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SUPREME COURT, STATE OF COLORADO

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Case No. 89SC612

AMICI CURIAE BRIEF OF COLORADO COUNTIES, INC. AND THE COLORADO
MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENTS

COLORADO STATE BOARD OF LAND COMMISSIONERS, and WESLEY D. CONDA,
INC., a Colorado corporation,

Petitioners,

V.

COLORADO MINED LAND RECLAMATION BOARD; BOARD OF COUNTY
COMMISSIONERS OF BOULDER COUNTY, COLORADO; PEOPLE FOR ELDORADO
MOUNTAIN, INC., a Colorado non-profit corporation; and CITY OF
BOULDER, COLORADO,

Respondents.

Certiorari to:

Colorado Court of Appeals
Case Nos. 88CA0373 and 88CA0375

on Appeal from:

City and County of Denver District Court
Case No. 86CV1812

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ISSUES PRESENTED FOR REVIEW

Amici Curiae, Colorado Counties, Inc. and the Colorado Municipal League, address only the following two issues identified in the order granting the Petition for Certiorari:

1. Whether the application of local zoning regulations to School Lands directly by the County Board in denying Conda's application for a special permit unconstitutionally infringes on the Land Board's direction, control and disposition of School Lands or unconstitutionally diverts the School Lands from the exclusive benefit of the public school fund.

2. Whether the General Assembly delegated to Boulder County the land use and zoning authority to decide that the state school lands leased to petitioner Conda for mining may not be used for that purpose.

STATEMENT OF THE CASE

Amici adopt and incorporate herein the statement of the case contained in the Petitioners' Joint Opening Brief as clarified within the Answer Brief of the Respondents Boulder County, the Colorado Mined Land Reclamation Board, the People for Eldorado Mountain, Inc. and the City of Boulder.

INTEREST OF THE AMICI

The Colorado Municipal League is a non-profit voluntary

association of 246 (99.68% of the total) municipalities located throughout the state of Colorado, including all home rule municipalities, all municipalities greater than 2,000 in population, and the vast majority of those with a population of 2,000 or less. These municipalities are responsible for adopting master plans and adopting and enforcing land use regulations pursuant to Parts 2 and 3 of Article 23 of Title 31, C.R.S. applicable within their incorporated areas. Colorado Counties is a Colorado nonprofit corporation which was founded in 1907. All of Colorado's sixty-three counties are members or associate members of Colorado Counties. Counties are responsible for adopting land use regulations within unincorporated areas pursuant to Section 30-28-101, et seq., C.R.S. All local governments including counties and municipalities are given broad land use controls in the Local Government Land Use Control Enabling Act, Section 29-28-101, et seq., C.R.S.

Local governments have been delegated land use powers in order to balance basic human needs, legitimate environmental concerns and neighboring uses. Local governments are best able to plan for orderly development within their respective jurisdiction which will promote health, safety, morals, order, convenience, prosperity and general welfare of present and future needs, Sections 29-28-102, 31-23-301 and 31-23-207, C.R.S. These powers allow local governments to plan roads and coordinate traffic; develop adequate water, sewer and drainage facilities, and anticipate other

infrastructure needs; and provide for control of flood, fire and other safety hazards. Without such controls, mixing of incompatible land uses could occur, such as industrial buildings developed in residential neighborhoods, hazardous waste disposal sites located near schools, or high rise complexes constructed in flood zones.

Petitioner-Appellant, the Colorado State Board of Land Commissioners, (Land Board) owns surface rights in 3 million acres and mineral rights in a total of 4 million acres of land throughout the state of Colorado (School Lands). The location of those holdings throughout the state are shown on the map prepared by the Land Board attached as Appendix A. The Land Board has the power to lease these lands to private parties as well as to sell such lands. The Land Board recognizes in its Opening Brief that land use regulation authority is delegated to local governments by statute, but asserts that such regulation should not apply to School Lands. Such a decision would preclude local governments from protecting their citizens from the adverse effects of incompatible land uses, and planning for growth and development around and on millions of acres of School Lands.

