energy's involvement would have made the project purely federal, and as such, whether state regulation of the project would be void under an intergovernmental analysis.<sup>35</sup>

In summary, the legal issues are as follows: First, under the property clause, can Vermont regulate private activities on federal land? Second, does the federal statute, enacted pursuant to the property clause, and which authorizes the United States Forest Service to issue permits for private use of federal lands, preclude state review of these activities? Third, does the statute under which the Department of Energy acted preempt state environmental regulations? Finally, would the Department of Energy's involvement make the project purely federal, and thus immune from state regulation because of intergovernmental immunity?

#### I. EXTENT OF STATE JURISDICTION OVER DEVELOPMENTS WITHIN THE GREEN MOUNTAIN NATIONAL FOREST

Since the proposed meteorological tower lies within the Green Mt. National Forest, the initial inquiry focuses on whether Vermont can exercise its police power over activities on federal land. This inquiry is divided into two portions. First, there is the question of the extent of state jurisdiction under the property clause of the United States Constitution. Second, and related to the first inquiry, is the scope of state authority under a federal statute, enacted pursuant to the property clause, under which the U.S. Forest

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32. The fact that the Department of Energy's wind energy program was not dependant upon the use of federal lands is illustrated by the success of one project. Vermont's first modern wind generator became operational in spite of the withdrawal of the Department of Energy from an agreement similar to the one with Green Mt. Power. The agreement was with a group of private investors who successfully completed a wind turbine project on private land. Rutland Herald, Dec. 31, 1981 at 1, col. 1.

33. See *infra* text accompanying notes 110-21.

34. See *infra* text accompanying notes 103-50.

35. See *infra* text accompanying notes 151-63.

Service issued a land use permit to Green Mt. Power.<sup>36</sup>

### A. State Jurisdiction Under the Property Clause

#### 1. Distinction Between Article I and Article IV Lands

There are two constitutional foundations for federal authority over national lands. Under the article I property clause<sup>37</sup> the federal government can "exercise exclusive Legislation in all cases whatsoever . . . over all places purchased by the consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings." Under the article IV property clause,<sup>38</sup> the federal government "shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

Thus, there is an important distinction between the types of federal property. Under the article I property clause, the national government has exclusive jurisdiction over enclaves used for specific enumerated purposes; military installations for instance. While the article IV property clause can also apply to article I property, by no means does the article I property clause apply to all article IV lands. In order for article I to apply, the lands involved must be used for one of the enumerated purposes.<sup>39</sup> The majority of federal lands fall within the article IV property clause, as they are not used for forts, dock-yards, and other like purposes, but are used for grazing, timber management, mineral exploration, recreation and other similar uses.<sup>40</sup>

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36. The issue of state review of activities of U.S. Forest Service permit holders is also relevant to other activities occurring within the Green Mt. National Forest. For example, the Sugarbush ski area of Warren and Fayston, Vermont, has proposed an extensive expansion involving construction of new skiing facilities and housing. The expansion will be located partially within the Green Mt. National Forest. A question has arisen as to whether Act 250 is applicable to the portion of the expansion located on federal land. Because Act 250 does apply to the private land portion, Sugarbush has consented to undergo Act 250 review for the entire project. The U.S. Forest Service will have to issue a permit for the use of the federal land. *The Sugarbush Expansion*, 2 VT. ENVTL. REP. 1 (July-Aug. 1981). For further discussion of constitutional principles relating to these types of activities, see *infra* text accompanying notes 37-76 and note 64.

37. U.S. CONST. art. 1, § 8, cl. 17.

38. U.S. CONST. art. IV, § 3, cl. 2.

39. See generally *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 539 (1885); Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976).

40. Of 714 million acres of federal land, approximately 704 million acres are article IV lands. Barry, *supra* note 8 at 396 n.51. (citing BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF

An examination of the Vermont law on this subject, contained in title one, exemplifies this distinction.<sup>41</sup> Sections 551 and 552 cede exclusive jurisdiction, except the right of civil and criminal service of process, over lands purchased by the federal government for the establishment of national forests within Vermont. Under section 555 Vermont ceded to the national government the jurisdiction to "make and enforce such laws, rules and regulations as the United States shall deem necessary for the administration, protection and management of such national forests." Section 556 provides further that "in all other respects, the jurisdiction over person and property within such territory shall not be changed by reason of such acquisition of title to such lands by the United States."

The Green Mountain National Forest is clearly article IV land. This is evident from the fact that it is not used for any of the purposes enumerated in the article I property clause. Furthermore, the Vermont statutes distinguish between article I lands and lands to be used for the establishment of a national forest. Moreover, the terms of the Vermont statute, section 555, closely parallel the like provision of the article IV property clause.

## 2. Federal Power with Respect to Article IV Lands

Until quite recently the states had full governmental jurisdiction over article IV lands, with several important exceptions.<sup>42</sup> This general rule has its origins in two early United States Supreme Court cases, *Mayor of New Orleans v. United States*,<sup>43</sup> and *Pollard v. Hagen*.<sup>44</sup> Both of these cases involved property which had been held as common lands under the laws of France and Spain, but which were transferred to the United States in the early part of the nineteenth century. As new states were created out of the territory acquired by the Louisiana Purchase, the question arose in both of the above cases whether the United States or the newly created states had governmental jurisdiction over these common lands.

In both of these cases the Court held that the states had gov-

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INTERIOR, PUBLIC LAND STATISTICS, table 7, at 10 (1975).

41. VT. STAT. ANN. tit. 1, §§ 551-556 (1972 & Supp. 1981).

42. See *infra* text accompanying notes 49-63.

43. 35 U.S. (10 Pet.) 662 (1836).

44. 44 U.S. (3 How.) 212 (1845).

ernmental jurisdiction over the lands.<sup>45</sup> In each case the Court clearly enunciated the governing principles for its decision. First, under the doctrine of enumerated powers the United States has only those powers expressly delegated to it.<sup>46</sup> It followed that since the national government had exclusive jurisdiction over specified lands under the article I property clause, it could not have exclusive jurisdiction over lands not used for purposes specified in the article I property clause.<sup>47</sup> Second, if the federal government retained exclusive jurisdiction over these common lands when the new states were created, these states would be at a disadvantage compared to the original thirteen states, whose common lands established by the English Crown became state property upon Independence.<sup>48</sup>

Two implications stemmed from these cases. First, federal government jurisdiction was exclusive over article I lands. Second, with respect to article IV lands, the states have general governmental jurisdiction and the national government had the same powers and duties as a private proprietor.<sup>49</sup> This is the genesis of what became known as the "classic article IV property clause doctrine."

