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Mining Law - Gravel Extraction - Is Local Control over Small Gravel Mining the Best Road for Regulation - River Springs Limited Liability Company v. Board of County Commissioners of County of Teton

Natasha Saypol

Case Note

MINING LAW—GRAVEL EXTRACTION—Is Local Control Over Small Gravel Mining The Best Road For Regulation? *River Springs Limited Liability Company v. Board of County Commissioners of County of Teton*, 899 P.2d 1329 (Wyo. 1995).

INTRODUCTION

In October of 1992, River Springs Limited Liability Company (River Springs) acquired ownership of fifty-eight acres of real property in Teton County.[1] The property was located near two state highways travelled by tourists and within half a mile of approximately one hundred fifty-nine residential property owners.[2] River Springs planned to use the property for gravel processing, knowing that Teton County previously had zoned the area of the gravel site as "Residential-Agricultural 3" in its Teton County Comprehensive Plan and Implementation Program (Plan).[3]

In December of 1992, River Springs applied to Teton County for a Conditional Use Permit (CUP) to extract and process gravel, sand,

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1. River Springs Ltd. Liab. Co. v. Board of County Comm'rs of Teton County, 899 P.2d 1329, 1331 (Wyo. 1995). The court consolidated this appeal with the case of Becho, Inc. v. Board of County Comm'rs of Teton County. *Becho* involved several issues similar to those in *River Springs*, as well as the issue of whether counties can regulate a grandfathered use of property. *Id.* at 1330-31, 1334-35.

2. Answer Brief of Appellee Teton County Board of Commissioners at 2-3, River Springs Ltd. Liab. Co. v. Board of County Comm'rs of Teton County, 899 P.2d 1329 (Wyo. 1995)(No. 94-23) [hereinafter Brief of Appellee] (on file with the *Land and Water Law Review*).

3. *River Springs*, 899 P.2d at 1331. The Teton County Comprehensive Plan and Implementation Program defines Residential-Agricultural 3 use as: "1 residential unit per 3 acres. These lands include low gradient uplands, alluvial fans, high terraces, and low terraces with groundwater more than 3 feet below the surface." Brief of Appellee, *supra* note 2, at App.B at ix. The Teton County Comprehensive Plan was adopted pursuant to WYO. STAT. ANN. § 9-8-301 (Michie 1977) which provides, "All counties shall develop a countywide land use plan which shall incorporate the land use plans of all incorporated cities and towns within the county." *Id.*

and rock.[4] River Springs submitted the application because the Plan prohibits mining activities unless the Board of County Commissioners of Teton County (Board) grants a CUP.[5] River Springs included a traffic analysis, air quality study, alternative site analysis, material cost analysis, drainage calculations, noise analysis, wildlife assessment, visual impact analysis, and wetlands study in its application.[6] On May 18, 1993, the Board voted three to two to deny the CUP because River Springs' proposed gravel operations did not meet certain standards.[7]

While the CUP decision was pending, River Springs applied for and obtained on August 18, 1993, a permit from the Land Quality Division of the Wyoming State Department of Environmental Quality (DEQ) to conduct a limited mining operation on its property.[8] In addition, the Air Quality Division of the DEQ issued River Springs permits to operate screening, washing, crushing and asphalt production equipment.[9] After receiving the DEQ permits, but before Teton Coun-

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4. *River Springs*, 899 P.2d at 1331. Gravel extraction, processing and asphalt mix operations are not outright permitted uses in a residential/agricultural zone. Brief of Appellee, *supra* note 2, at 3. County commissioners may permit these operations in certain areas if the gravel operator can meet the required findings for issuance of a conditional use permit. *Id.* Specifically, River Springs wanted to "screen excavated materials to separate usable rock, sand and gravel; wash the excavated materials to clean them of dirt and mud; crush the aggregate and rock into smaller usable aggregate and gravel; and mix the aggregate and gravel with hot tar to make asphalt." *River Springs*, 899 P.2d at 1331.

5. *River Springs*, 899 P.2d at 1331.

6. *Id.*

7. The Board of County Commissioners explained in their findings of fact the requirements River Springs failed to meet for issuance of the CUP:

> (b)The proposed use shall be designed to be compatible in terms of scale, bulk and general appearance with adjacent land uses and with existing and potential uses in the general area; (c)The proposed use shall provide for the avoidance of significant adverse impacts on the surrounding area with regard to trash, odors, noise, glare, vibration, air and water pollution and other health and safety factors or environmental disturbances; (d)The proposed use shall be compatible with the pattern of existing developed land uses in the vicinity and shall not permanently injure the appropriate future use of neighboring property; (e)The proposed use shall not be such as to create a nuisance to other properties, or their occupants in the vicinity, or a hazard to public health, safety or welfare; . . . (g) The proposed use shall not have a significant adverse affect upon traffic, with particular reference to congestion, automative and pedestrian safety and convenience, traffic flow and control, access, maneuverability and removal of snow from streets and parking areas.

See Application for Conditional Use Permit of River Springs Limited Liability Company, at 5 (Board of County Commissioners of Teton County, Jan. 5, 1994) [hereinafter Commissioners' Findings of Fact]. *See also* Brief of Appellant River Springs Limited Liability Company at 2, River Springs Ltd. Liab. Co. v. Board of County Comm'rs of Teton County, 899 P.2d 1329 (Wyo. 1995) (No. 94-23) [hereinafter Brief of Appellant] (on file with *Land and Water Law Review*).

