



Aquifer Water Protection & Oil and Gas Ordinance Citizens Working Group (CWG) Ordinance Team

October 10, 2018

Submission for the Sandoval County New Mexico County Commission

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Aquifer Water Protection & Oil and Gas Ordinance

**Sandoval County New Mexico
Citizens Working Group (CWG) Ordinance Team**

ORDINANCE LEGAL REVIEW

UNM School of Law Natural Resources and Environmental Law Clinic

July 16, 2018

LEGAL REVIEW SUBJECT

Questions Relating to Regulation of Oil and Gas in Sandoval County

- What is Sandoval's County Power to Ban or Burden Hydraulic Fracturing?
- Can Sandoval County ban injection wells?
- Are local governments required to comply with tribal water standards?
- Is the New Mexico Water Quality Control Commission compliant with federal water law?
- Does the State Engineer have sole authority over the appropriation and regulation of water rights?

ORDINANCE LEGAL REVIEW PURPOSE

To meet the ordinance legal solidity requirement, the Ordinance Team has signed an agreement with the University of New Mexico's Law Clinic and other attorneys to review our draft ordinance text and research selected critical legal questions.

MEMORANDUM

TO: Mary Feldblum
Sandoval County Citizens Working Group; Ordinance Team

FROM: Meaghan Baca, UNM NREL Clinic Student

DATE: July 16, 2018

RE: Questions Relating to Regulation of Oil and Gas in Sandoval County

The Sandoval County Citizens Working Group (“CWG”) has requested the University of New Mexico School of Law Natural Resources and Environmental Law clinic to research and provide an opinion on several legal issues relating to the regulation of oil and gas development in Sandoval County. This memorandum discusses the principles of home-rule, preemption, and four specific questions posed by the CWG.

Questions Presented and Brief Answers

1. What is Sandoval’s County Power to Ban or Burden Hydraulic Fracturing?

Sandoval County is not a home-rule county. As such, the County is a subdivision of New Mexico and may only promulgate regulations through a grant of positive police power from the State. New Mexico grants local governments broad power to provide laws that protect traditional local interests. The County must also avoid regulations that conflict with state law, for example by prohibiting activities that are implicitly encouraged through a state regulatory program. Accordingly, Sandoval County may enact ordinances pertaining to oil and gas industry as long as the regulations do not ban hydraulic fracturing and that the regulations relate to traditional local interests.

2. Can Sandoval County ban injection wells?

No, Sandoval County may not ban injection wells. Sandoval County may regulate water used in injection, as long as the regulation is within the County’s authority under state law, addresses a concern of local government, and does not eliminate an operator’s ability to hydraulically fracture.

3. Are local governments required to comply with tribal water standards?

Yes, Sandoval County should acknowledge Tribal water quality standards, and if there are established Tribal standards the local governments’ actions not may adversely impact tribal water and lands located in Sandoval County.

4. Is the New Mexico Water Quality Control Commission compliant with federal water law?

Yes, the New Mexico Water Quality Control Commission adopted the federal standards set forth in the federal Safe Drinking Water Act and the Clean Water Act and must abide by federal laws.

5. Does the State Engineer have sole authority over the appropriation and regulation of water rights?

Yes, the New Mexico State Engineer has sole authority over the appropriation and regulation of water rights in Sandoval County.

I. Discussion

A. The Power of Sandoval County to Ban or Burden Hydraulic Fracturing

Before I address the four issues raised by the Working Group, as a general matter it is important to understand the role of the state government vis-à-vis the county governments, the power of local governments, and the doctrines of home-rule and state preemption. These principles are reviewed in this section to assist the Working Group in considering whether a county law may ban or burden fracking.

1. Home Rule: Power of Local Authority

Generally, New Mexico counties have the police power to establish land zones and districts when such zoning is used to promote the public's interest. *Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 10, 89 N.M. 503, 505. Public interest is defined as the safety, health, morals and general welfare of the county. *Id.* The basis underlying why a county chooses to zone must be determined upon its circumstances and locality. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926). Accordingly, it is a proper exercise of a county's police power to regulate land use in an effort to protect the community, *Id.* at 389-90, so long as there is a reasonable relation to the public's health, morals, safety and general welfare. *Id.* at 392. However, county powers must be consistent with state law. When there is an inconsistency between local and state law, the state law bars the local action under the doctrine of preemption.

Before I discuss preemption, let me review the concept of home-rule that recognizes local municipalities or counties possess authority to regulate in a wide variety of areas unless the state government has reserved the power to itself by legislation or in the state's constitution. In short, a "home rule" county or municipality generally has broader authority to pass local laws. Some home rule municipalities' ordinances have been upheld despite conflict with state law.

Local power always stems from the state. As such, local authority to self-govern is either granted broadly from the state to the local government through home rule, or granted narrowly and explicitly from the state through Dillon's Rule. Dillon's Rule requires that the state either expressly grants the local government power, the power is implied or necessarily implied, or the

powers are absolutely essential to the functioning of the local government. Dian Land, *Dillon's Rule...and the Birth of Home Rule*, Municipal Reporter, Dec. 1991. <https://nmml.org/wp-content/uploads/Dillon%E2%80%99s-Rule-The-Birth-of-Home-Rule.pdf>. See also, *City of Trenton v. State of New Jersey*, 262 U.S. 182, 18-88, 43 S. Ct. 534, 536, 67 L. Ed. 937 (1923). Sandoval County has not adopted home-rule status (and does not qualify for home rule status under the New Mexico Constitution), but New Mexico does grant broad authority to local governments to enact zoning ordinances that provide for the welfare of the county and its inhabitants. *Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1201 (10th Cir. 2002).

Article X, section 6 of the New Mexico Constitution provides the home-rule amendment which allows for municipal legislatures to adopt, repeal or amend home rule charters. N.M. Const. art. X, § 6; see also, *Einer v. Rivera*, 2015-NMCA-045, ¶ 6, 346 P.3d 1197, 1199. Essentially, article X, section 6 gives a municipality independent power to govern itself unless a state statute expressly limits a power. *Einer*, 2015-NMCA-045, ¶ 8. Conversely, a non-home-rule municipality is merely a subdivision of the state and only possesses powers that are positively granted to it by the state legislature. *Id.*

The New Mexico Constitution provides in order for a county to be designated as home-rule, it must conform to the two requirements in article 10, section 5 of the New Mexico Constitution pertaining to rural counties; see also *Einer*, 2015-NMCA-045, ¶ 7, or it must conform to two requirements in article X, section 10 of the New Mexico Constitution pertaining to urban counties. A rural county must be less than one hundred forty-four square miles in area, and have no less than ten thousand in population. N.M. Const. art. X, § 5. Whereas an urban county must be less than one thousand, five hundred square miles with a population no less than three hundred thousand. N.M. Const. art X, § 10. Sandoval County has a population of 142,507 and is 3,710.65 square miles.¹ This vastly exceeds the square mile maximum required by Article X. Sandoval County does not meet the standards mandated by the New Mexico Constitution that would qualify it adopt home-rule status. N.M. Const. art. X, § 5, 10; see also, NMSA, § 13-15-1. As such, it is not eligible to enjoy the same independent rule making power as a home-rule municipality.

As a non home-rule county, Sandoval County "possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers" *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 1976-NMSC-029, ¶6, 89 N.M. 313, 551 P.2d 1360. Even for non-home rule counties, however, New Mexico law grants significant legislative authority to county governments. The powers granted to counties include the power to enact zoning ordinances and those ordinances that are "necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants." *Rancho Lobo*, 303 F.3d, 1201.