The classic article IV property clause doctrine, that the states have governmental jurisdiction over article IV lands while the federal government merely has a proprietary interest, became subject to several notable exceptions which limited the states' powers over article IV lands. First, as a proprietor of article IV lands, the United States has significant powers. One of these powers includes the right to dispose of federal property free from state interference.<sup>50</sup> Thus, it is recognized that state statutes of limitation and

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45. 44 U.S. (3 How.) 212, 221-24 (1845); 35 U.S. (10 Pet.) 662, 735-37 (1836).

46. 44 U.S. (3 How.) at 223; *see also* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-06 (1819); 35 U.S. (10 Pet.) at 376.

47. 44 U.S. (3 How.) at 223; 35 U.S. (10 Pet.) at 732-37.

48. 44 U.S. (3 How.) at 223; 35 U.S. (10 Pet.) at 737.

49. Engdahl, *supra* note 39, at 293-97. Like a private owner, the government is holding the land in a proprietary, and not a governmental capacity. For example, when the federal government owns land for a post office, it is holding the land in order to carry out a governmental function. On the other hand, when the federal government sells timber off of a national forest, it is not carrying out a governmental function, but is acting like a private landowner.

50. With respect to the Lincoln Ridge project, the U.S. Forest Service is not disposing of federal property in a legal sense by issuing a use permit to Green Mt. Power Co. *See* 43 C.F.R. § 2801.1-1 (1979). "No interest granted by the regulations in this part shall give the holder (of a right-of-way permit) thereof any estate of any kind in fee in the lands. The

state laws creating or disregarding equitable or inchoate rights are given no effect.<sup>51</sup> A related exception to the classic doctrine is that federal laws and activities designed to protect the federal property interest, although proprietary in nature, are preemptive of conflicting state law.<sup>52</sup>

Another major exception to the classic doctrine, apart from the ones arising from the unique nature of federal proprietorship, arose when the federal government used article IV lands to effectuate a power expressly enumerated in the federal Constitution.<sup>53</sup> In *Kohl v. United States*,<sup>54</sup> the United States Supreme Court held that state consent to a federal land purchase necessary for a post office was not required since consent indicates a right to withhold such consent, which would impair the ability of the federal government to carry out an enumerated power, namely; maintenance of a postal system.<sup>55</sup> In other words, when the federal government intends to use land for an enumerated purpose, the article IV property clause does not protect state interests.

This exception was clearly explained in *Ft. Leavenworth Railroad Co. v. Lowe*,<sup>56</sup> where the Court also expressly reaffirmed the

interest granted shall consist of an easement, license, or permit in accordance with the terms of the applicable statute . . ." *Id.*

51. See *Broder v. Water Co.*, 101 U.S. 274 (1879) (nuisance action to abate use of a canal across plaintiff's property not actionable when plaintiff is a transferee of the federal government which had previously granted an easement for use of the canal); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1872) (action for ejection of an adverse possessor; state statute of limitations inapplicable where the plaintiff holds a federal grant for the property); *Irvine v. Marshall*, 61 U.S. (20 How.) 558 (1858) (purchase of public land by an agent creates a resulting trust in favor of the principle even though the statutes of the territory have abolished all resulting trusts).

52. *Hunt v. United States*, 278 U.S. 96 (1928) (federal government has the power as proprietor of public lands to reduce the numbers of an overpopulated deer herd which was threatening public land, independent of state game laws); *United States v. Alford*, 274 U.S. 264 (1927) (federal statute requiring extinguishing of open fires on federal land applied to open fires on private property adjacent to the federal property); *Camfield v. United States*, 167 U.S. 518 (1897) (federal government has the power as proprietor of public lands to cause removal of fences erected on private land which blocked access to the federal property).

53. This exception to classic property clause doctrine has its origins in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), where Maryland attempted to tax the activities of a bank created by the federal government. Chief Justice Marshall said that the powers of the federal government are limited to those enumerated in the Constitution, and those means "necessary and proper" to carrying out an enumerated power. *Id.* at 405-06, 412-424. Within this sphere of action the federal government is free from state regulation under the supremacy clause.

54. 91 U.S. 367 (1875).

55. *Id.* at 372.

56. 114 U.S. 525 (1885).

classic article IV property clause doctrine. In *Ft. Leavenworth*, the United States operated a military installation on article IV lands. The State of Kansas attempted to tax the property of a private corporation located wholly within the federal enclave. The Court pointed out that insofar as the land was used for military purposes (an enumerated power), the state possessed no general governmental jurisdiction over the property.<sup>57</sup> Yet, the Court reaffirmed the classic doctrine in stating that the federal land, "unless used as a means to carry out the purpose of the government, is subject to the legislative authority and control of the states equally with the property of private individuals."<sup>58</sup> In addition, the Court said that a subsequent cession of exclusive jurisdiction by Kansas was valid only to the extent that the property was used to effectuate an enumerated power of the national government.<sup>59</sup> When the enumerated use ceased, full jurisdiction was to revert to the state.<sup>60</sup> Finally, the Court found that although the property was being used for an enumerated purpose, Kansas could still enforce the tax because it did not interfere with that use.<sup>61</sup>

The classic article IV property clause doctrine retained full validity well into the twentieth century.<sup>62</sup> A recent United States Supreme Court decision, however, has negated most of the classic doctrine by giving the federal government broad, exclusive jurisdiction over article IV lands.<sup>63</sup>

Before turning to that case, however, it is first necessary to consider the Lincoln Ridge project in light of the exception to the classic doctrine which gives the federal government broad jurisdiction over article IV lands which are used for an enumerated pur-

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57. *Id.* at 527, 531.

58. *Id.* at 531.

59. *Id.* at 542.

60. *Id.*

61. *Id.*

62. *See, United States v. Boyd*, 378 U.S. 39 (1964) (property and activities of private persons on article IV land are subject to taxation by the states); *Wilson v. Cook*, 327 U.S. 474 (1946) (where land owned by the United States was part of the forest reserve, state had jurisdiction); *Silas Mason Co. v. Tax Comm'n of Washington*, 302 U.S. 186 (1937) (state reservation of right to serve process within federal lands is construed to include full governmental jurisdiction, so long as federal enumerated powers are not interfered with); *Colorado v. Toll*, 268 U.S. 228 (1925) (state can regulate traffic within a national park as a power not ceded by the state); *Kansas v. Colorado*, 206 U.S. 46 (1907) (states have power to regulate arid land reclamation within federal property).

