

MINERAL DEVELOPMENT VERSUS WATERSHEDS: PROTECTING DRINKING WATER SUPPLIES FROM IMPACTS OF FEDERAL OIL AND GAS DEVELOPMENT

Robert W. Randall¹

ABSTRACT

In the arid west, local communities could not survive without a reliable source of clean and safe drinking water. Communities have historically used their land use authority to assure the protection of source watersheds for the benefit of their citizens.

However, the rush to increase domestic energy production from federal minerals has begun to encroach on these drinking water supplies. In some places on Colorado's western slope, the Bureau of Land Management has started leasing federal oil and gas resources underlying municipal watersheds, and communities have begun exploring options for the protection of their drinking water supplies.

Absent consent or cession, a state retains jurisdiction over federal lands within its boundaries, and states are free to enforce their criminal and civil laws on that land. This state police power extends to activities on federal lands, unless it is preempted by federal legislation enacted pursuant to the Property Clause of the U.S. Constitution. Likewise, municipalities have the power to enact ordinances not inconsistent with state laws that are necessary and proper to provide for the health and safety of their inhabitants.

State and local governments therefore are not precluded from regulating federal oil and gas development to protect natural resources, so long as this regulation is done within certain parameters. State or local authority must be exercised to influence activities for the protection of the environment, rather than to prohibit activities altogether through land use regulation.

Given the rapidly increasing leasing and development of federal minerals taking place on Colorado's western slope, local authorities are looking for ways to protect valuable drinking water supplies. This paper will explore the legal and policy implications of this trend, including the adoption of local watershed protection ordinances and application of the preemption doctrine.

INTRODUCTION

Communities of the arid west could not survive without a reliable source of clean and safe drinking water. As Mark Twain once famously wrote, "Whiskey is for drinking. Water is for fighting over." Perhaps less famous, but equally important these days, is Twain's sentiment about energy: "What is a government without energy? And what is a man without energy? Nothing -- nothing at all. . . . Sum all the gifts that man is endowed with, and we give our greatest share of admiration to his energy. And today, if I were a heathen, I would rear a statue to Energy and fall down and worship it!"² But what happens when the worship of energy comes into conflict with the need for drinking water?

Rising energy prices and new technologies have led to an increased emphasis on developing federal oil and gas resources, and Colorado's western slope has become ground zero for a contemporary oil and gas boom. Nationwide, drilling permits more than tripled in the five years between 1999 and 2004, from just over 1,800 to 6,399.³ Ninety-five percent of those drilling permits were for wells to be located in the five Rockies states:

¹ Staff Attorney, Western Resource Advocates, 2260 Baseline Road, Suite 200, Boulder, Colorado 80211, bob@westernresources.org.

² Mark Twain, Letter to Orion Clemens, June 1860.

³ Government Accountability Office, "Oil and Gas Development: Increased Permitting Activity Has Lessened BLM's Ability to Meet Its Environmental Protection Responsibilities," GAO-05-418, at 5 (June 2005).

Colorado, Montana, New Mexico, Utah, and Wyoming. In 2006, the BLM was on target to issue over 10,000 drilling permits. All told, over 35 million acres of federal public lands were under lease for oil and gas in 2004.⁴

These expanding efforts to develop federal petroleum resources have begun to encroach on other values of the land. It often seems that nothing is off-limits in the current rush to get gas from the ground, and this fact has drawn opposition from unlikely quarters. No longer is it just wilderness-loving preservationists opposing the widespread leasing of Colorado's natural heritage, but it is also recreationists, hunters, anglers, and outfitters. Importantly, opposition to oil and gas leasing has also begun to come from towns and cities as leasing has begun to take place in areas from which they draw their drinking water.

Communities have historically used their land use authority to assure the protection of source watersheds for the benefit of their citizens. But what happens when efforts by local governments to regulate oil and gas activities in their watersheds conflict with federal leasing mandates or state laws regulating the industry? Inevitably, complicated preemption issues arise that call jurisdiction into question and potentially leave watersheds at risk. These issues are currently playing out in the courts and on the ground on Colorado's western slope.

FEDERALISM AND THE PREEMPTION DOCTRINE

Generally, a state retains jurisdiction over federal lands within its boundaries, and states are free to enforce their criminal and civil laws on that land. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). This state police power extends to activities on federal lands, unless it is preempted by federal legislation enacted pursuant to the Property Clause of the U.S. Constitution. Id. Likewise, municipalities have the power to enact ordinances not inconsistent with state law that are necessary and proper to provide for the health, safety, prosperity, comfort, and convenience of their inhabitants. Town of Frederick v. North American Resources Co., 60 P.3d 758, 761 (Colo. App. 2002).