Therefore, in the context of oil and gas development, Sandoval County's attempt to regulate fracking must be within the authority granted to local governments by the state. In addition, any ordinance must not be preempted by state oil and gas law, as analyzed below.

¹ <https://www.census.gov/quickfacts/fact/table/sandovalcountynewmexico/SBO030212>.

2. Preemption in New Mexico

Preemption may occur in three ways: express field preemption, implied field preemption or conflict preemption. *Rancho Lobo*, 303 F.3d, 1201. First, express field preemption occurs when the state explicitly declares they intend to regulate an entire field of law such that no other local government may promulgate laws regulating the same activity. *Id.* at 1201-03. Second, implied field preemption arises when the state clearly intended to preempt an entire field of law by asserting regulations that are so pervasive there is no additional room for local law to regulate the same activity. *Id.* at 1203. Last, conflict preemption may exist when a local law conflicts with state law objectives. *Id.* at 1205. This conflict arises when compliance with both state and local law is impossible or when the local law stands as an obstacle to accomplish the full purpose and aspiration of the state. *Id.*

As determined in a 2015 oil and gas fracking case, New Mexico state law does not expressly or impliedly preempt the entire oil and gas field. *Swepi, LP v. Mora Cty., N.M.*, 81 F. Supp. 3d 1075, 1193 (D.N.M. 2015). The lack of field preemption may allow room for concurrent regulation by a county and the state. *Id.* at 1196. However, a county cannot outright ban an activity that is highly regulated by the state and which the state impliedly encourages. *Id.* at 1199; see also, *Stennis v. City of Santa Fe*, 2008–NMSC–008, ¶ 22, 143 N.M. 320, 176 P.3d 309.

Swepi involved a challenge to Mora County’s ordinance imposing hydraulic fracking prohibitions. *Id.* at 1087. The federal district court found that counties have concurrent authority to regulate some areas of oil and gas extraction because the Oil and Gas Act of New Mexico (NMSA 1978, § 70-1-1, (1953)) does not address “issues with which local governments are traditionally concerned,” such as traffic, noise, nuisance from sound, dust, chemical run-off, or impact to neighboring properties related to oil-and-gas production. *Swepi*, 81 F. Supp. 3d, at 1196. Thus, New Mexico’s state law does not preempt the entire oil and gas field. Instead, county governments may enact laws that protect the public’s interests related to certain effects from oil and gas industry as long as those laws do not conflict with state law according to the doctrine of conflict preemption.

The New Mexico Oil and Gas Act asserts “authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil or gas operations in” New Mexico. NMSA 1978, § 70-2-6 (1953). See also, NMSA 1978, § 70-2-2 (1953). In *Swepi v. Mora*, the Federal District Court of New Mexico stated that the New Mexico Oil and Gas Act is “focused” to prevent waste, regulate drilling, and regulate the maintenance of wells. *Swepi*, 81 F. Supp. 3d, at 1196. *Swepi* also held that the law impliedly demonstrates the State’s intent to encourage oil and gas extraction. *Id.* at 1199. The Oil and Gas Act contemplates the regulation of drilling in order to prevent waste. Said positively, the prevention of waste is the encouragement of conservation. As such, any county regulation that would extinguish an operator’s ability to conserve oil and gas through drilling and wells would conflict with state law objective to prevent waste.

In *Swepi*, Mora County attempted to completely ban drilling, an activity impliedly encouraged by the state through regulation. Accordingly, the Court held that Mora County law

conflicted with state law not only because the County contradicted state law, by prohibiting an activity that State allows and encourages, but also because the County law undermined the State's objective to prevent waste by prohibiting a method of oil conservation, drilling.

In summary, the County may promulgate regulations that typically concern local governments in relation to the welfare of the County when such a concern is not addressed by the State and when those regulations do not conflict with state law objectives. The State's objective is to prevent waste of oil and gas through the regulation of drilling and wells. The Tenth Circuit held that when a state highly regulates an activity, that activity is encouraged. Therefore, because NM highly regulates drilling in order to prevent waste, NM impliedly encourages the conservation of oil and gas. Consider for example, OCD promulgates regulations regarding horizontal drilling. As such, horizontal drilling is an activity the State impliedly encourages in order to prevent oil and gas waste. Accordingly, a county could not ban horizontal drilling as that would conflict with state law which allows horizontal drilling and impliedly encourages through regulation. Furthermore, the prohibition of horizontal drilling could undermine the Oil and Gas Act's intention to prevent the waste of oil and gas.

However, there is no infringement of state authority where a local ordinance merely complements a state statute. *Rancho Lobo v. Devargas*, 303 F.3d, at 1201. A county could complement a statute regarding oil and gas operations by adding more stringent requirements to an activity associated with operations, so long as those requirements do not frustrate the state's objective. *New Mexicans for Free Enter. v. The City of Santa Fe*, 2006-NMCA-007, ¶ 43, 138 N.M. 785, 802. For example, in *Rancho Lobo v. Devargas*, the Tenth Circuit held that a county's ordinance that prohibited clear cutting did not conflict with state law because that statute did not grant a right to clear cut. *Rancho Lobo*, 303 F.3d, at 1205. As such, the county's more stringent regulation did not undermine any state law objective. Similarly, Sandoval County could impose more stringent regulations related to drilling as long as the County does not frustrate state law or state law objectives. See section B(1) for how Sandoval County may enact more stringent regulations.

In conclusion, Sandoval County is not a home-rule county. Therefore, it may only promulgate regulations through a positive grant of power by the Legislature. State law does grant even non-home rule counties broad authority to enact zoning ordinances and other ordinances that address health, safety, economic development, and other issues. Furthermore, the County's regulation must not conflict with state law and state law objectives as required by the preemption doctrine. In drafting an ordinance the Working Group should be mindful of the kinds of pollutants, procedures it seeks to regulate, and prohibitions it seeks to enact so that the provisions complement and do not conflict with state law. Otherwise such regulations would be preempted.

B. Sandoval County may not ban injection wells

Sandoval County may not prohibit injection wells. The EPA sets standards regarding the use of injection wells through the Underground Injection Control Program ("UIC"), a subsidiary program of the Safe Drinking Water Act ("SDWA"). 40 C.F.R. §§ 144.1, 146.4 (2010). In 1982, the EPA granted primacy to New Mexico to self-regulate and enforce the UIC. 48 Fed.

Reg. 31640 (July 11, 1983) (to be codified at 40 C.F.R. p. 145). As such, part of the New Mexico Oil Conservation Division's ("OCD") federally mandated authority is to implement the minimum UIC standards prescribed by the EPA, *Id.*, 40 C.F.R. 144.4, 146.6 (2010). When an activity is regulated by the state, that activity is impliedly encouraged. *Swepi v. Mora*, at 1199. As such, local government may not enact a law that conflicts with the interest of the state. *Rancho Lobo v. Devargas*, at 1205.

The OCD promulgates many regulations regarding injection wells. NM Admin Code 19.5. Accordingly, it is the intent of the State to allow operators to utilize injection wells in the oil and gas extraction processes. However, as discussed in Section A, a field is not preempted if: (1) state law does not explicitly state or clearly intend that the local ordinance is preempted, *Rancho Lobo*, at 1201-03; and (2) state law does not address the kinds of issues which typically concern local governments. *Swepi*, at 1195. Importantly, when a county promulgates regulations where there is room for concurrent regulation, those regulations must not conflict with state law. *Id.*, at 1198. The test is whether the ordinance prohibits an act the general law permits or vice versa. *Id.* However, an ordinance may require more stringent regulations if those regulations do not undermine the state's interest. *Rancho Lobo*, at 1205. Most New Mexico courts have upheld ordinances that were merely more restrictive than state law. *Swepi*, at 1199.

