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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
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9 OIL-DRI CORPORATION OF NEVADA, a
10 Nevada Corporation, and OIL-DRI
CORPORATION OF AMERICA, a Delaware
Corporation,

Case No. CV02-02196

11 Petitioners and Plaintiffs,

Dept. No. 9

12 vs.

13 WASHOE COUNTY, a political subdivision of
14 the State of Nevada,

15 Respondent and Defendant,
16

17 DECISION

18 OIL-DRI Corporation of Nevada and OIL-DRI Corporation of America have filed
19 a Petition-Complaint for Declaratory Relief, Review of Land Use Decision, and Money
20 Damages. The action is brought pursuant to the provisions of NRS 278.0233 to review
21 certain actions taken by Washoe County with respect to an Application for Special Use
22 Permit. OIL-DRI does not seek reversal of Washoe County's decision for land use purposes
23 but rather seeks an award of damages based on Washoe County's decision to deny the
24 Special Use Permit.

25 In July of 1999, OIL-DRI submitted to the Bureau of Land Management a Plan
26 of Operations for the proposed excavation of two mine pits on federal land, a processing
27 plant on OIL-DRI's private land and associated roads and other facilities. The mine pits are
28 located on mining claims located and staked by OIL-DRI. In September of 2001, the BLM

1 issued a final Environmental Impact Statement on OIL-DRI's project for review and
2 comment before the issuance by the BLM of a Record of Decision. In the Environmental
3 Impact Statement, the BLM expressly acknowledged Washoe County's authority over OIL-
4 DRI's proposal on federal land including:

5 In addition to BLM, other federal, state, and local agencies have jurisdiction
6 (including inspection responsibilities) over certain aspects of the proposed
7 action. Table 1-1 provides a comprehensive listing of the agencies and their
8 respective permits/authorizing responsibilities. The primary permits to be
9 obtained by OIL-DRI include a reclamation permit, air quality operating permit,
10 and a special use permit.

11 Table 1-1 of the Environmental Impact Statement specifically listed Washoe
12 County as having regulatory responsibilities over OIL-DRI's proposed operations.

13 The Record of Decision issued by the Bureau of Land Management was subject
14 to appeal to the Interior Department's Board of Land Appeals. In March of 2002 and before
15 the end of the 30-day period for public appeal, BLM withdrew its Record of Decision. As of
16 the date of the hearing on this matter, the Bureau of Land Management has not reinstated
17 the Record of Decision. As a consequence, the Bureau of Land Management has not yet
18 determined that OIL-DRI's mining claims covering the mine pits are valid under the 1872
19 mining law.

20 On November 13th, 2001, OIL-DRI submitted an Application for a Special Use
21 Permit to Washoe County (OIL-DRI clay plant Special Use Permit Application No.
22 SWOO12-O34O). The application encompassed OIL-DRI's plans to undertake clay mining
23 operations on public land and to construct and operate an associated (and required) clay
24 processing facility on nearby private lands within Washoe County.

25 On December 12th, 2001, Washoe County's planning staff submitted a written
26 report to the Washoe County Planning Commission recommending denial of the Special
27 Use Permit Application. On December 18th, 2001, the Washoe County Planning
28 Commission conducted a public hearing on the Application. The hearing included testimony
from five representatives of OIL-DRI, four representatives of the Reno Sparks Indian
Colony, four different Citizen Advisory Boards, four other interested groups and 44

1 individuals. Approximately 173 other persons were present and signed a sheet entitled
2 "opposed but not speaking". At the conclusion of the hearing, the Washoe County Planning
3 Commission on a 5 to 2 vote denied OIL-DRI's Special Use Permit Application. In doing so,
4 the Planning Commission made 8 specific factual findings supporting the denial.

5 On December 31, 2001, OIL-DRI appealed the denial of its Application to the
6 Washoe County Commissioners. On January 11, 2002, the Department of Community
7 Development issued a detailed written report recommending Washoe County uphold the
8 Planning Commission's decision to deny the Special Use Permit. On February 26, 2002,
9 the Washoe County Commissioners held a public hearing on OIL-DRI's appeal of the permit
10 denial. On a 3 to 2 vote the Washoe County Commissioners affirmed the Planning
11 Commission's denial of the Special Use Permit.

12 At no time in the process did OIL-DRI request a bifurcation of the Application.

13 In its Petition, OIL-DRI makes two claims. First, Washoe County's decision to
14 deny OIL-DRI's Special Use Permit Application illegally conflicted with federal mining law
15 and should, therefore, be preempted by those laws. And second, Washoe County abused
16 its discretion by not dividing the Application into two separate Applications - one covering
17 the mining operations on federal land and the other covering the processing plant on private
18 land.