63. *See infra* text accompanying notes 69-76.

pose.<sup>64</sup> If the Department of Energy had remained involved in the project, a strong argument could have been made that the federal government was acting within its enumerated powers, thus bringing it within the above exception to the classic doctrine.<sup>65</sup>

Analysis under this exception, however, closely parallels the analysis necessary to determine the preemptive effect of the federal statute under which the Department of Energy acted.<sup>66</sup> In brief, the preemptive effect of this statute depends in large part upon whether it falls within the enumerated powers of the federal government.<sup>67</sup> To the extent that it does, the Department of Energy's involvement would clearly have brought the Lincoln Ridge project within this exception to the classic property clause doctrine. Since preemption analysis encompasses the inquiry into enumerated powers, this discussion is saved for that part of this note.<sup>68</sup> In sum, it can be said that if the federal statute has preemptive effect, then the Lincoln Ridge project would have fallen within the "enumerated powers" exception to the classic property clause doctrine.

In any event, the fine distinctions in property clause analysis are blurred by *Kleppe v. New Mexico*.<sup>69</sup> In *Kleppe*, the issue was whether the Federal Wild Free Roaming Horses and Burros Act<sup>70</sup> prevailed over conflicting state law concerning a problem of wild

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64. The proposed Sugarbush expansion also presents the issue of the applicability of Vermont law (Act 250) to the activities of a U.S. Forest Service land use permit holder. See *supra* note 36. Under classic property clause doctrine, the proposed Sugarbush project is subject to Vermont's jurisdiction because the use of federal lands in this situation does not meet any of the exceptions to the classic doctrine. The United States is not disposing of any property since Sugarbush will use the land under a use permit, and title will remain with the federal government. Nor is the activity "protecting" the federal property interest. Finally, although a commerce clause argument probably could be made in order to show that the use is pursuant to an enumerated power, at least one authority states that making provision for public recreation is not an objective within the scope of any federal enumerated power. Engdahl, *supra* note 39, at 314 n.140.

65. See *infra* text accompanying notes 105-21.

66. *Id.*

67. Congress may rely upon the necessary and proper clause, U.S. CONST. art. 1, sec. 8, cl. 18, or any other provision of the constitution as authority for legislation authorizing and regulating private activities upon federal land. However, in such a circumstance the fact that the activity is on land held under the basic title of the United States is wholly irrelevant. See Landstrom, *State and Local Government Regulation of Private Land Using Activities on Federal Lands*, 7 NAT. RESOURCES LAW. 77, 79-80, (1976).

68. See *infra* text accompanying notes 105-21.

69. 426 U.S. 529 (1976).

70. 16 U.S.C. §§ 1331-1340 (1976).

burros on federal land.<sup>71</sup> The United States Supreme Court upheld the application of the federal law in very broad terms.<sup>72</sup> The Court could easily have upheld the federal statute on the grounds of protecting federal lands, or that the burros were federal property, and hence only the federal government could dispose of them.<sup>73</sup> Such a decision would have preserved the classic property clause doctrine (and thus assuage state concerns) while upholding federal power. But, instead, the Court said that article IV gave Congress "complete power" over public lands,<sup>74</sup> and for the first time expressly tied the supremacy clause to an exercise of Congressional power under the article IV property clause,<sup>75</sup> thus giving the federal government the power to exclude state review of federal proprietary actions.<sup>76</sup>

### B. *Scope of State Jurisdiction Under the Federal Land Policy and Management Act of 1976*

Since *Kleppe* gave the federal government the power to exclude state review of federal actions relating to national lands, the next inquiry is whether Congress exercised that power in the statute under which the United States Forest Service acted in issuing a permit to Green Mt. Power. Under the Federal Land Policy and

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71. In *Kleppe*, the problem stemmed from wild burros which were interfering with the livestock operations of a rancher who used federal lands. Pursuant to the normal practice, the rancher contacted personnel of the New Mexico Livestock Board, who entered the federal property, removed the burros, and sold them at public auction under the authority of the New Mexico Estray Law, N.M. STAT. ANN. § 47-14-1 (1966).

Under the Federal Wild Free Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1976), the Secretary of Interior, through the Bureau of Land Management, is directed to protect and manage wild horses and burros on federal lands. *Id.* at §1333.

After the sale of burros by the New Mexico Livestock Board, the Bureau of Land Management directed the Board to recover the animals, and return them to the federal property. Consequently, the State of New Mexico, the New Mexico Livestock Board, the Board's director, and a purchaser of three of the burros filed a complaint in the United States District Court of New Mexico seeking a declaratory judgment that the federal law was unconstitutional and an injunction against its enforcement. *Kleppe*, 426 U.S. at 533-35.

72. *Kleppe v. New Mexico*, 426 U.S. 529, 539-43 (1976).

73. See Engdahl, *supra* note 39 at 354.

74. *Kleppe*, 426 U.S. at 439-40 (1976).

75. Engdahl, *supra* note 39 at 354.

76. It is hard to gauge the effect of *Kleppe* on any Act 250 review of the proposed Sugarbush expansion. Although the Court in *Kleppe* did state that it was limiting its opinion to the facts at hand, its use of broad language concerning the power of the federal government under the article IV property clause poses problems for Act 250 jurisdiction. Perhaps the Court was not aware of the broad effects of its remarks. See Engdahl, *supra* note 39 at 351, where it is suggested that the New Mexico Attorney General did not properly address the traditional property clause doctrine.

Management Act of 1976<sup>77</sup> (hereinafter cited as "Federal Land Act"), the Secretary of Agriculture is authorized to issue "rights of way"<sup>78</sup> upon national forest lands for "systems of generation, transmission, and distribution of electric energy . . ."<sup>79</sup> Green Mt. Power needs this grant of authority in order to utilize the national forest land.<sup>80</sup> Under the Federal Land Act it is explicitly stated that:

[e]ach right-of-way shall contain (a) terms and conditions which will (i) carry out the purposes of this Act . . . (ii) minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) *require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (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.*<sup>81</sup>

Thus, on the face of the statute it is clear that Congress intended right of way users, such as Green Mt. Power, to meet the standards of state environmental and utility laws. Whether or not this requires actual compliance with the state permit process or whether the substantive standards alone must be met is not clear.<sup>82</sup> It is clear, however, that compliance with state standards for air and water quality, environmental protection and powerplant siting is required, as long as the state standards are more stringent than applicable federal standards. It is evident that Act 250 and Vermont law governing Public Service Board jurisdiction fall within the gambit of specified state laws,<sup>83</sup> and a good argument can be

77. 43 U.S.C. §§ 1701-1782 (1976).