SUMMARY OF ARGUMENT

Home rule municipalities, by Article XX of the Colorado Constitution, and statutory municipalities and counties, in their capacity as political subdivisions of the State, possess statutory

police power to adopt and enforce regulations designed to protect the public health, safety and welfare. The General Assembly, in the enactment of land use legislation, has given broad authority to local governments to regulate all land use within their respective jurisdictions, and has consistently committed to local control of land use decisionmaking. Section 29-20-102, C.R.S.;

C & M Sand and Gravel v. Board of County Commissioners, 673 P.2d 1013 (Colo.App. 1983). Boulder County's regulations at issue in this appeal were enacted pursuant to such land use legislation and, similar to other local government's land use regulations, were designed to regulate the manner in which a particular land use could be conducted in the public interest through the imposition of reasonable conditions and mitigation measures. In this case the regulations do not preclude all uses or even all mining uses.¹

The duties and responsibilities of the Land Board, as prescribed by Article IX, Sections 9 and 10, of the Colorado Constitution do not vest the Land Board with plenary power over the use of state lands. Accordingly, the Land Board is not immune from

¹ Boulder County's regulations allow mining on the Land Board property under certain conditions pursuant to a special use permit. Conda applied for such a permit, but Boulder County denied the request and Conda did not submit a revised application to the County addressing the public concerns raised by Boulder County (Rec. Vol II, pp. 724 - 728). Conda did not pursue judicial review of the County's action denying its Special Use Permit Application pursuant to Rule 106(a)(4), C.R.C.P. Rule 106(a)(4) C.R.C.P. is the exclusive remedy available to challenge the denial of the special use permit and the statute of limitations for such a challenge has expired. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975). Therefore, the specific application of Boulder County's regulations to Petitioner Conda's mining expansion request is not before this Court.

local land use regulations designed to protect the public health, safety and welfare, so long as such regulations do not divest the Land Board of its constitutional responsibilities in the disposition of state lands, and the use of revenues therefrom, for the support of common schools. Boulder County's regulations do not attempt to regulate activities within the exclusive authority of the Land Board. Rather, Boulder County's regulations seek to mitigate the projected impact of the particular use proposed by Conda.

The application of local land use regulations to School Lands is of utmost importance to local government in ensuring planned and orderly development through the imposition of reasonable conditions concerning land use compatibility and the provision of necessary public services and infrastructure, and in protecting the public health, safety and welfare by mitigating the projected impact of certain types of land uses within the respective local jurisdiction. As reflected by a survey of Colorado counties, local land use regulations similar in nature to Boulder County's regulations have been applied to both private and public lands in a uniform and non-discriminatory manner.

ARGUMENT

- I. **THE GENERAL ASSEMBLY HAS DELEGATED TO LOCAL GOVERNMENT THE LAND USE AUTHORITY TO PLAN FOR AND REGULATE ALL LAND USE WITHIN THEIR RESPECTIVE JURISDICTIONS.**

Land use regulatory authority of local governments emanates

from the police power of the state. The exercise of the police power, be it in the enactment of land use controls or in decisions enforcing such regulations, must bear a rational relationship to the public health, safety, and welfare. Tri-State Generation and Transmission Association, Inc. v. Board of County Commissioners, 42 Colo. App. 479, 600 P.2d 103 (1979); see generally; Village of Euclid v. Ambler Realty Co., 272 U.S. 365 L.Ed 303, 47 S.Ct. 114 (1926); Sellon v. City of Manitou Springs, 745 P.2d 229 (Colo. 1987).

