

Common Ground Rising

Presentation for Sandoval Democrats Federation of Women

This presentation is made for educational purposes to give a general understanding of issues and law and it is not intended to give legal advice

Points of View

- * To Ban Fracking or Not To ban Fracking and When
- * The MORA Ban of Fracking and its Precedent
- * What our alternatives are for protection
- * Why an Ordinance is important
- * Safety Concerns – Pipeline Exposures IN Placitas
- * Water, air and Health Concerns
- * Our Proposals for moving forward

Aspects of the Mora Decision

- * **Background:** In 2013, Mora County Commissioners passed the “Mora County Community Water Rights and Local Self-Government Ordinance,” which essentially prohibited all mineral extraction in the County. The rationale behind this ordinance was concern among county residents and landowners that mineral production could pose threats to water quality, ecosystems, and the health of the land.
- * **LAWSUIT:** In January 2014, SWEPI, LP, an oil and gas production company, filed suit challenging the validity of the ordinance. It brought a number of claims, including allegations that the ordinance violated the Supremacy Clause, Equal Protection Clause, Due Process Clause, Dormant Commerce Clause, the First Amendment, and the Fifth Amendment. SWEPI then moved for summary judgment on a number of these claims
- * **RULING:** In a 199-page ruling, the court thoroughly considered each of the claims brought by SWEPI. [Read full opinion [here.](#)] Here is a summary of the court’s ruling on each claim.
- * **(1) SWEPI’s Fifth Amendment Claim Is Not Ripe.** SWEPI claimed that the ordinance constituted a taking of private property for which it was owed just compensation. The Court, however, held this claim was not ripe for decision at this time. In order to prove a takings claim is ripe for decision, a plaintiff must show how a regulation will be applied to the property in question and the challenge may not be brought until the property owner has sought compensation from the governmental entity accused of the taking. Here, SWEPI failed to seek compensation from Mora County as allowed by the New Mexico inverse condemnation statute. Thus, the court refused to consider the Fifth Amendment claim..

Mora Ruling implications

- * (2) The Ordinance Violates the Supremacy Clause. The Supremacy Clause essentially provides that federal law will trump (or pre-empt) conflicting state law. The court found that four sections of the ordinance violate this clause. Each of the improper sections dealt with Mora County's attempt to strip corporations of constitutional rights. But the United States Supreme Court has previously found that corporations are "persons" such that they are entitled to protections of the Equal Protection Clause, and have rights under the First and Fifth Amendments. Simply put, Mora County has no power to contradict or nullify constitutional rights recognized by federal law. Moreover, Mora County attempted to prohibit a corporation from arguing that federal law pre-empted the ordinance. Again, Mora County has no power to determine when federal claims may be brought.
- * (3) The Ordinance Does Not Violate the Due Process or Equal Protection Clauses. Where a law is passed that discriminates against different groups, but does not involve a fundamental right (i.e. right to vote), the law does not violate equal protection or substantive due process so long as there is a legitimate governmental interest the classification created. Here, Mora County prohibited only corporations from oil and gas production, but did not enact a similar ban for individuals. SWEPI argued that this constituted discrimination with no legitimate basis. The court disagreed, finding that Mora County had a legitimate basis for prohibiting corporations from extracting minerals in the county because it is likely that only corporations would have the resources to engage in oil and gas production, which the County believed could endanger the environment. Because the property rights at issue in this case are not considered a fundamental right, and because Mora County had a legitimate interest in treating corporations differently than individuals under this law, no violation occurred under the Due Process or Equal Protection Clauses.
- * (4) The Ordinance Violates the First Amendment by Chilling Protected Speech. The provision in the ordinance which attempts to strip corporations of First Amendment Rights is invalid. This provision is substantially overbroad and restricts First Amendment rights that are clearly afforded to corporations under federal law.

Mora Ruling Aspects

- * (5) Mora County Lacks Authority To Impose Zoning Laws on State Land. The ordinance is silent as to whether it applies to state lands, but Mora County argued that it could be applied to state-owned land because extraction on that land could impact neighboring private properties. Because a County does not have the legal authority to impose zoning regulations on land owned by the State of New Mexico, the ordinance would be invalid as applied to any state-owned land.
- * (6) The Ordinance Conflicts with New Mexico State Law by Banning Production. Local laws may conflict with state law and, if they do so, they will be pre-empted and held invalid. There are two types of pre-emption recognized: Field and Conflict.
- * Field pre-emption occurs when it is clear from the law that the Legislature intended to control a particular area of law. SWEPI argued that state law pre-empted the field of oil and gas production. The court rejected that argument. While there are certainly state laws related to oil and gas production, there is no language indicating that the Legislature intended the state to be solely responsible for passing regulations related to oil and gas. Instead, there is room for concurrent local and state regulation in certain areas on which the State has not passed regulations.
- * Conflict pre-emption occurs when a local law expressly conflicts with a state law. Here, because Mora County banned oil and gas production, which is an activity expressly allowed by state law, conflict pre-emption occurred.

What Happens Now?

- * According to media reports, Mora County is considering an appeal of the court's decision. If taken, that will be heard by the United States Court of Appeals for the Tenth Circuit. Additionally, because SWEPI was successful on its claims, it will likely seek recovery of its reasonable attorney's fees and costs from Mora County.
- * **What Can We Learn?**
- * The clearest lesson from this opinion is that local laws that prohibit all oil and gas production activities are likely going to face numerous constitutional issues. Chief among these will likely be issues involving the Supremacy Clause and the 5th Amendment takings clause.
- * Additionally, this case makes clear that a local ordinance may not strip corporations of Constitutional rights guaranteed to both individuals and corporations by federal law. Local authorities considering oil and gas bans would be well served by omitting this type of language as it is a fairly easy legal decision that such provisions are not permitted.
- * Finally, although the ruling invalidates the broadly drafted ban passed in Mora County, this issue is not likely to go away. This opinion potentially leaves the door open for less restrictive local ordinances. For example, the court stated that there are certain issues related to oil and gas production that are not addressed by state law, which leave room for county regulation. As examples, the court listed traffic, noise, nuisance claims from sound, dust, or chemical run off, and the potential negative impact on neighboring landowners.

What is a Moratorium

- * A: a legally authorized period of delay in the performance of a legal obligation or the payment of a debt.
- * B: a waiting period set by an authority- *Merriam-Webster*
- * C: the act of suspending: the state or period of being suspended such as:
 - * a: temporary removal
 - * B: Temporary withholding(Decision)

Moratoriums

- * **Moratoriums are NOT Fracking Bans**
- * San Miguel County RESOLUTION NO. 12-08-09-OIL&GAS, PROPOSING AN ORDINANCE IMPOSING A ONE-YEAR MORATORIUM ON THE EXPLORATION AND EXTRACTION OF OIL AND GAS IN SAN MIGUEL COUNTY.
 - * Background Information: At its October meeting, the County Commission directed staff to begin work on a moratorium relating to oil and gas exploration in the county. The Commission expressed concern that the County exists regulations in this area were very out-dated and needed to be revised and up-dated, and that during the revision and amendment process, a moratorium should be imposed. Following that direction, county staff proposes a Resolution allowing the Commission to consider at its January 2010 meeting, a moratorium ordinance.
 - * Action Requested of the Commission: Adopt SMC RESOLUTION NO. 12-08-09-OIL&GAS, proposing the adoption of a moratorium ordinance for oil and gas exploration.