



Denver Mining Club

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Creeping Local Control of Mining Operations

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Background Facts

The Colorado Example



- Colorado received \$43 million in Fiscal Year 2002 as its share of federal mineral royalties from coal and oil and gas production
- \$24.3 million (58%) was paid to Colorado state school fund & local school districts
- In Fiscal Year 2002, the BLM collected from BLM Managed Lands in Colorado:
 - (i) \$379,764 in recreational use fees
 - (ii) \$104,098,389 in mineral royalties; rents and bonuses
- Coal accounts for 82% of Colorado's electrical needs



Hottest Western Topics

- Attempts by local governments to regulate energy development
- Ban on use of cyanide in gold and silver production
- Access for exploration
- Bonding for reclamation



Creeping Local Control

- All of aware of NIMBY issues
 - NIMBY attacks continue
 - OIL-DRI case classic example
- Concern is more county attempts to limit mining by regulation
 - Gunnison County, Colorado
 - Summit County, Colorado
 - Adams County, Colorado

Local Government Control and the Forests



- Departure of Clinton Administration resulted in turn toward grass roots environmental attacks at county and regional forest level
- In some areas every federal agency decision is attacked
- Preemption is ignored – local decision making preferred
- Pressure placed on county commissioners and planning commissions
- Pressure placed on BLM and FS land use management, planning, a quasi zoning process

Local Government

HRO

- Local government's (counties, towns and cities) want piece of regulatory action
- Not necessary new, but scale has enormous impact
- Generally occurs as NIMBY response as residential development encroaches on public lands
- Ranchers are also much more active, especially where actors and fat cats have second homes



Local Government (continued)

- Important source of information: “What Every Westerner Should Know About Energy” by Patricia Nelson Limerick, et al.; published by Center of the American West (2003)
 - “Aren’t there any unloved and unlovely places left”
 - “Why the fight focuses here”
 - Argues for reconciliation among competing interests



Summit County, Colorado Example

- January 26, 2004 county adopted resolution No. 2004-10
- Prohibits use of cyanide “or other toxic/acidic ore-processing reagent in any heap leach or vat leach mining or milling operations”
- Also adopted performance standards for chemicals “classified as toxic or acidic by Colorado Division of Minerals and Geology”

Summit County, Colorado Example (continued)



- Follows lead of several other counties
- Attempt at statewide ban like Montana failed
- Ignores regulation by Colorado Office of Mined Land Reclamation and its Board

Summit County, Colorado Example (continued)



- Ignores Senate Bill 93-247 passed in 1993 in response to Summitville issues
 - Regulates mining operations which uses “designated chemicals” such as cyanide
 - Occupies field regulated by Summit County
 - Requires specific environmental protection plan
- February 2004 Colorado Mining Association sued Summit County Commissioners; Sierra Club and Alliance for Responsible Mining (Roger Flynn) intervened

Summit County, Colorado Example (continued)



- Processes banned by county are expressly permitted under state law
- Summit County Planning Department had recommended against adoption of ban
- Major CMA arguments:
 - county regulates technical standards for mining operation, an activity reserved to the exclusive authority of CMLB
 - state has completely occupied the field
 - county regulations created operational conflict with state regulations

Summit County, Colorado Example (continued)



- County ignores preemption arguments raised by CMA and industry
- State law does subject mining operators to local zoning and land use authority and regulations
- County is political subdivision of state existing only as convenience to state
- But no local government can require a reclamation permit or require reclamation standards
- Ski County Rule: Breckenridge, Copper Mountain and Keystone; Climax Mine

Summit County, Colorado Example (continued)



- General rules regarding preemption
 - Express preemption as evidenced by state legislative language
 - Inferred preemption where evidence indicates state intended to occupy field
 - Operational preemption arises where local government's regulation conflicts with application of a state statute



Oil-Dri Example

- Washoe County, Nevada by 3-2 vote (on February 26, 2002) denied Oil-Dri Corporation combined permit for open pit kitty litter clay mine and processing plant
- Plant originally proposed for Federal land
- Plant moved to private land
- Permit application included BLM and private land
- BLM previously approved Plan of Operations for 2 open pits but withdrew approval on March 1, 2002