Boulder County's land use regulations and similar land use regulations by local governments are enacted pursuant to, inter alia, the County Planning and Building Code, Sections 30-28-101, et seq., and 30-28-201, et seq., C.R.S.¹; the Colorado Land Use Act, Sections 24-65-101, et seq., C.R.S.; the Local Government Land Use Control Enabling Act, Sections 29-20-101, et seq.; and the Preservation of Commercial Mineral Deposits Act, Sections 34-1-301, et seq., C.R.S. In addition to the foregoing, municipalities and counties plan for and regulate land use within their respective jurisdictions pursuant to the Planned Unit Development Act of 1972, Sections 24-67-101, et seq., C.R.S.; Areas and Activities of State Interest Act (H.B. 1041), Sections 24-65.1-101, et seq.; Certificates of Designation for Solid Wastes Disposal Sites and

¹ Cities have similar powers to plan for and regulate land uses and buildings pursuant to Sections 31-23-201, et seq.; Sections 31-23-301 et seq.; and 31-15-601 et seq., C.R.S.

Facilities, Sections 30-20-101, et seq., C.R.S., and Hazardous Waste Disposal Sites, Sections 25-15-201, et seq., C.R.S.; and the provisions of Title 43 governing county highways and roads. Such expressed delegation of land use authority to local government not only encompasses land use planning considerations, but also the timely provision of necessary public services and infrastructure, environmental protection concerns, and health and safety related concerns.

In considering particular land uses such as mineral extraction operations, local governments generally employ a special review process similar in nature to Boulder County's land use regulatory process. Uses subject to a special review process are those uses which are permitted within a zone, but which because of the possibility that the permitted use could become incompatible in certain respects with neighboring uses, special permission is required before the land may be put to that use. Elam v. Albers, 616 P.2d 168 (Colo.App. 1980). A local government's decision to approve or deny a special use must be based upon established criteria and adequate standards designed to further a legitimate governmental objective. See Western Paving v. Board of County Commissioners of Boulder County, 181 Colo. 77, 506 P.2d 1230 (1973); Cottonwood Farms v. Board of County Commissioners, 725 P.2d 57 (Colo.App. 1986), aff'd, 763 P.2d 551 (Colo. 1988); Western Paving Construction v. Jefferson County Board of County Commissioners, 689 P.2d 703 (Colo.App. 1984); C & M Sand & Gravel

v. Board of County Commissioners, supra. Consistent with such established criteria and standards, a local government may impose reasonable conditions on the approval of a special use to mitigate projected impacts. See generally; Kings Mill Homeowners Association, Inc. v. City of Westminster, 192 Colo. 305, 557 P.2d 1186 (1976); Western Paving Construction v. Board of County Commissioners, supra; C & M Sand & Gravel v. Board of County Commissioners, supra.

Facially, the land use regulatory process enacted by Boulder County complies with the foregoing principles and is a legitimate exercise of the police power expressly delegated to counties by the General Assembly. However, the specific application of the County's land use regulations to Conda's mining expansion request is not properly before the Court since Conda did not pursue its exclusive judicial remedies pursuant to Rule 106(a)(4), C.R.C.P., nor attempt to address the concerns of Boulder County through the submittal of a revised application.

The Land Board asserts plenary power to use School Lands as it deems appropriate and without the local government's review of the impacts associated therewith. Such a premise, if upheld, would severely restrict local government's ability to plan for and regulate basic land use matters such as building and fire safety standards; drainage; road location, design and construction; location of recreational and educational sites; and the protection and enhancement of natural resources. The exemption of School Lands

from local land use regulation would not only impact the School Lands, internal use and immediately surrounding areas, but would also impact the entire local community's comprehensive planning efforts to provide for regional and centralized services and infrastructure. If this Court exempts School Lands from land use regulations delegated to local governments by the General Assembly, the door will be open for the Land Board to assert School Lands are exempt from every other statutory enactment which grants any entity other than the Land Board oversight over land uses including siting and operation of solid waste disposal facilities, Section 30-20-101, et seq.; siting and operation of hazardous waste disposal facilities, Section 25-15-201 et seq., and location, operation, reclamation, and safety requirements related to mineral resources contained in Title 34, C.R.S.