8. *River Springs*, 899 P.2d at 1332. The DEQ issues what is termed a "limited mining permit" for a ten acre gravel operation. *See* DEQ Revised Form 10, Feb. 1995 (the limited mining permit application).

9. Brief of Appellant, *supra* note 7, at 3.

ty had acted, River Springs began extracting and processing dirt, sand, and gravel in order to produce marketable sand and gravel.[10]

On September 22, 1993, the Board demanded that River Springs stop its activities because it did not have a CUP to conduct them.[11] The Board asserted that River Springs was "proscribed" from conducting any gravel mining activities "absent [the Board's] consent in the form of a CUP in spite of any permits issued by the DEQ."[12]

River Springs commenced an action for a declaratory judgment in the Ninth Judicial District Court for Teton County on October 4, 1993.[13] On January 21, 1994, the district court certified three questions to the Wyoming Supreme Court.[14] The court held that sand, gravel, rock and limestone are not "mineral resources" for purposes of Wyo. Stat. § 18-5-201; Wyo. Stat. § 18-5-201 allows county commissioners to limit land use by foreclosing the extraction of sand, gravel, rock, and limestone; and that the county's authority to prohibit land use is not preempted by the state, but if the county permits gravel extraction, the DEQ has statutory authority to regulate those activities.[15]

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10. *River Springs*, 899 P.2d at 1332.

11. *Id.*

12. *Id.*

13. *Id.*

14. *River Springs*, 899 P.2d at 1330. The three certified questions presented by the district court in the *River Springs* case were:

> 1. Whether sand, gravel and rock excavated and removed from alluvial deposits are 'mineral resources' within the meaning of W.S. § 18-5-201 (1977), which states in pertinent part that 'no zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the *mineral resources* in or under any lands subject thereto.'
>
> 2. Whether, W.S. § 18-5-201 (1977) and/or the Wyoming Environmental Quality Act, W.S. § 35-11-101 et. seq., preempt or otherwise constrain a Board of County Commissioners' zoning authority to *prohibit* mineral extraction and production activities. 3. Whether, W.S. § 18-5-201 (1977) and/or the Wyoming Environmental Quality Act, W.S. § 35-11-101 et. seq., preempt or otherwise constrain a Board of County Commissioners' zoning authority to *regulate* the aforementioned activites, and if so, the extent of that preemption or limitation.

Id. (emphasis added). The court answered the questions as follows:

> 1. No.
>
> 2. Yes, assuming that the extraction and production activities are accomplished for *minerals*.
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> 3. Assuming that the activities relate to *minerals*, the board of county commissioners cannot prohibit those activities, but it can regulate such activities so long as they are not regulated under the Wyoming Environmental Quality Act, Wyo. Stat. § 35-11-101 to -1428 (July 1994).

Id. at 1331. (emphasis added). In the consolidated appeal, *Becho* raised two similar certified questions: whether limestone material, extracted "for use as gravel products for road base purposes and riprap," constitutes mineral resources for purposes of WYO. STAT. ANN. § 18-5-201 (1977) and, if limestone is a mineral resource, to what extent § 18-5-201 limits county commissioners who want to regulate limestone extraction and production. *Id.* at 1330-31.

15. *Id.* at 1330. The court's holding was in response to all five certified questions presented by *River Springs* and *Becho* in the consolidated appeal. *See supra* note 14.

This case note focuses on the regulatory status of small gravel mining before and after the *River Springs* decision. It questions the court's interpretation of the interplay between the Wyoming county zoning statute (Title 18)[16] and the Wyoming Environmental Quality Act (EQA or the Act)[17] in differentiating county and state authority over gravel operations. Finally, the note addresses the implications of gravel mining's new regulatory status.

BACKGROUND

County Zoning Authority Over Gravel Mining

The Wyoming county zoning statute grants county commissioners the authority to regulate the use of property and the physical dimensions of these uses.[18] Title 18 provides:

> To promote the public health, safety, morals and general welfare of the county, each board of county commissioners may regulate and restrict the location and use of buildings and structures and the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes in the unincorporated area of the county.[19]

This inital grant of power is then limited by the next sentence of the section:

> However, nothing in W.S. 18-5-201 through W.S. 18-5-207 shall be construed to contravene any zoning authority of any incorporated city or town and no zoning resolution or plan shall prevent any use of occupancy reasonably necessary to the extraction or pro-

16. WYO. STAT. ANN. § 18-5-201 (Michie 1977).

17. WYO. STAT. ANN. §§ 35-11-101 -1428 (Michie 1977).

18. Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 726 (Wyo. 1985) (zoning involves the regulation of physical dimensions of land uses, such as height setbacks and minimum area). *See* WYO. STAT. ANN. § 9-8-102(a)(xvi) (Michie 1977) (defining zoning as "a form of regulatory control granted to local governments which may be used to guide and develop specific allowable land use."); Vince Ford v. Board of County Comm'rs of Converse County, No. 96-50 at 5 (Wyo. Sept. 24, 1996) (zoning is the process which controls the "physical configuration" of land development). *See also* 80-22 Op. Wyo. Att'y Gen. 106, 107 (1980) [hereinafter Op. Wyo. Att'y Gen] (zoning authority over mining includes authority to "approve the location of the mine, the location and use of office buildings and equipment storage sheds, [and] the placement of roads.").