Thus it is well-accepted that states are not precluded from regulating federal oil and gas development to protect resources -- or from delegating this regulatory authority to local bodies -- so long as it is done within certain parameters. At issue when evaluating state or local laws affecting oil and gas development on federal leases is whether they are preempted by a higher authority. The U.S. Supreme Court has stated:

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

Kleppe, 426 U.S. at 543 (internal citations omitted). As the Supreme Court wrote over a hundred years ago, "A different rule would place the public domain of the United States completely at the mercy of state legislation." Camfield v. United States, 167 U.S. 518 at 526 (1897).

The purpose of the preemption doctrine is to establish a priority among potentially conflicting laws enacted by various levels of government -- federal, state, and local. Board of County Comm'rs v. Bowen/Edwards Ass., Inc., 830 P.2d 1045, 1055 (Colo. 1992).

Federal Preemption Doctrine: Is State Law Preempted by Federal Law?

The question of whether state law is preempted by federal law stems from the Supremacy Clause of the United States Constitution, which provides that the laws of the United States "shall be the supreme law of the land." U.S. Const. Art. VI, cl. 2. It is well-established that, pursuant to the Property Clause, Congress possesses the power to preempt state law. Thus a federal agency acting within the scope of its congressionally delegated authority may also preempt state law. Louisiana Pub. Serv. Comm. v. Fed. Comm'n. Comm., 476 U.S. 355, 369 (1986).

⁴ BLM, "Total Number of Acres Leased" (unpublished table, January 31, 2005).

Whether a state environmental regulation is preempted by federal law is governed by the U.S. Supreme Court's decision in the Granite Rock case. There, the Court reiterated that there are two ways a state law can be preempted by federal law. The Court stated:

State law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987) (citations and internal quotations omitted).

Case Study: The Granite Rock Case

The Supreme Court in Granite Rock applied the test set out above and held that federal law does not *per se* preempt environmental regulations imposed by states on federally-authorized mining activities on federal public lands. Id. at 588-89. Granite Rock Co. argued that because the Mining Act of 1872 and Forest Service regulations governed conditions under which the company could mine in a national forest, any state permit requirement was *per se* preempted. Id. at 580. The Court disagreed.

The Court first examined whether applicable federal laws and regulations “occupied the field” of mining on federal lands so as to preclude state regulation of the same subject matter. Id. at 583. The Court determined that the Mining Act and Forest Service regulations did not occupy the field because they were “devoid of any expression of intent to pre-empt state law.” Id. On the contrary, the USFS regulations upon which Granite Rock had relied to demonstrate federal preemption in fact assumed that those submitting plans for mining operations on federal lands would comply with state laws. Id. at 583 (*citing* 36 C.F.R. §§ 228.8(a), (b), & (c) (Operators within national forests must comply with state standards for air quality, water quality, and for the disposal and treatment of solid wastes)). The Court stated, “[i]t is impossible to divine from these regulations, which expressly contemplate coincident compliance with state law as well as with federal law, an intention to preempt all state regulation of unpatented mining claims in national forests.” Id. at 584.

In the second phase of its analysis, the Court examined whether the state permit requirement at issue conflicted with federal law. The Court distinguished permissible state environmental regulation from impermissible state land use regulation, explaining that if a state was regulating the environmental effects of the use of the lands chosen by the Forest Service, rather than dictating or forbidding that use, the regulations would be permissible. Id. at 582. The Court determined that the state regulations at issue were environmental because “the Coastal Commission [] consistently maintained that it [did] not seek to prohibit mining of the unpatented claim on national forest land.” Id. at 586. The Court explained the difference between permissible state regulation of environmental impacts on federal lands versus the impermissible state regulation of the uses of those lands as follows:

The line between environmental regulation and land-use planning will not always be bright . . . However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

Id. at 587.

Thus federal preemption law with respect to state regulation of oil and gas development currently turns on whether the regulations are considered to be land use planning or environmental regulation.

State Preemption Doctrine: Is Local Law Preempted by State Law?

Again, municipalities and counties can enact ordinances not inconsistent with state law that are necessary and proper to provide for the health, safety, prosperity, order, comfort, and convenience of the municipality. CRS

31-15-103; Town of Frederick v. North American Resources Co., 60 P.2d 758, 761 (Colo. App. 2002). Likewise, the Local Government Land Use Control Enabling Act, CRS 29-20-101 *et seq.*, grants local governments broad authority to plan for and regulate the use of land within their respective jurisdictions.

Colorado's preemption test is similar to the federal test laid out in Granite Rock. Where both state and local concerns are present, a local ordinance and a state statute may coexist, with both remaining effective and enforceable, so long as they do not contain express or implied conditions that are irreconcilably in conflict with each other. See Town of Carbondale v. GSS Prop., LLC, -- P.3d --, 2005 WL 2155508 (Colo. App. 2005). The Colorado courts apply a three-part analysis to determine whether a local ordinance is preempted by state law.

