Legal Backgrounder

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Fighting the Frack Attack: The State of State Preemption Efforts

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Over the last decade, the technological matrimony of modern hydraulic fracturing and horizontal drilling has redrawn America's domestic energy map. Areas of the country that had never known oil and gas derricks or had not seen significant petroleum development in over a century became key basins of activity. Even regions well accustomed to rigs and pumpjacks witnessed activity on scales never before seen. Markets shifted, geopolitical lines moved, the public gained interest, and media coverage surged.

States, appropriately acting as the primary regulators of oil and gas development, passed laws, updated their regulations, or drafted oil and gas statutes for the first time. Federal agencies catalogued their statutory authority to regulate hydraulic fracturing and exercised it to its fullest extent (with mixed results). Many localities also waded into the regulatory fray, testing the extent of their zoning authority by banning hydraulic fracturing and/or horizontal drilling. Those bans created tremendous friction between certain municipalities and activists, while also exacerbating strained relations between regulators and the regulated.

The lawsuits that have followed those local bans sought to elucidate the line between state and local authority. In some cases the litigation did just that. Unfortunately, in many ways that line remains blurred or has been even further obscured through contradiction. The ongoing debate has also brought forth altogether new jurisdictional questions. While court decisions on local bans stimulate interesting debates over lawmaking in our federal system, they are of even more profound importance to the local and state jurisdictions, petroleum companies, anti-hydrocarbon activists, and residents directly impacted by the regulations.

Introduction to cases

Litigation involving state and local jurisdiction over oil and gas development goes back as far as the industry itself. Recent cases differ, however, because they often arise in jurisdictions without longstanding petroleum development where the case law on the state/local jurisdictional boundaries is far less developed. Plaintiffs are also directing legal challenges at local bans targeting specific technologies (hydraulic fracturing and horizontal drilling) as opposed to the broader "oil and gas development" activity—as the technology gripes are, in most respects, merely a proxy for a broader opposition.

Pennsylvania issued the first decision of the new era of modern hydraulic fracturing in 2013 and signaled that these jurisdictional questions must be addressed on a state-by-state basis because they are a function of state laws and regulations. In 2014, New York was the first state to interpret provisions of oil and gas regulation

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that are found, in some form or another, in many states' regulations. Ohio followed in 2015, punctuating the regulation-specific nature of the legal inquiry and demonstrating how explicit preemption language can, and should, make unnecessary the legal haranguing over the interplay of state and local jurisdiction. Finally, just a few months ago, Colorado rounded out the jurisdictional jurisprudence with two decisions interpreting substantially the same language the New York court interpreted but reaching the opposite result.

Pennsylvania: *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013)

The Pennsylvania legislature passed Act 13 in 2012, which amended the Pennsylvania Oil and Gas Act to prohibit localities from regulating oil and gas operations and requiring statewide uniformity among local zoning ordinances with the development of oil and gas resources. *See* 58 PA. CONS. STAT. §§ 2301-3504. On December 19, 2013, a plurality of the Pennsylvania Supreme Court struck down Act 13 on the basis that it violated Pennsylvania's Environmental Rights Amendment, which designates the Commonwealth as trustee of Pennsylvania's public natural resources.

Specifically, the court held that the legislature could not preempt local environmental legislation affecting oil and gas operations because to do so would "fundamentally disrupt [the municipalities'] expectations respecting the environment." 83 A.3d at 978. The court further held that Act 13 violated the Commonwealth's fiduciary duties "to prevent degradation, diminution, and depletion of our public natural resources" by causing some communities to carry a heavier environmental burden and "permitting industrial uses as a matter of right in every type of pre-existing zoning district," which would "degrade[] the corpus of the trust." *Id*. at 979-80.

