

The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities

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I. INTRODUCTION

Just a few years ago, the United States worried about the expensive proposition of increasing dependence on foreign oil and gas. Now, due in part to hydraulic fracturing’s role in releasing large reserves of oil and gas, gas prices have plummeted, and by 2018, the United States may be a

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net exporter of natural gas.¹ This expansion in development, a boon to the economy, nevertheless has some local governments concerned about health, safety, and interruptions to local life that a hydraulic fracturing operation can cause. Several localities have taken matters into their own hands by passing regulations, varying from regulating where and how hydraulic fracturing may be carried out within their jurisdictions to outright bans.²

In response to these concerns over potentially adverse impacts on public health and the natural environment associated with hydraulic fracturing operations, state and local governments each seek greater control over the oil and gas industry. The balance of power differs tremendously by jurisdiction, but the authority to exercise control over the “where” and “how” continues to present major issues for local governments trying to govern locally, state and regional government agencies, industry representatives, and nongovernmental entities.

Conflicts between state preemption and local land use authority are forcing companies to make difficult decisions about where to deploy scarce exploration resources. This Article explores the statutory and constitutional authorities of municipal entities to regulate hydraulic fracturing within their borders. A local government’s authority to regulate oil and gas interests within its borders is limited by law. Municipal efforts inherently conflict with state regulatory programs addressing the practice, in large part because state interests in the efficient and economical extraction of oil and gas resources are overwhelming. Further, these municipal attempts to regulate hydraulic fracturing are misguided, preempted, and an invalid means of addressing the allegedly local concerns associated with these operations.

II. BACKGROUND

Hydraulic fracturing has become an indispensable component of profitable oil and gas development in the United States. It has also

1. *Oil and Natural Gas Import Reliance of Major Economies Projected to Change Rapidly*, U.S. ENERGY INFO. ADMIN. (Jan. 22, 2014), <http://www.eia.gov/todayinenergy/detail.cfm?id=14691> (citing *AEO2014 Early Release Report*, U.S. ENERGY INFO. ADMIN. 13 (Dec. 16, 2013), [http://www.eia.gov/forecasts/aeo/er/pdf/0383er\(2014\).pdf](http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2014).pdf)).

2. In many cases, local ordinances purporting to use a zoning power fared no differently than those that referred to a “ban.” For the purposes of this Article, which is focused on the preemption analysis, both types of ordinances are considered, and the type of ordinance is noted in the discussion of each case. For a fuller exploration of this distinction, see Kevin J. Duffy, *Regulating Hydraulic Fracturing Through Land Use: State Preemption Prevails*, 85 U. COLO. L. REV. 817, 850-58 (2014) (describing the operational conflict that can occur regardless of whether an ordinance is considered a ban or a zoning regulation).

become a well-publicized and hotly contested practice by some local governments, who flex their “home rule” muscles in an attempt to prohibit hydraulic fracturing within city and county limits. But even though the home rule doctrine allows local government entities in some states to handle their own local affairs, local government regulation is preempted where the state has already regulated or where a local ordinance would conflict with a state interest.

A. Oil and Gas Operations in the United States

Today, oil and gas activities in the United States, including hydraulic fracturing, are regulated at the state level, and a number of states have resisted local attempts at regulation where they conflict with policies underlying state oil and gas regulations.³ Hydraulic fracturing, or the injection of water and chemicals into rock at high pressure to release oil and gas, is a process used in a vast majority of natural gas wells.⁴ It is a critical step in unlocking oil and natural gas reserves embedded in shale and other tight, underground rock formations across the country.⁵ State laws control the process from beginning to end. Each step of the drilling and hydraulic fracturing process is subject to regulation, including preparing the site, drilling the well, disposing of waste after the process is complete, and everything in between.⁶

The number of hydraulic fracturing operations within states differs greatly.⁷ The state with the highest number of gas and oil wells in the United States is Texas.⁸ Colorado is fourth (exceeded in the number of wells only by Texas, Pennsylvania, and Kansas), and its 84,357 active wells primarily extract from the Niobrara Shale.⁹ New York, where a moratorium was in place for years, recently became the first state with

3. Nicholas Deutsch & P. Randall Crump, *The Power Struggle over the Regulation of Hydraulic Fracturing*, E&P, Mar. 2014, at 8, 8, available at <http://www.epmag.com/power-struggle-over-regulation-hydraulic-fracturing-712716>.

4. *Fact Sheet: On Fracking*, EARTH JUST., <http://earthjustice.org/features/campaigns/fact-sheet-on-fracking> (last visited Jan. 16, 2015).

5. *Hydraulic Fracturing: Unlocking America's Natural Gas Resources*, AM. PETROLEUM INST. 1, 2 (July 2014), <http://www.api.org/oil-and-natural-gas-overview/exploration-and-production/hydraulic-fracturing/~media/Files/Oil-and-Natural-Gas/Hydraulic-Fracturing-primer/Hydraulic-Fracturing-Primer-2014-highres.pdf>.

6. See *Fact Sheet: On Fracking*, *supra* note 4.

7. Matt Kelso, *Over 1.1 Million Active Oil and Gas Wells in the US*, FRACTRACKER ALLIANCE (Mar. 4, 2014), <http://www.fractracker.org/2014/03/1-million-wells/>.

8. Bobby Magill, *Fracking the USA: New Map Shows 1 Million Oil, Gas Wells*, CLIMATE CENT. (Mar. 27, 2014), <http://www.climatecentral.org/news/fracking-the-usa-maps-show-americas-1.1-million-oil-and-gas-wells-17226>.

