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COLORADO SUPREME COURT STRIKES DOWN ORDINANCE BANNING THE USE OF CYANIDE IN MINING OPERATIONS

On January 12, 2009, the Colorado Supreme Court struck down a Summit County land use ordinance that prohibited the use of cyanide and other toxic or acidic chemicals in heap or vat leach mining operations. In its decision in *Colorado Mining Association v. Board of County Commissioners of Summit County*, the Court upheld the supremacy of state legislation over local regulation and indicated that generally, counties, particularly statutory counties, cannot completely ban an activity that the state legislature has specifically authorized.

This case arose in 2004 after Summit County passed a land use ordinance that prohibited the use of "cyanide or other toxic/acidic ore-processing reagents in heap or vat leach applications" in any zoning district in the county. The Colorado Mining Association (CMA) challenged this decision. The district court ruled in favor of CMA, holding that the ordinance was expressly preempted by the Mined Land Reclamation Act (MLRA). The County appealed and the court of appeals reversed the district court decision finding that the MLRA did not preempt the ordinance, holding that the complete prohibition was not a reclamation standard because in the absence of operations utilizing cyanide, there would not be any reclamation. The Supreme Court granted certiorari and reversed the court of appeals decision.

The use of cyanide or toxic or acidic chemicals for mineral extraction has been a controversial topic in Colorado since the Summitville Mine incident in 1993, and the Colorado General Assembly responded by passing amendments to the MLRA that give the Mined Land Reclamation Board (the Board) very specific authority to regulate the use of such chemicals in a manner that protects human health, property, and the environment.

In this case, the Court held that the Board's statutory authority to regulate the use of toxic or acidic chemicals in mineral extraction impliedly preempted the Summit County ordinance. Implied preemption occurs in regards to statutory counties when the state expresses a "sufficiently dominant" interest in a subject that there is no room for local regulation of the same subject matter. The Court held that through the amendments to the MLRA, the General Assembly demonstrated that the state had a sufficiently dominant interest in both mineral development and in human health and environmental protection that the MLRA so occupied the field of regulating the use of toxic or acidic chemicals in mining operations that it impliedly preempted the ordinance. The Court recognized that, as a statutory county, Summit County had an interest in mining operations within its boundaries and recognized the County's land use authority, but held that the County could not use a general prohibition to negate a "more specifically drawn statutory provision the General Assembly has enacted." The "General Assembly granted the Board extensive authority to authorize and regulate mining operations proposing to utilize toxic or acidic chemicals for mineral extraction," and so a statutory county could not completely ban the use of toxic or acidic chemicals.

The Court spent significant time discussing the different treatment of statutory counties and "home-rule" cities or counties. Statutory counties are given land use and other governing authority through statutory grants by the General Assembly. Home-rule cities and counties are given their land use and other governing authority by the Colorado Constitution. The source of a county's authority is important to the preemption analysis because a statutory county's regulations are more easily preempted than a home-rule city or county. Statutory counties' authority is limited to that given to them by the General Assembly, and so, to the extent there is conflict, a specific statute passed by the General Assembly regulating a subject will preempt local regulations passed under the general regulatory authority granted to the counties by statute. Home-rule cities and counties derive their regulatory authority from the state constitution and so a more stringent analysis is required before finding that a land use ordinance is preempted.

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The Court did not specifically find that a home-rule city or county ordinance similar to the Summit County ordinance would be upheld or struck down on the basis of implied preemption, but home-rule cities and counties are still subject to a preemption analysis and a similar decision could be reached in regards to home rule cities or counties. In 1992, the Colorado Supreme Court in *Voss v. Lundvall Bros.*, invalidated an ordinance passed by the City of Greeley, a home rule city, that completely banned the drilling of oil or gas wells within the corporate limits of the city. The Court held that the city ordinance was preempted by the Colorado Oil and Gas Conservation Act.

In the short term, this decision may lead to the challenge of ordinances in other counties which have similarly restrictive provisions. Ultimately though, this decision may increase the effort by some groups to pass legislation specifically granting counties greater land use rights over mining operations. House Bill 08-1165, which did not make it out of the House in the 2008 session, is an example of this type of legislation. The mining industry should anticipate increased efforts to pass such legislation.

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