Similar to Rio Arriba County in *Rancho Lobo*, Sandoval County may promulgate more stringent regulations regarding oil and gas if: (1) the field is not entirely preempted by state law; (2) the ordinance does not conflict with state law; and (3) if the ordinance regulates an activity that is likely to have an impact to the health, safety and welfare of the County.

Sandoval County may not prohibit injection wells because this prohibition would frustrate OCD's purpose and authority to protect groundwater under the Safe Drinking Water Act ("SDWA") in relation to underground injection wells. 40 C.F.R. 144.1 (2010). Furthermore, if injection wells are necessary to drill, prohibiting injection wells would also conflict with the State law's implied intent to allow use of injection wells in the furtherance of the conservation of oil and gas. Nonetheless, the County may promulgate more stringent regulations on injection wells, as long as they are not antagonistic to state law. For example, N.M. Admin. Code 19.15.16.10(B) provides, "the operator shall use sufficient (emphasis added) cement on surface casing to fill the annular space behind the casing to the top of the hole, provided that authorized division field personnel may allow exceptions (emphasis added) to this requirement when known conditions in a given area render compliance impracticable." Sandoval County may supplement this law by providing, "the operator shall use (insert specific type of cement that is "sufficient") on surface casing to fill the annular space behind the casing to the top of the hole, unless an authorized OCD field personnel has allowed an exception to the operator." This county regulation would not conflict with state law because it merely requires a more stringent regulation without preventing an operator from actually constructing an injection well and extracting oil and gas.

(1) Sandoval County may regulate the type of water used in injection wells

Sandoval County may regulate the types of fluids authorized to be used in Class II injection as long as that regulation would not deny on an operator's ability to frack. *Swepi* determined that the Oil and Gas Act of New Mexico does not preempt the entire oil and gas field, but the State does have authority to enact and enforce laws which prevent the "waste" of oil and gas. *Swepi*, at 1196. Because state law regulates some aspects of oil and gas, conflict preemption should be examined regarding the fluid regulation of injection wells. Injection wells are an integral process to hydraulic fracturing. Environmental Protection Agency, Class II Oil and Gas Injection Wells (2017), <https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells>. Typically, a water-chemical solution is injected into a shale formation which triggers the process in which an operator may remove oil from the shale formation. *Id.* OCD does not address what types of water must or may be used in the injection process. NM Admin. Code 19.15.16. The Court in *Swepi* held that OCD's scope of authority focuses primarily on the prevention of "waste" and the drilling and maintenance of oil-and-gas wells. *Id.* Accordingly, OCD's intent in regulating injection wells is to prevent contamination of underground water during oil production processes, not the type of fluid to be used in injection. Notably, in *Rancho Lobo*, the Court of Appeals for the Tenth Circuit held that a local law may not conflict with state law objectives. *Rancho Lobo*, at 1205. Because successful hydraulic fracturing requires a special water solution, any local law that would likely prevent an operator's ability to drill for oil by mandating a type of solution would most likely be preempted due to conflict with state law objectives. However, as long as the operator's ability to frack is not exterminated, the County should be able to require specific types of water be used in injection, such as recycled water.

For example, Santa Fe County requires that only "fresh" water be used in injection. Santa Fe, NM, Oil and Gas Ordinance § 11.24.4 (2008). San Miguel County requires that only groundwater or recycled water be used as part of the fracturing process. San Miguel, NM., Oil and Gas Ordinance § 12.7 (2014). Accordingly, Sandoval County may seek to prescribe what type of water may be used in Class II injection wells as long as the ordinance does not prevent an operator's capacity to hydraulically fracture.² Sandoval County could also consider requiring operators to disclose types of chemicals used in fracking processes.³

² Example of ordinance that does not conflict with state law: Boulder County, Colorado requires an operator to disclose, during the permitting process, all instances over the last ten years when an operator has been cited for violation of federal, state, or county oil and gas laws. Boulder County Land Use Code, Art. 12 § 400 (B)(4)(a). Colorado State law does not require this disclosure. Therefore, Boulder is able to request such information without conflicting with any state law objectives.

Another example of a non-conflicting regulation is the Santa Fe County oil and gas ordinance which requires an environmental impact report ("EIR") that assesses possible negative impacts to land surrounding oil well development. Santa Fe County Oil and Gas Ordinance 9.6.1.7.2.

³ Sandoval County could consider requiring operators to disclose the types of chemicals used in fracking processes. As required by New Mexico state law, operators must submit to OCD "total volume of fluid; trade name, supplier, purpose, and CAS numbers of ingredients in fluid; maximum concentrations of ingredients in additives and fluid (% by mass). However, no

C. Sandoval County should acknowledge and abide by Tribal water quality standards⁴

The Sandoval County oil and gas ordinance should recognize that certain tribes in and around Sandoval County may have more stringent water quality standards, and that it is necessary for Sandoval County to not violate these sovereign water standards.

Certain tribes are granted authority by the federal government to enact their own water standards, similar to the same authority granted to states. This is referred to as “treatment as a state” (TAS) status. The Clean Water Act authorizes the EPA to require entities that discharge upstream from TAS-approved tribes to comply with tribal water standards. The CWA is enforced through the issuance of permits through the National Pollutant Discharge Elimination System (NPDES). These permits obligate specific reporting requirements and monitoring of discharged pollutants from a point source on a case-by-case basis. A point source may be a direct or indirect source of contamination into a navigable surface water of the United States. Any unaccounted for pollutant discharged from a point source to a US surface water is subject to violations of the CWA. Two recent circuit decisions have held that discharges into groundwater that then contaminate navigable surface water are also subject to regulation under the CWA. Therefore, a violation of the CWA is possible if a tribal surface water is found to be contaminated by groundwater that is traceable to a discernable point source, such as an injection well. Additionally, certain tribes in New Mexico define surface water to include groundwater. As such, it is possible that contamination of tribal groundwater (not just surface water) would violate the Clean Water Act

“In 1987, Congress amended the Clean Water Act to authorize the [omitted] EPA to treat Indian tribes as states under certain circumstances for purposes of the Clean Water Act.” *City of Albuquerque v. Browner*, 97 F.3d 415, 419 (10th Cir. 1996). In upholding the Pueblo of Isleta’s ability to enact water quality standards that are stricter than the standards of its surrounding state

more disclosure must be made than would be included on a Material Safety Data Sheet under 29 C.F.R. § 1910.1200(i)(I). Brandon J. Murrill & Adam Vann, *Hydraulic Fracturing: Chemical Disclosure Requirements*, Congressional Research Service Report, Appendix B, June 19, 2012. Although the County may require disclosure fracking chemicals, it may not require the disclosure of trade secrets or confidential business information. *Id.*

Sandoval County should be mindful that any regulation attempting to regulate water used in injection should justify the regulation according to issues with which local governments have positive police power to regulate such as: economic development and local employment, water quality and availability, soil protection, archeological, historic and cultural resources, abatement of noise, dust, smoke and traffic, hours of operation, compatibility with adjacent land uses, cumulative effect when combined with existing harvests.” *Rancho Lobo*, at 1205.