[F]irst, the express language of the statute may indicate state preemption of all local authority over the subject matter; second, preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest; and third, a local law may be partially preempted where its operational effect would conflict with the application of the state statute.

Board of County Comm'rs, La Plata Cty v. Bowen/Edwards Assoc., Inc., 830 P.2d 1045, 1056-57 (Colo. 1992) (internal citations omitted).

Case Study: The Bowen/Edwards Case

In Board of Cty. Comm'rs, La Plata County v. Bowen/Edwards Assoc., Inc., an oil and gas company challenged regulations adopted by La Plata County that were meant to "facilitate the development of oil and gas resources within the unincorporated area of La Plata County while mitigating potential land use conflicts between such development and existing, as well as planned, land uses." 830 P.2d 1045, 1050 (Colo. 1992). The regulations rendered facilities subject to administrative approval by the county planning department. Id. The regulations contained performance standards that must be met as a condition for county approval, including "land use coordination standards," "environmental quality standards," and "surface disturbance standards." Id. at 1050 n.3. The regulations prohibited the construction of any oil or gas facility "unless administrative approval has been granted" by the Planning Department or the Board of County Commissioners. Id. The regulations also empowered the county attorney to file a civil action to prevent or abate any structure erected in violation of the regulations. Id. Bowen/Edwards argued that the county's regulations were preempted by a state law, the Oil and Gas Conservation Act.

The Colorado Supreme Court found at the outset that the expressly delegated authority conferred on counties by the Local Government Land Use Control Act and the County Planning Code, CRS 30-28-101 *et seq.*, "leaves no doubt that land-use regulation is within the scope of a county's legislative power." Id. at 1056. Nonetheless, the Court was required to consider whether the Oil and Gas Conservation Act rendered La Plata County's Oil and Gas Regulations void under the Colorado preemption doctrine. After enumerating its three-part test (set out above), the court applied it to the facts of the case.

First, the Court found that the county's land use regulations were not expressly preempted by state statute. Id. at 1057. Specifically, it contrasted the state's interest in oil and gas development (efficient production and utilization of natural resources of the state) with the county's interest in land-use control (orderly development and use of land in a manner consistent with local use and environmental concerns). Id. Because of the distinct nature of the interests, the Court found that a statute would have to unequivocally state its intent to prohibit a county from exercising land-use authority, and it found that no such intent was expressed in the Oil and Gas Conservation Act. Id.

In analyzing the second prong of the state preemption test, the Court considered whether the Oil and Gas Conservation Act impliedly demonstrated a legislative intent to occupy all aspects of oil and gas development -- including land-use controls over those activities. Id. With regard to oil and gas development, the state's interest is expressed in the Oil and Gas Conservation Act, CRS 34-60-101 *et seq.*, the purpose of which is to promote the development, production, and utilization of oil and gas resources of the state, CRS 34-60-102(1). The Act forms the Colorado Oil and Gas Conservation Commission (COGCC), CRS 34-60-104, and charges it with enforcing these purposes and enacting regulations to do the same. CRS 34-60-104(1). The Act grants the Commission broad authorities with regard to oil and gas development in Colorado. For instance, the Commission has the authority to

regulate the “drilling, producing, and plugging of wells and all other operations for the production of oil or gas,” as well as oil and gas operations generally “so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, taking into consideration cost-effectiveness and technical feasibility.” CRS § 34-60-106(2)(a)-(d). The Commission also has authority to regulate the drilling, casing, operation, and plugging of seismic holes or exploratory wells in such a manner as to prevent the pollution of fresh water supplies by oil, gas, salt water, or brackish water. *Id.* at 106(1)(c). The Commission may also regulate drilling operations to prevent blowouts, explosions, cave-ins, seepage, and fires. *Id.* at 106(1)(d). Consonant with these authorities, the Commission has adopted extensive regulations covering these subjects.⁵

Looking to the “whole purpose and scope of the legislative scheme” of the Act, the Court found that it did not demonstrate a legislative intent to occupy all aspects of oil and gas development. The Court found that the efficient and equitable production of oil and gas resources required uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration, and it added that the need for uniform regulation extended also to the location and spacing of wells. *Id.* citing Voss v. Lundvall Brothers, 830 P.2d 1061, 1067-68 (Colo. 1992). The Court concluded, however, that the state’s interest in uniform regulation of these matters did not militate in favor of an implied legislative intent to preempt all aspects of a county’s authority to regulate land within its jurisdiction. *Id.*

