Will State Authority or Local Preference Regulate Colorado’s Fracking?

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Colorado is ground zero for the debate over hydraulic fracturing. In 2014, four local municipalities passed laws that imposed moratoriums on hydraulic fracturing. One of the moratoriums banned all oil and gas activities. Those municipalities, whose citizens have taken it upon themselves to regulate the oil and gas industry in Colorado, have found themselves embroiled in litigation.

Given the well-developed body of law that gives the state the power to regulate the oil and gas industry in Colorado, a constitutional amendment has been proposed. If passed, the Community Rights Amendment would purport to give local municipalities the right to ban hydraulic fracturing. Even if the amendment were to pass, it remains far from certain if the amendment would in fact have the force and effect that its proponents believe it will.

This article discusses the citizen-initiated hydraulic fracturing bans that have passed in Colorado, the litigation that has resulted, the proposed Community Rights Amendment that will likely find its way onto the statewide Colorado ballot in November 2014, and the potential ramifications if the amendment is successful.

LOCAL VOTERS IN COLORADO PUSH FORWARD FRACKING MORATORIA AND BANS

In November 2014, four Colorado municipalities had citizen-initiated petitions on the ballot: Boulder, Broomfield, Lafayette, and Fort Collins. Each of these cities is located along the Front Range of Colorado, north of Denver. All are technically situated within the area that comprises the Niobrara shale formation—the shale that has seen intense oil and gas development in Colorado. In particular, Lafayette and Fort Collins are just west of Weld County, the area that has the most oil and gas development in the state of Colorado.

Each petition that was on the 2014 ballot in these jurisdictions sought to enact voter-approved ordinances or charter amendments prohibiting hydraulic fracturing and related activities. In Boulder, the petition sought to extend that city’s moratorium banning fracking until 2018 to allow time for further study and
development of the state’s natural resources to the benefit of all of the citizens of Colorado.”

With respect to the development of oil and gas resources, the oil and gas industry is regulated by the Colorado Oil and Gas Conservation Commission. Its statutory mandates include, among other things, fostering, encouraging, and promoting the development, production, and utilization of oil and gas resources in the state consistent with the protection of public health, safety, and welfare. To accomplish this purpose, the commission has a set of rules and regulations that govern all aspects of oil and gas development and operations in the state of Colorado. These rules include, among others, permitting, drilling, production, spacing, unitization, chemical treatment of wells, and setback requirements. The commission’s rules also address environmental concerns relating to air, water, and soil.

Colorado also has home-rule municipalities. Under the Colorado Constitution, a home-rule municipality has the right to self-governance in purely local, municipal matters. The Colorado Constitution provides that a home-rule municipality’s ordinances pertaining to local matters “supersede within the territorial limits . . . any law of the state in conflict therewith.” Zoning authority and land use have routinely been recognized as matters of local concern that are within a home-rule municipality’s power to regulate. As a result of these two competing interests, the battle between state and local regulation of oil and gas development in Colorado has resulted in a well-developed body of case law.

The two cases most cited are Board of County Commissioners v. Bowen/Edwards Associates, Inc. and Voss v. Lundvall Brothers, Inc., both of which were decided by the Colorado Supreme Court in 1992. In Bowen/Edwards, operators challenged regulations adopted by La Plata County that required oil and gas operators to obtain a permit from the county, in addition to the permits required by the Colorado Oil and Gas Conservation Commission. The Colorado Supreme Court reversed the district court’s judgment, which had found that the Colorado Oil and Gas Conservation Act completely preempted a county’s ability to enact any land-use regulations concerning oil and gas operations.

In response to these citizen-initiated regulations and prohibitions imposed on the oil and gas industry, those jurisdictions whose citizens have gone down this path have now found themselves embroiled in litigation.

THE STATE’S INTEREST IN UNIFORM REGULATION OF OIL AND GAS OPERATIONS

In Colorado, the state’s policy is “to encourage, by every appropriate means, the full assessment. In Broomfield and Fort Collins, the petitions sought to impose five-year bans on the use of hydraulic fracturing, as well as on the disposal or storage of any solid or liquid waste created in connection with hydraulic fracturing operations. And in the city of Lafayette, voters proposed a total ban on all oil and gas development in the city.

In opposition to these petitions, the oil and gas industry spent over $900,000. Despite this spend, each petition passed. In Boulder, 76 percent of voters sided in favor of the moratorium. In Fort Collins and Lafayette, 55 percent and 58 percent, respectively, cast their votes in favor of banning fracturing. And in Broomfield, after a back-and-forth recount, that city’s moratorium passed by a mere 20 votes.