⁴ Under certain circumstances, the Tribal Authority Rule authorizes Tribes to self-promulgate air quality standards under the Clean Air Act just as a state would. 63 Fed. Reg. 29, 7254 (Feb. 12, 1998) (codified at 42 U.S.C. §7601 (d)). Similar to compliance with Tribal CWA standards, the County should recognize these tribal air standards and strive to not violate such standards. Currently, there are no tribes in New Mexico authorized under the CAA; however, that does not mean New Mexico tribes will not be authorized under the CAA in the future. <https://www.epa.gov/caa-permitting/tribal-nsr-implementation-epas-south-central-region>

government, the court in *Browner* also affirmed the tribe's ability to designate unique tribal water uses upon which those water quality standards are based, for example, unique cultural water uses. The City of Albuquerque, upstream of the Pueblo, was required by the EPA to comply with the Pueblo's more stringent standards for the section of the Rio Grande that runs through the Pueblo.⁵

Tribes can be treated as states for most purposes and programs of the Clean Water Act. 33 U.S.C. § 1377. In addition to tribes establishing their own water quality standards, tribes may administer the National Pollutant Discharge Elimination System permit program, granting or denying certification for federally permitted activities that may result in discharges of pollutants into the surface waters, and developing management programs for nonpoint source pollution. States may also administer such programs.

The Clean Water Act establishes two primary permit programs. One is the NPDES (National Pollutant Discharge Elimination System) program under which a permit must be obtained before any "point source" may discharge pollutants into navigable waters. A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Rapanos v. United States*, 547 U.S. 715, 753, 126 S. Ct. 2208, 2233, 165 L. Ed. 2d 159 (2006). The second program is the permit program for the discharge into navigable waters of dredged or fill material, known as the § 404 permit program after the section of the statute that created it. The EPA, NM and certain tribes all have effluent standards that must be met. 33 U.S.C. § 1311; N.M. Admin. Code § 20.6.2.2101; Pueblo of Sandia Water Code §§ B(6-7), H; Pueblo of Santa Ana Water Code §§ B(6-7), H. Violations of these effluent standards are measured by direct or indirect discharge of pollutants into navigable surface waters of the United States. 33 U.S.C. §§ 1311, 1319.

The EPA and a growing number of federal courts are confronting the issue of whether and when discharges to groundwater are regulated under the Clean Water Act, 33 U.S.C. §§ 1251 – 1388. Specifically, EPA on February 20, 2018, requested comments on whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow may be subject to regulation under the CWA. See 83 Fed. Reg. 7126 (Feb. 20, 2018). This is a new approach by the EPA because generally the EPA has taken a case-by-case approach to determining whether such discharges are subject to the CWA. In determining whether a direct hydrologic connection exists, EPA has typically taken a fact-specific approach that considers "the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source" in addition to factors such as "geology, flow, and slope." 83 Fed. Reg. at 7128. The comment period ended on May 21, and EPA received 58, 336 responses with industry groups calling for EPA to decline or limit CWA permitting relating to groundwater, and environmental and citizen groups requesting EPA preserve or expand its permitting regime.

⁵ A significant number of tribes now have EPA-approved water quality standards. See <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes.cfm>.

The backdrop for EPA seeking comments includes a number of recent federal court decision regarding regulation of discharges to groundwater under the CWA. The U.S. Court of Appeals for the Ninth Circuit recently held that a point source discharge to groundwater of more than a de minimis amount of pollutants is subject to the CWA’s NPDES program if the discharge is “fairly traceable from the point source . . . such that the discharge is the functional equivalent of a discharge into the navigable water.” *Hawai’i Wildlife Fund v. Cnty of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). *Hawai’i Wildlife Fund* involved a challenge by environmental groups to the County of Maui’s wastewater disposal practices. The County disposed 3 to 5 million gallons of treated sewage every day by injecting it into one of four wells at their wastewater reclamation facility. The parties did not dispute that some of the wastewater travelled through groundwater and reached the Pacific Ocean via submarine springs; the issue was whether such activities required an NPDES permit under the CWA.

On April 12, 2018, the U.S. Court of Appeals for the Fourth Circuit similarly found that discharges to groundwater can be regulated under some circumstances. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4thth Cir. 2018). In that case, an underground pipeline broke and spilled petroleum products into nearby soil and groundwater. *Id.* at 643. The pollutants then traveled several hundred feet through the groundwater into two nearby creeks (which constitute “navigable waters” that are regulated under the CWA). *Id.* The court first considered whether the CWA requires that pollutants discharge “directly” from a point source to protected waters. The court determined it does not, relying in part on language from Justice Scalia’s plurality opinion in *Rapanos v. United States*: “[t]he [CWA] does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters.’” 547 U.S. 715, 743 (1987) (emphasis in original).

Having determined that no direct connection between a point source and navigable waters was required for liability to attach under the CWA, the court turned to the question of causation: What standard should courts apply to determine whether groundwater has provided a sufficient connection between a point source and navigable waters?

Here, the Fourth Circuit again considered the result in *Hawai’i Wildlife Fund*, but this time reached a slightly different conclusion. In *Hawai’i Wildlife Fund*, the Ninth Circuit determined that an indirect discharge must be “fairly traceable” from a point source to protected waters. There, the court considered that standard satisfied where a tracer dye study confirmed that wastewater effluence from disposal wells reached the Pacific Ocean.

The Fourth Circuit instead turned to a term of art favored by the Environmental Protection Agency (EPA): “direct hydrological connection.” The court held that the “complex and highly technical nature” of CWA enforcement means that the EPA’s interpretation of its statutory authority “warrants respectful consideration” under *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Citing federal guidelines and standards in which the EPA has asserted that CWA liability exists where a party discharges “from a point source via ground water that has a direct hydrologic connection to surface water,” the court determined “direct hydrological connection” to be the appropriate standard. *Upstate Forever*, at *22–23.

The court further explained that assessing whether such a connection exists is a factual inquiry, where “time and distance,” and “geology, flow, and slope” are all relevant. *Id.* Turning to whether plaintiffs had sufficiently alleged such a connection, the court held that they did: “plaintiffs have alleged that pollutants are seeping into navigable waters . . . about 1000 feet or less from the pipeline.” *Id.* Describing 1000 feet as an “extremely short distance,” the court held the pleadings sufficient under the newly adopted standard.

It is important to note that both the *Hawai’i Wildlife Fund* and *Upstate Forever* cases involved citizen suits, rather than enforcement actions initiated by the EPA itself. These cases, therefore, establish grounds for citizen organizations to pursue CWA groundwater-discharge claims in cases where EPA declines to do so.⁶

Together, *Hawai’i Wildlife Fund* and *Upstate Forever* suggest a significant expansion of CWA liability and potential permitting requirements for the regulated community. These authorities mean that industry and individuals need to carefully consider discharges to land or groundwater that could potentially reach navigable waters and evaluate whether CWA permitting is required, in addition to other potentially applicable federal, tribal and state permits. Moreover, as cautioned by *Upstate Forever*, where accidental spills and leaks are concerned, companies and environmental managers will need to consider ongoing migration of contaminants through groundwater well after the cause of discharges may have been resolved.

In New Mexico, ground water is defined as “interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply.” NM Admin. Code 20.6.2 (z). No New Mexico federal district court or Court of Appeals for the Tenth Circuit have considered whether a point source discharged to groundwater can be regulated under the CWA. This means that even if contaminated groundwater flowed into a surface water which subsequently flowed and polluted a designated Pueblo surface water, a court must first consider whether contamination of groundwater that then conveys to navigable waters is regulated under the CWA. If a court finds that groundwater can be regulated under the CWA, it must then determine if there is a “fairly traceable” point source from the contamination to the surface waters as determined by the Ninth Circuit or a “direct hydrological connection” as found by the Fourth Circuit.