19. WYO. STAT. ANN. § 18-5-201 (Michie 1977).

> duction of the mineral resources in or under any lands subject thereto.[20]

Title 18's mineral resources restriction exempts from county control any "reasonable means" of removing minerals.[21] At the very least, counties must allow access to the mineral and the use of equipment for its extraction.[22] However, Title 18 does not define what constitutes a "mineral resource." Thus, the statute does not expressly identify which substances are exempt from county zoning.

Historically, the case of *Chittim v. Belle Fourche Bentonite Products Co.* controlled the definition of the word "mineral."[23] In *Chittim,* the court concluded that Bentonite was a mineral since it was (i) "of greater value while in place than the enclosing country or superficial soil," (ii) was "valuable in itself for commercial purposes" and (iii) was "near enough to market to have a value."[24] Because gravel is a marketable product, county commissioners assumed that gravel mining fell under the mineral exemption in Title 18 and was therefore considered subject primarily to state control under the EQA.[25]

However, in 1988 the court narrowed its earlier definition of a mineral.[26] In *Miller Land,* the court held that gravel was not a mineral.[27] The court adopted the "ordinary and natural meaning test" in place of the *Chittim* marketability test.[28] The court concluded that gravel, which is

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20. *Id.*

21. Op. Wyo. Att'y Gen., *supra* note 18, at 108.

22. *Id. See generally,* Getty Oil Co. v. Royal, 422 S.W.2d 591, 593 (Tex. Civ. App. 1967) (explaining the traditional relationship between the dominant subsurface estate and the servient surface estate); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (explaining that one rationale for the dominance of the mineral estate was that the mineral estate owner could only benefit from the land through mineral production).

23. In Chittim v. Belle Fourche Bentonite Prod. Co., 149 P.2d 142, 146 (Wyo. 1944), the court adopted the following definition of the word mineral:

> any form of earth, rock, or metal of *greater value while in place than the enclosing country or superficial soil* . . . The real test seems to be the character of the deposit as occurring independently of the mere soil, *valuable in itself for commercial purposes,* that is, *near enough to a market to have a value.*

Id. (citation omitted) (emphasis added).

24. *Id.* at 146.

25. Interview with Andy Kasehagen, Director of City of Laramie/Albany County Planning Office, in Laramie, Wyo. (Aug. 27, 1996) [hereinafter Kasehagen Interview]. *See infra* 36 and accompanying text.

26. Miller Land & Mineral Co. v. State Highway Comm'n, 757 P.2d 1001 (Wyo. 1988).

27. *Id.* at 1001.

28. *Id* at 1004. The "ordinary and natural meaning test" provides:

> [S]ubstances such as sand, gravel and limestone are not minerals within the *ordinary and natural meaning* of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value, as for example sand that is valuable for mak-

useful only for building and road-making purposes, is not a mineral in the ordinary and generally accepted meaning of the word.[29]

Though the *Miller Land* decision arguably opened the door to county regulation of gravel extraction, many counties in Wyoming continued to treat gravel as a mineral, failing to enact formal gravel regulations.[30] In the practical application of Title 18, county commissioners did not prohibit gravel extraction. If an operator wanted to extract and process gravel, he could do so without county intervention.[31] However, some counties did

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> ing glass and limestone of such quality that it may profitably be manufactured into cement. Such substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word.

Id. (quoting Heinatz v. Allen, 217 S.W.2d 994, 997 (Tex. 1949)) (emphasis added).

29. *Miller Land*, 757 P.2d at 1004. In their concurring opinions, Justices Rooney, Thomas and Cardine agreed with the majority's holding that gravel is not a mineral, but disagreed with the rationale of the holding. *Id.* at 1004-7. Justices Rooney and Thomas explained that gravel could be a mineral under the "ordinary and natural meaning test" if the gravel has "special value" or "inherent value" at the time the deed is executed. *Id.* at 1006-07. The gravel in the *Miller Land* case was not a mineral because it only obtained requisite value when the Highway Department began construction in 1985, not when the deed was conveyed in 1978. *Id.* at 1006.

30. *See, e.g.*, Chris Tollefson, *County Reviews Zoning Laws in Wake of Court Decision*, CASPER STAR TRIBUNE, July 28, 1995, at C1. ("Natrona County officials are scrambling to review zoning regulations in light of last week's ruling by the Wyoming Supreme Court giving county commissioners the right to regulate sand, gravel and limestone mining."); Bill Luckett, *County Seeks Input on Gravel Mining Regs*, CASPER STAR TRIBUNE, Aug. 24, 1996, at C1. ("After five years of intermittent controversy and lawsuits, an unprecedented coalition of rural landowners and industry representatives has put together a series of regulations designed to guide the development of gravel and limestone mining in Natrona County."). Some counties do not even have zoning regulations, e.g., Johnson County, Albany County and Converse County. One explanation for why *Miller Land*'s new test did not change county practices is that counties thought the *Miller Land* decision had no bearing on § 18-5-201 of the Wyoming Statutes because of its particular facts. Kasehagen Interview, *supra* note 25. *Miller Land* involved the court's construction of a mineral reservation clause in a deed. *Miller Land*, 757 P.2d at 1001. In that specific context, the court held that gravel was not a mineral in order to minimize title uncertainty. *Id.* at 1004. The court rested its decision on the policy ground that to characterize gravel as a mineral would mean that a grantor reserves much of the surface estate that is purportedly conveyed to a grantee. *Id.* at 1005.