New York: *Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014)

Prior to New York officially implementing its fracking ban, several local municipalities passed ordinances banning the practice. New York's Oil, Gas and Solution Mining Law (OGSML) contains many analogous provisions to Colorado's Oil and Gas Conservation Act (COGCA), discussed *infra*, including a stated purpose of ensuring maximum resource recovery and protecting the rights of landowners. Unlike the Colorado Supreme Court, however, the New York high court read the statute as limited to the technical requirements for operating an oil and gas well, rather than evincing a uniform regulatory regime that preempts local efforts that impede the OGSML's goal.

In furtherance of the law's goal, the OGSML contains a "supersession clause," which states: "The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." N.Y. ENVTL. CONSERV. LAW § 23-0303(2). The New York Constitution's home-rule provision appears to be more restrictive than Colorado's equivalent, only permitting local ordinances that are "not inconsistent with the provisions of this constitution or any general law." NY CONST. art. IX, § 2(c)(ii).

Nevertheless, the New York Court of Appeals found that the OGSML "preempt[s] only local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses within town boundaries." 16 N.E.3d at 1197. Rather than finding a broad legislative intent to regulate all aspects of oil and gas activities, the court determined that the OGSML was limited to the "safety, technical and operational aspects of oil and gas activities across the State." *Id*. at 1199. As a result, the court held that municipalities were not preempted from enacting their own bans on oil and gas activities under their zoning authority within their jurisdiction.

Ohio: *State ex rel. Morrison v. Beck Energy Corp*., 37 N.E.3d 128 (Ohio 2015)

On February 17, 2015, the Ohio Supreme Court, in a plurality decision, held that the Home Rule Amendment to the Ohio Constitution does not permit municipalities to enact their own oil-and-gas permitting scheme atop the state system. *State ex rel. Morrison v. Beck Energy Corp*. An energy company sued Munroe Falls after the city attempted to prevent drilling based on its own municipal ordinances requiring separate zoning approval, despite the state having already issued a permit. *Id*. at 131.

The Home Rule Amendment grants municipalities the "broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide nature or interest," but does not permit municipalities to exercise those powers in a manner that "conflict[s] with general laws." However, Ohio Rev. Code Ann. § 1509.02 gives the state "sole and exclusive authority" to regulate the permitting, location, and spacing of oil and gas wells and production operations within Ohio and expressly prohibits local governments from "discriminat[ing] against, unfairly imped[ing], or obstruct[ing] oil and gas activities and operations regulated under [§ 1509.02]."

The Ohio Supreme Court found the local ordinances conflicted with § 1509.02 in two ways. First, the ordinances "prohibit what [§ 1509.02] allows: state-licensed oil and gas production within Munroe Falls." *Id*. at 135. As the court noted, "a municipal-licensing ordinance conflicts with a state-licensing scheme if the local ordinance restricts an activity which a state license permits." *Ibid* (citations and quotations omitted). The court was unpersuaded by the city's argument that the statute and ordinances regulate two different things—*i.e.*, that the ordinances addressed traditional zoning concerns whereas § 1509.02 relates to the "technical safety and correlative rights topics." *Id*. at 136. Rather, the court found that the ordinances and § 1509.02 "unambiguously regulate the same subject matter—oil and gas drilling—and they conflict in doing so." *Ibid*.

Second, the court found that the Ohio General Assembly intended to preempt local regulations on the subject of oil and gas wells and production operations. *Id*. at 136-37. The concurring opinion took special heed to note that the decision did not resolve whether a municipality could still enact zoning ordinances that affect oil and gas wells, *Id*. at 141 (Kennedy, J., concurring), potentially limiting the impact of the case.

Colorado: *City of Ft. Collins v. Colo. Oil & Gas Ass'n*, 2016 CO 28; *City of Longmont Colo. v. Colo. Oil and Gas Ass'n*, 2016 CO 29.