Some Pueblos specifically define surface water to include groundwater. This inclusion of groundwater into the surface water definition might allow for tribal groundwater to be protected under the CWA. For example, the Pueblo of Sandia encompasses wetlands into its definition of surface waters, Pueblo of Sandia Water Code, § P, as does the Pueblo of Isleta. Pueblo of Isleta Water Code § VII. The Pueblo of Santa Ana expressly states that groundwater and storm water are considered surface waters on Pueblo lands. Santa Ana Pueblo Water Code § 65.1. Whereas,

⁶ These recent decisions in the Fourth and Ninth Circuits create a potential circuit split regarding the status of groundwater under the CWA. See *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (groundwater is not regulated under the CWA even when it is “hydrologically connected with surface waters”); *Rice v. Harken Expl. Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (discharges onto land, with seepage into groundwater, that have only an indirect connection with a navigable water are not regulated under the CWA).

the Pueblo of Taos explicitly states implementation of the CWA on the Pueblo applies to “pueblo water” which encompasses groundwater. Pueblo of Taos Water Code § B(h). These codes are approved and supported by the EPA through the CWA. 33 USC 26, §1377. As such, neighboring governments of the Pueblos should be cognizant that any human or industrial activity that would pollute pueblo waters or lands would be subject to violations under the CWA. 33 USC 26, §1377. Because certain tribes legally recognize that groundwater and surface water are interconnected, a court may find that the violation of tribal groundwater is in fact a violation under the Clean Water Act.

In summary, pursuant to the Clean Water Act, Sandoval County has a duty to observe and respect tribal surface waters according to a tribe’s sovereign authority to regulate their own water standards. Some Tribal water codes identify surface water and groundwater to have an indistinguishable connection, and recently, two circuits have recognized that contamination of groundwater that conveys to navigable waters can be regulated under the Clean Water Act. As such, the Clean Water Act may apply to discharges to groundwater in some circumstances, although this is still legally uncertain. New Mexico and the Tenth Circuit have yet to consider the connection of surface and groundwater. However, in light of other recent circuit decisions and new tribal water codes, an operator could be held liable under the Clean Water Act for violation of tribal water standards if contamination to surface or groundwater were to occur. It does not seem that the County has a duty to enact a law that would mitigate tribal water contamination from a point source belonging to a private entity. However, citizens or tribes could bring suit against the EPA or state for failure to require injection wells to be permitted under the NPDES. Furthermore, if an NPDES permit was issued, a tribe may protest this permit under Section 401(a)(2) of the Clean Water Act. Nonetheless, the County should recognize that tribes have certain water quality standards which should be acknowledged and considered when approving oil and gas permits.

D. The New Mexico Water Quality Control Commission is in compliance with federal water law

The New Mexico Water Quality Control Commission (“WQCC”) is responsible for complying with federal water laws. The WQCC is the New Mexico regulatory agency that enforces water standards in New Mexico through the federal Safe Water Drinking Act, 42 U.S.C. § 300f (1974), and several New Mexico statutes. NMSA 1978, § 74-1-12 (1999); NMSA 1978, § 74-6-3(E) (1999); NMSA 1978, § 74-1 (1999); NMSA, 1978, § 3-29-21 (2006), NMSA 1978, § 20-7-4 (1987), Drinking Water State Revolving Loan Fund Act. Pursuant to NMSA 1978 §§ 74-1-12 and 74-1-6(E) (1999), New Mexico adopted the same water standards set forth by the United States Environmental Protection Agency (“EPA”) in the Safe Drinking Water Act. Additionally, New Mexico must adhere to federal standards even if those standards are not explicitly adopted into state law. For example, New Mexico is still subject to the federal Clean Water Act implemented by the EPA even though New Mexico has not chosen to administer the NPDES program like other states have.

E. The State Engineer has sole authority over the appropriation and regulation of water rights

The State Engineer has sole authority over the appropriation and regulation of water rights. As such, Sandoval County may not require or impose any regulations regarding the apportionment of water within the County.

The New Mexico State Engineer has authority to appropriate and regulate all waters of the State. NMSA 1978, §§ 72-1-1 (1982), 72-2-1 (1982), 72-5-1 through 37(1982), 72-12-1 through 28 (1982). Waters of the states encompasses “all natural water flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the State of New Mexico” NMSA 1978, § 72-1-1 (1982). The State Engineer may authorize water masters within water districts to appropriate and regulate waters within a district. NMSA 1978 § 72-3-2. The “sole means for acquiring a water right is to ‘make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by’” the state engineer. NMSA 1978, § 72-5-1 (1982). See also, *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 24, 147 N.M. 523, 532, 226 P.3d 622, 631. Accordingly, the appropriation of waters is in the sole discretion of the State Engineer’s Office. As such, Sandoval County may not restrict or appropriate water rights within the County.

Conclusion

Sandoval County is not a home-rule municipality. Therefore, any regulation promulgated by the County must stem from a positive grant of authority from the State and the regulation must also not be preempted.

The County may not ban injection wells because it is likely that the prohibition of injection wells would deny operators the ability to conserve oil and gas. A prohibition of this nature would undermine the state’s interest and directly conflict with state law, which is not acceptable under the doctrine of preemption. Accordingly, banning injection wells in Sandoval County is not recommended. However, Sandoval County may be able to regulate what type of water is used in injection wells, as long as an operator’s ability to conserve oil is not impeded by the County’s regulations. The Oil Conservation Division does not address the types of water that must be used in the injection process. As such, there may be room for concurrent regulation of injection from the County. Santa Fe County and San Miguel County have already taken advantage of this room for concurrent regulation and require that only “fresh” water, groundwater or recycled water to be used in injection processes.

Furthermore, Sandoval County should recognize that tribes in and around Sandoval County are granted authority to enact water quality standards more stringent than the State under the Clean Water Act. Although the Clean Water Act typically applies to surface waters, certain tribes incorporate groundwater into their surface water definition and two Circuit courts of appeals have recognized the connection of ground and surface water in the hydrological cycle. Although this area of law is still developing, any contamination of groundwater or surface water that infiltrates tribal lands may be subject to federal violation of the Clean Water Act. As such,

the Sandoval County's oil and gas ordinance should be judicious in protecting sovereign tribal water standards from oil and gas industry.

The Water Quality Control Commission regulates water quality standards throughout the state of New Mexico. The Commission has adopted the federal Safe Drinking Water Act and must comply with the federal Clean Water Act. As such, the Commission is compliant with federal water quality standards.

Lastly, the State Engineer has sole authority to appropriate and regulate all waters of the State. As such, when the State Engineer has adjudicated water rights to an operator, the County may not encroach on the delegated authority of the State Engineer by attempting to also regulate those same water rights.

Aquifer Water Protection & Oil and Gas Ordinance

**Sandoval County New Mexico
Citizens Working Group (CWG) Ordinance Team**

ORDINANCE LEGAL REVIEW

UNM School of Law Natural Resources and Environmental Law Clinic

July 27, 2018

LEGAL REVIEW SUBJECT

Questions Relating to the Zoning and Administrative Process of
Oil and Gas Permitting in Sandoval County

- Whether a county may zone its land according to the geology of the region? If so, may it ban horizontal hydraulic fracking in one or more zones based on geology?
 - Whether limiting notice and hearing requirements in District A compared to Districts B and C violates procedural due process or equal protection under XVI Amendment of the U. S. Constitution or under Art. 2, Section 18 of the New Mexico Constitution?
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ORDINANCE LEGAL REVIEW PURPOSE

To meet the ordinance legal solidity requirement, the Ordinance Team has signed an agreement with the University of New Mexico's Law Clinic and other attorneys to review our draft ordinance text and research selected critical legal questions.