Finally, the Court considered whether La Plata County’s regulations were partially preempted because of operational conflict with the application of the state statute or its regulations. *Id.* at 1059. Noting that preemption in such a situation could arise “where the effectuation of a local interest would materially impede or destroy the state interest,” *id.*, the Court found that it was unable to determine whether an operational conflict existed between the county regulation and state law without a factual record. Though the Court relied on the county regulations’ stated purpose to “facilitate the development of oil and gas resources. . . while mitigating potential land-use conflicts,” to find that the regulations appeared designed to harmonize development with land-use, it nonetheless found that a fully developed evidentiary record was needed to assess operational conflict. *Id.* at 1060. The Court found that there could be situations where such conflict existed where, for example, the county regulations imposed technical conditions on the drilling or pumping of wells under circumstances where no such conditions would be imposed under the state scheme. *Id.* Because the trial court dismissed the complaint on the pleadings in this case, there was no such record before the Supreme Court.

Thus the state of the law in Colorado with regard to county or municipal regulation of oil and gas activities is that such regulation is permitted, even on federal leases, so long as its application does not present an operational conflict with compliance with state law and the regulations of the Colorado Oil and Gas Conservation Commission.

Case Study: The Voss Case

On the same day it issued the Bowen/Edwards decision, the Colorado Supreme Court decided another preemption case, Voss v. Lundvall Brothers, 830 P.2d 1061 (Colo. 1992). There, the Court rejected a home-rule city land-use ordinance that imposed a total ban on the drilling of any oil, gas, or hydrocarbon wells within the City of Greeley. In reaching this conclusion, the Court rejected the reasoning upon which the Court of Appeals relied, namely that the Oil and Gas Conservation Act preempted a home-rule city from regulating *any* aspect of oil and gas development in the city. Instead, the Supreme Court found that the statewide interest in the efficient development and production of oil and gas prevented the city from exercising its land-use authority so as to totally ban oil and gas drilling in the city. *Id.* at 1062. Though the Court found that zoning authority to control land use within municipal borders was a matter of local concern (as expressed under the Local Government Land Use Control Enabling Act), it also found that the state had a “significant interest” in the efficient operation of oil and gas development (as expressed in the Oil and Gas Conservation Act). *Id.* at 1064-65. Noting that while city ordinances supersede a conflicting state statute with regard to “purely local concerns,” oil and gas development presented an issue of concern to both local governments and the state. *Id.* at 1066.

In determining whether the Greeley ordinance conflicted with the state’s interest in efficient development of oil and gas resources, the court analyzed four factors: whether there is a need for statewide uniformity in

⁵ These rules are available on the COGCC’s website: <http://oil-gas.state.co.us/>.

regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government, and whether the Colorado Constitution specifically committed the matter to state or local regulation. *Id.* at 1067, *citing Denver v. State*, 788 P.2d 764 (Colo. 1990). As to the first factor, the Court found that the need for statewide uniformity weighed heavily in favor of state preemption of Greeley's total ban on drilling within city limits. *Id.* Because the resource is in subterranean pools that do not conform to political boundaries, its efficient extraction often requires a drilling pattern dictated by pressure characteristics. Moreover, a ban on drilling in Greeley could result in wasteful production from pools that underlie the city but extend to land where production is not prohibited -- resulting in waste and harm to correlative rights of resource owners. *Id.* The Court also found that the Greeley ordinance had extraterritorial effect because it would limit production to only one portion of a pool outside the city limits, resulting in increased production costs that could render projects economically unfeasible. *Id.* at 1067-68. The regulation of oil and gas development was also found to be traditionally a matter of state rather than local control, further militating in favor of preemption. *Id.* at 1068. The Court concluded that the state's interest in efficient oil and gas development was sufficiently dominant over a home-rule city's imposition of a total ban on drilling within city limits. *Id.* In so holding, the Court reiterated the fact that Greeley was not prohibited from exercising any land-use authority over the city lands, but that such regulation could not frustrate the goals of the Oil and Gas Conservation Act. *Id.*

This case demonstrates another aspect of state preemption law with regard to mineral development: a local body may not enact an outright ban on gas drilling within its boundaries. To do so would be in irreconcilable conflict with the state's interest in development of oil and gas resources, as expressed in the Colorado Oil and Gas Conservation Act.