9. *Id.*

major natural gas deposits to ban fracturing.¹⁰ New York sits on the Marcellus Shale with more than 15,000 active wells found primarily in the western part of the state.¹¹

The requirements of state regulatory programs are divergent as well. Some states require disclosure of the chemicals and practices used during the fracking process, while others allow this to remain confidential or require disclosure but provide an exception for trade secrets.¹²

B. Local Government and Home-Rule Authority

Throughout the United States, local ordinances banning or restricting hydraulic fracturing have been challenged in state and federal courts.¹³ Because the United States Environmental Protection Agency does not regulate fracking within the continental United States,¹⁴ the conflicts have largely arisen in home-rule cities where there is a legislative grant of power to a state agency to regulate oil and gas activity in the state. Local government entities are a creation of the state and only have the powers delegated to them by the state (although not every power must be mentioned for a locality to exercise it).¹⁵ Traditionally, many local governments in the United States have operated under Dillon's rule, which "allows a state legislature to control local government structure"

10. *Environmental Win: Gov. Andrew Cuomo Bans Fracking in New York State*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Dec. 17, 2014), <http://indiancountrytodaymedianetwork.com/2014/12/17/environmental-win-gov-andrew-cuomo-bans-fracking-new-york-state-158340>.

11. Magill, *supra* note 8.

12. Katie Valentine, *Major Drilling Services Company Will Now Disclose All Fracking Chemicals*, CLIMATE PROGRESS (Oct. 2, 2014, 4:35 PM), <http://thinkprogress.org/climate/2014/10/02/3575249/baker-hughes-fracking-chemical-disclosure/> (citing John Murawski, *NC Fracking Panel Passes Chemical Disclosure Rule*, NEWSOBSERVER.COM (Jan. 14, 2014), http://www.newsobserver.com/2014/01/14/3532704_nc-fracking-panel-passes-chemical.html?rh=1; Joanna M. Foster, *In Wyoming, Drillers Are One Step Closer To Disclosing What's in Fracking Fluid*, CLIMATE PROGRESS (Mar. 13, 2014, 9:40 AM), <http://thinkprogress.org/climate/2014/03/13/3399471/wyoming-fracking-fluid-case/>; Spencer Hunt, *Shale Drillers Must Report Chemicals*, COLUMBUS DISPATCH (Sept. 30, 2013, 5:53 AM), <http://www.dispatch.com/content/stories/local/2013/09/30/shale-drillers-must-report-chemicals.html>).

13. *See infra* Part III.

14. Claudia M. Barrett, *2014 Should Be Pivotal for Fracking Regulation*, LAW360 (Feb. 10, 2014, 5:58 PM), <http://www.law360.com/articles/508609/2014-should-be-pivotal-for-fracking-regulation> (subscription required).

15. *See, e.g.*, *Hawkins v. Common Council of Grand Rapids*, 158 N.W. 953, 956 (Mich. 1916) ("The power conferred in the charter of Grand Rapids to remove its officers was but recognition of ancient usage, and an inherent incident of its incorporation, with stated limitations, was forbidden by no constitutional restriction and thus expressly conferred by its accepted charter, governed and limited corporate action in that particular." (citing *People v. Hurlbut*, 24 Mich. 44 (1871))); *State ex rel. Ennis v. Superior Court*, 279 P. 601, 606 (Wash. 1929) (stating that common law directs "a liberal construction of the legislative enactment providing for the adoption of charters by cities of the first class" (citing WASH. REV. CODE § 35.22.900)).

and functions.¹⁶ However, home-rule local governments are where the preemption battle is primarily taking place.

Home-rule governments have been granted much broader powers and autonomy by the state.¹⁷ Powers vary by state, and sometimes even within states, because it is generally the home-rule city itself that chooses how much power to exercise, up to the amount allowed by the state constitution or authorizing statute.¹⁸ For example, home-rule localities often have exclusive control over city zoning.¹⁹ Some additionally have broad powers, such as “eminent domain, taxation, and election holding.”²⁰ Local powers may be protected by the state constitution or by statute.²¹ But almost all home-rule localities have zoning power, which can be the foundation for an attempt to ban or institute moratoria on hydraulic fracturing within city limits.²²

C. *Preemption*

The interface of home-rule jurisdiction and preemption continues to present legal issues and political tension. State laws can expressly or

16. *Local Government Authority*, NAT’L LEAGUE CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority> (last visited Jan. 26, 2015).

17. *See, e.g.*, TEX. LOC. GOV’T CODE ANN. § 51.072 (West 2013) (“The [home-rule] municipality has full power of local self-government.”); *People ex rel. Metro. St. Ry. Co. v. State Bd. of Tax Comm’rs*, 67 N.E. 69, 70-71 (N.Y. 1903) (“The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution. Even prior to Magna Charta [sic], some cities, boroughs, and towns had various customs and liberties, which had been granted by the crown, or had subsisted through long user [sic], and among them was the right to elect certain local officers from their own citizens, and, with some restrictions, to manage their own purely local affairs.”).

18. *City of Santa Fe v. Young*, 949 S.W.2d 559, 560 (Tex. App. Hous. 14th Dist. 1997) (“A home-rule city looks to the legislature *not* for grants of power, but only for limitations on their powers granted by article XI, § 5 of the Texas Constitution. Merely because the legislature has addressed a subject matter does not prevent a home-rule city from regulating the same subject matter as well—but an ordinance of a home-rule city that conflicts with a state statute is unenforceable to the extent of such conflict.” (citing *State v. City of La Porte*, 386 S.W.2d 782, 785 (Tex. 1965); *Dall. Merchant’s & Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993))).

19. *See, e.g.*, *Colo. Oil & Gas Ass’n v. City of Fort Collins*, No. 13CV31385, slip op. at 1 (Colo. Dist. Ct. Aug. 7, 2014) (“Fort Collins is a home-rule city The City’s Charter provides that the City may appropriately plan and zone areas within the City’s boundaries.” (citation omitted)).

20. Joel Minor, *Local Government Fracking Regulations: A Colorado Case Study*, 33 STAN. ENVTL. L.J. 59, 87 (2013) (citing COLO. CONST. art. XX, §§ 1, 6) (discussing Colorado home-rule cities).

21. *See, e.g., id.* at 89.

