The Fracking Battle in Colorado

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What we will cover

- The law of operational preemption – what can local governments legally regulate?

- Potential legislation – what can we expect regarding local control and setbacks?

- Litigation: the Martinez decision and the Amendment 71 decision.

- Ballot Measures for 2018.

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 year 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).

- Thornton litigation will test this interpretation.

Performance Based Standards

- Performance-based standards that do not on their face obviously conflict with COGCC regulations and are dressed up with land-use verbiage.

- "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."

- "The oil and gas operation will not significantly degrade the environment."

- 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?

- Local Control Legislation? Operational preemption is created by state statute. If state law changes, so does the preemption test.

- Setback Legislation? Foote bill: location at least 1,000 feet from school property line and other high occupancy buildings.

The Martinez Decision

- Now before the Colorado Supreme Court.

- 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, among other reasons, 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.

- But it has huge implications if not reversed. Could be interpreted as mandating that the COGCC may not approve any rulemaking or permit that impairs the environment to any degree.

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.

- Courts rarely second-guess agencies' interpretation of their enabling statute or the process by which agencies make complex decisions. Majority here did both.

Amendment 71 Decision

- In Semple v. Williams, court held that Amendment 71 ("Raise the Bar") violated the Fourteenth Amendment by violating the "one person, one vote" principal.

- Court found that the 2% signature requirements from each of the State's 35 senate districts was unconstitutional because voter population varies widely between state senate districts.

- Court issued an injunction striking the 2% requirement in the November 2018 election.

- State has filed an emergency appeal with the Tenth Circuit.

Ballot Measures

- Important dates: April 6 (filing deadline), April 18 (last Title Board meeting), August 6 (all signed initiative petitions must be filed), Sept. 10 (Secretary must certify ballot), Nov. 6 (general election).

- *Initiative #97:* Seeks to create buffer zones whereby new oil and gas production not on federal land must be 2,500 feet from homes, schools, water bodies. In litigation.

Ballot Measures (cont.)

- *Takings Initiatives #108-113*: property can't be reduced in fair market value by government(at all or by more than 10 percent), or damaged by restricting uses without just compensation.

- Local Government Control Initiatives *#178-181*: affirms that local governments can regulate certain surface aspects of oil and gas development so long as the regulation does not conflict with state law and does not otherwise impose conditions that are not technically feasible or economically practicable.

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.