



Federal Court Rebuffs Local Attempt to Ban Oil and Gas Development

By: [Russ Miller](#)

In *SWEPI, LP v. Mora County, New Mexico*,¹ a producer holding leases on state-owned lands challenged a County Ordinance that, among other things, declared it unlawful for any corporation to (1) engage in the extraction of hydrocarbons; (2) construct or maintain infrastructure related to the extraction of hydrocarbons; (3) engage in the extraction of water from any surface or subsurface source within the county for use in the extraction of hydrocarbons; or (4) deposit, store, transport or process waste water, “produced” water, “frack” water, brine or other materials, chemicals or by-products used in the extraction of hydrocarbons. The Board of County Commissioners adopted those provisions to safeguard the rights of people and ecosystems within the County, including “the right to have an energy system based on fuel sources other than fossil fuel sources,” and to keep the County’s water out of “the hands of a corporate few.” To that end, the County Commissioners went so far as to declare that Corporations violating the County’s Ordinance “shall not have the rights of ‘persons’ afforded by the United States and New Mexico Constitutions,” including the right to petition courts for redress, the right to due process, and the right to equal protection.

Following a long line of precedent established by the United States Supreme Court, the Court easily concluded that county governments lack authority to nullify constitutional rights that extend to corporations. The Supremacy Clause of the United States Constitution provides that federal law trumps contrary state and local laws, regardless of whether federal law is inconsistent with local policies. But the Court concluded the county’s prohibition against hydrocarbon extraction did not violate the producer’s rights to Due Process or Equal Protection under the federal Constitution, and that its claim for an unconstitutional “taking” was premature because it had not yet sought compensation under existing state law. Accordingly, the Court did not find that the United States Constitution prohibits local governments from banning the extraction of hydrocarbons within their borders.

Nevertheless, the Court held that New Mexico’s state law pre-empted the county’s ban against hydrocarbon extraction, even if the federal Constitution did not. First, the Court held that local governments cannot enforce zoning regulations on state lands without the state’s consent, which Mora County did not obtain. Second, and perhaps more importantly, the Court held that a ban on

¹ Case No. CIV 14-0035; In the United States District Court for the District of New Mexico; Decided January 19, 2015.

the extraction of hydrocarbons was impliedly pre-empted by New Mexico's Oil and Gas Act, because (1) it attempted to prohibit activities that the statute allows; (2) it would cause a waste of hydrocarbon resources; and (3) it failed to recognize or protect mineral owners' correlative rights. The Court acknowledged that the state's Oil and Gas Act does not expressly say that extraction of hydrocarbons is permitted in New Mexico, but it noted that the state had created an extensive statutory and regulatory scheme to govern such activities. As noted by the Court: "[I]f state law did not permit oil-and-gas production, the State would not so heavily regulate oil-and-gas production." Because the county's total ban against activities related to hydrocarbon extraction conflicted with the state's laws, the Court held the Ordinance was wholly invalid.

Although this case represents a very substantial victory for the oil and gas industry, it is not a complete triumph in the continuing battle over local regulation of oil and gas operations. The Court found that New Mexico's Oil and Gas Act does not address "the kinds of issues with which local governments are traditionally concerned," such as traffic, noise, nuisance from dust or chemical run-off, or the impact of oil-and-gas production on neighboring properties. Accordingly, the Court held that New Mexico's Oil and Gas Act does not entirely pre-empt the field of oil-and-gas regulation and "left room for concurrent jurisdiction" with local governments in some instances. Additionally, the Court noted that "an ordinance is not necessarily invalid because it provides for greater restrictions than state law." Therefore, the Court hypothesized that "[i]f the Defendants had merely regulated oil-and-gas production in Mora County, those regulations may not conflict with state law, even if they were stricter than state law."

The Court's speculation that strict local regulations "may not" conflict with state law is merely *dicta*, which is not binding as precedent in other cases. That *dicta* is of dubious value, since the cases the Court relied upon for support each involved industries where state law was silent on the subject of the local government regulations. Nevertheless, the Court's unsolicited *dicta* on that subject should serve as a reminder that, while local governments may not be able to prohibit oil-and-gas operations entirely, operators in New Mexico should not ignore local interests.

Whether a particular local regulation "goes too far" and is pre-empted by state law in a particular jurisdiction requires a very detailed analysis on a case-by-case basis, and the test in each state can vary substantially. For the foreseeable future, the permissible limits of local regulation likely will remain a controversial and hotly-contested subject of further litigation. To avoid establishing bad precedent, industry participants should consult with legal counsel early in the process before deciding whether to contest a specific local regulation. In the meantime, the Court's decision in *Mora County* provides further support for the position that a total ban on oil and gas development "goes too far."

For a copy of the Court's opinion, click [here](#).

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