22. *Municipality Fracking Bans*, BALDWIN HILLS OIL WATCH, <http://baldwinhillsoilwatch.org/action-center/municipality-fracking-bans/> (last visited Jan. 25, 2015).

impliedly preempt local ordinances.²³ Under the federal preemption doctrine, preemption can be implied through either field preemption (where Congress intended to occupy the field) or conflict preemption (where it is impossible to comply with both laws at once).²⁴ The state-local preemption doctrine operates in much the same way.²⁵

One of the major differences between the state preemption doctrine and its federal counterpart, however, is the source of power for enacting local ordinances. While states retain all powers not given to the federal government by the United States Constitution,²⁶ municipalities and counties, in contrast, are powerless without a state constitutional or legislative grant.²⁷ Home rule empowers municipal governments to pass laws restricting fracking through zoning or by banning it completely.²⁸ This can create tension between two state statutes—an apparently preemptive oil and gas statute and a home rule or similar statute granting power to a local government entity.²⁹

Though it is difficult to speak of a single preemption test that applies in all jurisdictions, a court confronted with a home-rule preemption question may ask several questions about the ordinance:

1. Does the local law relate to the property, affairs[,] or government of the local government . . . ?
2. Is there an express or implied conflict between a state statute and the local law?
3. Does the state statute violate the constitution[al] limitations regarding special laws that relate to the property, affairs[,] or government of a local government?

23. Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Preemption Again*, SCOTUSBLOG (Mar. 11, 2013, 11:05 AM), <http://www.scotusblog.com/2013/03/scotus-for-law-students-sponsored-by-bloomberg-law-preemption-again/>.

24. *Id.*

25. *See, e.g.*, Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, slip op. at 4 (Colo. Dist. Ct. July 24, 2014) (quoting Bd. of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1056-57 (Colo. 1992) (en banc)) (describing state doctrines of express, implied, and operational conflict).

26. *See* U.S. CONST. amend. X.

27. Robinson Township v. Commonwealth, 83 A.3d 901, 977 (Pa. 2013) (“[P]olitical subdivisions are ‘creations of the state with no powers of their own.’” (quoting Fross v. County of Allegheny, 20 A.3d 1193, 1202 (Pa. 2011))).

28. Joe Stinson, *The Home Rule Authority of New York Municipalities in the Land Use Context*, LAND USE L. CENTER, PACE L. SCH. (1997), <http://celdf.org/downloads/New%20York%20State%20-The%20Home%20Rule%20Authority%20of%20Municipalities%20in%20Land%20Use%20Context.pdf>.

29. *Id.*

4. If the local law conflicts with a general state statute, has the local government validly exercised its supersession authority?³⁰

In short, in many jurisdictions, home rule limits state interference where a local ordinance relates to a *purely local concern* and does not conflict with state law.³¹ The state law preempts a local ordinance where the state law serves a *significant state interest*.³²

III. ANALYSIS

The conflict of local ordinances with state laws is inherent, unavoidable, and irreconcilable.³³ Whether an ordinance completely bans hydraulic fracturing, bans certain types of fracturing, or restricts it to certain areas through zoning, these local ordinances should be preempted by state law, and most courts that have considered the issue agree. Wherever hydraulic fracturing is banned or restricted by zoning, oil and gas activity has significantly less value and may even become economically untenable. A few outlier jurisdictions have found that some other right or interest the state has granted to a local government outweighs the overwhelming state interest in uniform regulation of oil and gas activity in the state, but even those courts did not shy away from an analysis of the robust state interest in regulation. Grants of power to local government, state oil and gas laws, and local ordinances vary widely, but preemption is consistently a ground on which courts overturn local ordinances or otherwise find them to be unlawful.

A. *The State's Overwhelming Interest in Safe, Efficient Oil and Gas Exploration and Development*

Several jurisdictions have overturned local ordinances seeking to regulate hydraulic fracturing on preemption grounds, acknowledging that the legislature and state administrative agencies provide for more efficient statewide regulation.

1. Compliance with a Single Set of Laws and Legislative Intent

Local laws may not materially impede a legitimate state interest. A ban on hydraulic fracturing destroys the state interest in oil and gas

30. *Id.*

31. *See id.* (quoting *In re Mitchell v. Borakove*, 639 N.Y.S.2d 791, 795 (App. Div. 1st Dep't 1996)).

32. *See id.*

33. *See Colo. Oil & Gas Ass'n v. City of Longmont*, No. 13CV63, slip op. at 16 (Colo. Dist. Ct. July 24, 2014).

production in a municipality, because without hydraulic fracturing, production is inefficient and in most cases cannot be continued.³⁴ For example, the Colorado Oil and Gas Association (COGA) abandoned a lawsuit in October 2014 because COGA believed it was clear that the challenged law in the city of Longmont was preempted by Colorado state law.³⁵ In Colorado, oil and gas operations are a matter of mixed state and local concern.³⁶ In such matters, a state statute prevails in a conflict between the statute and a home-rule municipal ordinance.³⁷ Accordingly, oil and gas operations may be controlled by local governments only to the extent that local ordinances do not conflict with state law.³⁸

A state oil and gas regulation and a local ordinance banning fracking will nearly always be in conflict because of the underlying purposes of the statewide law. First, the state law promotes statewide uniformity.³⁹ It is much more efficient for the state to regulate technical aspects of oil and gas development; it prevents waste and protects fair ownership interests.⁴⁰ Second, oil does not follow local boundary lines.⁴¹ To drill outside of Longmont (or any other city) and stop at the border is an inefficient use of resources.⁴² Third, oil and gas has traditionally been governed by the state, not local entities.⁴³ It is a state issue, so even though the court in *Colorado Oil & Gas Ass'n v. City of Longmont* acknowledged the sincerely held safety and health concerns of city residents, they were not enough to make hydraulic fracturing a purely local issue.⁴⁴ Thus, as COGA has pointed out, the law is clear in

34. *Id.* at 15.