II. THE CONSTITUTION REQUIRES A BALANCE BETWEEN MAXIMIZING AMOUNTS FOR DISPOSITION OF SCHOOL LANDS AND REASONABLE REGULATIONS ADOPTED BY THE STATE.

Article IX, Section 9, of the Colorado Constitution provides that the Land Board shall have the direction, control and disposition of the public lands of the state under such regulations as are and may be prescribed by law. Article IX, Section 10, of the Colorado Constitution provides that it shall be the duty of the Land Board to provide for the location, protection, sale or other disposition of School Lands under such regulations as may be prescribed by law. Based upon these constitutional provisions, the

Land Board and Conda assert complete immunity from application of Boulder County's land use regulations to School Lands within the County's jurisdiction.

It is well established that the General Assembly cannot delegate to local government the authority, either independent of or jointly with the Land Board, to dispose of School Lands. See Sunray Mid-Continent Oil Company v. State, 149 Colo. 159 368 P.2d 563 (1961); In re Canal Certificates, 19 Colo. 63, 34 P. 274 (1893). Nor can local government, in the exercise of its police powers, impose discriminatory or unreasonable regulations, the resultant effect of which would likewise divest the Land Board of its delegated authority to sell, lease, or otherwise dispose of School Lands. See generally; In re Leasing of State Lands, 18 Colo. 359, 32 P. 986 (1893). Nor can local government divert School Lands nor the proceeds from the disposition thereof to non-school support purposes. See People ex rel Dunbar v. City of Littleton, 183 Colo. 195, 515 P.2d 1121 (1973).

However, it is also well established that the General Assembly can adopt regulations pertaining to powers of the Land Board. In Re Leasing of State Lands, supra. In that case the Land Board challenged the right of the legislature to limit leases of school lands to five years. In determining the time limitation was a proper regulation, the Court made a thorough analysis of the type

of regulation which is allowed under Article IX, Section 10 of the Colorado Constitution.³

The Colorado General Assembly directed that land use regulations be adopted and enforced by local government. C & M Sand and Gravel v. Board of County Commissioners, supra, at 1016. Moreover, Court has held that local governments are not immune from their own regulations, unless an exemption has been specifically provided, Clark v. Town of Estes Park, 686 P.2d 777 (Colo. 1984). Although the Land Board may be able to achieve the highest price by using this Boulder County site for mining without any regulation by Boulder County, the consequences of a rule that would allow the millions of acres of School Lands throughout the state to be used for mining or any other purpose considering only the maximum price without compliance with state laws requiring local government land

³ In Re Leasing of State Lands, supra, the Court recognized that: a. "the power of the state board is to be exercised under (1) "such regulations as may be prescribed by law," and (2) "in such manner as will secure the maximum possible amount therefor," at 364, 32 P. at 988; b. The Constitution must be construed to give meaning to each provision, at 364, 32 P. at 988; c. It would be useless for the state to prescribe regulations if the Land Board could determine to secure a greater amount by ignoring the regulation, at 365, 32 P. at 988; and d. "Therefore, in leasing state lands, the board must first look to the statutes to ascertain the regulation therein prescribed, and then, in exercising their constitutional powers, they must so act as in the judgment of the board will secure the maximum amount, under the prescribed regulations; the power to regulate being expressly reserved to the legislature." 18 Colo. at 364, 32 P. at 988. The Court further stated that the legislature may not, under the guise of regulation, take away all power of disposition from the Land Board. However, there is a presumption that the legislature "will exercise its powers in accordance with the constitution, and for the best interests of the state at large. . . . The beneficence of such a policy a general rule is apparent, although in exceptional instances a different policy might seem to promise greater returns to the state." 18 Colo. at 365, 32 P. at 988.

use regulation would be devastating to planning and development throughout the State of Colorado.