78. 43 U.S.C. § 1702(f) (1976) defines the term right-of-way as including "an easement, lease, permit or license to occupy use, or traverse public lands granted for the purpose listed in subchapter V [issuance of rights-of-way permits] of this chapter."

79. 43 U.S.C. § 1761 (1976).

80. Brief for the Respondent at 4, *In re Green Mt. Power Corp. and United States Department of Energy*, Declaratory Ruling #120 (Vt. Env'tl. Bd. August 13, 1980). Green Mt. Power was issued this authority in a permit granted by the U.S. Forest Service. U.S. Forest Service, Special Use Permit, User No. 4827 (Aug. 17, 1981).

81. 43 U.S.C. § 1765 (1976) (emphasis added).

82. For further discussion of the question concerning substantive as compared to procedural and substantive compliance, see *infra* text accompanying notes 159-63.

83. 43 U.S.C. § 1765 (1976) requires right-of-way permit holders to comply with state air and water quality standards, and standards relating to public health and safety, environmental protection, and powerplant siting. Act 250 easily falls within this list of applicable

made that Vermont's laws are more stringent.<sup>84</sup> If Vermont's standards are more stringent, it is logical that not only its substantive standards be met, but also all procedural requirements, as the Vermont agencies administering these strict standards would be more familiar than federal agencies in administering them.

Moreover, the legislative history of the Federal Land Act governing issuance of rights-of-way clearly shows Congressional intent to submit users to state environmental review, particularly with respect to powerplant siting. In the Joint Statement of the Committee of Conference,<sup>85</sup> it is reported that the conferees adopted the House requirements that right-of-way users meet state standards for environmental protection and powerplant siting, if the standards are more stringent than federal standards.<sup>86</sup> Furthermore, in debate over right-of-way conditions, the House specifically inserted the word "siting" in the list of state legal standards which must be met by right-of-way users.<sup>87</sup> Finally, it is noteworthy that the new

state laws. First, it is state law establishing standards for "environmental protection." Second, it has criteria relating to air and water quality standards. VT. STAT. ANN. tit. 30, § 248 (Supp. 1980), requiring the Public Service Board to issue a "certificate of public good" for new powerplants also falls within the category of state laws enumerated in 43 U.S.C. § 1765 (1976). First, it is a powerplant "siting" law in that it requires powerplants to meet specified criteria, some of which relate to the physical impact of a new generating facility. Second, it also contains criteria relating to environmental considerations, and thus is a state law relating to environmental protection. VT. STAT. ANN. tit. 30, § 248 (Supp. 1980).

84. Under 43 U.S.C. § 1765(b) (1976) the Secretary of Agriculture is authorized to condition a right-of-way permit by requiring location of the right-of-way in such a manner as causes the least damage to the environment, taking into account feasibility of such a condition. Also, The National Environmental Policy Act, (NEPA) 42 U.S.C. §§ 4321-4361 (1976 & Supp. III, 1979) requires a federal agency engaging in a major activity significantly affecting the human environment to prepare a detailed statement listing the environmental impact of the activity, and possible alternatives, with their environmental impacts. *Id.* § 4332. There is no requirement that the federal agency choose one of the lesser environmentally damaging alternatives. Rather, NEPA is designed to provide full disclosure of environmental impacts of federal activities in order to enlighten decision-making.

In contrast to these federal requirements is Vermont law, which requires compliance with affirmative environmental criteria before a permit or certificate will be issued. In this positive requirement Vermont law is definitely more stringent than federal law. Furthermore, the wide range of considerations addressed by Vermont law, especially Act 250, far transcends the scope of the federal laws. It is clear that Vermont law meets the 43 U.S.C. § 1765 (1976) threshold of being stricter than federal law.

85. H.R. CONFERENCE REP. No. 94-1724, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6228.

86. *Id.* at 6236.

87. 122 CONG. REC. 23473-74 (1976). Congressional concern over compliance with state powerplant siting laws is evident by the debate and adoption of the amendment reprinted below:

Mr. SEIBERLING. Mr. Chairman, with respect to the amendment, it states that "Each right-of-way shall contain \*\*\* terms and conditions which

statute concerning powerplant siting on federal lands replaced an older statute regarding the same subject which made no mention whatsoever about compliance with state laws.<sup>88</sup>

In summary, it is clear that the Federal Land Act obviates *Kleppe* insofar as it shows clear Congressional intent to require right-of-way users of national forests, particularly with respect to power plants, to comply with state environmental and siting laws. Although it is not clear whether this entails actual compliance with Vermont's permit procedures, a good argument can be made that it does.

## II. THE EFFECT OF DEPARTMENT OF ENERGY INVOLVEMENT ON THE APPLICABILITY OF VERMONT LAW

In its declaratory ruling, the Environmental Board held that Act 250 was not applicable to the Lincoln Ridge project because it involved federal activity on federal land.<sup>89</sup> At the time the Environmental Board rendered its decision, the Department of Energy had not yet withdrawn from the project. The following part of this note analyzes the impact of the Department of Energy's involvement on the applicability of Vermont law to the Lincoln Ridge project. Although the withdrawal of the Department of Energy renders much of this analysis moot, it is included both as a guide for future controversies involving state and federal relations and as a critique of the Environmental Board's ruling.

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will" - "assure compliance with State standards for public health and safety, environmental protection, and construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards;"

However, that does not apply to "siting." That only requires compliance with State standards for rights-of-way, and it seems to me that in view of the colloquy that we had with respect to my previous amendment, if the gentleman is going to do what I understood him to say the amendment would do, the word, "siting," must be inserted in the last portion of this amendment in front of the word, "construction." If the word, "siting," were inserted, then I would have no problems with this amendment . . .

Mr. MELCHER. Mr. Chairman, it would be repetitious, but I find no objection to it . . .

The amendment, as modified, was agreed to.

88. See 16 U.S.C. § 522 (1976), which was repealed in 1976 by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).

89. *In re Green Mt. Power Corp. and U.S. Dep't of Energy*, Declaratory Ruling 120, at 3-4 (Vt. Env'tl. Bd., Nov. 14, 1980).