35. Erin Udell, *Judge Denies Stay in Fort Collins Fracking Lawsuit*, COLORADOAN (Nov. 10, 2014, 3:32 PM), <http://www.coloradoan.com/story/news/local/2014/11/10/judge-denies-stay-citys-legal-hydraulic%20fracturing-battle/18805611/>. In 2012, a district court in Colorado invalidated the city of Longmont's ban on "hydraulic fracturing and the storage and disposal of hydraulic fracturing waste in the City of Longmont." *See Colo. Oil & Gas Ass'n*, No. 13CV63, slip op. at 17. The key plaintiffs "[we]re the Colorado Oil and Gas Association (COGA), an association of oil and gas operators, [and a statewide agency] the Colorado Oil and Gas Conservation Commission (COGCC)." *Id.* at 1.

36. *Colo. Oil & Gas Ass'n*, No. 13CV63, slip op. at 13.

37. *Id.* at 12-13 (quoting *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1066 (Colo. 1992) (en banc)).

38. *Id.* at 17 (mentioning COLO. REV. STAT. §§ 34-60-101 to -130 (2014)).

39. *Id.* at 11.

40. *Id.* at 10-11 (quoting *Voss*, 830 P.2d at 1065-66; *Bd. of Cnty. Comm'rs of La Plata Cnty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1058, 1060 (Colo. 1992) (en banc)) (finding no implied preemption but using the analysis to support its finding of conflict preemption).

41. *Id.* at 11-12.

42. *See id.* at 12.

43. *Id.*

44. *Id.* at 13.

Colorado, and for local governments to continue to fight them would simply be a waste of taxpayers' money.⁴⁵

A challenge to a municipal ban in Munroe Falls, Ohio, also relied on the benefit of efficiency and uniformity that state law provides. The local ordinance in contention was a zoning restriction.⁴⁶ The city of Munroe Falls' ordinance denied an energy company the right to drill in a residentially zoned area, even though the company already had a permit from the state.⁴⁷ The appellate court found for the energy company, holding "that the local zoning rules conflicted with the state statute, which gives the state 'sole and exclusive authority' over oil and gas drilling across Ohio."⁴⁸ The state interest was strong, and as the challengers of the ordinance pointed out, "'The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation.'"⁴⁹ In contrast, "[t]he City want[ed] to turn back the clock to the patchwork of local control and regulation that the General Assembly replaced with a comprehensive plan."⁵⁰

While the city framed the issue as one about home rule more broadly,⁵¹ the industry challenger emphasized the legislative intent to give the state agency exclusive oil and gas permitting power.⁵² On February 16, 2015, the Ohio Supreme Court sided with the industry in a 4-3 decision.⁵³ "Ohio's home rule authority does not allow a municipality to 'discriminate against, unfairly impede, or obstruct oil and gas activities

45. See Udell, *supra* note 35 (citation omitted).

46. Randy Ludlow, *High Court To Decide: Is Fracking Subject to Local Rules?*, COLUMBUS DISPATCH (Feb. 27, 2014, 5:52 AM), <http://www.dispatch.com/content/stories/local/2014/02/26/supreme-court-drilling-rights.html>.

47. Jim Phillips, *Locals Lending Support in Suit over City Regulations on Oil/Gas Wells*, ATHENS NEWS (Dec. 1, 2013), http://www.athensnews.com/ohio/article-41226-locals-lending-support-in-suit-over-city-regulations-on-oil_gas-wells.html.

48. Robert Higgs, *Ohio Supreme Court Case over Munroe Falls' Drilling Laws Could Impact Home Rule Authority Across the State*, CLEVELAND.COM (Feb. 25, 2014, 5:55 PM), http://www.cleveland.com/open/index.ssf/2014/02/ohio_supreme_court_case_over_m.html (quoting State *ex rel.* Morrison v. Beck Energy Corp., 989 N.E.2d 85, 90 (Ohio Ct. App. 2013), *aff'd*, No. 2013-0465 (Ohio Feb. 17, 2015)).

49. Appellees' Merit Brief at 5, State *ex rel.* Morrison v. Beck Energy Corp., No. 2013-0465 (Ohio Feb. 17, 2015) (quoting OHIO REV. CODE ANN. § 1509.02 (emphasis added)).

50. *Id.* at 27.

51. Higgs, *supra* note 48 (quoting Munroe Falls Mayor Frank Larson).

52. Ludlow, *supra* note 46.

53. *Ohio Supreme Court Invalidates Local Fracking Restrictions*, NAT'L L. REV. (Feb. 23, 2015), <http://www.natlawreview.com/article/ohio-supreme-court-invalidates-local-fracking-restrictions>.

and production operations.”⁵⁴ According to the court, this is exactly what the local Ohio regulations did, making them invalid.⁵⁵

Lastly, in a rare federal opinion on local fracking ordinance preemption, the United States District Court for the District of New Mexico struck down a local ban in a rural county in New Mexico.⁵⁶ “Judge James Browning found that Mora County’s ban violated both the U.S. Constitution’s Supremacy Clause and state laws that allow drilling generally and fracking specifically.”⁵⁷ Since other courts may look to Judge Browning’s opinion for guidance, this ruling also bodes well for the uniform application of state oil and gas laws.

2. The Power of Statutory Language

In other jurisdictions, the preemptive language of a statute can be sufficiently strong so that the court requires very little analysis of the state interest because the state legislature has already done its part to expressly preempt a local regulation. Considering a strongly worded state oil and gas law, the United States Court of Appeals for the Fifth Circuit struck down a local law in Shreveport, Louisiana, that banned new drilling within 1,000 feet of Cross Lake, “the main source of water for Shreveport.”⁵⁸ The ordinance was preempted in its entirety by a Louisiana state statute, which reads, “No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such permit.”⁵⁹ The local ordinance was therefore invalid due to a comprehensive scheme of the state government.⁶⁰

54. *Id.* (quoting *Beck Energy Corp.*, No. 2013-0465, slip op. at 13).

