Should States or Cities Regulate Fracking: Colorado the Latest State to Confront the Issue

Dr. Patrick Fitzgerald January 3, 2013

As fracking has moved into densely populated areas, increasing numbers of local governments have imposed restrictions and, in the process, come into conflict with state governments that believe the practice is theirs to regulate.

Local governments contend their land use authority entitles them to restrict or even ban fracking. State governments counter that their police power statutes should prevail. The dispute comes down to a classic supremacy battle – albeit one involving the most significant energy innovation of the century.

At least three states have brought preemption challenges, including Colorado. The CentennialState is a longtime oil and gas hub and sits atop rich shale reserves. The Niobrara formation has drawn considerable attention and, though much of the formation is in remote locations, a portion runs under the most urbanized corridor in the RockyMountain region – metro Denver and the Front Range.

There, the heart of the debate is between the right of the Colorado Oil and Gas Commission ("COGGC") to regulate the industry – including drilling practices – and the rights of local governmental organizations, primarily municipalities and counties, to regulate local issues of concern. Many local governments and their constituents believe that the COGCC, despite extensive expertise, inadequately protects non-industry interests.

A number of Colorado jurisdictions have adopted or at least considered anti-fracking ordinances. The one that might have drawn the most media interest, however, is the Denver suburb of Longmont.

Last summer, it approved restrictions on fracking. Colorado believed that fracking was a matter of statewide concern and demanded consistent regulations across jurisdictions. On behalf of the COGGC, the Colorado attorney general filed a complaint in state district court, seeking to invalidate portions of the ordinance that restricted certain fracking practices and required approvals for multi-well sites, directional and horizontal drilling techniques, and facilities relocations.

As litigation proceeded, Longmont put a referendum on the November ballot that would have banned fracking outright. The referendum, modeled after a similar ban in Pittsburgh, was approved in November. Longmont became the first city in Colorado to categorically ban fracking.

Although Colorado Governor John Hickenlooper promised not to sue the town over the referendum, he said the state would support actions brought challenges brought by private companies. And earlier this month, the Colorado Oil and Gas Association (COGA) filed a complaint. In a statement, the COGA said the referendum "constitutes an illegal ban on oil and gas drilling, it denies private mineral owners the right to develop their property, it attempts to prohibit operations that the state laws permit, and it purports to regulate technical aspects of oil and gas operations in a manner that is preempted by the Colorado Oil and Gas Conservation Act and its implementing regulations.was approved and is likely to lead to yet more litigation."

Certain of the core issues that the Longmont ordinance and referendum present are not new. In past cases, Colorado courts have considered the authority of local governments to restrict oil and gas development. The cases have not involved fracking – a technique that was first tested more than half a century ago but that has only become economical on a broad scale in recent years. Nevertheless, the cases have involved forms of energy extraction that subjected nearby land uses to similar industrial externalities and that inspired local regulations premised on similar land use authority.

In Bowen/Edwards Associates, Inc. v. Board of County Commissioners of LaPlata, 830 P. 2d 1045 (Colo. 1992), for instance, a Colorado federal court held that the Colorado Oil and Gas Conservation Act, C.R.S. §34-60-101, *et seq*. did not entirely preempt a county from exercising its land use authority over any and all aspects of oil and gas development and operations in unincorporated areas.

But the defining case is Voss v. Lunvall Brothers, Inc., 830 P.2d 1061 (Colo. 1992). There, the Supreme Court struck down a Greeley home rule ordinance banning oil and gas development within the city limits. The court determined that the ordinance was inconsistent with City and County of Denver v. State of Colorado, 788 P.2d 764 (Colo. 1990), which held that, in matters of mixed local and state concern, a home rule municipal ordinance could co-exist with a statute only so long as there was no conflict between the ordinance and the statute. The Court noted that should there be such a conflict, it would be the state statute that would supersede the conflicting local ordinance.

Grounds in overturning the Greeley ban included: (1) the reality that decisions pertaining to drilling were dictated by parameters such as pressure characteristics of the given reservoir; (2) the fact that, because each well only drains a select portion of a given reservoir, an irregular drilling pattern would result. The ban would thus cause less than optimal recovery and a corresponding waste of oil and gas. (Voss, at 1067). The Supreme Court concluded:

> ... Greeley's total drilling ban thus affects the ability of non-resident owners of oil and gas interests in pools that underlie both the City and land outside the City to obtain an equitable share of production profits in contravention of the statutory purposes of the Colorado Oil and Gas Conservation Act. Voss, *supra* at 1068.

Since regulating drilling could have extraterritorial effects – and since, under Colorado law, the regulation of conduct with extraterritorial effects is left to the state – the state law controlled and the Greeley ordinance was invalidated.

In hearing challenges to the new Longmont ban, Colorado courts may conclude that fracking is analogous to drilling or may attempt to draw a distinction between the two activities. Either way, the courts will have to make certain factual conclusions about fracking – does it or does it not cause earthquakes or ground subsidence, for instance – that even fracking experts have yet to conclusively resolve.

In the Longmont litigation – and in similar litigation that has or soon will arise in other shale states – there is no reason to believe that generalist judges will understand the geodynamics any better than the scientists will. In the end, a decision could come down to a gut call, an intuitive reaction to fracking itself. (For a discussion about how the reactions to fracking do not always square with the actual environmental impacts, see this earlier post from David Spence.)

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