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ENERGY IN THE LAW

Senate Bill 2019-181 Did Not Resurrect Longmont's 2012 Hydraulic Fracturing Bans

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On November 1, 2020, the Boulder County District Court issued an order confirming that local governments' authority to regulate oil and gas operations is limited to surface impacts and does not include the ability to ban fracking. A copy of the Court's order is available here.

Ever hopeful, Our Health, Our Future, Our Longmont and Food & Water Watch (the "Plaintiffs") filed a declaratory judgment complaint in January 2020 seeking a court order that the City of Longmont's hydraulic fracturing ban is no longer preempted by state law. Specifically, the Plaintiffs alleged that with the passage of Senate Bill 2019-181 ("SB 19-181"), Article XVI of Longmont's municipal charter, which banned hydraulic fracturing and fracture fluid storage and disposal in the City (the "Bans"), is no longer preempted by state law.[1]

Because local governments may now regulate oil and gas surface activities to minimize adverse impacts to protect the public health, safety, welfare and the environment[2] and, have regulatory authority over "oil and gas development," which regulations may be more restrictive that state regulations,[3] the Plaintiffs argued that the City's more restrictive Bans are no longer preempted by state law. The Colorado Oil and Gas Association ("COGA") intervened in this case and took the laboring oar in making the legal arguments against the Plaintiffs' claims.

Following the compelling logic of the Supreme Court in the *City of Longmont*, Judge LaBuda found that the Bans remain unenforceable even after the enactment of SB 19-181. First, the Bans were matters of both state and local concern. This is principally because the state needs uniformity in the way it regulates the optimal recovery of oil and gas within, and without local boundaries to protect correlative rights and to prevent waste and the extraterritorial impact of permitting such Bans. The Bans would lead to a ripple effect across the state or a "de facto

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[1] After a lengthy court battle which commenced in 2012, the Colorado Supreme Court in 2016 determined that Article XVI of the Longmont municipal charter, which banned hydraulic fracturing of oil and gas wells and the storage of hydraulic fracturing waste in Longmont, was in operational conflict with the Oil and Gas Conservation Act of Colorado, and permanently enjoined the City from enforcing the Bans. *City of Longmont v. Colorado Oil and Gas Ass'n*, 369 P.3d 573 (Colo. 2016) ("*City of Longmont*"). For a more complete summary of this case, *see* "City of Longmont Litigation Update," 2014 and "Win for Industry: Longmont and Fort Collins' Fracking Nans Materially Impede State's Interest and are Preempted by State Law," May 2, 2016.

[2] C.R.S. § 29-20-104(1)(h)(I)-(VI) (2019).

[3] C.R.S. § 34-60-131 (2019).

statewide ban,"

Second, Judge LaBuda determined that while SB 19-181 changed the oil and gas land use regulations afforded to local governments (*see* fn. 2), this statutory change pertains only to surface impacts and activities and not subsurface oil and gas well activities. The Court found that there was no genuine issue of fact that hydraulic fracturing of an oil and gas well is a subsurface activity. As such, the Court determined that the next inquiry was whether the Bans were in operational conflict with the current state law to remain preempted.

Third, Judge LaBuda found that even after the enactment of SB 19-181, the Supreme Court's *City of Longmont* pronouncements that the City was preempted from regulating subsurface hydraulic fracturing of wells remained valid. The Court went one step further in declaring that the additional state interests in oil and gas development as set forth in the Legislative Declaration (Sec. 34-60-102 (2019)) "does not diminish the state's interest in oil and gas development, but rather enhances it."

In reaching this holding, Jude LaBuda cited to the intent and purpose of the Oil and Gas Conservation Act which is to produce oil and gas at its maximum rate subject to three conditions. Those three conditions are to (1) protect the health and safety of the public, environment, and wildlife; (2) protect correlative rights of owners in the source of hydrocarbons; and (3) to prevent waste.[4] The added legislative purpose of waste prevention enhances the state's interest in the regulation of hydraulic fracturing. In addition, SB 19-181 did not cede any hydraulic fracturing regulatory authority to local governments and the Commission's rules continue to robustly regulate subsurface hydraulic fracturing activities, among others.

Thus, the Boulder County District Court found that the Bans remain in operational conflict with state law even after the enactment of SB 19-181. As such the City of Longmont's Bans are beyond the regulatory scope of any local government because hydraulic fracturing is a subsurface activity which the state exclusively regulates and the City may not prohibit.[5]

We expect the Plaintiffs to appeal this district court ruling to the Colorado Court of Appeals before the end of the year.

For further information, please contact Karen Spaulding at Beatty & Wozniak, P.C.

[4] C.R.S. § 34-60-102(1)(b)(2019).

[5] The Court noted that the Plaintiffs did not make any argument concerning the ban of the storage and disposal of frac fluids, so concluded that this omission was an acknowledgement that the storage and disposal ban was inextricably linked to the hydraulic fracturing ban. However, the Court also found Longmont's storage and disposal ban to be in operational conflict with state law.