

The Fracking Battle in Colorado

Presented by:
Mark Mathews

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 Brownstein Hyatt
Farber Schreck

What we will cover

- The law of operational preemption – what can local governments legally regulate?
- Potential legislation – what can we expect regarding local control?
- The Martinez decision – is this the future of judicial review of agency decisions?

What is operational preemption?

- It's really an issue of who decides how oil and gas is regulated.
- What is the state's role and what is local government's role.
- The state regulates Oil and Gas through the Oil and Gas Conservation Act and has hundreds of pages of regulations covering virtually every aspect of oil and gas development.
- Local governments are passing increasingly comprehensive regulations covering the same issues regulated by the state.
- So who decides? The Longmont and Fort Collins decisions.

What do the Longmont and Fort Collins decisions mean?

- Some groups have interpreted these decisions as “narrow.” They argue that the decisions say nothing more than bans and long-term moratoria are illegal.
- The decisions change the ground rules of local government control in Colorado.

Operational Conflict Test

- “We will analyze an operational conflict by considering whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes **will necessarily satisfy this standard.**”
- Local government law can be conflicted in two ways: Is there a conflict (forbid/authorize test) and, even if there isn't, does the local government law materially impede the state's interest?

How is this test applied?

- Court held that industry was right: “[i]n virtually all cases,” the operational conflict test “will involve a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes ‘on the ground.’”

How is this test applied (part 2)

- Huge impact. Operational conflict cases should be resolved on summary judgment within a few months of the filing of a complaint, rather than after years of discovery and hearings.
- Should be no need for long trials or discovery.
- Issues raised by Longmont – alternatives to fracking, level of activity in area, safety of fracking – are irrelevant.

So . . .

- The importance of these decisions cannot be overstated.
- For the first time in Colorado, we now have a clear statement by the highest court as to what the operational conflict standard is (forbid/authorize and materially impede), and how it should be applied (a facial analysis between the state and local government law).
- But are local governments following these decisions?



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Boulder County

- There is currently a moratorium on all oil and gas development in Boulder County. The current moratorium is scheduled to terminate on May 1, 2017. Subject of litigation.
- Despite the ongoing moratorium, Boulder County enacted new oil and gas regulations in March 2017. These regulations will become the law in Boulder if the current moratorium is not extended.
- Are the regulations legal or are they operationally preempted? These will likely require an “as applied” challenge by an operator who has either been denied a permit or granted a permit with onerous and impracticable conditions.

Adams County (or Broomfield or Thornton)

- Performance-based standards that do not on their face obviously conflict with COGCC regulations and are dressed up with land-use verbiage. Adams County regulations provide:
- “The special use is compatible with the surrounding area, harmonious with the character of the neighborhood, not detrimental to the immediate area . . . or future development of the area, and not detrimental to the health, safety, or welfare of the inhabitants of the area and the County.”
- Do these regulations conflict with COGCC regulations?

Lafayette

- On March 21, 2017, Lafayette enacted the Climate Bill of Rights and Protections.
- “All residents and ecosystems in Lafayette possess the right to be free from all activities . . . including the extraction of coal, oil or gas . . . which threaten human physical and neurological systems.”

Lafayette (cont.)

- This “right” is now being advocated as a means to ban oil and gas without getting into the operational preemption doctrine.
- Courts have to date generally rejected arguments that there is a “right” to a healthy environment. *Lake v. City of Southgate*, 2017 WL 767879 (E.D. Mich. Feb. 28, 2017).
- But this is a legal theory that is not going away.

Moratoria

- Court struck down Fort Collins' five-year moratorium . . . but “we express no view as to the propriety of a moratorium of materially shorter duration.”
- Left unresolved legality of moratoria of “materially shorter duration.” One of the few issues left murky by the decisions.
- But the Court left good clues in its decision



Proposed Legislation



Legislation on the Horizon?

- Operational preemption is created by state statute. If state law changes, so does the preemption test.
- Local Control Legislation?
 - House Bill 1355 from last session. Bill allowed any local government to designate a “mineral resource area” and imposed regulations upon all oil and gas activity within that area that are more stringent than COGCC regulations.
- Setback Legislation? Foote bill: location at least 1,000 feet from school property line and other high occupancy buildings.
 - Could we see legislation or a statutory ballot measure increasing setbacks?

The Martinez Decision

- The decision arose from a petition for rulemaking seeking a rule precluding the COGCC from issuing any drilling permits until “the best available science demonstrates . . . that drilling can occur in a manner that does not” impair the environment.
- The COGCC denied the petition because it required consideration of environmental impacts alone rather than a balancing of multiple factors.

Martinez Decision (cont.)

- The Court of Appeals reversed, rejecting the historical balancing test and concluding that the Act required that all development and production should be accomplished with the focus on environmental impacts.
- Limited decision: court did not mandate that a rulemaking occur and certainly didn't suggest the outcome of any rulemaking.

Martinez Decision (cont.)

- But it has huge implications if not reversed. By throwing out a balancing test and yet not providing any guidance on what level of environmental compliance is required, the decision could be interpreted as mandating that the COGCC may not approve any rulemaking or permit that impairs the environment to any degree.

Martinez – Grounds for Reversal



Martinez Decision—Grounds for Reversal

- Ignores multiple goals of Act.
- Ignores statutory language that environmental mitigation must be balanced with technical feasibility and cost effectiveness.
- Concludes that the COGCC is wrong as to how it interprets the Act. Under judicial deference, agency's interpretation is upheld even if the statute is deemed ambiguous.
- Courts rarely second-guess agencies' interpretation of their enabling statute or the process by which agencies make complex decisions. Majority here did both.

Conclusion



Conclusion

- The scope of what local governments can regulate has been substantially narrowed by these decisions.
- Just as importantly, the manner in which the industry can challenge regulations is now streamlined and less expensive. Local governments can no longer draw out preemption challenges.
- But, of course, grey areas of the law remain. And certain local governments will try to use these areas to carve out new theories of local government control. The battle over fracking is far from over.