These four ballot initiatives come on the heels of a successful measure that passed in Longmont, Colorado. Longmont, which is another city along Colorado’s Front Range, passed a voter-initiated charter amendment in 2012 that bans hydraulic fracturing and the disposal or storage of related waste within the city limits. This voter-initiated ban was passed shortly after the Longmont City Council adopted extensive regulations relating to oil and gas operations within its jurisdiction. The Longmont regulations set forth a detailed regulatory scheme that addresses topics including how multiwell sites and directional and horizontal drilling techniques can be used, setback requirements, chemical reporting rules, and the protection of wildlife habitat.
According to the court, while the Colorado Oil and Gas Conservation Act does not completely preempt county regulations, "local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest."14

On the same day, the Colorado Supreme Court decided the Voss case. In Voss, the city of Greeley—which is now oil- and gas-friendly, and in the heart of the Niobrara shale play in Weld County—passed an ordinance that prohibited the drilling of oil and gas wells within its city limits. The ordinance was challenged on preemption grounds.15 The Colorado Supreme Court held that the Colorado Oil and Gas Conservation Act preempted Greeley, a home-rule city, from enacting a land-use ordinance that imposed a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city.16 According to the court, the Colorado Oil and Gas Conservation Act "evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources in a manner calculated to prevent waste and to protect the correlative rights of common-source owners and producers to a fair share of the production profits."17

To weigh the state’s interest against Greeley’s home-rule interest, the court analyzed four factors: (1) a need for statewide uniformity of regulation, (2) whether local regulation would have an extraterritorial impact, (3) whether state or local government traditionally regulates the subject matter, and (4) whether the Colorado Constitution commits the subject matter to state or local regulation. After analyzing these factors, the court determined that the state’s interest outweighed the city of Greeley’s interest. In reaching this determination, the court concluded the following:

[T]he state’s interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city’s imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits. Because oil and gas pools do not conform to the boundaries of local government, Greeley’s total ban on drilling within the city limits substantially impedes the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste and that furthers the correlative rights of owners and producers in a common pool or source of supply to a just and equitable share of the profits. (Ibid., at 1068)

However, the court did make it clear that its holding did not mean that there was no ability whatsoever for a home-rule municipality to exercise its land-use authority in the area of oil and gas development. According to the court, [i]f a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city’s regulations should be given effect. (Ibid., at 1068–69)

It is against this backdrop that three out of five citizen initiatives discussed above have been challenged.

LOCAL MUNICIPALITIES NOW FIND THEMSELVES LITIGATING TO DEFEND THEIR INITIATIVES

Shortly after the Longmont City Council adopted its own set of oil and gas regulations, the Colorado Oil and Gas Conservation Commission filed suit against the city of Longmont. According to its complaint, Longmont’s regulations are preempted because they conflict with the state’s interest in uniform regulation of oil and gas operations. Nor can Longmont’s regulations be harmonized with the state’s oil and gas laws and regulations in a manner that would be consistent with the stated goals of the Oil and Gas Conservation Act.18

As with Longmont’s regulations, Longmont’s voter-initiated ban on hydraulic fracturing has also resulted in a lawsuit. This lawsuit was brought by the Colorado Oil and
On January 20, 2014, the Community Rights Amendment was submitted by the Colorado Community Rights Network. According to the Colorado Community Rights Network, its mission is to elevate local self-governance above corporate control. The Community Rights Network claims this is necessary because the laws as they currently exist in Colorado are used against local communities to interfere with their attempts to make decisions necessary to protect public health, the environment, and the local economy.

Despite claiming to be a 100 percent Colorado grass-roots effort, the Colorado Community Rights Network is being assisted and supported by the Community Environmental Legal Defense Fund, a public interest law firm based in Pennsylvania. The Community Environmental Legal Defense Fund has supported efforts to ban hydraulic fracturing in Pennsylvania, New York, Maryland, Ohio, and New Mexico.

The language of the proposed Community Rights Constitutional Amendment is broad—it is not just limited to banning hydraulic fracturing (see Appendix A).

If the proposed amendment were to pass, Coloradans would have an inherent right to local self-government. This “inherent right” would include the ability to enact local laws protecting health, safety, and welfare, and the power to enact local laws establishing, defining, altering, or eliminating the rights, powers, and duties of for-profit business entities, operating
or seeking to operate in a community. Thus, if the proposed amendment were to pass, cities could potentially be able to create patchwork regulations that are inconsistent with state laws. Alternatively, cities could prohibit a given industry or activity outright that is otherwise authorized by state law.

The proposed amendment goes on to state:

provided however, that local laws shall not restrict fundamental rights of individuals, their communities, or the natural environment secured by the Constitution of the State of Colorado, the U.S. Constitution, or international law, nor shall local laws weaken protections for people, their communities, or the natural environment provided by state, federal, or international law.

