Oil and Gas Cases Point to Challenges

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This article was originally published in the April 5, 2013, Guest Column Section of BizWest

How much can a Colorado county or home-rule city regulate oil and gas development within its city limits? Expect Colorado courts to re-address that question given recent actions in Longmont and Fort Collins.

In November, Longmont voters approved a ballot measure that banned hydraulic fracturing within city limits. Then, last month, the Fort Collins City Council passed a similar amendment to the City of Fort Collins code. The amendment, with almost no exception, prohibits the "use of hydraulic fracturing to extract oil, gas or other hydrocarbons" within the city of Fort Collins. This article addresses the city's amendment, but may apply equally to Longmont's ballot measure.

The amendment does not explicitly ban oil and gas development in the city, though it could have that practical effect. According to the Colorado Oil and Gas Association, more than 90 percent of the oil and gas wells in Colorado utilize hydraulic fracturing. The amendment bans one of the industry's most effective tools for producing those natural resources.

Because the amendment may effectively prohibit all oil and gas development in the city, legal challenges are expected. Two likely challenges are that the amendment is pre-empted by state law and that the amendment represents an unconstitutional taking of property by the city without just compensation.

The Colorado Supreme Court has been down this road before. Two pre-emption cases, both decided June 8, 1992, illustrate how varying degrees of municipal or county regulation of oil and gas development may be treated. One case was Voss v. Lundvall Bros. Inc. and the other was Bowen/Edwards Associates Inc. v. the Board of County Commissioners of La Plata County.

The Lundvall case arose in Greeley. The city of Greeley, now relatively oil and gas development-friendly, was not always that way. In 1985, Greeley voters approved Greeley Ordinance No. 89, expressly prohibiting "the drilling of any well for the purpose of exploration or production of any oil or gas or hydrocarbons within the corporate limits" of Greeley. Separately, the Greeley City Council approved Greeley Ordinance No. 90, with language parallel to that of Greeley Ordinance No. 89.

Lundvall Brothers and other oil and gas producers sued the City of Greeley (Gail Voss was the city clerk, hence the case name). Affirming the judgment of the Court of Appeals in favor of Lundvall, the Colorado Supreme Court stated, "the state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act (title 60 of Article 34 of the Colorado Revised Statutes) 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 the Bowen/Edwards case, the La Plata County Commissioners enacted land-use regulations regarding oil and gas development in La Plata County. Critically, the regulations stated, "It is the county's intent … to facilitate the development of oil and gas resources within the unincorporated area of La Plata County while mitigating potential land-use conflicts between such development and existing, as well as planned, land uses." The county required oil and gas developers to obtain county permits, in addition to those required by the COGCC, prior to commencing operations. Bowen/Edwards, an oil and gas producer, challenged the validity of the county's regulations.

In Bowen/Edwards, the Colorado Supreme Court stated, "(t)here is no question that the efficient and equitable development and production of oil and gas resources … requires uniform regulation of the technical aspects of drilling … waste prevention, safety precautions, and environmental restoration. … The need for uniform regulation extends also to the location and spacing of wells." However, the court concluded that the state's regulations do not pre-empt all aspects of a county's land-use measures and that the land-use controls might be reconciled with oil and gas development rules. In other words, the two sets of regulations can coexist.

Where Fort Collins' amendment falls on the balance between full drilling prohibitions in the Lundvall case and the land-use regulations in the Bowen/Edwards case remains to be seen.

The amendment also may face challenges that it constitutes a taking of property without just compensation. Section 15 of Article 2 of the Constitution of the State of Colorado provides, "Private property shall not be taken or damaged, for public or private use, without just compensation." The Colorado Supreme Court, citing other courts in a 1993 decision in the case of City of Northglenn v. Grynberg, stated, "(a) taking occurs when an entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property" and when an owner is "called upon to sacrifice all economically beneficial uses of real property to the common good, (the) owner has suffered a taking."

Mineral interests, including rights to oil and gas, are real property interests that may or may not be separated, or severed, from the ownership of the property's surface. Persons owning only severed mineral interests in property in the city likely will have the best claim that the amendment constitutes an unconstitutional taking. With the amendment, owners and lessees of mineral interests underlying the lands within the city, especially those who do not also own surface interests, could claim that the amendment causes a substantial deprivation of the use of their properties for which the city has not compensated them.

Stay tuned. Most likely, court challenges that develop in Fort Collins and Longmont will be in the news for years to come.

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