31. *See* Brief of River Springs Limited Liability Company in Support of Petition for Rehearing at Exhibit 3 para. 2, River Springs Ltd. Liab. Co. v. Board of County Comm'rs of Teton County, 899 P.2d 1329 (Wyo. 1995) (No.94-23) [hereinafter Petition for Rehearing] (on file with *Land and Water Law Review*). In his affidavit, David Hanlin, Assistant Chief Engineer, Wyoming Department of Transportation explained that,

> [i]f the county in which the sand or gravel source is located has an active zoning program, WYDOT [Wyoming Department of Transportation] in some cases informally 'clears' the location with the county before proceeding with further establishment of the pit; however, the state of Wyoming establishes these sand and gravel pit sources without obtaining a formal mining pit permit for each individual source based on the authority provided under W.S. § 35-11-401(e)(ii)[of the EQA].

Id. In his affidavit, David Owen, member of River Springs Limited Liability Company, said that "[p]rior to this court's decision, I never understood that Teton County could shut down a sand and gravel operation located on ten acres or less. There are several other ten acre operations in Teton County and none of them have ever been required to obtain a permit from Teton County." *Id.* at Exhibit 4 para. 2.

require zoning permits if gravel processing involved a batch plant.[32] Generally, barring landowner objections, counties approved permits because mining operations were economically beneficial to the county.[33]

State Regulatory Authority Over Gravel Mining

In 1973, the Wyoming State Legislature passed the Environmental Quality Act.[34] Among the purposes of the EQA are to "plan the *development, use, reclamation*, preservation and enhancement of the air, land and water resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; [and] *to retain for the state the control over its air, land and water.*"[35] The Act created the DEQ and granted it authority to regulate mining.[36] The Legislature did not provide specifically for a local role in regulation of mining.[37]

The Land Quality portion of the EQA lists numerous requirements governing the extraction and production of minerals, expressly defined to include sand and gravel.[38] The DEQ Land Quality Division prohibits any mine operation from commencing unless it issues a valid mining permit.[39] To obtain a permit, a mining operator must fill out an application which includes a mining and reclamation plan.[40]

The DEQ considers several factors in issuing a permit, including whether the proposed operation would harm any area having particular historical, archaeological, wildlife, surface geological, botanical or scenic value; whether the proposed operation constitutes a public nuisance or endangers the public health and safety; and whether the affected land lies

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32. Kasehagen Interview, *supra* note 25 (counties employ varying degrees of formality for obtaining permits when the gravel operation involves large machinery).

33. *Id.*

34. WYO. STAT. ANN. §§ 35-11-101 to -1428 (Michie 1977).

35. *Id.* § 102 (emphasis added).

36. *Id.* §§ 401-37. The DEQ is comprised of six divisions: Land Quality, Air Quality, Water Quality, Solid and Hazardous Waste Management, Abandoned Mine Land and Industrial Siting. *Id.* § 105.

37. *Id.* § 102 (providing, in relevant part, that one of the purposes of the EQA is "to retain for the state the control over its air, land and water and to secure cooperation between agencies of the state, agencies of other states, interstate agencies, and the federal government in carrying out these objectives").

38. *Id.* §§ 401-437 (the Land Quality provisions of the EQA). *Id.* § 103(e) (providing that 'minerals' means coal, clay, stone, sand, gravel . . . and any other material removed from the earth for reuse or further processing.").

39. *Id.* § 405(a).

40. *Id.* §§ 406(a),(b). The requirement of a mining and reclamation plan is designed to assure control of present and future uses of the land and control of adverse environmental impacts. *Id.* §§ 406 (b)(i)-(ix).

within three hundred feet of any existing occupied dwelling, home, public building, school, church, community or institutional building, park or cemetery.[41] The last two criteria give authority to the DEQ over concerns typically addressed by local zoning regulations.[42] The DEQ's broad authority further supports the idea that the legislature intended the state to regulate gravel mining.

Section 35-11-401(e) of the EQA excludes six excavation operations from the strict requirements of DEQ's Land Quality division.[43] These include:

> (ii) Excavations other than for the extraction of coal by an agency of federal, state or local government or its authorized contractors for highway and railroad cuts and for the purpose of providing fill, sand, gravel and other materials for use in connection with any public project agencies for the purpose of providing sand, gravel and other materials for use in connection with any public project if governmental reclamation requirements are satisfied . . .
> (vi) Surface mining operations, whether commercial or noncommercial, for the removal of sand, gravel . . . from an area of ten (10) acres or less of affected land . . . .[44]

Exempt operations are still required to meet a number of standards outlined in the Land Quality division's Rules and Regulations in order to obtain a permit.[45]

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41. *Id.* § 406(m).