As explained in the next section, even if the Community Rights Amendment were to pass in Colorado, the amendment may lead to more uncertainty rather than what its proponents want—the ability of local jurisdictions to ban hydraulic fracturing within their borders.

COMMUNITY RIGHTS AMENDMENT MAY NOT ACHIEVE ITS INTENDED RESULT

While many local communities have adopted community rights law throughout the country, the effort in Colorado to obtain a constitutional amendment to address hydraulic fracturing appears to be a first. And while the proposed amendment’s language attempts to insulate local jurisdictions’ decisions on if and how hydraulic fracturing will be allowed, even if the amendment passes, the Colorado Supreme Court, and perhaps even the United States Supreme Court, will likely have the last say.

The proposed amendment provides that local jurisdictions will not be able to weaken protections that already exist under federal and state law. Any charter amendment or ordinance passed by a local jurisdiction that would seek to rely on the Community Rights Amendment would still need to establish that it has not weakened rights that otherwise exist under federal or state law. In essence, local communities would find themselves defending their laws under essentially the same preemption-type doctrine that they must overcome today, albeit with an added argument. The state of Colorado, and the oil and gas industry, would still be able to look to the Colorado Oil and Gas Conservation Act as the framework for how oil and gas operations are to be conducted in the state to argue that a local jurisdiction has weakened protections that are otherwise afforded under state law.

The proposed Community Rights Amendment also provides that local laws cannot restrict fundamental rights secured by the United States and Colorado Constitutions. One such right that is often mentioned in the context of hydraulic fracturing bans is the prohibition against takings. Under both the United States Constitution and the Colorado Constitution, private property cannot be taken for public use without just compensation.21 While the language of the Takings Clause is straightforward, the case law that has developed is anything but clear.22 In the minerals context, one law may be held to constitute a taking while a similar law may not be found to be a taking.23 Each case is fact-dependent, and decisions can often be results-oriented.

Thus, while the outcome of a takings claim is uncertain, one thing is certain—the issue will find its way to the courts if the Community Rights Amendment passes and results in hydraulic fracturing bans that prevent mineral owners from developing oil and gas interests in Colorado.

CONCLUSION

Oil and gas development has long been a part of the state of Colorado’s economy. The industry is well regulated by the state in a fair manner that achieves the goals the state is required to achieve—promote the development of oil and gas resources while protecting the health, safety, and environment of its citizens. Colorado voters will likely be faced with deciding whether to vote...
in favor of or against the Community Rights Amendment in November 2014.

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Regardless of how the vote turns out, the courts will likely continue to have the final say on whether hydraulic fracturing bans will stand or fall in the state of Colorado.

NOTES
7. See, generally, Complaint, Colorado Oil & Gas Association v. City of Longmont, Case No. 2012 CV00960, Weld County District Court, Colorado.
8. See, generally, Complaint, Colorado Oil and Gas Conservation Commission v. City of Longmont, Case No. 2012CV000702, Boulder County District Court, Colorado.
9. C.R.S. § 24-33-103.
12. Ibid.
17. Ibid., at 1065–1066.
18. See Note 8.
19. Colorado Oil & Gas Association v. City of Longmont, Case No. 2012 CV00960, Weld County District Court, Colorado.
20. According to the Colorado Oil and Gas Association, it elected not to challenge the initiative that passed in Boulder because there are no active wells in the city. And the election results of the Broomfield initiative are being challenged in court. See Handy, R. (2013, December 4). State oil, gas association sues Fort Collins over fracking moratorium. Coloradoan. Retrieved from http://www.coloradoan.com.
22. Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (“Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”).

Appendix A. Proposed Community Rights Constitutional Amendment

Right of the People to Local Self-Government. “As all political power is vested in and derived from the people, and as all government of right originates from the people, the people have an inherent and inalienable right to local self-government, including in each county, city, town, and any other municipal subdivision or other local community within the State. That right shall include, without limitation, the power to enact local laws protecting health, safety, and welfare by recognizing the fundamental rights of people, communities, and the natural environment, and by securing those rights using prohibitions and other means; and the power to enact local laws establishing, defining, altering, or eliminating the rights, powers, and duties of for-profit business entities, operating or seeking to operate in the community, to prevent such rights and powers from usurping or otherwise conflicting with the fundamental rights of people, their communities, and the natural environment. Local laws adopted pursuant to this right shall not be subject to preemption by international, federal or state laws, nor shall they be subject to limitation pursuant to Article XX, section 6 of the Colorado Constitution; provided however, that local laws shall not restrict fundamental rights of individuals, their communities, or the natural environment secured by the Constitution of the State of Colorado, the U.S. Constitution, or international law, nor shall local laws weaken protections for people, their communities, or the natural environment provided by state, federal, or international law.”