55. *Id.* (discussing *Beck Energy Corp.*, No. 2013-0465, slip op. at 13).

56. Richard Nemeč, *Federal Court Rejects New Mexico County Fracking Ban*, NGI’s SHALE DAILY (Jan. 21, 2015), <http://www.naturalgasintel.com/articles/101106-federal-court-rejects-new-mexico-county-fracking-ban> (discussing *SWEPI, LP v. Mora County*, No. CIV 14-0035 JB/SCY, slip op. at 199 (D.N.M. Jan. 19, 2015)).

57. *Id.* (discussing *SWEPI*, No. CIV 14-0035 JB/SCY, slip op. at 2-3).

58. *Energy Mgmt. Corp. v. City of Shreveport (Energy Mgmt. II)*, 467 F.3d 471, 475 (5th Cir. 2006) (citing *Energy Mgmt. Corp. v. City of Shreveport (Energy Mgmt. I)*, 397 F.3d 297, 299 (5th Cir. 2005)).

59. *Id.* at 479 (quoting *Energy Mgmt. I*, 397 F.3d at 300) (emphasis added)).

60. 2006 was not the first time the *Energy Management II* case had reached the Fifth Circuit. The prior opinion cited Louisiana case law explaining the state’s preemption scheme:

Local power is not pre-empted unless it was the clear and manifest purpose of the legislature to do so, or the exercise of dual authority is repugnant to a legislative objective; if there is no express provision mandating pre-emption, the courts will determine the legislative intent by examining the pervasiveness of the state regulatory

Despite the statute's clear language, local challenges in Louisiana have resurfaced. St. Tammany Parish filed a lawsuit "to get a ruling on the power of parish zoning laws, prevent [the Louisiana Department of Natural Resources (DNR)] from awarding any fracking units or permits in St. Tammany, get a ruling on whether St. Tammany can create [a] fracking ban, and to throw out the unit approval [that the] DNR ha[d] already established for [the] Helis Oil's project."⁶¹ However, the DNR issued a state permit to drill a vertical well in December 2014 over the local government's objection.⁶² This indicates that it is likely that state preemption will prevail in Louisiana, once again. The Louisiana state statute uses similar language to the Ohio law, "sole and exclusive authority,"⁶³ but even laws that do not use the phrase "expressly forbidden" can, and have, resulted in conflict preemption with a permitting state or other oil and gas statute.⁶⁴

3. The State's Authority To Protect the Environment

When local governments cite environmental concerns as grounds for a hydraulic fracturing ban, one aspect of the preemption analysis is often that a state agency is already vested with the exclusive authority to protect the environment of the state. For example, a ban in Morgantown, West Virginia, was preempted by state law.⁶⁵ In banning hydraulic fracturing, the local ordinance characterized hydraulic fracturing as a nuisance.⁶⁶ The court noted that Morgantown did not need such an ordinance, particularly where the state agency was already acting to ensure that the environment was protected in the hydraulic fracturing

scheme, the need for state uniformity, and the danger of conflict between the enforcement of local laws and the administration of the state program.

Energy Mgmt. I, 397 F.3d at 303 (citing *Palermo Land Co. v. Planning Comm'n*, 561 So. 2d 482, 497 (La. 1990); *Hildebrand v. City of New Orleans*, 549 So. 2d 1218, 1227 (La. 1989)).

61. Ashley Rodrigue, *Judge: St. Tammany Fracking Challenge Can Move Forward*, WWLTV.COM (Oct. 27, 2014, 6:44 PM), <http://www.wwltv.com/story/news/local/northshore/2014/10/27/northshore-fracking/18001129/>.

62. Robert Rhoden, *State Office of Conservation Grants Drilling Permit for Helis Oil's Project Near Mandeville*, NOLA.COM (Dec. 19, 2014, 4:35 PM), http://www.nola.com/politics/index.ssf/2014/12/state_office_of_conservation_g.html (citing *Order No. 1577-I*, LA. OFF. CONSERVATION (Dec. 19, 2014), http://dnr.louisiana.gov/assets/OC/Order1577_1_wpermiten_closed1.pdf).

63. Higgs, *supra* note 48 (quoting *State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85, 90 (Ohio Ct. App. 2013), *aff'd*, No. 2013-0465 (Ohio Feb. 17, 2015)); LA. REV. STAT. ANN. § 30:28(F) (2014).

64. *See infra* Part III.C.1.

65. *Ne. Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, slip op. at 9 (W. Va. Cir. Ct. Aug. 12, 2011) (citing W. VA. CODE R. § 22-6 (1994)).

66. *Id.* at 2 (citing W. VA. CODE R. § 8-12-2 (1969)).

context.⁶⁷ The court found that the state environmental agency was responsible for administering and enforcing laws to protect the environment.⁶⁸

This analysis was echoed by the *Colorado Oil & Gas Ass'n* court's dismissal of local health and safety concerns.⁶⁹ The city's complaint that the state was "not doing its job to Longmont's satisfaction" was unavailing in light of the overriding state interest.⁷⁰ Like shale, environmental concerns do not stop at city boundaries. State environmental laws serve to encourage the most efficient resource development by industry while simultaneously protecting the state's resources.

B. The Countervailing Interests of State Constitutional Rights and Small-Town Character

As in Colorado and Ohio, energy development is an important state interest in Pennsylvania.⁷¹ But the unique environmental rights embedded in the state constitution ultimately defeated a statewide law, a win for local governments seeking to regulate fracking through zoning ordinances. In 2009, the Supreme Court of Pennsylvania ruled that the Pennsylvania Oil and Gas Act (POGA) only preempted the local ordinance to the extent that it purported to establish a comprehensive oil and gas regulatory scheme.⁷² The court acknowledged the "need for statewide uniformity in the regulation of the oil and gas industry."⁷³ The township would nevertheless be permitted to use its zoning power to dictate well location, "even if such regulations preclude[d] oil and gas drilling in certain zones."⁷⁴ Though the township could not regulate how companies drilled, the case affirmed the power of local government to regulate the "where" of oil and gas activity.⁷⁵

67. *Id.* at 9-10 (mentioning W. Va. Exec. Order No. 4-11 (July 12, 2011), available at <http://www.governor.wv.gov/Documents/20110713150559476.pdf>).