42. The typical standards for the issuance of a special permit by a local zoning body include: "(1) that the use must be in harmony with the intent and purpose of the locality's zoning law and comprehensive plan; (2) that it will not adversely affect the health, safety and welfare of the community; [and] (6) that it will not cause traffic, parking, population density or environmental problems." 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 44.03 [1] at 44-42,-43 (1986). Rohan suggests that other conditions frequently imposed on the grant of a permit include: "screening/buffer, distance from other similar uses, setback, minimum lot size, parking and existence of certain public facilities." *Id.* § 44.04[2], at 44-65.

43. WYO. STAT. ANN. § 35-11-401(e) (Michie 1977).

44. *Id.* §§ 401(e)(ii),(vi). Other exempt operations which are potentially open to county regulation are:

> (i) Building or expansion of utilities, soil conservation conveyances and foundation excavations for the purpose of constructing buildings and other structures not used in mining operations; . . . (iii) The extraction of sand, gravel, [or] dirt, . . . by a landowner for his own non-commercial use from land owned or leased by him; (iv) Archaeological excavations; [and] (v) Other surface mining operations which the [DEQ] determines to be of an infrequent nature and which involve only minor surface disturbances.

Id. §§ 401(e)(i),(iii)-(v).

45. DEQ Land Quality, Rules and Regulations, Chapter X, *Limited Mining Operations for Ten*

Preemption

The case of *K N Energy* defines the Wyoming preemption doctrine.[46] In *K N Energy*, the court contrasted the means for resolving a conflict between federal and state power and a conflict between state and local authority.[47] In the first situation, the court will invoke federal preemption principles.[48] However, in the latter situation the court will not find that the state has preempted a field to the exclusion of local action.[49] Instead, the court will closely compare the statutes involved to determine what authority the Wyoming State Legislature has granted to the local body.[50]

In reconciling county and state statutes, the court looks at two primary factors: (1) legislative intent which is found, if possible, in the express language of the statutes, and (2) the scope of power granted to the state by the legislature.[51] The *K N Energy* court concluded that it would interpret the legislature's "broad grant of regulatory power" to the state as placing a "restricted meaning" on corresponding local authority.[52] In

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(10) Acres or Less of Affected Land, at 60-63. To obtain a permit the mining operator must: notify the DEQ of the location of the mining operation and the mineral to be mined; provide a quadrangle map and a description of the proposed mining operation and methods (number of acres affected, depth to which mining will occur, premining and proposed post-mining land use); file a bond; file an annual report; and agree to follow the DEQ's reclamation guidelines. *Id.* §§ 1-4. The reclamation guidelines address topsoil, seeding, fertilization, petroleum wastes and other toxic materials and prevention of erosion. *Id.* § 4.

46. K N Energy, Inc. v. City of Casper, 755 P.2d 207 (Wyo. 1988).

47. *Id.* at 210. The court speaks of a conflict between state and "municipal" authority. *Id.* However, "municipalities" is a term which is intended to include counties. Schoeller v. Board of County Comm'rs of Park County, 568 P.2d 869, 875 (Wyo. 1977).

48. *K N Energy*, 755 P.2d at 210. (citing Gulf Oil Corp. v. Oil and Gas Conservation Comm'n, 693 P.2d 227 (Wyo. 1985); Industrial Siting Council v. Chicago & North Western Transp. Co., 660 P.2d 776 (Wyo. 1983)).

49. *Id.* at 210. In Green River v. Debernardi Constr. Co., 816 P.2d 1287, 1291 (Wyo. 1991), the court discussed a four-factor preemption test taken from a Michigan case but did not adopt the test. *Id. Compare* C&M Sand & Gravel v. Board of County Comm'rs of Boulder County, 673 P.2d 1013 (Colo. App. 1983). The court held that the trial court erred in finding that the entire field of regulation of land use for mining operations had been preempted by the Reclamation Act and the Preservation Act. *Id.* at 1015. In finding against preemption, the court reasoned that it was significant that the Reclamation Act did not mention traditional local zoning concerns and the Act specifically provided for a local role in mining regulation. *Id.* at 1016. *See also supra* notes 37, 42 and accompanying text.

50. *K N Energy*, 755 P.2d at 210.

51. *Id.* at 214-16.

52. *Id.* at 216. The court stated that "the legislature's broad grant of regulatory power to the PSC [Public Service Commission] supports our conclusion that it intended a *restricted meaning* to be applied to the [city's] authority to franchise under § 15-1-103(a)(xxxiii)." *Id.* (emphasis added). The court concluded, "[i]t is apparent, in examining [city] Ordinance No. 16-85, that it encompasses a substantial degree of the regulatory authority assigned by statute to the PSC." *Id.* The court declared the city ordinance void because the ordinance was adopted "without statutory authority." *Id.* In

fact, many Wyoming cases favor state regulation over local regulation.[53] In these cases, the Wyoming Supreme Court points to the negative implications of piecemeal regulation.[54]

PRINCIPAL CASE

In *River Springs*, the Wyoming Supreme Court held that sand, gravel and rock are not "minerals" within the context of Title 18.[55] The court was not persuaded to depart from the "ordinary and natural meaning test" adopted in *Miller Land*,[56] and pointed to the fact that River Springs did

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Vandehei Developers v. Public Serv. Comm'n, 790 P.2d 1282, 1286 (Wyo. 1990), the court stated that "[t]he scope of the authority granted to the PSC demonstrates a legislative intent that the police power of the state, to the extent that it relates to public utilities, shall be exercised by the PSC and to preserve none of that power for municipalities." *Id.* (quoting K N Energy, Inc. v. City of Casper, 755 P.2d 207, 213 (Wyo. 1988)). The court seemed to strengthen its position that a county does not have the power to regulate public utilities by pointing out that the powers of a county are usually more restricted than those of a municipal corporation. *Id.*

53. *See* Dunnegan v. Laramie County Comm'rs, 852 P.2d 1138 (Wyo. 1993); *Green River*, 816 P.2d at 1287; *Vandehei*, 790 P.2d at 1282; *K N Energy*, 755 P.2d at 207.