LOCAL EFFORTS TO REGULATE FEDERAL OIL AND GAS ACTIVITIES

The discussion above makes clear that state and local bodies are not precluded from regulating federal oil and gas development to protect resources. The Tenth Circuit Court of Appeals has rejected the argument that the federal government has asserted exclusive jurisdiction to regulate oil and gas exploration, development, and conservation on federal lands. *Texas Oil and Gas v. Phillips Petroleum Co.*, 406 F.2d 1303, 1304 (10th Cir. 1969), *cert. denied* 396 U.S. 829 (1969). The Mineral Leasing Act expressly preserves state and local authority over oil and gas operations. *See* 30 U.S.C. §§ 187 (lease terms shall not be in conflict with state laws) and 189 ("Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have. . ."). Internal BLM guidance on implementation of the Mineral Leasing Act also recognize a role for state and local laws in regulating activities on federal leases:

Lessees and operators have the responsibility to see that their exploration, development, production, and construction operations are conducted in a manner which (1) conforms with applicable Federal laws and regulations and with State and local laws and regulations to the extent that such State and local laws are applicable to operations on Federal or Indian leases; *** BLM approval of the [Application for Permit to Drill] does not relieve the lessee and operator from obtaining any other authorization required for operations on Federal and Indian lands.

BLM Onshore Oil and Gas Order No. 1; Approval of Operations on Onshore Federal and Indian Oil and Gas Leases, 48 Fed. Reg. 48916, 48921 (Oct. 21, 1983).

State Law Authority to Enact Local Ordinances in Colorado

Under existing law, Colorado municipalities have the power to enact ordinances that are necessary and proper to provide for the health and safety of their inhabitants. CRS 31-15-103. In the Local Government Land Use Control Enabling Act of 1974, CRS 29-20-101 to 107, the Colorado General Assembly conferred broad authority on local governments to plan for and regulate the use of land within their respective jurisdictions. CRS 29-20-102(a). The statutory scheme vests counties with the power to regulate development and activities in hazardous areas, to protect land from activities that would cause immediate or foreseeable material damage to wildlife habitat, to preserve areas of historical and archeological importance, to regulate the location of activities and development which may result in significant changes in population density, to provide for the phased development of services and facilities, to regulate land use on the basis of its impact on the community or surrounding areas, and to otherwise

plan for and regulate land use so as to provide for the orderly use of land and the protection of the environment consistent with constitutional rights. CRS 29-20-104(1).

More specifically, municipalities have the authority under existing law to take actions to “maintain[] and protect[]” municipal waterworks and municipal water from pollution. CRS 31-15-707(1)(b). To this end, state law grants municipalities jurisdiction over the municipal waterworks -- including all reservoirs, streams, trenches, pipes or drains associated with it -- as well as “the stream or source” from which the water in their municipal waterworks is taken “for five miles above the point from which it is taken.” Id. Municipalities may enact ordinances and regulations necessary to carry out this power to maintain and protect municipal water supplies. Id. In Mt. Emmons Mining Company v. Town of Crested Butte, the Colorado Supreme Court first recognized a town’s authority to enact a watershed district permit ordinance under this statutory provision. 690 P.2d 231 (Colo. 1984). The Court’s opinion largely deals with jurisdictional and procedural issues, but it also stands for the larger proposition that a town is not precluded from requiring those proposing destructive activities in their watershed to first obtain a permit. Id. at 241.

Counties in Colorado also have some regulatory authority over land use within their jurisdiction. In contrast to a home-rule municipality, which has certain inherent powers, “[a] county is not an independent governmental entity existing by reason of any inherent sovereign authority of its residents; rather, it is a political subdivision of the state, existing only for the convenient administration of the state government, created to carry out the will of the state.” Board of County Comm’rs of Delores County v. Love, 470 P.2d 861, 862 (Colo. 1970). As an agency of the state government, a county possesses only the regulatory authority “expressly conferred upon [it] by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such express powers.” Id. Such regulatory powers have been granted to counties by the Colorado County Planning Code, CRS 30-28-101 to 137, which gives counties the power to “provide for the physical development of the unincorporated territory within the county and for the zoning of all or any part of such unincorporated territory. CRS 30-28-102. County authority under the Planning Code includes the power to “divide the territory of the county which lies outside of cities and towns into districts or zones of such number, shape, or area as it may determine, and, within such districts or any of them, . . . [to] regulate the . . . uses of land.” CRS 30-28-113(1). County zoning regulations promulgated under the County Planning Code may include the classification of land uses and the distribution of land development and utilization. CRS 30-28-115(1). A county also has the authority to adopt a zoning plan that regulates, among other things, “the uses of land for trade, industry, recreation, or other purposes.” CRS 30-28-111(1).

The exercise of these powers, however, is subject to both federal and state preemption doctrines and must operate within these limitations.

Case Studies

Below are three case studies describing current attempts by local governments to regulate federal oil and gas activities: one pending in the courts, one awaiting implementation, and another recently adopted by the Grand Junction City Council.