A. *Sources of Federal Superiority: The Preemption and Intergovernmental Immunities Doctrines*

In its ruling that the Lincoln Ridge project involved federal activity on federal lands, the Environmental Board did not clearly delineate between the federal lands and federal activity issue.<sup>90</sup> Moreover, the Environmental Board, in discussing the federal activity aspect of this case did not discuss in depth the doctrines which give activities of the federal government superiority over state law.<sup>91</sup> There are two such doctrines which are applicable here: preemption and intergovernmental immunities.

Both doctrines stem from the supremacy clause, which states that federal laws enacted pursuant to the federal constitution are the "supreme law of the land,"<sup>92</sup> and which has been interpreted to mean that inconsistent state laws are void.<sup>93</sup> Although both the preemption and intergovernmental immunities doctrines have similar roots, they are conceptually different in their application.

The preemption doctrine arises where a state law regulates a subject matter which is also regulated by the federal government under a federal statute. For instance, past preemption cases have involved the concurrent federal/state regulation of subjects as diverse as fruit marketing,<sup>94</sup> oil tanker design,<sup>95</sup> grain warehouses,<sup>96</sup> and control of subversive activities.<sup>97</sup> Under the preemption doctrine, the federal statute is scrutinized to determine whether Congress intended to "preempt" state law which also regulates the subject matter covered by the federal statute.<sup>98</sup> In this way, the inquiry is focused on the effect of the applicable federal statutes on state law.

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90. See *supra* text accompanying notes 23-33.

91. The Environmental Board merely cited two cases which are not directly applicable to this legal issue. The Board cited *Kleppe v. New Mexico*, 426 U.S. 529 (1976) which deals with the extent of federal authority over federal lands, see *supra* text accompanying notes 69-77, and *Citizens v. Prouty*, 122 Vt. 443, 176 A.2d 751 (1961) which involved Federal preemption of Vermont Law concerning hydroelectric facilities. *In re Green Mt. Power Corp. and U.S. Department of Energy, Declaratory Ruling 120*, at 3-4 (Vt. Envtl. Bd., Nov. 14, 1980).

92. U.S. CONST. art. VI, cl. 2.

93. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

94. *Florida Lime and Avocado Growers Inc. v. Paul*, 373 U.S. 132 (1963).

95. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

96. *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947).

97. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

98. See *infra* text accompanying notes 122-150.

The doctrine of intergovernmental immunities differs from the preemption doctrine in that the former is involved where a state attempts to regulate an affirmative federal activity. For instance, past cases have involved state regulation of pollution by federal installations,<sup>99</sup> the application of state pricing policies for milk purchased by the federal government,<sup>100</sup> and the extraction of state inspection fees for federally owned fertilizer.<sup>101</sup> Under this doctrine, a state cannot regulate, or otherwise interfere with, a "federal activity," unless there is clear Congressional intent to the contrary.<sup>102</sup> In sum, the focus of the intergovernmental immunities doctrine is whether a state law interferes with an activity of the federal government, as opposed to the preemption doctrine, which is focused on the compatibility of state law with a federal statute.

### B. *Application of the Preemption Doctrine to the Lincoln Ridge Project.*

Preemption analysis of the Lincoln Ridge project involves an analysis of the effect of two federal statutes. First, there is the question of whether the statute under which the Department of Energy acted, the Nonnuclear Research and Development Act of 1974,<sup>103</sup> preempts state regulation of programs established under it. Second, under the National Environmental Policy Act (NEPA),<sup>104</sup> the Department of Energy, before proceeding with any active involvement, would have had to meet specified procedures designed to minimize the environmental impact of its activities. Thus, the question would have arisen as to whether NEPA preempted Vermont law.

#### 1. Preemptive Capability of Department of Energy Activity

Before an exercise of federal power can preempt a state law, that power must have "preemptive capability."<sup>105</sup> Under the doctrine of enumerated powers first enunciated in *McCulloch v. Maryland*,<sup>106</sup> the federal government is supreme only within that sphere

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99. *Hancock v. Train*, 426 U.S. 167 (1976).

100. *Paul v. United States*, 371 U.S. 245 (1963).

101. *Mayo v. United States*, 319 U.S. 441 (1943).

102. *Hancock v. Train*, 426 U.S. at 198.

103. 42 U.S.C. §§ 5901-5920 (1976 & Supp. III 1979).

104. 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979).

105. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 56-57 (1973).

106. 17 U.S. (4 Wheat.) 316 (1819).

of activity which effectuates an enumerated power of the national government. Although Congress can use an enumerated power to effectuate an extraneous end,<sup>107</sup> that exercise of federal power lacks preemptive capability over conflicting state law.<sup>108</sup> Thus, preemptive capability exists only where the exercise of federal power is pursuant to a constitutionally enumerated end.<sup>109</sup>

Turning to the Lincoln Ridge project, it is clear that the Department of Energy was acting under a federal statute which gave its acts preemptive capability over inconsistent state laws. The Lincoln Ridge Project is a minute manifestation of the Nonnuclear Energy Research and Development Act of 1974.<sup>110</sup> This Act includes a Congressional finding that the nation is suffering from a shortage of environmentally acceptable forms of energy and that the urgency of the problem will require commitments equal to that of the Manhattan and Apollo projects.<sup>111</sup> The Act requires the development of a comprehensive plan to develop short, middle, and long term solutions.<sup>112</sup> To this end the former Energy Research and Development Agency<sup>113</sup> is authorized to engage in joint federal/private projects to develop environmentally sound energy sources.<sup>114</sup> The inquiry here is whether there is a constitutionally enumerated source of power for this huge undertaking.

Even a cursory constitutional analysis shows that the Nonnuclear Research and Development Act was enacted pursuant to several of the enumerated powers of the federal government. First, under the commerce clause, the federal government has the power to "regulate commerce . . . among the several states."<sup>115</sup> Although there is no overt indication that the Nonnuclear Research and Development Act was enacted pursuant to the commerce clause, the

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107. *King v. Smith*, 392 U.S. 309 (1968) (the federal Aid to Families With Dependent Children (AFDC) program is based upon a scheme of cooperative federalism which the states are not required to accept); *United States v. Darby* 312 U.S. 100 (1941) (congress may use its commerce clause power to regulate the minimum wages and maximum hours of intrastate activity); *See also* Engdahl, *supra* note 105, at 63-76.

108. *See Regents v. Carroll*, 338 U.S. 586 (1950); *See also* Engdahl, *supra* note 105, at 71-74.