68. *Id.* at 6 (quoting W. VA. CODE R. § 22-1-1(a)(2) (1994)).

69. *See* *Colo. Oil & Gas Ass'n v. City of Longmont*, No. 13CV63, slip op. at 15 (Colo. Dist. Ct. July 24, 2014).

70. *See id.* at 14.

71. For additional discussion of Pennsylvania's dispute on this issue, see Jordan Lesser, *Local Land-Use Control, Constitutional Environmentalism, and Hydrofracking: New York and Beyond*, 28 *TUL. ENVTL. L.J.* 315, 322-31 (2015).

72. *Range Res.-Appalachia, LLC v. Salem Township*, 964 A.2d 869, 876 (Pa. 2009).

73. *Id.* at 874.

74. *Id.* at 872 (discussing *Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855, 863-64 (Pa. 2009)).

75. *Id.* at 873 n.3. The invalidated local ordinance purported to regulate:

In response, the legislature passed a new law, Act 13, which repealed several sections of POGA and added six new sections, including a chapter that “prohibit[ed] any local regulation of oil and gas operations, including via environmental legislation, and require[d] statewide uniformity among local zoning ordinances with respect to the development of oil and gas resources.”⁷⁶ Act 13 was successfully challenged by seven localities as violating several provisions of the Pennsylvania Constitution.⁷⁷ The constitution guarantees, for example, “clean air, pure water, and . . . preservation of the natural, scenic, historic and esthetic values of the environment.”⁷⁸ The opinion mourned past “shortsighted exploitation” of Pennsylvania’s environment and sought to avoid further exploitation.⁷⁹ The Pennsylvania ruling is somewhat of an anomaly in hydraulic fracturing preemption case law, but opponents of a local hydraulic fracturing ban should not neglect an analysis of the state constitution when determining how best to challenge a local law, particularly as unhappy citizen groups seek state constitutional amendments in other states.⁸⁰

Prior to the enactment of the statewide ban, Middlefield and Dryden, New York, also resulted in a win for local governments.⁸¹ The

(1) the location and grading of access roads from public roads to well sites; (2) the creation of tire cleaning areas along access roads where they intersect with public roads; (3) the slope of access roads for storm water management purposes; (4) the construction of cross pipes under access roads for storm water management purposes; (5) the entry of excess maintenance agreements requiring operators to repair public roads damaged by heavy equipment; (6) the location and grading of gas transmission lines running from the well heads to ensure and maximize surface development; (7) a minimum depth at which transmission lines should be located to ensure they do not interfere with farming or other surface development; (8) the installation of marking ribbons on transmission lines for easy identification to ensure they are not subject to damage or disruption by other excavation in the area; (9) mandatory testing of potable water supplies; and (10) the location of water cleaning facilities associated with coal bed methane operations which are not provided for under the Act.

Id. (citing Brief of Appellant at 19-20, *Great Lakes Energy Partners v. Salem Township*, 931 A.2d 101 (Pa. Commw. Ct. 2007) (No. 1866 C.D. 2006)).

76. *Robinson Township v. Commonwealth*, 83 A.3d 901, 915 (Pa. 2013) (citing 58 PA. CONS. STAT. §§ 3301-3309).

77. *Id.* at 915-16 (mentioning PA. CONST. art. I, §§ 1, 10, 27, art. III, §§ 3, 32).

78. Marie Cusick, *Pennsylvania Supreme Court Strikes Down Controversial Portions of Act 13*, ST. IMPACT (Dec. 19, 2013, 3:41 PM), <https://stateimpact.npr.org/pennsylvania/2013/12/19/state-supreme-court-strikes-down-act-13-local-zoning-restrictions/> (quoting *Robinson Township*, 83 A.3d at 948).

79. *Robinson Township*, 83 A.3d at 976.

80. See, e.g., *Colorado Community Rights Amendment*, COLO. COMMUNITY RTS. NETWORK, <http://cocrn.org/proposed-constitutional-amendment/> (last visited Jan. 16, 2015).

81. For additional discussion of New York’s dispute on this issue, see Lesser, *supra* note 71, at 317-22.

towns were allowed to use local zoning laws to effectively ban oil and gas activity within city limits, including hydraulic fracturing.⁸² New York's Oil, Gas and Solution Mining Law (OGSML) did not preempt local zoning authority.⁸³ New York's home-rule law specifically gives local governments the power "to pass laws both for the 'protection and enhancement of [their] physical and visual environment.'"⁸⁴ Middlefield and Dryden capitalized on this, the court found, appropriately using their home-rule authority "in determining that gas drilling would permanently alter and adversely affect the deliberately-cultivated, small-town character of their communities."⁸⁵

The court relied on an earlier case, *Frew Run Gravel Products, Inc. v. Town of Carroll*,⁸⁶ which found that a statewide law did not prevent localities from zoning to exclude sand and gravel mining.⁸⁷ There was no preemption in *Frew Run* because the state law and the local law had "an entirely different subject matter and purpose"; "the phrase 'local laws relating to the extractive mining industry'" in the relevant statewide law did not prohibit local zoning provisions.⁸⁸ The local ordinance regulated land use in the city while the state law regulated the extractive mining industry. "In effect, local laws that purported to regulate the 'how' of mining activities and operations were preempted[,] whereas those limiting 'where' mining could take place were not."⁸⁹ This was true in Middlefield and Dryden as well, even though the activity, hydraulic fracturing, was banned in all zoning districts.⁹⁰

C. *The Imminent Conflict Between State Interests and Local Control*

1. State Passivity Leads to Economic Loss

On February 28, 2014, Los Angeles became the largest United States city to ban hydraulic fracturing.⁹¹ The ban placed a temporary

82. *Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1191 (N.Y. 2014).