Case Study: Gunnison County Regulations

In May 2003, Gunnison County adopted regulations that apply to and require a permit for “[a]ll Oil and Gas Operations in the incorporated areas on public and private land within the County.” County Regulations § 1-102A. The purpose of these regulations is “to provide reasonable limitations on and safeguards for the exploration and production of oil and gas resources in the County. . .” and “to provide a framework for the responsible production of oil and gas resources in a manner that conserves other natural resources, that is sensitive to surrounding land uses, and that mitigates adverse impacts to and protects the public health, safety, welfare and the environment of the County.” Id. at § 1-101. Gunnison County regulations include performance standards that must be satisfied by the operator, unless it is shown that satisfaction of the performance standards is technically infeasible and a waiver is granted. Id. at § 1-107. These performance standards require mitigation of impacts to the natural environment, public facilities, and adjacent property, but they do not prescribe where oil and gas operations must be located or how they must be conducted.

The County Regulations specifically state that the County “intends to avoid duplicative permit processes and requirements” by reviewing permit applications “concurrently with other state or federal permitting processes wherever possible.” *Id.* at § 1-101. An applicant for a county Oil and Gas Permit may substitute for the County submittal requirements the company’s federal Application for Permit to Drill (APD) or its drilling-permit application submitted to the COGCC, where appropriate. *Id.* at § 1-104. In considering an application, the County first looks at the state and federal permit requirements and conditions that are imposed on the applicant, and then reviews the permit application to determine which aspects of county regulation have not been addressed within these other permits.

BDS International, Inc. is an oil and gas company based in Nevada that owns and operates a number of and pipelines in Gunnison County that are located on federal and private lands. In June 2003, BDS began work on a well located on Forest Service lands without applying for or obtaining a permit from the county, notwithstanding a provision in their operating permit from the Forest Service providing that the permittee “shall comply with all federal, state, county and municipal laws, ordinances and regulations which are applicable to the area or operations.” Upon learning that BDS had begun work on its well, Gunnison County filed suit in Colorado District Court, seeking an injunction to prevent BDS from conducting oil and gas activities in the county without first obtaining a county permit. At a hearing in conjunction with the preliminary injunction, a representative of BDS stated that the company did not feel that a permit from Gunnison County was required “because we are on federal land.”

In ruling on Gunnison County’s preliminary injunction, the Colorado District Court determined that the County was not completely preempted from regulating oil and gas activities under applicable caselaw, and that the County Regulations were valid. Nonetheless, the District Court ruled that certain provisions of the County Regulations were preempted because they conflicted with certain provisions of the Colorado Oil and Gas Conservation Act and COGCC regulations. This ruling was apparently based on a “side by side” comparison of the County Regulations and not on any evidence of operational conflict between the county regulation and state law.

Gunnison County appealed the District Court’s ruling to the Colorado Court of Appeals. Board of County Comm’rs of the County of Gunnison, Colorado v. BDS Int’l, LLC, No. 04-CA-1679 (Colo. App. filed Aug. 20, 2004). Briefing in the case was completed in November 2005, and the parties are awaiting a decision. Gunnison County contends that the only test to determine whether a local regulation is preempted by state statutes or regulations is whether the local regulations would “materially impede or impair” the state’s interest, and that such a determination was possible only with a fully-developed evidentiary record. Appellees argue that an inquiry into the existence of an operational conflict is unnecessary, and that any local ordinance addressing the same subject matter as a state law or regulation is necessarily preempted.

This case will have important ramifications for whether local ordinances addressing environmental safety are preempted by state laws and regulations applicable to oil and gas activities on federal lands even in the absence of an operational conflict. The Colorado Court of Appeals is expected to issue a decision in the case sometime in the next year.

Case Study: Palisade Watershed Protection Ordinance

In 1997, the Town of Palisade on Colorado’s western slope adopted a Watershed Protection Ordinance pursuant to its authority in the Local Government Land Use Control Enabling Act. Again, that law gives municipalities the authority to take actions to “maintain[] and protect[]” municipal waterworks and municipal water from pollution and gives them jurisdiction over the stream or source for their municipal waterworks for five miles above the point from which it is taken. CRS § 31-15-707(1)(b). The intent of the Palisade Watershed Ordinance was the “maintenance and protection of an adequate supply of the highest quality and quantity” of drinking water and the protection of the Town’s water supply and water works from “pollution, impairment, injury, or damage.” Sec. 14-2. It requires a permit for any of a broad range of activities in the watershed boundary that may alter water drainage courses, including timber harvesting, mining operations, drilling activities, spraying of pesticides or herbicides, using or storing toxic or hazardous materials, and motorized travel. Sec. 14-41. The ordinance sets forth detailed requirements for the permit application, including a description of the activity and any reasonable alternatives, a map of any surface waters, springs, or seeps that may be affected by the proposed activity, water quality baseline data, proposed mitigation measures, and other information. Sec. 14-53. Certain activities are declared “by their very nature” to cause a significant degradation of water quality: drainage alterations, timber

harvesting, and mining and drilling operations. Sec. 14-56. For these types of operations to proceed, the Palisade Board of Trustees must make a determination that the activity can be conducted in such a way as to avoid degradation of water quality. Id.