19 With respect to OIL-DRI's preemption claim, the United States Supreme Court
20 holds that state law can be preempted in two general ways: One, where congress
21 evidences an intent to occupy a particular field, any state law falling within said field is
22 preempted; and/or, two, where congress has not entirely displaced state regulation over a
23 matter in question, state law is preempted to the extent it actually conflicts with federal law.
24 *California Coastal Commission v. Granite Rock Co.*, 480 US 572, 586; 107 S. Ct. 1419,
25 1428 (1987). Where a Court scrutinizes state action

26 the question presented is merely whether the State can regulate uses rather
27 than prohibit them. Put another way, the State is not seeking to determine
28 basic uses of federal land, rather it is seeking to regulate a given mining use so
that it is carried out in a more environmentally sensitive and resource-protected
fashion. The line between environmental regulation and land use planning will
not always be bright; for example, one may hypothesize a state environmental
regulation so severe that a particular land use would become commercially

1 impracticable. However, the core activity described in each phrase is
2 undoubtedly different. Land use planning in essence chooses particular uses
3 for the land; environmental regulation, at its core, does not mandate particular
4 uses of the land but requires only that, however the land is used, damage to the
environment is kept within prescribed limits. Congress has indicated its
understanding of land use planning and environmental regulation as distinct
activities.

5 In this case, there is no express declaration of preemptive effect in the
6 regulatory framework from mining on federal lands. Further, relevant BLM regulations are
7 not so broad as to preclude any State regulation, and in fact in this case, recognize the
8 applicability of state law. OIL-DRI acknowledges that environmental review and the
9 imposition of reasonable state and local environmental regulations on its mining activity on
10 federal lands are deemed not in conflict with federal law and are allowed.

11 The record in this case demonstrates that Washoe County decided OIL-DRI's
12 specific proposal could not protect the environment within the limits set by the County. The
13 record does not show a categorical land use planning by Washoe County. In denying the
14 Special Use Permit, Washoe County's decision was based solely on the impacts from
15 Petitioners' proposal, not the location. Furthermore OIL-DRI is free to modify its proposal
16 and propose mining operations that comply with county environmental and quality of life
17 protections.

18 OIL-DRI argues that Washoe County's denial of the Special Use Permit for the
19 mining operations on federal land constitutes a "defacto ban on mining" rejected in *South*
20 *Dakota Mining Association, Inc. v. Lawrence Co.*, 977 F.Supp. 1396 (D.S.D. 1997). The
21 Court disagrees. Washoe County's actions in this case dealt with the specific permit
22 application before it. Nothing in Washoe County's action could be construed to be a per se
23 ban on all mining operations on the public land part of OIL-DRI's Special Use Permit
24 Application.

25 Therefore, the Court concludes that the Special Use Permit Application in this
26 case did not illegally conflict with federal mining law and is not preempted by those laws.
27 Further, the Court concludes that Washoe County's scheme for review of environmental
28 impact is consistent with the requirements of *Granite Rock Co.*, *supra*.

Next, OIL-DRI contends that the Application should have been separated by Washoe County. OIL-DRI, not Washoe County, selected the method for applying for a special use permit. Nothing in Washoe County ordinance 110.334.10 requires a party to file a Special Use Permit Application in any particular manner. Instead, guidelines are provided concerning the review of detailed mining plans and what must be submitted to Washoe County for review. The Court knows of no legal authority and OIL-DRI has failed to cite any that requires Washoe County to bifurcate or separate parts of a Special Use Permit Application during the review or hearing process.

Further, under OIL-DRI's theory, even if Washoe County had separated the Application it would have resulted in the approval of a mining plant and the denial of a processing plant. Such a result would have left OIL-DRI with no opportunity to proceed with its Plan of Operations.

At oral argument OIL-DRI's counsel candidly conceded that the rejection of the processing plant on private land by Washoe County was supported by substantial evidence. The Court agrees. In the absence of any legal obligation to separate the application, OIL-DRI's concession supports Washoe County's action on the Application as a whole. Furthermore, a review of the record shows that Washoe County's decision was supported by substantial evidence.

Good cause appearing it is hereby ordered that Petitioners/Plaintiffs' Petition/Complaint for Declaratory Relief, Review of Land Use Decision and Money Damages is DENIED and judgment shall be entered in favor of Defendant and against OIL-DRI. Pursuant to NRS 3.180, Washoe County shall prepare findings of fact, conclusions of law and judgment consistent with this decision.

DATED this 30 day of December, 2004.

James W. Hundley
DISTRICT JUDGE

CERTIFICATE OF SERVICE BY MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court, in and for the County of Washoe; and that on this 3 day of January, 2005, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Stephen C. Mollath, Esq.
Prezant & Mollath
6560 SW McCarran Blvd., Ste. A
Reno NV 89509

Earl M. Hill, Esq.
Marshall Hill Cassas & DeLipkau
P. O. Box 2790
Reno NV 89505-2790

Madelyn Shipman, Esq.
Assistant District Attorney
Washoe County District Attorney's Office
P. O. Box 30083
Reno NV 89520

Patrick L. Smith, Esq.
Smith, Doherty & Belcourt, P.L.L.C.
815 E. Front Street, Suite 3
Missoula MT 59802

Roger Flynn, Esq.
Western Mining Action Project
2260 Baseline Road, Suite 110A
Boulder CO 80302

Nicole Rinke, Esq.
Western Mining Project
505 S. Arlington Avenue, Suite 110
Reno NV 89509

Richard W. Harris, Esq.
Harris & Thompson
6121 Lakeside Drive, Suite 360
Reno NV 89511