On May 2, 2016, the Colorado Supreme Court found that the COGCA—which establishes a regulatory regime over drilling, producing, and operating oil and gas wells—preempts municipalities from banning fracking. The cities of Longmont and Fort Collins had enacted a fracking ban and a 5-year fracking moratorium, respectively, asserting that the restrictions were proper exercises of their inherent zoning authority. The Colorado Constitution recognizes the sovereignty of home-rule cities by providing that a municipality's "charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith." Colo. Const. art. XX, § 6. Thus, in matters of local concern, a home-rule ordinance supersedes a conflicting state statute.

However, when a home-rule ordinance involves matters of statewide or mixed state and local concern, it becomes subject to preemption. The court determined that fracking ordinances involve matters of mixed state and local concern because they implicate both (1) the need for uniform statewide regulation and the extraterritorial impact of a fracking ban, along with (2) the local government's traditional zoning authority. Therefore, the fracking ordinances were subject to a preemption analysis.

While the court found that the COGCA neither expressly nor impliedly conflicted with the fracking bans, the restrictions did "operationally" conflict with the COGCA by materially impeding the effectuation of a

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state interest. *Longmont* at ¶ 54; *Fort Collins* at ¶ 30. The COGCA identifies the state's interest in oil and gas development as follows:

> It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources, and subject further to the enforcement and protection of the coequal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom.

COLO. REV. STAT. § 34-60-102(1)(b). The COGCA also empowers the Colorado Oil and Gas Conservation Commission to regulate the drilling, producing, and operations of oil and gas wells. COLO. REV. STAT. § 34-60-105(1).

The Colorado Supreme Court found that the COGCA and the Colorado Oil and Gas Commission's "pervasive rules and regulations, which evince state control over numerous aspects of fracking, convince us that the state's interest in the efficient and responsible development of oil and gas resources includes a strong interest in the uniform regulation of fracking." *Fort Collins* at ¶ 29. The fracking bans, however, materially impeded the effectuation of the state's interest by preventing operators from fracking, even when they abide by the Colorado Oil and Gas Commission's rules and regulations, thereby rendering the state's statutory and regulatory scheme superfluous. Neither was the court persuaded by the fact that Fort Collins's moratorium was not permanent. *Fort Collins* at ¶ 31.

Conclusion

The decisions discussed here have helped answer a handful of jurisdictional questions, but they have also brought an armload of new uncertainties. The incremental nature of the case law suggests that these jurisdictional questions will endure for years to come—particularly where the case law is built state by state and statute by statute. As evidenced by the divergent outcomes in New York and Colorado, these jurisdictional decisions are seldom consistent and even more rarely definitive.

Municipalities in Colorado cannot ban hydraulic fracturing under the state's current statutory structure, but it is unclear whether that structure will remain—Colorado is at the epicenter of a heated ballot initiative to change the state's oil and gas laws. It is also not clear where local authority ends under the current regime. The *Fort Collins* court struck down a local moratorium on hydraulic fracturing based (in significant part) on the moratorium's long duration; however, it left an open question as to whether a shorter moratorium could survive a legal challenge. Similarly, New York has decided that the state's regulation of hydraulic fracturing does not displace or remove local authority. But now that the state has effectively banned hydraulic fracturing, might this holding preserve a municipality's authority to *allow* hydraulic fracturing within its borders?

The stakeholders in the state preemption debate will surely be testing out the jurisdictional reach of these decisions, and legislatures will use these decisions in an attempt to avoid protracted litigation regarding the interplay of state and local jurisdiction over oil and gas operations. States that want their rules to preempt local ordinances will learn from the Ohio Supreme Court decision and will make the preemptive nature of their statutes express and clear. States that want to allow local jurisdictions to ban hydraulic fracturing will simply state so expressly or adopt public-trust provisions such as those in Pennsylvania's constitution.

Even with increasingly clear state oil and gas statutes, questions will remain—and be litigated—over whether, or at what point, local regulations concerning the means by which oil and gas operations are conducted (*e.g.*, timing, road, light, or noise restrictions) intrude on state authority.

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