MEMORANDUM

TO: Mary Feldblum
Sandoval County Citizens Working Group; Ordinance Team

FROM: Meaghan Baca

DATE: July 27, 2018

RE: Questions Relating to the Zoning and Administrative Process of Oil and Gas Permitting in Sandoval County

The Sandoval Citizens Working Group (“CWG”) has requested the University of New Mexico School of Law Natural Resources and Environmental Law clinic to research and provide an opinion on two legal issues relating to the zoning and administrative process in Sandoval County. This memorandum discusses the principles of a county’s power to zone land, procedural due process, and equal protection.

Questions Presented

1. Whether a county may zone its land according to the geology of the region? If so, may it ban horizontal hydraulic fracturing in one or more zones based on geology?
2. Whether limiting notice and hearing requirements in District A compared to Districts B and C violates procedural due process or equal protection under the XVI Amendment of the U.S. Constitution or under Art. 2, Section 18 of the New Mexico Constitution?

Brief Answers

1. Yes, a county may zone its land according the geology of the region. It is likely a court would overrule a ban on horizontal hydraulic fracturing in one zone if it eliminated an operator’s ability to mine oil and gas.
2. By limiting the notice and hearing requirements in District A compared to Districts B and C, it is likely the Adang Ordinance violates procedural due process of limited individuals, but unlikely to violate equal protection pursuant to Article 2, Section 18 of the New Mexico Constitution and the XVI Amendment of the United States Constitution.

Statement of Facts

The proposed Adang Ordinance (“AO”) divides Sandoval County into three distinct districts based largely on geological features: Districts A, B, and C. District A is comprised of the San Juan Basin. The San Juan Basin is a “structurally simple” depression that is not heavily faulted. AO, VI.A.(1). This particular basin contains oil and gas reserves that have been developed over the last century. *Id.* at VI.A.(2). Despite some surface spills and casing leaks

arising from conventional drilling, the San Juan Basin has not experienced any known drinking water contamination from unconventional drilling (i.e., hydraulic fracturing). *Id.* at VI.A.(3).

District B is a “transition zone” between the San Juan Basin and the Middle Rio Grande Basin (MRGB), part of the Colorado Plateau (District B includes part of the San Juan Basin). *Id.* at VII.A. District B is a geologically complex and ecologically fragile area that also includes all or part of 12 Native American Tribal Reservations. *Id.* It has no history of oil and gas production. *Id.*

District C is located in the MGRB, and is highly faulted, fractured, and fissured and is an area with active tectonic movement. *Id.* at VIII.A.(5). District C contains 90% of Sandoval County’s population. *Id.* at VIII.A.(1). It is currently nonproductive of oil and gas, and largely unexplored. *Id.* at VIII.A.(8).

District A is also distinct from Districts B and C pursuant to the permitting requirements for operators and the notice and hearing processes afforded to the public when oil and gas zoning applications are under review. The AO provides that District A zoning permits shall be reviewed by the Director of Planning and Zoning to determine sufficiency of an operator’s compliance with the Sandoval County Oil and Gas Ordinance. *Id.* at (G)(1). Once the Director determines the application is complete, public notice of the application will be published in a local newspaper of general circulation. *Id.*, at (H). Interested parties are given sixty days to review the application and provide comments regarding the application to the Director. *Id.* The Director may take these comments into consideration when determining whether to approve the application. *Id.*

In District B, applications will be submitted to the Director to determine compliance and needs of possible affected parties (surface property owner and pueblo entities). The Director will review the application and submit a written report with a recommendation to deny or grant a conditional use permit to the Sandoval County Planning and Zoning Commission. The Commission will then review the application for compliance with the Sandoval County Comprehensive Zoning Ordinance. The Commission is required to consider an oil well’s potential impact on fresh water aquifers, surface property owners, adjacent landowners, sensitive habitats and resources, and Native American entities and cultural sites. *Id.* at (H)(4)(a)-(e). Furthermore, District B requires that there be a public hearing and actual notice to landowners within two miles of an application site and all Native American pueblo agencies within three miles of an application site. *Id.* at Art. VII (I), XI (1)(c), (2).

In contrast with District A, the process for a permit application in District B provides actual notice instead of constructive notice to nearby landowners and pueblos, and a hearing in front of the Planning and Zoning Commission in addition to a written comment period. Further, the Commission is directed to specifically consider factors such as potential impact on water quality, affected property owners, and Pueblos in District B when deciding whether to grant a permit, whereas the Director of Planning and Zoning is not explicitly required to take these factors into account in District A.

The AO prohibits hydraulic fracturing in District C. The AO provides that conventional drilling may be granted a permit under the same notice and public hearing process as provided for in District B. *Id.* at Art. VIII (E).

Discussion

1. A County may zone its land according to the geology of the region as long as the zoning has a substantial relation to the public health, safety, morals, or general welfare.

A county is a subdivision of the state and may only exercise powers directly granted to it by the Legislature. *Vill. of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365, 388. Pursuant to NMSA 1978, section 3-21-1(B)(1) (2007), a county has the authority to divide territory within its jurisdiction into districts for zoning as necessary to carry out for the purposes of promoting health, safety and welfare of the county. This districting method by a governmental body is known as zoning. *Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 10. When zoning is based on protecting the public interest, courts have upheld the idea that this is a legitimate exercise of police power. *Id.* See also, *City of Santa Fe v. Gamble-Skgomo, Inc.*, 73 N.M. 410, 17 (1964). Courts have also specifically upheld the use of districting under municipal or county zoning ordinance. See *City of Santa Fe v. Gamble-Skgomo*, ¶ 10. The validity of a regulatory zoning ordinance must be examined according to the connection and circumstances of locality compared to the districting. *Vill., of Euclid*, 272 U.S. at 387-88. The segregation of industries to a particular district, when exercised reasonably, may bear a rational relation to the general welfare of the community. *Euclid*, at 392.

The United States Supreme Court held that it is a proper exercise of police power, and not a violation of Constitutional substantive due process protections, for a locality to enact regulatory ordinances that district the locality when in furtherance of protecting the health, safety, and general welfare of the people. *Id.* at 395. In the seminal case, *Village of Euclid*, the petitioner asserted that a city ordinance dividing the city into several districts to regulate building construction violated Constitutional property rights under the guise of police power. *Id.* at 386. The ordinance relegated industrial establishments to areas of the village separated from residential sections in order to stem industrial activity from injuring the residential public. *Id.* at 389-90. Upon this premise, the Court held that there is a rational relationship between the zoning of the city and protection of the general welfare. *Id.* at 390, 397. The Court also affirmed that a zoning regulation may only be declared unconstitutional if provisions are clearly arbitrary and unreasonable, and have no substantial relation to the public, health, safety, and morals. *Id.* at 396. Furthermore, the Court found that conclusions of supportive commissions and reports were evidence that the standard for being arbitrary had not been met. *Id.* 394-95.

In this case, Districts A, B and C are zoned according to the geology of the county based on science proffered by New Mexico Tech. The AO asserts that District A is a safer location to horizontally hydraulically fracture because the geologic strata is uniform, opposed to the strata in Districts B and C which is geologically complex or even highly faulted and tectonically active. The AO further claims that groundwater in Districts B and C is at a much higher risk of contamination due the faulted strata in the area compared to District A. According to the

findings in the AO, preventing contamination to groundwater is a public interest the County wants to protect for the general welfare of the community.