83. *Id.*

84. *Id.* at 1194 (alteration in original) (quoting N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(11) (2014)).

85. *Id.* at 1202.

86. 518 N.E.2d 920 (N.Y. 1987).

87. *Wallach*, 16 N.E.3d at 1196 (quoting *Frew Run*, 518 N.E.2d at 922).

88. *Id.* (quoting *Frew Run*, 518 N.E.2d at 922).

89. *Id.* (citing *Frew Run*, 518 N.E.2d at 922).

90. In coming to this conclusion, the court looked at (1) the plain language, (2) how the supersession clause fit into the statute as a whole, and (3) the legislative history, *id.* at 1198-1201 (discussing *Frew Run*, 518 N.E.2d 920). The court found that each of these factors supported its interpretation that local zoning laws were not preempted. *Id.* at 1201.

91. *Los Angeles Becomes Largest US City To Prohibit Fracking*, RT.COM (Mar. 1, 2014, 2:47 PM), <http://rt.com/usa/los-angeles-fracking-ban-290/>.

moratorium on “all activity associated with well stimulation,” including hydraulic fracturing.⁹² California also passed a statewide law in 2013, Senate Bill 4, which includes permitting, chemical and drilling notification, and monitoring requirements.⁹³ The state law does not expressly prohibit local governments from enacting local hydraulic fracturing ordinances.⁹⁴ Interestingly, “[t]he savings clause appears to permit Los Angeles to impose additional environmental and mitigation requirements related to hydraulic fracturing” and requires the *state* to comply with them.⁹⁵

Other California localities that have opposed or sought to oppose hydraulic fracturing have come against resistance as well. In November 2014, challenger Citadel Exploration filed a claim (an administrative prerequisite to a lawsuit) against San Benito County, seeking \$1.2 billion in damages due to the fracking ban instituted by the voters.⁹⁶ This number was “based on the estimated 20-40 million barrels of oil Citadel says it could have extracted in the area over the next several decades.”⁹⁷ Although the Los Angeles ban was first in time, the fight against hydraulic fracturing in California is likely to take place in San Benito County.⁹⁸

2. Local Activism Prompts State Agency Action

Denton, Texas, promises to be the next major battleground for the preemption fight, in a state that has historically embraced oil and gas exploration and development. In a November 2014 vote, citizens of the city of Denton, Texas, passed a municipal ordinance banning hydraulic

92. *Id.* (quoting Memorandum from the Office of the City Clerk, City of L.A., to All Interested Parties, L.A. CITY COUNCIL (Mar. 4, 2014), http://clkrep.lacity.org/onlinedocs/2013/13-1152-S1_CA_02-28-14.pdf (emphasis added)).

93. Jayni Foley Hein, *State Releases New Fracking Regulations Amid SB 4 Criticism, Controversy*, BERKLEY BLOG (Nov. 18, 2013), <http://blogs.berkeley.edu/2013/11/18/state-releases-new-fracking-regulations-amid-sb-4-criticism-controversy/>.

94. Earl L. Hagstrom, *State Legislation vs. Municipal Home Rule over Fracking*, LAW360 (Mar. 24, 2014, 5:29 PM), <http://www.law360.com/articles/520360/state-legislation-vs-municipal-home-rule-over-fracking> (subscription required) (discussing CAL. PUB. RES. CODE §§ 3150-3161; CAL. WATER CODE § 10783).

95. *Id.* (discussing CAL. PUB. RES. CODE § 3160(n)).

96. Kathryn Oehlschlager, *Fracking Preemption Fight To Play Out in San Benito County*, JD SUPRA BUS. ADVISOR (Nov. 25, 2014), <http://www.jdsupra.com/legalnews/fracking-preemption-fight-to-play-out-in-96671/>.

97. *Id.*

98. *See id.*

fracturing within the city limits.⁹⁹ The next day, two lawsuits were filed, challenging it on preemption grounds: one by the Texas General Land Office (GLO)¹⁰⁰ and one by the Texas Oil and Gas Association (TXOGA).¹⁰¹ The GLO complaint cites the Texas Constitution for the proposition that “[n]o home-rule ordinance shall contain any provision inconsistent with the general laws enacted by the Legislature of this State.”¹⁰²

As in Colorado, Texas oil and gas is historically governed by the state—the Railroad Commission is “one of the oldest [regulatory agencies] of its kind in the nation.”¹⁰³ As in every state, efficiency is served by requiring energy companies to comply with only one set of laws.¹⁰⁴ The concerns of Denton’s electorate, while probably sincerely held, must yield to the legislative grant of authority to the state agencies on this matter. Stopping energy and gas extraction at the borders of Denton would be inefficient; as the complaints allege, oil and gas extraction without hydraulic fracturing is a much lower-value pursuit. Unlike in Pennsylvania, the Texas Constitution does not provide a countervailing right to a clean environment.¹⁰⁵ Like West Virginia, there is already a state environmental agency, the TCEQ, taking care of the concerns the citizens of Denton have identified. As the TXOGA points out, “The Railroad Commission and the TCEQ have broad authority to

99. Max B. Baker, *Attorneys To Help Denton Residents Defend Fracking Ban*, STAR-TELEGRAM (Nov. 30, 2014, 2:59 PM), <http://www.star-telegram.com/2014/11/30/6327920/attorneys-to-help-denton-residents.html>.

100. Plaintiff’s Original Petition and Application for Permanent Injunction at 5, *Patterson v. City of Denton*, No. D-1-GN-14-004628 (Tex. Dist. Ct. filed Nov. 5, 2014).