In December 2005, the Colorado State Office of the BLM announced its intent to offer the competitive sale of 157 parcels containing nearly 170,000 acres of federal lands and minerals for oil and gas leasing in its February 2006 quarterly lease sale.⁶ The Sale Notice included 10 parcels located in the Palisade Municipal Watershed, and, pursuant to the applicable BLM Resource Management, stated that these leases would be issued with a stipulation providing:

All lease operations will avoid interference with watershed resource values located on the following portions of this lease:

Watershed resource: Palisade Watershed

This may include the relocation of proposed roads, drilling sites, and other facilities, or application of appropriate mitigating measures.

This stipulation may be waived or reduced in scope in circumstances change, or if the lessee can demonstrate that operations can be conducted without causing unacceptable impacts on the concern(s) identified.

Sale Notice at 137; Grand Junction RMP Record of Decision at 2-9, D-1. Two days before the lease sale, the BLM amended the Sale Notice. With regard to the Palisade watershed parcels, the BLM added a Lease Notice stating:

The lessee is hereby notified that this lease contains privately owned surface of the Town of Palisade that is within the Town's designated Watershed and is covered by a Watershed Protection Ordinance.

Notice of Addendum-2, Exhibit GJ-LN-17.⁷

The BLM offered the eleven parcels in Palisade's municipal watershed in the February 9, 2006 lease sale, and formal protests of the sale were filed with the BLM's Colorado State Director by the Town of Palisade, City of Grand Junction, and Western Colorado Congress.⁸ These protests raised a number of legal and policy issues, including the BLM's failure to consider and comply with the Safe Drinking Water Act's Source Water Assessment and Protection Program, failure to comply with the National Environmental Policy Act, and failure to comply with the planning provisions of the Federal Land Policy and Management Act. The BLM State Director dismissed these protests on August 3, and in doing so attached additional conditions to the lease issuance. First, the BLM immediately suspended the issuance of the watershed leases for up to one year, during which the successful bidder (Genesis Oil and Gas) committed to prepare a "community-based development plan" to identify elements of design and development to address the communities' concerns. The BLM also required the lessee to submit site-specific Plans of Development for all development activities prior to seeking authorization for any surface-disturbing activities on the watershed leases. The Plan of Development is to include design criteria and best management practices and will undergo environmental review under NEPA before operations may be approved. Finally, the BLM imposed 40-acre "No Surface Occupancy" stipulations that will apply to all known spring locations within the Palisade watershed, totaling 960 acres, to ensure protection of drinking water facilities.

Thus the Town of Palisade gained protections for its watershed in response to its protest that it might not have gotten otherwise. Nonetheless, the Town remains extremely concerned about the potential impacts that gas drilling could have on their drinking water supplies. In addition to the protections and procedures outlined above, the Town may choose to apply its Watershed Protection Ordinance to require the lessee to submit detailed baseline water quality and flow data, as well as alternative drilling or location measures. It remains to be seen how the lessee and Town will work together to address potential impacts to watershed values before the lessee submits drilling

⁶ See http://www.co.blm.gov/oilandgas/documents/06Feb_SN.pdf.

⁷ See http://www.co.blm.gov/oilandgas/documents/06Feb9_A2.pdf.

⁸ The City of Grand Junction owns the property from which the Town of Palisade draws its drinking water, a ground water system known as Kruzen Springs municipal water supply. The February 2006 lease sale also included portions of the City of Grand Junction's municipal water supply.

permits. Once drilling permits are submitted, the Town will have the opportunity to enforce its ordinance, which could trigger a response from the state or lessee. The Town of Palisade's efforts to protect its drinking water presents an interesting opportunity to watch local control in action.

Case Study: Grand Junction Watershed Ordinance

On September 6, 2006, the Grand Junction City Council unanimously agreed to adopt a comprehensive watershed protection ordinance. The City Council had considered a similar measure in 2003, but it failed to pass. Now, with the huge increase in oil and gas activity near the city and with its encroachment into the areas from which the city draws its drinking water, the politics were different. Local activists collected over 2,500 signatures to put the City watershed ordinance on the ballot in November, but the City Council opted to pass it themselves rather than going through with the vote.