III. THE APPLICATION OF LOCAL LAND USE REGULATIONS DIRECTLY BY THE COUNTY BOARD DOES NOT UNCONSTITUTIONALLY INFRINGE ON THE LAND BOARD'S CONSTITUTIONAL RESPONSIBILITIES IN THE DISPOSITION OF STATE LANDS.

In the instant appeal, neither the purpose nor effect of the constitutional provisions governing the Land Board's disposal of School Lands and Boulder County's land use regulations enacted pursuant to statute are inconsistent or irreconcilable. Boulder County does not attempt to accomplish any prohibited activities through the application of its land use regulations. Boulder County is not asserting that it has the power to substitute its judgment for the Land Board with respect to the disposal of School Lands or the use of proceeds therefrom. Boulder County is merely seeking to exercise its delegated police power to regulate and mitigate the impacts of particular land uses located on School Lands. Since there is no conflict, the laws and regulations of the two bodies can coexist and both are effective. See generally; Cherokee Water & Sanitation District v. El Paso County, 770 P.2d 1339 (Colo.App. 1988); City and County of Denver v. Board of County Commissioners, 760 P.2d 656 (Colo.App. 1988).

The Land Board also attempts to argue that the County is using its land use regulations unconstitutionally to deprive the Land Board of the maximum profit from its land. First, the Land Board

has no right to maximum profits from its lands free of all regulation. The Land Board has "a duty to do no less, and the power to do no more, respecting the disposition of state lands under its control" than is provided in state laws. Walpole v. State Board of Land Commissioners, 62 Colo. 554, 163 P.848, 849 (1917).

Second, the Land Board is not being deprived of all uses of its property. The Boulder County land use regulations allow mining and several other uses of the property. Mining operations have existed on the property since 1969 (Rec. Vol. II, p.708). The United States and Colorado Supreme Courts have consistently held that a taking does not occur by the enforcement of reasonable regulations and a property owner is not entitled to use his property solely to maximize profits, without compliance with reasonable regulation. First Evangelical Lutheran Church of Glendale v. County of Los Angeles, Calif., 482 U.S. 304, 96 L. Ed 2d 250, 107 S.Ct. 2378 (1987); Sellon v. City of Manitou Springs, 745 P.2d 229 (Colo. 1987).

Third, whether the power of counties to regulate land use is considered to be delegated by the various land use acts (Sections 24-65-101, et seq.; 24-65.1-101, et seq.; 24-67-101, et seq.; 25-15-201, et seq.; 29-20-101, et seq.; 30-20-101, et seq.; 30-28-101, et seq.; 30-28-201, et seq.; and 34-1-301, et seq.) or through the Mined Land Reclamation Act (Section 34-32-101, et seq., C.R.S. (MLRA)), the legislature has manifested its intent that land use

regulations are to be accomplished by local governments. Since the Land Board functions as a landlord and not as a regulatory body, a holding that Land Board lessees are not subject to local zoning would result in land use impacts of those uses being totally unregulated. There would be no process to ensure that the health, safety and welfare of the citizens of this state would be protected. If zoning regulations apply to lessees on Land Board land, the Land Board can, like any other landlord, maximize its revenues within the regulatory framework provided by the state to protect the health, safety and welfare of its inhabitants. The Land Board, like any other landlord, is protected from overly restrictive local regulations by its constitutional entitlement to reasonable use of its land. Cherry Hills Village v. Trans-Robles Corp., 181 Colo. 356, 509 P.2d 797 (Colo. 1973). The Land Board, like any other landlord, must nevertheless comply with local zoning.

IV. AN ADVERSE DECISION WOULD HAVE A SIGNIFICANT IMPACT ON THE ABILITY OF LOCAL GOVERNMENTS' TO PLAN AND REGULATE LAND USES WITHIN THEIR RESPECTIVE JURISDICTIONS.