109. Engdahl, *supra* note 105, at 63-76.

110. 42 U.S.C. §§ 5901-5920 (1976 & Supp. III 1979).

111. *Id.* at § 5901 (1976).

112. *Id.* at § 5905 (1976).

113. The functions vested by law in the Energy Research and Development Agency were transferred and vested in the Department of Energy. *Id.* at § 7151 (Supp. I 1977).

114. *Id.* at § 5906 (1976).

115. U.S. CONST. art. I, § 8, cl. 2.

broad interpretation given to that clause<sup>116</sup> gives rise to a strong argument that the Act is within its scope. The meteorological aspect of the Lincoln Ridge project was part of a national program in support of wind electrical generation.<sup>117</sup> Such a program, if successful, would have had a noticeable effect on electricity production throughout the nation. If a wind generator is built, the power that it will produce will have an effect on interstate power sales.<sup>118</sup> Thus, it is clear that under a broad interpretation of the commerce clause, the Department of Energy's involvement in the Lincoln Ridge project was within an enumerated power of the Constitution. Similarly, under the federal Constitution, the national government is given broad powers to prepare for and carry out wars.<sup>119</sup> The United States Supreme Court has stated that an assurance of an abundant supply of electric energy constitutes a national defense asset.<sup>120</sup> The Lincoln Ridge project was a part of a national alternative energy program designed to lessen our dependence on foreign oil, which many feel to be a threat to our national security.<sup>121</sup> In sum, the Department of Energy's involvement in the Lincoln Ridge project was most likely within the war powers of the federal government. Since the federal government was acting according to enumerated powers of the constitution, the first requirement of preemption, "preemptive capability," was met. The next inquiry is into the relationship of the federal statutes with state law.

## 2. Preemption of Vermont Law

In early preemption cases, whenever Congress acted within its scope of constitutional authority, conflicting state laws were automatically preempted.<sup>122</sup> But, if Congress had the power to act with

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116. See *United States v. Darby*, 312 U.S. 100 (1941) (federal regulation of minimum wages and maximum hours, an intrastate activity, upheld because wage rates have a substantial effect on interstate commerce.); *Wickard v. Filburn*, 317 U.S. 111 (1942) (federal regulation of wheat production upheld because of its "cumulative effect" on interstate commerce).

117. *In re Green Mt. Power Corp. and U.S. Dep't of Energy*, Declaratory Ruling 120, at 2 (Vt. Envtl. Bd., Nov. 14, 1980).

118. In view of the relatively small amount of electricity that can be produced by a single wind turbine, it is likely that power sales from a Lincoln Ridge turbine will be on an intrastate basis. However, this power would be tied into a regional power grid, and could replace electricity bought out-of-state.

119. See U.S. CONST. Art. 1, § 8, cls. 1, 11-16; art II, § 2, cl. 1.

120. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 328 (1936).

121. See *Mills and Woodson*, *Energy Policy: A Test for Federalism*, 18 ARIZ. L. REV. 405, 412-14 (1976).

122. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

reference to a specific subject, and had not done so, a compromise was reached as to the validity of state law on the subject. If the subject matter required a uniform, national approach to regulation, the states were precluded from regulating the subject matter.<sup>123</sup> However, if the subject matter allowed diverse regulatory treatment, then state regulation was permissible.<sup>124</sup>

This old approach has been discarded for a newer doctrine which holds that preemption is a matter of judicially ascertained congressional intent.<sup>125</sup> Several principles govern the inquiry under this approach. First, there is a presumption in favor of the validity of an exercise of a state's police power.<sup>126</sup> Second, conflicts between federal and state laws are to be avoided when at all possible.<sup>127</sup> Third, valid state laws are to be preempted only where there is an actual repugnance so direct that the two regimes of law cannot stand together.<sup>128</sup> Finally, under the supremacy clause, state law cannot stand in the way of the full accomplishment of a national objective.<sup>129</sup>

The first step in ascertaining congressional intent concerning preemption is to look at the language of a statute for an explicit declaration. Nowhere in the Nonnuclear Research and Development Act does it specifically indicate that programs established thereunder are to be subject to state regulation. This absence of explicit congressional intent is significant in light of the above mentioned maxim that there is a presumption in favor of the validity of an exercise of a state's police power,<sup>130</sup> However, in the 1978

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123. *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 319-23 (1851).

124. *Id.* at 324.

125. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (state regulation of oil tanker construction and traffic preempted by similar federal laws); *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 141 (1963) (no Congressional intent to preempt state regulation of fruit marketing); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230-32 (1947) (congress explicitly intended to preempt state regulation of grain warehouses.).

126. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

127. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-46 (1960) (and cases cited therein).

128. *Kelly v. Washington*, 302 U.S. 1 (1937) (and cases cited therein).

129. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 141-42 (1963).

130. *See supra* note 126.

amendments to the Act,<sup>131</sup> which established a similar program for the development of alternative fuels, Congress does show intent that federal/private projects are subject to state environmental review. In one section it is provided that: "[n]othing in this section shall be construed as affecting the obligations of any person receiving financial assistance pursuant to this section to comply with Federal and State environmental, land use, water, and health and safety laws and regulations or to obtain applicable Federal and state permits, licenses, and certificates."<sup>132</sup> This language is inconclusive because it is limited to programs which usually involve serious environmental consequences established under that section. But it does show that despite the urgency of the energy crisis, Congress did intend to submit important synthetic fuel projects to state review.

Moreover, further evidence of congressional respect for state law is found in the Department of Energy Act of 1977.<sup>133</sup> Under section 7113 of that act it is provided that "[n]othing in this chapter shall affect the authority of any state over matters exclusively within its jurisdiction." State environmental laws have been recognized by the United States Supreme Court as a valid exercise of a state's police power under the tenth amendment.<sup>134</sup> Further provisions of the act require coordination between the policies of the Department of Energy and the states.<sup>135</sup> Since the functions of the former Energy Research and Development Agency, which includes the Lincoln Ridge Project, were transferred to the Department of Energy, it is very likely as a matter of statutory construction that Congress intended such activities to be controlled by state environmental laws. However, since the statutory language does not unequivocally dispose of the issue of congressional intent, it is necessary to utilize judicially fashioned criteria for discerning implicit intent.

The inquiry as to whether Congress implicitly intended to preempt state law is guided by the following criteria:

- (1) whether the scheme of federal regulation is so "pervasive" as to make reasonable the inference that Congress left

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131. 42 U.S.C. §§ 5903(c)-5920 (Supp. II 1978).