54. *See, e.g., Vandehei*, 790 P.2d at 1285-86. The court held that Wyo.Stat. § 1-26-813 (1977), which provides that utilities must obtain permission from a county commission when putting their lines on county roads, did not grant the Laramie County Board of Commissioners the authority to regulate public utilities. *Id.* The court reasoned that "[i]f each county were to pronounce its own regulation and control over electric wires, pipe line and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state." *Id.* at 1286. In *Green River*, 816 P.2d at 1292, the court held that a city ordinance which established a 10% preference for contractors who are city residents was in violation of a state statute which set a 5% preference in the bid process for contractors who are state residents. *Id.* The court reasoned that a "great deal of uncertainty and confusion would result" if each county and city established its own preference system for local contractors in the bid process. *Id.* at 1291.

55. *River Springs*, 899 P.2d at 1330, 1334. *See supra* note 1 (the *River Springs*' holdings are in response to a consolidated appeal). In *River Springs*, the court did not address appellant's central argument that to determine the legislature's intent in using certain words in a statute, those words must be taken in the sense in which they were understood at the time the statute was enacted and not at some subsequent time. Brief of Appellant, *supra* note 7, at 6-9 (citing L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663, 669 (Wyo. 1991); Title Guar. Co. of Wyo., Inc. v. Belt, 539 P.2d 357, 359 (Wyo. 1975)). In it's brief, River Springs argued that the court should adopt the *Chittim* definition of "mineral" in effect in 1955 when Title 18 was adopted, which included gravel, and not the definition adopted for the first time in 1988 in *Miller Land*, which excluded gravel. *Id. See supra* notes 23, 28 and accompanying text. *See also* Petition for Rehearing, *supra* note 31, at 7 (arguing that pursuant to WYO. STAT. ANN. § 39-6-30 (Michie 1977), which is entitled "Excise taxes on the extraction of minerals," the state of Wyoming has been collecting a 2% severance tax on the extraction of gravel and sand for years). *See also* Missoula County v. American Asphalt, Inc., 701 P.2d 990 (Mont. 1985). The Montana Supreme Court construed MONT. CODE ANN. § 76-2-209, a statute similar to WYO. STAT. ANN. § 18-5-201, which provided that no resolution or ordinance could be adopted that would "prevent the complete use, development or recovery of any mineral, forest or agricultural resources by the owner thereof." The Montana Supreme Court determined that a county must at least allow the activities necessary to develop the resource to the point at which the operator can effectively utilize it. *Id.* at 992-93.

56. *See supra* note 28.

not assert that its sand, gravel and rock was intended for any other purpose than that related to "road-making."[57]

The court held that since sand, gravel and rock are not minerals, Teton County is free to apply its zoning and planning authority under Title 18 to foreclose the extraction of those substances.[58] The court explained that the activities River Springs proposed were "industrial, or possibly commercial," and Teton County has "clear authority" to apply its zoning plan in a way that would prohibit such activities and promote orderly development of unincorporated areas.[59]

The court acknowledged that in adopting the EQA, the Legislature "explicitly and specifically" granted the authority to prohibit and regulate mining activities to the DEQ.[60] However, the court held that counties can initially foreclose activities the DEQ would otherwise regulate.[61] The court explained that its task was to "harmonize" Title 18 and the EQA, thus affording "legitimate effect" to both statutes.[62]

The court held that if county land use regulations foreclose activities the DEQ otherwise would regulate, there can be no excavation, extraction, production, or processing of sand, gravel, or rock.[63] If the county permits the extraction or processing of sand, gravel, or rock, then the DEQ may regulate these activities.[64] "If, however, the DEQ, pursuant to an exception in the statute, does not regulate [these] activities, they may be regulated by the county in a way that does not conflict with state regulation."[65]

Because the Teton County zoning plan allows gravel extraction at certain locations if the Board issues a CUP,[66] the court considered whether River Springs would have to meet county or state regulations. The court explained that the DEQ, by issuing a limited mining permit pursuant to the ten acre exemption in § 35-11-401(e)(vi), "manifested a decision not to exercise state regulatory authority."[67] Because the county could, therefore, invoke its regulatory power, the court upheld the Board's denial of River Spring's application for a CUP because the use sought by

57. *River Springs*, 899 P.2d at 1333.
58. *Id.* at 1330, 1334.
59. *Id.* at 1334.
60. *Id.* at 1335.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 1337.
66. *See supra* note 4 and accompanying text.
67. *River Springs*, 899 P.2d at 1336.