Similar to the city in *Village of Euclid*, the AO attempts to zone Sandoval County into districts which would limit oil and gas activity according to specific district provisions. The districting of the County is premised upon the potential impact oil and gas activity can have on groundwater. The AO asserts groundwater is a public interest that it intends to protect. This is similar to the intended protection of residential areas from industrial activity in *Village of Euclid*. In both cases, the local government attempts to safeguard the general welfare by zoning their jurisdiction in such a way that the activity is not prohibited outright in the jurisdiction but rather allowed only in some areas in order to divert negative impacts away from the public. Moreover, in this case, the AO bases its districting upon a detailed and comprehensive report regarding Sandoval County's groundwater and potential impacts of hydraulic fracturing. According to *Euclid*, the consideration and application of investigatory reports to a zoning plan provides evidence of reasoned decision making and limits the possibility of a court considering such a zoning plan as clearly arbitrary and unreasonable. Considering that the ordinance would zone the County on the basis of a comprehensive geologic report, in order to protect the public's general welfare from groundwater contamination, it is likely that a court will uphold the zoning of Districts A, B, and C against challenges that the use of districts based on geology for zoning exceeds the County's authority as granted by the state or violates substantive due process under the Fourteenth Amendment of the U.S. Constitution or Article 2, Section 18 of the New Mexico Constitution.

1.a. May a County Zoning Ordinance Ban Horizontal Hydraulic Fracturing in One or More Districts based on Geology.

As analyzed in the separate Water Memo, state law allows concurrent regulation in oil and gas activity. *Swepi, LP v. Mora Cty., N.M.*, 81 F. Supp. 3d 1075, 1193 (D.N.M. 2015). Counties have authority to promulgate laws that protect the health, safety and welfare of the public. *Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 10, 89 N.M. 503, 505. These local laws must not conflict with state law. *Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1205 (10th Cir. 2002). A conflict between local government and state may arise if the local law frustrates the purpose of the state law. *New Mexicans for Free Enter. v. The City of Santa Fe*, 2006-NMCA-007, ¶ 43, 138 N.M. 785, 802. The issue in this matter is whether the prohibition of horizontal drilling only in District C would frustrate the State's objective to conserve oil and gas.

There is no exact case law that answers this issue; however, in *Swepi v. Mora*, the court reasoned that the New Mexico Oil and Gas Act asserts "authority over all matters relating to the conservation of oil and a gas and the prevention of waste of potash as a result from oil and gas operation in" New Mexico, but the field of oil and gas is not preempted. *Swepi, LP v. Mora Cty., N.M.*, 81 F. Supp. at 1193. As such, there is room for concurrent—but not conflicting—regulation from local governments. A regulation that would eliminate an operator's ability to conserve oil would conflict with state law objective to prevent oil waste. The prohibition of horizontal drilling in a single district could eliminate an operator's ability to frack. Not all oil reserves are may be taken advantage of without unconventional drilling techniques. If an operator could only produce oil by horizontal drilling but a local ordinance prohibited such a

technique, it is likely an operator will claim the local law is preempted by state law because it frustrates the purpose of the Act, to conserve oil.¹

In defense to such a challenge, the county could argue that the County is not banning all hydraulic fracturing, it is only banning hydraulic fracturing in the areas where it has a rational basis to believe there is greatest risk to groundwater, erosion of property values, and other traditionally local concerns. Such an argument could fail, however, because even a ban in one area of the county could be seen as conflicting with state law that would otherwise allow such drilling activities in that part of the state.

Under *Swepti*'s reasoning, there is room for concurrent regulation of oil and gas activity, as long as the State's intent to prevent the waste of oil is maintained. The complete prohibition of horizontal fracking in District C, however, is at risk of being found by the courts to conflict with state law and therefore to be preempted.

2. By limiting the notice and hearing requirements in District A compared to Districts B and C, it is likely the Adang Ordinance violates procedural due process for limited individuals, but not equal protection pursuant to article 2, section 18 of the New Mexico Constitution and the Fourteenth Amendment of the United States Constitution.

Article 2, section 18 of the New Mexico Constitution prescribes that “no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.” The U.S. Constitution provides similar protection to New Mexico residents under the Fourteenth Amendment.² Counties have wide discretion to promulgate regulations over county lands as discussed in Part 1 of this memo and Part 2 of the “Water Memo.” Despite this wide discretion, county law must comply with state and federal constitutions. Parts 2(A) and (B) will discuss whether the Adang Ordinance could be successfully challenged as violating procedural due process³ and equal protection provisions of the federal and state constitutions.

¹ A local regulatory law that eliminates an operator's entire ability to extract oil it might also be a regulatory taking under the Fifth Amendment of the United State Constitution.

² The New Mexico Supreme Court has recognized that New Mexico's equal protection clause affords rights and protections independent of the federal constitution. *Breen v. Carlsbad Municipal Schools*, 14. However, New Mexico courts use federal interpretation of the Equal Protection Clause as guidance. *Id.* (See also, *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 50, 306 P.3d 457, 469, asserting NM Const. art 2, § 18 and US Const. XVI due processes are similar.

³ Substantive due process protects policy enactments that exceed the limits of governmental authority: courts may find that a majority's enactment is not law and cannot be enforced as such, regardless of whether the processes of enactment and enforcement were actually fair. As discussed in Part 1 of this memo, Sandoval County has the authority to promulgate different regulations pertaining to the same act between districts. As such, substantive due process of this ordinance is not in dispute. Lawrence Gene Sager, *Fair Measure:*

Procedural due process affords interested parties the right to adequate notice and a fair hearing when subject to a deprivation of a property interest. *Mullane v. Cen. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). In order to bring a procedural due process claim, the plaintiff must first be deprived of a legitimate property interest through a government action. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, Kan.*, 715 F. Supp. 1000, 1115 (D. Kan. 1989), *aff'd*, 927 F.2d 1111 (10th Cir. 1991). In this case, it is possible that the grant of a well permit in District A, under the Adang Ordinance (AO), would be viewed as a governmental action that deprives adjacent property owners or other residents of a legitimate property interest. If the permitting process actually deprived a legitimate property interest, actual notice should be afforded to interested and identifiable parties because adjudicatory processes typically only affect a limited number of people. *Uhden v. New Mexico Oil Conservation Comm'n*, 1991-NMSC-006, ¶ 12, 112 N.M. 528. Furthermore, opportunity for a hearing to defend against the deprivation of property should be afforded to affected individuals. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The Equal Protection Clause protects against government actions that treat similarly situated people differently. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 290 (1978). Typically, intentionally discriminatory treatment of a suspect class such as race, religion, or national origin will be held unlawful under a court's strict scrutiny review. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). However, when a non-suspect class faces discriminatory treatment, under rational basis review, courts will uphold the law so long as it serves a legitimate government interest. *ACLU of NM v. City of Albuquerque*, 2006-NMSC-089, ¶ 19, 144 NM 471. In this case, the AO does not appear to intentionally discriminate against a suspect class. As such, an alleged violation of equal protection would only be subject to rational basis review. *ACLU of NM v. City of Albuquerque*, 2006-NMSC-089, ¶ 19. Under rational basis review, it is likely that the AO is reasonably related to and furthers the objective of protecting groundwater from contamination based on different geological factors. Accordingly, a court is likely to find that the Equal Protection Clause under the New Mexico and United States Constitution has not been violated.

Below, Parts A and B discuss the two issues raised by the Sandoval County Citizens Working Group, Ordinance Team regarding procedural due process and equal protection of District A in relation to the Adang Ordinance.

A. Does the AO violate procedural due process by only requiring constructive notice and a public comment period to District A during permitting of a hydraulic fracking well?