132. *Id.* § 5919 ( ).

133. 42 U.S.C. §§ 7101-7352 (Supp. III 1979).

134. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26 (1954).

135. 42 U.S.C. §§ 7112 (11), 7133(a)(6) (Supp. I 1977).

no room for the states to supplement it;<sup>136</sup>

(2) whether the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the subject;<sup>137</sup>

(3) whether enforcement of the state statute presents a serious danger of conflict with the administration of the federal program.<sup>138</sup>

With regard to the Lincoln Ridge project, the first criterion, "pervasiveness," refers to the federal provision regarding environmental safeguards. The major applicable federal scheme is the National Environmental Policy Act (NEPA).<sup>139</sup> Under NEPA, a federal agency is required to prepare a detailed statement of the environmental consequences of any "major federal activity significantly affecting the human environment," and list the alternatives to that activity which are more environmentally beneficial.<sup>140</sup> In its Program Opportunity Notice, the Department of Energy recognized that it would have had to comply with NEPA for all of its activities under the program, including the Lincoln Ridge Project.<sup>141</sup>

Thus, the issue is whether NEPA, a "pervasive" federal regulatory regime, preempts Vermont law. This issue can be disposed of by the terms of the federal statute. Section 4334 of title 42 provides that "[n]othing in section 4332 or 4333 of this title [the operative mechanisms of the Act] shall in any way affect the specific statutory obligations of any Federal agency . . . to act, or refrain from acting contingent upon the . . . certification of any other . . .

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136. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *But see* *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405 (1973), where the United States Supreme Court, in a case involving concurrent federal/state welfare regulations, held that the comprehensiveness of federal legislation does not necessarily indicate preemption. *Id.* at 415.

137. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (state regulation of aliens preempted by similar federal law because the federal government's preeminence in the area of foreign relations).

138. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

139. 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979). In addition to NEPA, the federal government can also insert environmental safeguards into the conditions for a right-of-way permit. The effect of these conditions on Vermont law is discussed *supra* at text accompanying notes 77-88.

140. 42 U.S.C. § 4332(2)(c) (1976).

141. RICHLANDS OPERATIONS OFFICE, U.S. DEP'T OF ENERGY, PROGRAM OPPORTUNITY NOTICE 07-79RL 10080.000 (1979) [hereinafter cited as PROGRAM OPPORTUNITY NOTICE].

State agency." Furthermore, section 4371(b)(2) states that the primary responsibility for implementing this policy rests with state and local governments. In sum, NEPA does not preempt state law.<sup>142</sup>

The second criterion is whether the subject matter is of "dominant federal concern."<sup>143</sup> It is here that a finding of implicit Congressional intent to preempt may be found. In *Minnesota v. Northern States Power Co.*,<sup>144</sup> the United States Supreme Court affirmed an Eighth Circuit Court of Appeals decision which invalidated a Minnesota law regulating radioactive discharges from nuclear plants. In its opinion, the court of appeals stressed the dangers in allowing restrictive state regulations to "unnecessarily stultify the industrial development and use of atomic energy for the production of electric power."<sup>145</sup> This case demonstrates the solicitude that courts have for the development of energy sources, and supports a conclusion that a court would find the Lincoln Ridge Project to touch upon a subject matter in which the national interest is dominant.

The third criteria is whether the enforcement of the state statute conflicts with the administration of the Federal program. In *California v. United States*,<sup>146</sup> the issue was whether a state could condition a water use permit issued to a federal water project. The Court held that Congress intended that a state may condition the control and use of the water,<sup>147</sup> but left open to what degree the state could impose conditions, holding that this issue would have to be faced after the state acted.<sup>148</sup> In a similar fashion, whether Vermont law would conflict with federal energy law depends on the results of the application of Vermont law to the project. It is clear, however, that a denial of the project under Vermont law would conflict with the federal scheme.

There are conflicting indications about whether Vermont law is preempted by federal law. Both the Nonnuclear Research and Development Act and the Department of Energy Reorganization

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142. See generally Watson, *State Control of Federal Pollution: Taking the Stick Away from the States*, 6 *ECOLOGY L. Q.* 429 (1977).

143. See *supra* text accompanying note 137.

144. 405 U.S. 1035 (1972), *aff'g* 447 F.2d 1143 (8th Cir. 1971).

145. 447 F.2d 1143, 1154 (8th Cir. 1971).

146. 438 U.S. 645 (1978).

147. *Id.* at 674-79.

148. *Id.* at 679.

Act contain sections showing congressional intent not to preempt state laws.<sup>149</sup> However, under the "criteria" approach to discerning implicit congressional intent, there are strong factors showing intent to preempt. The development of alternative energy sources is a matter of "dominant national concern," and a full denial of the project would conflict with operation of a federal program.

If a court did find preemption, Vermont law could be preempted only in those elements which unduly hinder the project. For instance, under Act 250 review, the project could be imposed with several conditions. A court could find that some of these conditions were so onerous that they would conflict with the administration of the federal program. But, the other conditions may not be so burdensome to warrant preemption, and a court could leave them intact. This "selective preemption" is in accord with the rule that valid state laws are to be preempted only where there is an actual repugnance so direct that the two regimes of law cannot stand together.<sup>150</sup>

### C. *Application of the Doctrine of Intergovernmental Immunities to the Lincoln Ridge Project*

The doctrine of intergovernmental immunities<sup>151</sup> was clearly applicable to the Lincoln Ridge Project because there was a question whether Vermont could regulate the project in view of the Department of Energy's past affirmative involvement. There are two issues within this subject: First, whether the Department of Energy's involvement was of such a degree as to call this project a federal activity; and second, whether Congress intended to allow state regulation. This latter question was answered in the negative in the preemption analysis,<sup>152</sup> so that the main inquiry here is factual: Would the Department of Energy's involvement have been such that the Lincoln Ridge Project would have been mainly a federal activity?

The Environmental Board reviewed the respective responsibilities of the Department of Energy and of the private participant. Although the Department was to furnish and install the meteorological tower, the prime responsibility of Green Mt. Power was to

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149. See *supra* text accompanying notes 130-35.