River Springs did not meet county regulations.[68] The court pointed out that River Springs applied for a CUP "with full knowledge that its site was zoned for residential and agricultural purposes" and therefore subject to county zoning requirements which might be very difficult to satisfy.[69]

ANALYSIS

In the *River Springs* case, the court was faced with the difficult task of reconciling two statutes governing mining regulation. The court's interpretation of the interplay between county zoning power and state regulatory authority over gravel mining in favor of local control is definitely plausible. However, the court's reasoning seems strained and inconsistent with prior case law. One implication of the *River Springs* decision is heightened regulation of small gravel mining operations. Other possible impacts include piecemeal regulation, local gravel shortages and delayed highway road projects.

County Zoning Authority Not Preempted By DEQ

Though the court described preemption as a "collateral issue,"[70] the court's decision not to invoke the preemption doctrine was a pivotal part of the opinion.[71] The court was not willing to say that the DEQ's issuance of a mining permit superseded the county's denial of a CUP. The court reasoned that since a county is a political subdivision of the state, rather than a sovereign entity in conflict with the state, the court must somehow reconcile the legislature's grant of zoning authority to the county with its grant of regulatory authority to the DEQ.[72] The court's reluctance to invoke the preemption doctrine is consistent with its prior decisions.[73] However, the court's resolution of competing state and county authority over the ten acre mining operation in the *River Springs* case is questionable.

When reconciling county and state statutes which occupy the same field, the Wyoming Supreme Court usually finds that the preemptive nature of a state statute supports the conclusion that the legislature intended to apply a "restricted meaning" to corresponding local authority.[74] In

68. *Id.* at 1336. *See supra* note 7 and accompanying text.
69. *River Springs,* 899 P.2d at 1336.
70. *Id.* at 1330.
71. *Id.* at 1335.
72. *Id.*
73. *See supra* notes 49-50 and accompanying text.
74. K N Energy Inc. v. City of Casper,, 755 P.2d 207, 216 (Wyo. 1988). *See supra* note 52 and accompanying text.

previous cases, the court has "restricted" local power to the point of nullification.[75] In *River Springs,* the court stated that the legislature "explicitly and specifically" granted the authority to prohibit and regulate mining activities to the DEQ.[76] However, the court applied the least restrictive meaning to Title 18 by giving counties the initial power to zone out gravel extraction.[77] This reconciliation of Title 18 and the EQA in favor of county control seems inconsistent with prior precedent.

County Regulation of DEQ Exempt Operations

In addition to holding that a county can foreclose gravel extraction, the court held that if a county permits a gravel operation, the county can regulate it if the DEQ excludes the operation from its regulation, as long as county regulation does not conflict with state regulation.[78] This holding is confusing, and raises the question of how county regulation can conflict with state regulation when the court explains that the county can only regulate in the absence of state regulation. One possible explanation for the opinion's apparent circularity is that the court recognized that the DEQ has several divisions.[79] The court's holding might imply that even if the DEQ Land Quality division exempts a gravel operation from its regulations, the operation might have to comply with DEQ Air Quality or Water Quality standards.[80]

Additionally, the court was not clear when it discussed why a ten acre operation was not regulated by the state. The court simply concluded that the DEQ's issuance of a limited mining permit to River Springs manifested a decision to exclude the ten acre operation from state regulatory authority.[81] The court offered no explanation why DEQ's ten acre permit requirements and subsequent authorization did not constitute "regulation."[82] Though the DEQ excludes ten acre operations from the stricter requirements applied to larger operations,[83] it subjects them to a formal

75. *See supra* note 52.

76. *River Springs,* 899 P.2d at 1335.

77. *Id.* at 1330, 1334-37.

78. *Id.* at 1337.

79. *See supra* note 36.

80. WYO. STAT. ANN. §§ 35-11-201 to -212 (Michie 1977) (Air Quality). *Id.* §§ 301-311 (Water Quality).

81. *River Springs,* 899 P.2d at 1336.

82. "Regulate" means "to govern or direct according to rule or to bring under control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists." BLACK'S LAW DICTIONARY 1286 (6th ed. 1990). A "permit" is "a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority." *Id.* at 1140.

83. *See supra* notes 38-40.

permitting process.[84] The court's reasoning appears to manipulate the meaning of "regulation," perhaps because the court was dissatisfied with the lack of DEQ regulation over small gravel operations.

Implications of the River Springs Decision

A. Extensive County Zoning Regulations

In holding that a county may regulate a small gravel operation to the extent that the state does not regulate it, the court has given counties the authority to enact comprehensive CUP requirements. CUP requirements generally encompass environmental concerns.[85] However, counties that can afford a specialist to implement detailed environmental measures potentially could have the most arduous CUP standards. For example, the 1995 Teton Gravel Regulations require a small gravel operator to: submit a noise study, provide a reclamation plan designed and certified by a Wyoming registered landscape architect; follow a hydrologist's report detailing how extraction can be accomplished in a manner most beneficial to the river system; improve fisheries and waterfowl habitats; preserve vegetation; follow grading and erosion/sediment measures and ensure no significant negative impacts to endangered species.[86]

Compliance with extensive gravel regulations is expensive for operators, and could instigate regulation shopping. If a gravel pit crosses county lines, or if an operator can extract in two neighboring counties, the operator will surely locate the extraction and processing where the regulations are least burdensome. The Teton gravel regulations will continue to force gravel extraction out of Teton County and into poorer counties.[87]

B. County Regulation of DEQ Non-Exempt Operations

Though the court held that counties can regulate DEQ exempt operations, counties might also try to regulate non-exempt DEQ operations. The 1995 Teton Gravel Regulations provide that Teton County will permit non-exempt DEQ operations under its zoning provisions only if a

84. *See supra* note 45 and accompanying text.