101. Original Petition at 1, *Tex. Oil & Gas Ass’n v. City of Denton*, No. 14-08933-431 (Tex. Dist. Ct. filed Nov. 5, 2014). The TXOGA alleges that the ordinance is preempted by the legislature’s grant of oil and gas development regulatory power to the Texas Railroad Commission (Railroad Commission) and the Texas Commission on Environmental Quality (TCEQ). *Id.* The TXOGA argues both implied preemption with the purpose of these other agencies regulating the oil and gas field and direct conflict with existing Railroad Commission and TCEQ regulations. *Id.* at 8.

102. Plaintiff’s Original Petition and Application for Permanent Injunction, *supra* note 100, at 4 (citing TEX. CONST. art. XI, § 5).

103. Eugene M. Kim & Stephen C. Ruppel, *Oil and Gas Production in Texas*, BUREAU ECON. GEOLOGY, U. TEX. AUSTIN (2005), <http://www.beg.utexas.edu/UTopia/images/pagesize maps/oilgas.pdf>.

104. *See supra* Part III.A.1.

105. As of the summer of 2012, the states with a right to a clean environment are Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and Rhode Island. David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENVIRONMENT (July-Aug. 2012), <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>.

regulate each of the ‘impacts’ and ‘dangers’ listed in the [Denton] ordinance—and have done so with unmistakable clarity.”¹⁰⁶

It is important to note that those opposing the ban will have some unique challenges. Texas home-rule cities have a historic tradition of “concurrent authority . . . to regulate oil and gas activities alongside the [Railroad] Commission.”¹⁰⁷ A Houston city ordinance in *Klepak v. Humble Oil & Refining Co.* that denied a local permit after a state permit had been granted was allowed to stand.¹⁰⁸ Although the case did not directly consider a preemption rationale, a drilling restriction around Lake Houston was upheld in 2012.¹⁰⁹ Another interesting aspect of the preemption battle unique to Denton is that, while GLO asserts its management power over the state’s mineral interests in the complaint, the Texas Natural Resources Code also allows a home-rule city, such as Denton, “to regulate exploration and development of mineral interests” within its boundaries.¹¹⁰ It remains to be seen whether the importance of the oil and gas money to Texas school children or the economic benefit of hydraulic fracturing to the city of Denton itself, argued in the complaints,¹¹¹ will have any impact on these proceedings.

IV. CONCLUSION

Preemption will likely continue to be one of the major challenges to efficient industry development and the protection of state interests. It may spread to other areas of oil and gas growth as well. The preemption battle between state and local governments has already spread to the silica-sand mining space, where local governments are claiming that they have a right to ban or place moratoria on “frac sand” mining,¹¹² which has

106. Original Petition, *supra* note 101, at 8.

107. Timothy Riley, *Wrangling with Urban Wildcatters: Defending Texas Municipal Oil and Gas Development Ordinances Against Regulatory Takings Challenges*, 32 VT. L. REV. 349, 362 (2007) (citing *Tysco Oil Co. v. R.R. Comm’n*, 12 F. Supp. 202, 203 (S.D. Tex. 1935); *Tysco Oil Co. v. R.R. Comm’n*, 12 F. Supp. 195, 201 (S.D. Tex. 1935)).

108. *Id.* at 362-63 (citing *Klepak v. Humble Oil & Ref. Co.*, 177 S.W.2d 215, 216-17 (Tex. Civ. App. 1944)).

109. *City of Houston v. Trail Enters., Inc.*, 377 S.W.3d 873, 884-85 (Tex. Ct. App. 2012), *cert. denied*, 135 S. Ct. 76 (2014).

110. Original Petition, *supra* note 101, at 10 (citing TEX. NAT. RES. CODE ANN. § 92.007 (emphasis added)).

111. *See id.* at 3; Plaintiff’s Original Petition and Application for Permanent Injunction, *supra* note 100, at 2.

112. *See, e.g.*, Chris Rodgers, *Arcadia Imposes One-Year Moratorium on Frac Sand*, WINONA POST (Sept. 18, 2014), http://www.winonapost.com/stock/functions/VDG_Pub/detail.php?choice=59509&home_page=&archives= (discussing *Special Meeting*, CITY OF ARCADIA (Sept. 15, 2014, 7:00 PM), http://www.cityofarcadiawi.com/vertical/sites/%7B755499FD-722A-4046-8441-4D26F8B9F61C%7D/uploads/Council_Minutes_9-15-14.pdf).

taken off in several Midwestern states¹¹³ due to increased demand for the small, smooth particles of sand needed to hold open fractured rock.¹¹⁴ Wisconsin and Minnesota “have more than 160 active fracking sand facilities combined, and another 20 projects are in the works.”¹¹⁵ Silica extraction could soon expand to as many as twelve other states.¹¹⁶ Preemption of hydraulic fracturing activity in local governments is likely only the beginning. The robust state interests that have resulted in local hydraulic-fracturing ordinance preemption will continue to be a crucial component of efficient oil and gas production as the industry represents an increasingly larger share of the U.S. energy portfolio.

113. Emily Chapman et al., *Communities at Risk: Frac Sand Mining in the Upper Midwest*, BOS. ACTION RES. 5, <http://www.civilsocietyinstitute.org/media/pdfs/092514%20CSI%20BAR%20frac%20sand%20mining%20report%20FINAL2%20-%20EMBARGOED.pdf> (last visited Jan. 18, 2014).

114. Paul Tosto, *MPR News Primer: Frac Sand Mining*, MPR NEWS (Mar. 8, 2012), <http://www.mprnews.org/story/2012/03/08/frac-sand-mining-mpr-news-primer>.

115. Maria Gallucci, *US Oil & Gas Fracking Boom Could Drive Silica Sand Mining Operations in 12 More States, Environmental Groups Say*, INT'L BUS. TIMES (Sept. 25, 2014, 5:12 PM), <http://www.ibtimes.com/us-oil-gas-fracking-boom-could-drive-silica-sand-mining-operations-12-more-states-1695246>.

116. *Id.*