The Watershed Protection Ordinance directs the City Council to adopt an ordinance "for the purpose of restricting any activity, or requiring changes in the way the activity or use is performed, within a watershed which creates a substantial risk of pollution or injury to the City's water supply or waterworks." Grand Junction Ordinance No. 3961, Sec. 3. Perhaps anticipating potential preemption challenges, the ordinance specifically states that it "shall not. . . be construed as an attempt to interfere with federal jurisdiction over federal lands within the City's watershed," and that it "should be construed to supplement and integrate with federal law and jurisdiction." *Id.* The Ordinance prohibits any land use activity that causes injury or damage to the city's waterworks and natural features of the watershed, and it prohibits any point or non-point sources of pollution from causing any measurable increase in pollution over the baseline water quality. Sec. 5(A), (B). Moreover, it places the burden of proving the lack of substantial risk of pollution or injury to the City's water supply (both in terms of quantity and quality) on the person proposing the activity in the watershed. Sec. 5(C). The Ordinance declares that certain activities "pose a substantial risk of pollution or injury" to water supplies and prohibits them without a Watershed Permit issued by the City: excavating, removing vegetation, handling hazardous materials, timber harvesting, mining operations (including extraction of oil and gas), and confined animal feeding operations. Sec. 6. Finally, the Ordinance requires the permittee to provide the city with a performance guarantee equal to 100% of the City Manager's estimate of the cost to ensure compliance with the Ordinance -- including costs of maintenance, operation, re-vegetation, and reclamation. Sec. 8. The Grand Junction Watershed Protection Ordinance appears to contain more general requirements than the Palisade Ordinance discussed above, however it encourages the City Council to implement the ordinance by adopting additional measures or resolutions "in light of the provisions and purpose hereof." Sec. 2.

When the City of Grand Junction failed to pass a watershed ordinance in 2003, it opted instead to enter into Memoranda of Understanding with the BLM and Forest Service. In passing the ordinance, City Council members said that it represents an effort to try to limit the impacts from oil and gas drilling before they are felt. City Council member Doug Thomason said, "Clearly, we're at a point where we need a few more tools in the belt, something with more teeth in it."⁹

Again, as oil and gas development begins to encroach onto areas that provide domestic drinking water, cities and towns are adopting measures to control industrial activities and mitigate their impacts. It will be interesting to review the City of Grand Junction's implementation of the Watershed Protection Ordinance, particularly in light of the upcoming decision of the Colorado Court of Appeals in the Gunnison County case and the possible application of the Town of Palisade's ordinance to influence activities in its watershed.

CONCLUSION

The above discussion makes clear that while local efforts to mitigate the impacts from oil and gas development are not precluded, they are also not unfettered. The State has authority to regulate under the Oil and Gas Conservation Act which is administered by the Oil and Gas Conservation Commission, and local bodies have the authority to regulate land use and development within their jurisdictions under the Local Government Land Use Control Enabling Act. But when a local body adopts a watershed protection ordinance, the Colorado courts have made clear that there is a point at which local regulations become preempted. The turning point is the degree to which exercise of local regulatory authority presents a conflict with the application of state law. But this point is

⁹

http://www.gjsentinel.com/news/content/news/stories/2006/09/07/9_7_1A_city_council.html.

hazy at best. Some conflict with state or federal law or regulation may be permissible, but how much? Local measures may not “materially impede or destroy” the state’s interest, but what does this really mean?

The Colorado Oil and Gas Conservation Commission tried to eliminate this confusion and uncertainty by amending its Rule 303(a) to provide that a commission drilling permit “shall be binding with respect to *any conflicting local governmental permit or land use approval process.*” The Colorado Court of Appeals, however, found this provision to exceed the scope of the Commission’s authority. Board of County Comm’rs of LaPlata County v. Colorado Oil and Gas Conservation Comm’n, 81 P.3d 1119 (Colo. App. 2003). By expanding the “operational conflict” rule of the Bowen/Edwards case to include “any conflicting” local rule, the Commission overstepped its bounds. Id. at 1125. The Court wrote that the Commission’s amended Rule 303(a) “would preempt local government actions beyond those that materially impede or destroy the state interest and would give oil and gas operators license to disregard local land use regulation.” Id. This, the Court found, would “erode[] the delicate balance between local interests and state interests set forth by Bowen/Edwards.” Id. The COGCC rule now reads, “The [Commission’s] Permit-to-Drill shall be binding with respect to any operationally conflicting local governmental permit or land use approval process.” COGCC Rule 303(a)(3).

Thus local bodies are free to adopt regulations and apply them to federal oil and gas activities, notwithstanding federal leasing law and state regulatory law, however they may not enforce these regulations in such a way as to create an operational conflict -- a determination that will turn on the facts of each case. This uncertainty is no doubt troubling to industry, state regulators, and communities alike.