From the Doghouse

Cities of Longmont and Fort Collins: State interest versus local control

*by Eric Thompson*

On May 2, 2016, the Colorado Supreme Court held that state law preempted local ordinances aimed at restricting and banning hydraulic fracturing. *City of Fort Collins v. Colo. Oil and Gas Ass’n*, 2016 CO 28 (2016), *City of Longmont v. Colo. Oil and Gas Ass’n*, 2016 CO 29 (2016).

In 2012, voters in Longmont, Colorado approved a ban on the practice of injecting pressurized water, along with sand and chemicals, downhole in order to greatly increase hydrocarbon production. While in 2013, voters in Fort Collins, Colorado approved a five-year moratorium on fracking in order study its impacts on human health and property values.

In response, the Colorado Oil and Gas Association (COGA), a trade association which promotes the benefits of responsible development, filed suit to invalidate both prohibitions. Lower courts agreed with COGA and invalidated both prohibitions. Both cities appealed.

As of the date of publishing, the author is unaware of the result of Fort Collins’ study. However, in June of 2015, the EPA’s *Hydraulic Fracturing Drinking Water Assessment* found no evidence that fracking has “led to widespread, systemic impacts on drinking water resources in the United States.” These findings were echoed by a October 2015 study authored by a group of Yale-led scholars appearing in the *Proceedings of the National Academy of Sciences*, as well as a research piece appearing in Duke University’s *Nicholas School of the Environment* in the previous calendar year.

Even though the belief that frack fluid migrates upward to contaminate the water table has been soundly disproved, the resolution of each case did not turn on whether or not the prohibitions were grounded in scientific fact. Instead, the Colorado Supreme Court unanimously nullified the fracking ordinances because state law preempted the local ordinances.

Colorado, like other jurisdictions, recognizes that local municipalities should have the power to regulate matters of local concern; however, that power is superseded if it conflicts with state law dealing with matters of (i) statewide concern, or (ii) mixed state and local concerns. After concluding that both ordinances impeded the application of Colorado’s Oil and Gas Conservation Act, the Supreme Court unanimously invalidated the local ordinances.

While the court correctly nullified the ordinances, the court may have reached a different conclusion if groups like Coloradans Resisting Extreme Energy Development (CREED) are successful, via ballot initiatives, to amend the state’s constitution. As discussed in more detail in The Rocky Mountain Oil Journal, January 29, 2016 – February 4, 2016, CREED has proposed a number of ballot initiatives which range from an outright ban on hydraulic fracturing, to specifically allowing local governments to have the power and authority to regulate oil and gas development within its jurisdictional borders.

While the Colorado Supreme Court’s decisions should be seen as a resounding victory for the industry, it is imperative the industry maintain the momentum of the favorable decisions to continue fighting against the forthcoming legal and political challenges accompanying the pending election cycle.

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