85. ROHAN, *supra* note 42 and accompanying text.

86. Teton County Comprehensive Plan, Gravel Text Amendment, Article II, § 231200: Gravel Processing and Extraction (1995) [hereinafter Teton Gravel Amendment]; *Id.* Art. V, § 5140: Conditional and Special Use Standards.

87. The list of gravel suppliers from outside Teton Valley include: HK Construction from Idaho Falls, Kilroy from Alpine, and Rice from Dubois. TETON COUNTY PLANNING DEPARTMENT, GRAVEL SUPPLY AND DEMAND IN TETON COUNTY AND JACKSON 1 (1995) [hereinafter Teton Gravel Report].

"cooperative regulatory agreement" is reached with the DEQ to ensure that the operation meets county standards.[88] It appears that Teton County will permit only those mining operations which it can regulate. If the DEQ agreed to this type of arrangement, Teton County would divest the DEQ of most of its regulatory authority over gravel mining since the county would regulate both exempt and non-exempt DEQ operations. If the DEQ resists Teton County's efforts to control larger mining operations, Teton County's ability to defend its regulatory scheme could be the subject of future litigation.

C. Effects on the Gravel Industry

The authority to zone out gravel is the power to aggravate local gravel shortages, close down businesses and impede highway road projects. In 1995, Teton County estimated that it had an annual gravel and sand deficit of over 500,000 tons despite the fact that it hauled gravel from Idaho Falls, Alpine and Dubois.[89] Construction of roads in Grand Teton National Park alone is expected to require an average of 61,500 tons per year for the next ten years.[90] The fact that the valley of Jackson Hole is underlain by a deep alluvial deposit of common sand, gravel and cobble rock[91] is of little impact if no one has access to it.

The *River Springs* decision could seriously affect the Wyoming Department of Transportation (WDOT) and members of the Wyoming Contractors Association (WCA) who contract with the WDOT and others for heavy industrial projects. The WDOT depends on local gravel supplies because there are only four principal large quarry operations in the state, and trucking sand and gravel from them to remote sites significantly increases construction costs.[92] Before *River Springs*, WDOT established gravel sources quickly and uniformly throughout the state without obtaining formal county approval based on the authority provided under Wyo.Stat. § 35-11-401(e)(ii).[93] It

88. *See* Teton Gravel Amendment, *supra* note 86, § 231200 (1). "No project shall qualify for a Special Use Permit if it requires a Small Mining Permit from the DEQ unless a *cooperative regulatory agreement* is reached with the DEQ, or some other mechanism is offered by the applicant, to ensure the standards of this Section are met and can be subject to the continued oversight and enforcement action by the County." *Id.* (emphasis added).

89. Teton Gravel Report, *supra* note 87, at 1.

90. *Id.* at 3.

91. Commissioners' Findings of Fact, *supra* note 7, at 4.

92. Petition for Rehearing, *supra* note 31, at Exhibit 2 para. 6 (affidavit of Robert L. Gaukel).

93. Petition for Rehearing, *supra* note 31, at Exhibit 3 para. 2 (affidavit of David Hanlin). Because government excavations, like the *River Springs* ten acre operation, fall under the DEQ § 35-11-401(e) exempt mining operations, counties can potentially prohibit and regulate them. *See supra* note 44.

seems that the Wyoming Legislature recognized the need for §35-11-401(e) exempt operators to have access to an expedient permitting system. Unless the Legislature revises the EQA, WDOT potentially will be forced to deal with twenty-three different sets of county regulations which will impede the timely and cost-effective pursuit of highway projects,[94] precisely the piecemeal approach the court usually disfavors.[95]

CONCLUSION

While a county can choose to locate a manufacturing plant far away from a residential area, gravel sources often exist along the river bed and close to residential homes. One implication of the *River Springs* decision is that county commissioners have authority to weigh the competing interests of small gravel operators and residential property owners. The county can either prohibit gravel extraction or allow it under certain conditions. What is ironic is that the court approves of the DEQ's regulation of larger mining operations which are likely to produce more noise, traffic and adverse environmental impacts. The overriding question is whether local control over gravel mining is the best approach to regulation in light of all of its implications. This is a question for the Legislature to answer. The Wyoming Legislature can revisit the EQA to make it expressly preemptive and put gravel mining regulation back in the hands of the state. If the legislature rejects this opportunity, the legacy of the *River Springs* decision will be one of inconsistent, piecemeal gravel mining regulation and continued litigation.

NATASHA SAYPOL

94. In his affidavit, Robert L. Gaukel, Executive Vice President of the Wyoming Contractors Association, explained that "if, as a result of the Supreme Court's decision, contractors are no longer able to operate ten acre sand and gravel operations without obtaining county approval (or if their operations are subject to being shut down at the will of a county), the bidding process will become extremely protracted and difficult." Petition for Rehearing, *supra* note 31, at Exhibit 2 para. 5.

95. *See supra* note 54 and accompanying text.