Oil-Dri Example (continued)

- After denial all parties agreed if plant were on BLM land, county could not block activity
- April 11, 2002 Oil-Dri sued in Federal court – *Oil-Dri Corp. v. Washoe County*, CV-N-02-0186-ECR-RAM
- Most significant legal point is U.S. Dept. of Justice on behalf of Environmental & Natural Resources Division filed amicus brief on question of preemption and interpretation of *California Coastal Comm'n v. Granite Rock*, 480 U.S. 572 (1987)



Oil-Dri Example (continued)

- Argues *Granite Rock* only allows reasonable environmental standards
- *Granite Rock* does not allow local land use regulation of Federal land
- cites *South Dakota Mining Ass'n Inc. v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998) which invalidated a local ordinance prohibiting issuance of mining permits on National Forest lands



Oil-Dri Example (continued)

- *Granite Rock* was a facial challenge, i.e., no permit had been sought
 - Therefore, no environmental standards before court
 - Narrow holding
- Decision is frequently miscited and misused by county attorneys who believe all county efforts are “reasonable”



Gunnison County, Colorado Example

- Gunnison County produces more coal than any other Colorado county, plus is location of Phelps Dodge Mt. Emmons molybdenum project
- Coal production from two mines
 - Mountain Coal Company owned by Arch Coal
 - Elk Creek Mine owned by Oxbow Mining
 - 10-12 million tons/year
 - In Gunnison County, Mountain Coal's and Oxbow Mining's tax revenues to the County in aggregate equal the total of the next 25 taxpayers

January 8, 2001 County passed comprehensive land use resolution (“LUR”)

- Regulated all aspects of coal and oil and gas exploration and development
- Ignored SMCRA, MSHA, federal and state water and air acts
- Ignored state mining and oil and gas reclamation statutes (see, e.g., C.R.S. 34-33-101)
- Ignored comments of mineral industry

Gunnison County, Colorado Example (continued)



- Coal industry mobilized and threatened litigation
- Gas permit litigation did occur
- 3 years later special coal area created with regulations relating to coal mining and reclamation
- Because Mt. Emmons project is inactive, no challenge has yet occurred

Gunnison County Coal Resource Special Area Regulations



- Recognizes importance of coal mining to county
- Claims “legitimate role in reasonably regulating the extraction” of coal
- Exempts mines from LUR of 2001
- Exempts
 - existing operations which register
 - methane venting “integral and essential” to coal mining
 - exploration



Gunnison County Coal Resource Special Area Regulations (continued)

- Requires
 - registration of existing operations
 - annual notification of operations
 - permit for new operations and expansions which cause “significant net adverse effect/impacts from new surface area disturbance”
 - financial security for new permits and expansions
 - new mines comply with performance standards
- County ignored preemption arguments
 - *Pennsylvania Coal Co. v. Township of Conemaugh*, 612 A.2d 1090 (Pa.Comm. 1992)



Gunnison County Coal Resource Special Area Regulations (continued)

County has also passed oil and gas regulations

- litigated oil and gas regulations
- state law allows some local control re oil and gas development but must be non-operational



Delta County, Colorado

- Adopted strict regulations
 - Delta County Regulation for Specific Development adopted June 3, 2003 and currently being revised
 - mainly affects oil and gas
 - attempt to thwart large coal methane gas play
- Regulates mine surface disturbance
 - Federal lands included
 - Requires minor development permit for subsurface expansions of coal mines
 - Annual revisions by County



Delta County, Colorado (continued)

- Minor development procedures can deny activity
- Any person can appeal decision on minor development
- Most Delta lands of mineral interest with Forest Service jurisdiction



Adams County, Colorado Example

- County Mineral Extraction Plan passed 3/10/05
- Contains performance standards for mineral extraction in conflict with state law



Concluding Comments

- This virus is spreading
- Internet appeals and comments
- Longer permitting times
- Higher prices