Local Regulation of Oil and Gas
Panel Presenters

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Types of Legal Challenges to Local Oil and Gas Regulations

• Preemption
• Regulatory Takings
• Substantive Due Process
• Section 1983 Constitutional Claims
Types of Preemption

• Express Preemption
  – Language of statute expressly preempts local authority

• Implied field preemption
  – Legislature intended to preempt local authority by completely occupying the field

• Implied conflict preemption
  – Conflict between state and local law
  – Local law prohibits what a state statute allows or vice versa
    • Not that simple – sometimes courts allow sub-state units to prohibit drilling in the very same location authorized by permit
Room for Concurrent Jurisdiction in New Mexico

- **San Pedro Mining v. Bd. of Cty. Commissioners (1995)**
  - Santa Fe County enacted land development code with extensive permit requirements for mines
  - Question whether preempted by N.M. Mining Act
  - N.M. Court of Appeals:
    - Applied three-part preemption test
    - No preemption of entire ordinance (but in dicta maybe operational conflicts)
Room for Concurrent Jurisdiction in New Mexico

• *Rancho Lobo, Ltd. v. Devargas (2002)*
  
  – Local ordinance prohibited clear-cutting trees, a practice allowed under State Forest Conservation Act
  
  – 10th Circuit:
    
    • Court bound by *San Pedro* to find concurrent jurisdiction; allows prohibition to stand
Mora County Ban

• Community Environmental Legal Defense Fund
  – “Community Rights” Ordinance
  – Adopted April 29, 2013
• No production of oil or gas, storing or transporting produced water, or creating infrastructure that supports extraction
• Provides that corporations that seek to produce have no rights under First and Fifth Amendments
• Legal Challenges
  – November 11, 2013 – IPANM sues alleging Due Process violations and preemption
  – January 1, 2014 – Shell sues also alleging Commerce Clause and Takings violations
Developments in New York

• De-facto statewide moratorium on high-volume hydraulic fracturing since 2008 to study health effects
  – Norse Energy Corporation declares bankruptcy and sues Cuomo Administration
  – “Joint Landowners Coalition of New York” sues

• More than 72 municipalities have banned fracking and 15 more have enacted moratoria
Norse Energy Corporation v. Town of Dryden; Cooperstown Holstein Corp. v. Town of Middlefield

- Preemption Language:
  - “The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.”
Norse Energy Corporation v. Town of Dryden; Cooperstown Holstein Corp. v. Town of Middlefield

• Plain Language Analysis
  – Legislature did not intend to prohibit zoning – only operational matters (i.e. all doesn’t mean all)
  – What about carve-out for roads and property taxes?

• Purpose of Statute
  – To prevent waste (not preempt zoning)
    • A ban doesn’t waste oil and gas – it is still there!
    • Is this right?
Developments in Pennsylvania

• February, 2012 – Pennsylvania Legislature replaces Pennsylvania Oil and Gas Act with “Act 13”
  – Expressly preempts entire field of environmental regulation of oil and gas
  – Expressly preempts local ordinances

• Act 13 is promptly challenged and portions are eventually struck down by the Pennsylvania Supreme Court, allowing local governments to regulate oil and gas through zoning
Robinson Township v. Commonwealth (December, 2013)

• Environmental Rights Amendment
  – “The people have a right to clean air, pure water, and to the preservation of the natural, historic and aesthetic values of the environment.”
  – Creates constitutional rights of individual citizens (on par with political rights) that may be enforced against the government
Environmental Rights Amendment

– “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”
– All natural resources (including on private lands) are held in public trust by the government – at all levels – including local governments
– Two public trust obligations:
  • Act affirmatively to enact environmental protections
  • Refrain from encouraging degradation of the environment and natural resources
Texas Developments

• 2013 – Dallas City Council amends oil and gas ordinance
  – Includes a 1,500 foot setback from any “protected use” but may be reduced to 1,000 feet by 3/4ths of City Council
  – Setbacks effectively eliminate new oil and gas drilling in City limits

• 2014 – Voter Initiative – November 4, Denton, Texas becomes first Texas city to ban hydraulic fracturing
Colorado Developments

• Longmont, Colorado
  – November 6, 2012 – voters adopt fracking and waste storage ban
  – Struck down by Boulder District Court on July 24, 2014

• Fort Collins, Colorado
  – November 5, 2013 – voters ban fracking for five years
  – Struck down by Larimer District Court on August 7, 2014

• Lafayette, Colorado
  – November 5, 2013 – voters adopt community rights ordinance that bans oil and gas extraction (like Mora County ban)
  – Struck down by Boulder District Court on August 27, 2014
Other New Mexico Developments

• 2008 – Santa Fe County Comprehensive Ordinance
• 2014 – San Miguel County Comprehensive Ordinance