As noted above, local land use regulations are designed to ensure planned and orderly development, and to protect the public health, safety and welfare. A determination by the Court to exempt School Lands from local land use regulation would not only impede the ability of local government to impose reasonable conditions to ensure land use compatibility and the timely provision of necessary

public services and infrastructure; but would also restrict the local government's ability to address environmental protection concerns, and safety and health related issues.

Amicus Curiae, Colorado Counties, Inc., conducted a survey of Colorado counties regarding local land use regulation of School Lands. One third of Colorado's counties were able to respond before this brief was due. The responding counties were representative of county government throughout the State in land area, population, urban/rural characteristics and geographic location. See Appendix B.

The responding counties that have enacted land use regulations apply them uniformly to private and public lands within their respective jurisdictions. None of the responding counties exempt School Lands from land use regulation nor have enacted different regulations applicable only to public lands. The majority of the responding counties have zoned School Lands under agricultural, rural, and forestry classifications which generally permit by right limited residential uses, agricultural uses, farming, ranching, open space, forests and accessory uses. A special use review process, similar to Boulder County's, is generally utilized for more intensive uses in the nature of mineral extraction operations, sawmills, sanitary landfills, multiple use wastewater treatment and water storage facilities, resorts, lumber yards, and scrap tire recycling facilities. In addition to zoning, some of the responding counties have adopted subdivision regulations, comprehensive plans,

planned unit development zoning, H.B. 1041 regulations, building and fire safety codes, and certificate of designation standards that are applicable to both private and public lands.

Adams, Jefferson and Lincoln Counties have School Lands within their respective boundaries that are presently developed. Prior to development, the Land Board and/or lessee of the property submitted to the respective county's land use processes and subsequently complied with all conditions imposed as part of the county's land use approval. Such development includes an oil equipment servicing operation, a mineral extraction operation and a Department of Corrections' medium security prison.

The responding counties cited the following areas of concern with the potential development/use of School Lands: lack of urban and even rural-residential infrastructure due to remoteness of School Lands from developed areas; water quality and quantity; air, visual and noise pollution; lack of access or inadequate access; floodplain protection; geologic hazards such as slope and soils instability and rockfalls; wildfire hazards; lack of fire protection and law enforcement; disruption of wildlife habitat, migration corridors, and breeding grounds; and disruption of archaeological resources. Uses which were cited as having the most potential adverse impact included mineral extraction operations, and hazardous and solid wastes disposal facilities.

Given the land area and extent of School Lands within the respective counties and municipalities, the exemption of School

Lands from public review and local land use regulation could irreversibly impact a local government's economic and environmental resources as well as thwart the local community's efforts to provide for planned and orderly development through the application and enforcement of uniform land use policies and regulations.

CONCLUSION

For all of the reasons and legal authorities cited herein and in Respondents' Joint Answer Brief, Amici Curiae, Colorado Counties, Inc. and the Colorado Municipal League, submit that the certiorari review be dismissed or the Court of Appeals be affirmed in its disposition on appeal.

Respectfully submitted this 8th day of June, 1990.



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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 1990, a true and correct copy of the foregoing Amici Curiae Brief of Colorado Counties, Inc. and the Colorado Municipal League in Support of Respondents was served by placing the same in the United States mails, postage prepaid, addressed to the following:

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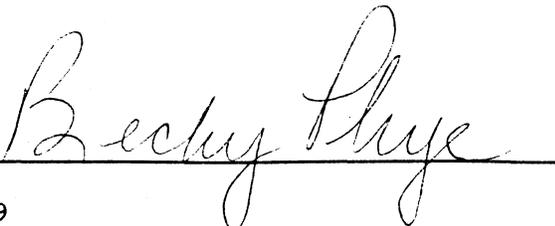
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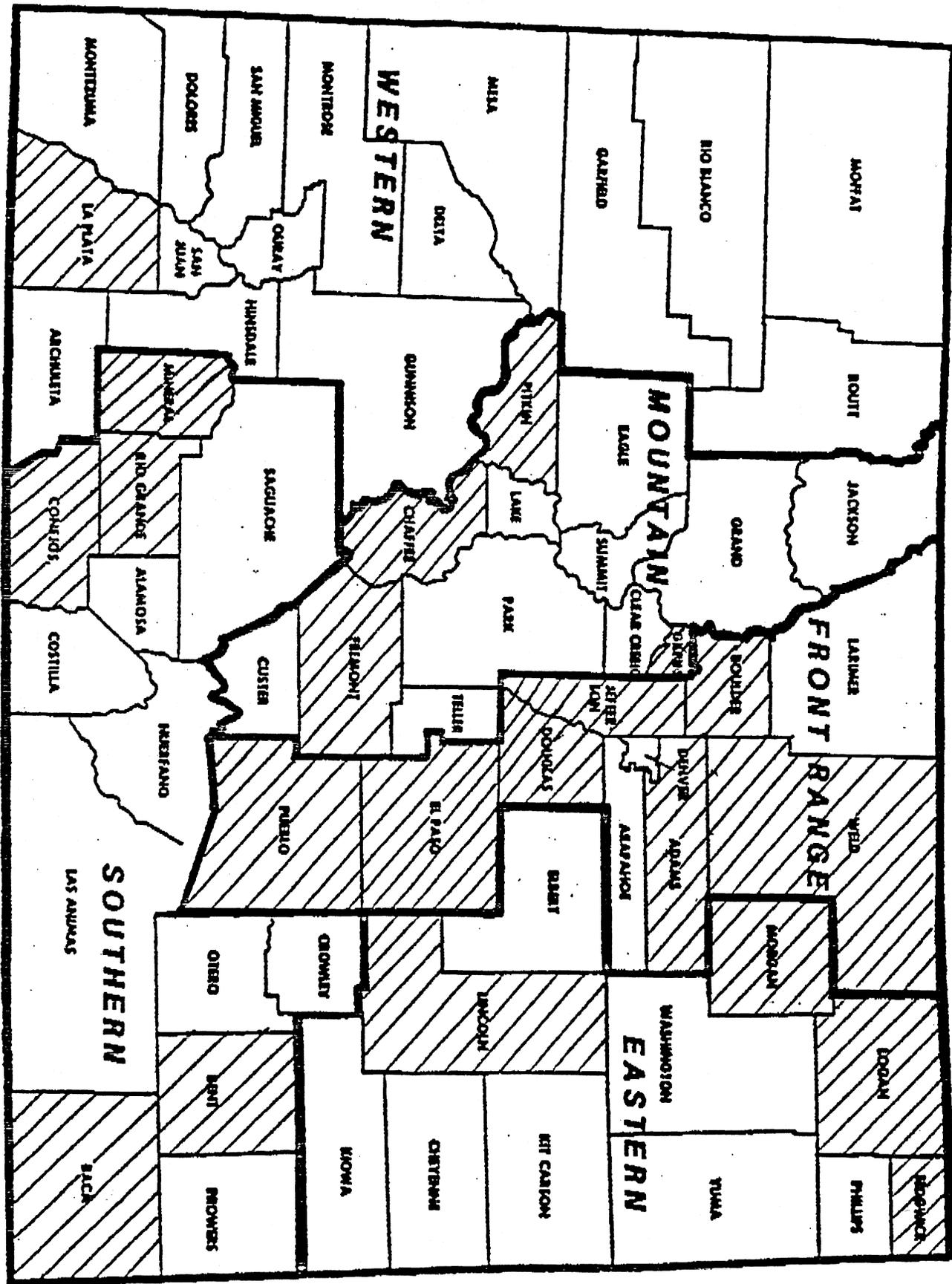
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APPENDIX B
 — Counties Responding to Survey —