150. See *supra* text accompanying note 128.

151. See *supra* text accompanying notes 99-102.

152. See *supra* text accompanying notes 130-49.

furnish and prepare the land.<sup>153</sup> The private participant was also to furnish access and electrical power, provide security, and collect the meteorological data.<sup>154</sup>

A strong argument can be made that Green Mt. Power's slated participation was of sufficient magnitude to preclude characterization of the project as a federal activity. The salient feature of this argument was the requirement that Green Mt. Power obtain and prepare the land for the tower. The focus of Act 250 proceedings is the effect of development on land in Vermont. All the federal government was to do was to provide a meteorological tower and assist in erecting it. Once that was done, the project was to become Green Mt. Power's responsibility. The federal government's projected involvement did not warrant calling the project a federal activity.

Moreover, there are strong policy arguments for characterizing the Lincoln Ridge project as private activity. Federal assistance is pervasive in an incredible variety of activities in our society. Federal aid for highway construction, housing, education, and industry are just a few examples.<sup>155</sup> To wholly exempt these activities from all state regulation because of federal assistance would reduce a state's jurisdiction to a minority of activities. Such a result would undermine our system of federalism by centralizing all power with the federal government.<sup>156</sup>

If the Lincoln Ridge project, with the Department of Energy's involvement, was a federal activity, the inquiry would shift to whether Congress intended the states to regulate the activity. In

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153. *In re Green Mt. Power Corp.*, and U.S. Dep't of Energy, Declaratory Ruling 120, at 2 (Vt. Env'tl. Bd., Nov. 14, 1980).

154. *Id.*

155. Under the United States Housing Act of 1973, 42 U.S.C. §§ 1401-1440 (1976), 42 U.S.C. §§ 3531-3541 (1976 & Supp. III 1979) establishing the Department of Urban Development, the federal government pours large amounts of money into redevelopment efforts. Here federal assistance has immunized some HUD projects from state law. See Note, *A Study in Federal-State Relations: Applying Warranties of Habitability to HUD as Landlord of Acquired Properties*, 67 GEO. L. J. 209 (Oct. 1978). Two entire titles of the United States Code are devoted to education and highways (titles 20 and 23, respectively). Finally federal aid to private industry is exemplified by the Lockheed and Chrysler bail-outs.

156. See generally Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM L. REV. 847 (June 1979). The degree to which state sovereignty is invaded by federal subsidization of state governmental functions, in the name of national policy, is surpassed where the federal government subsidizes private business and immunizes them from state regulation. See also Berney, *New Federalism Conference Planned*, Burlington Free Press, June 19, 1981 at 613.

its Program Opportunity Notice, the Department of Energy flatly stated that the private participant must “[p]rovide the required leases, easements, zoning approvals, etc. . . and all other approvals . . . necessary for the installation of the government furnished meteorological tower.”<sup>157</sup> However, as was discussed in the earlier preemption analysis, there is a strong indication that Congress intended to preempt state regulation of these types of projects.<sup>158</sup> Viewed in this light, the language in the Department of Energy Program Opportunity Notice seems to be at odds with congressional intent. This conflict disappears when the requirement of securing zoning approvals is read in context with the requirements of securing the necessary easements, releases, and other approvals. As a whole, the language is directed toward insuring that the private participant will secure clear title to the property in order to insure unimpeded use, rather than directing that state approval be secured.

Even if congressional intent to allow state regulation could be found, full state review might have been precluded by *Hancock v. Train*.<sup>159</sup> In *Hancock*, the State of Kentucky wanted several federal installations to obtain state air pollution discharge permits. The permits were required under Kentucky’s air quality implementation plan, which was established pursuant to the Clean Air Act.<sup>160</sup> Under the Clean Air Act, federal polluters are required to obtain state permits.<sup>161</sup> The federal government contested the permit requirement on the grounds of intergovernmental immunity.

The United States Supreme Court reaffirmed the principle “that the activities of the federal government are free from any state regulation, unless Congress clearly manifests a contrary intent.”<sup>162</sup> In this situation the Court held that Congress merely intended that federal polluters meet the substantive standards of state law, such as emission limitations, rather than both substantive and procedural requirements of state law.<sup>163</sup> The impact of this case is limited, however, by the fact that Kentucky was acting under state law enacted as part of a larger, federal regulatory

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157. PROGRAM OPPORTUNITY NOTICE, *supra* note 141, at pt. 5.1(c).

158. See *supra* text accompanying notes 130-49.

159. 426 U.S. 167 (1976).

160. 42 U.S.C. §§ 7401-7642 (Supp. III 1979).

161. *Id.* § 7418 (Supp. III 1979).

162. 426 U.S. at 179.

163. *Id.* at 181-86.

scheme. With the Lincoln Ridge project, the potentially applicable state laws were enacted by the Vermont Legislature independently of any federal authority.

In summary, if the Department of Energy's involvement would have made the Lincoln Ridge Project mainly a federal activity, there is no clear indication that Congress intended to permit state regulation of this type of activity. Thus, under the doctrine of intergovernmental immunities, Vermont would have most likely been precluded from exerting its jurisdiction. The Environmental Board, in its declaratory ruling, came to the same conclusion. Now, however, with the Department of Energy's withdrawal, there is no affirmative activity by the federal government other than the use of its land. Green Mt. Power intends to take up the responsibilities abandoned by the Department of Energy. In light of this factual change, the doctrine of intergovernmental immunities is no longer applicable.

#### CONCLUSION

The Lincoln Ridge project involves a myriad of issues concerning federalism. These include the power of states to regulate activities of federal lands in light of *Kleppe* and the Federal Land Policy and Management Act. Under *Kleppe*, the states have lost significant powers over federal land, while under the Land Management Act substantive state environmental standards must be met for private activities occurring on federal land. It is not clear, however, whether this entails procedural compliance. Perhaps a combination of the two results in a situation where the federal government decides whether or not state law has been met.

Furthermore, the Lincoln Ridge project, at one point, involved the power of the federal government to override state law under new energy legislation. While Congress remains silent on this issue, the means do exist for the courts to override state law in the form of preemption and intergovernmental immunities analyses. In order for the courts to utilize these doctrines, the federal government must remain active in the energy field. With the withdrawal of the Department of Energy, the opportunity exists for the Environmental Board, or another tribunal, to render a decision free from the limitations on state power presented by the preemption and intergovernmental immunities doctrines.

While the urgency of the energy crisis and the need to avoid

unnecessary duplication of regulatory schemes is recognized, it is desirable to preserve the integrity of state environmental laws. Many of these laws are very sophisticated, like Vermont's, and reflect local uniqueness and desires. In our hasty rush for new energy sources we should question the advancement of a bulky federal regulatory scheme over a proven state approach.

*Charles F. Storrow*