It is possible the AO violates procedural due process. While grants of a drilling permit under the AO ordinance would not implicate any property interest broadly held by all District A residents, some property owners near the drilling operation may be able to allege deprivation of a legitimate property interest. For those individuals, actual notice may be required because the

The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1228-29 (1978).

approval of oil and gas drilling permits may only affect the property interests of a limited number of readily identifiable individuals. Whether or not a hearing is required for individuals alleging a deprivation of a legitimate property interest will likely depend on the nature of the allegation. If the property deprivation is substantial, it is likely a court would find that a hearing was required.

Procedural due process ensures that prior to a government deprivation of life, liberty or property, a person receive reasonable notice and is afforded the opportunity of a fair hearing. *Mullane*, 399 U.S., at 313. To allege a procedural due process violation, a challenger must first identify a property interest that they are entitled to under state law or other rules sufficient to warrant due process protections. *Jacobs*, 715 F. Supp., 1116 (D. Kan. 1989). An abstract need or desire for an interest is insufficient. *Curtis Ambulance of Florida, Inc. v. Board of County Com'rs of Shawnee County, Kan.* 811 F.2d 1371 (10th Cir. 1387). Typical claims of entitlement to a legitimate property interest are based on statutory or contractual provisions. *Id.*

Once a property interest is established, what is adequate notice is determined according to whether the local government's action was adjudicatory or administrative. *Rayellen Res., Inc. v. New Mexico Cultural Properties Review Comm.*, 2014-NMSC-006, ¶ 27, 319 P.3d 639. An adjudicatory action is when the government rules on an individual's right, which may affect a limited group of people within a limited area. *Rayellen*, 2014-NMSC-006, ¶ 25. In contrast, an administrative action is regulatory and will most likely affect the general land use and general population. *Rayellen*, ¶ 27. Accordingly, actual notice (notice by mail) is reasonable and appropriate for adjudicative actions since affected people are easily identifiable, and constructive notice (notice by publication) is reasonable and appropriate for administrative actions since affected people may be vast and hard to identify. *Id.* When determining whether a hearing is appropriate in procedural due process, three factors must be contemplated: (1) the private interest that will be affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the value of additional safeguards; and (3) the governmental interest in imposing burdens on the procedure at issue. *Mills v. New Mexico State Bd. of Psychologist Examiners*, 1997-NMSC-028, ¶ 5, 123 N.M. 421. The necessity of a hearing is determined on a case-by-case basis. *Id.*

i. Some individuals in District A may be able to claim that a legitimate property interest is being deprived when a specific drilling permit is granted

The threshold question with regards to whether the procedure made available to non-permittee residents in District A under the Adang Ordinance is sufficient under Constitutional due process protections is whether those residents of District A have a legitimate property interest that is being deprived by the County's permitting process. For example, adjacent landowners might argue that the County's grant of a drilling permit lowers their property value, interferes with their quiet enjoyment of their property, or increases risk of contamination to their groundwater.

In *Uhden v. New Mexico*, an individual petitioner brought a procedural due process claim against the New Mexico Oil Conservation Division for lack of actual notice and hearing prior to the Commission approving an application to widen well spacing, which subsequently reduced the petitioner's royalties from the well. *Uhden*, 1991-NMSC-089, ¶ 2. The Court established that

the petitioner had a clear property interest in her oil and gas lease, as it was a state contractual property right. *Uhdén*, ¶ 8.

Petitioners in *Rayellen v. New Mexico Cultural Properties* were private land owners who alleged due process was violated when the New Mexico Cultural Properties listed Mount Taylor as cultural property on the state historic register, depriving them the ability to develop their surface and mineral rights, without providing actual notice to all affected property owners. *Rayellen*, ¶¶ 8, 9. Although the Court did not address the issue directly, the Court's decision implicitly affirmed that the loss of surface and mineral rights because of the cultural listing was a legitimate property interest sufficient to bring a procedural due process claim. *Rayellen*, ¶¶ 14, 17.

In *Jacobs*, a limited group of land developers attempted to rezone their residential property to commercial use so as to build a shopping mall. *Jacobs*, 715 F. Supp., 1114. After several denials of rezoning from the city commission, petitioners claimed, among other things, a violation of procedural due process for lack of an impartial hearing. *Jacobs*, 1114-15. The court articulated that the petitioners must first establish a legitimate property right to bring a due process claim. *Jacobs*, at 1115. The appellants claimed that state law gave them a legitimate expectation of rezoning. *Id.* at 1117. The court held, however, that in order to establish a legitimate expectation sufficient for a due process challenge, there needed to be a set of rules provided by state law or by the commission that gave rise to an expectation of rezoning if the criteria were met. *Id.* at 1116. In the absence of such rules, the discretion given to the zoning commission to deny rezoning did not give rise to legitimate property interest for the purposes of a due process challenge. *Id.*

Non-permittee residents in District A likely do not have a broadly-held property interest recognized by state law or county law that should be afforded procedural due process protections during the adjudication of an oil and gas drilling permit. For example, a District A resident could try to bring a due process claim alleging that the approval of a drilling permit has deprived him of a property interest in uncontaminated groundwater. As in *Jacobs*, a court would be unlikely to find that granting the permit would constitute the deprivation of a legitimate property interest. Even if state law or the County ordinance were found to create a legitimate expectation of uncontaminated groundwater, the County approval of a drilling permit does not deprive residents of uncontaminated groundwater. At worst, it potentially increases the risk of contamination. It is unlikely that Courts would find that the County ordinance or other law establishes a legitimate expectation that residents have a property right to prevent activities that could increase risk of contamination to their groundwater. Consistent with the court's reasoning in *Jacobs*, this might be different if the Adang Ordinance established conditions that would require denial of a permit in District A if a risk of contamination was found, giving rise to the legitimate expectation that no permits be granted if they increased the risk to groundwater. Under the language of the ordinance, however, there are no such specific criteria limiting permitting discretion in this way.

There may be instances, however, where a specific property owner in District A can allege that granting a specific permit would lead to a deprivation of a legitimate property interest, more closely resembling the facts in *Uhdén*. For example, a neighboring property owner may be able to allege that the grant of a drilling permit will result in the diminishment of her property

value, or deprive her of quiet enjoyment of her property (if drilling activities were to bring noise or pollution into her property). If an individual in District A has a definite or actual property right, such as surface rights, to a parcel of land that will be affected by a well permit, then that specific individual would be entitled to procedural due process prior to the granting of the permit.

In sum, most residents in District A probably do not have a property interest that would trigger a procedural due process protection during the granting of a county drilling permit. Nonetheless, in specific permitting decisions, some private landowners may be able to claim that the grant of a permit deprives them of a legitimate property interest and therefore bring a valid procedural due process challenge.

ii. District A individuals with legitimate property rights are not afforded adequate notice.

If a court determines that a plaintiff has a legitimate property interest which may be protected by procedural due process, the court must then determine what would be adequate notice and hearing to affected parties. The notice required should be “appropriate to the nature of the case.” *Mullane*, 339 U.S. at 313. The test applied by the court is whether notice is “reasonably calculated under the circumstances to inform interested parties of its action in order to afford them the opportunity to be heard.” *Rayellen*, 2014-NMSC-006, ¶ 20. In general, actual notice is required for adjudicatory processes that directly impact a relatively few individuals, whereas constructive notice is sufficient for administrative processes that impact the general public.

In *Uhden*, actual notice to the property owner was required because the commission’s action was based on the adjudication of an individual property right and because the property owner was easily identifiable. *Uhden*, ¶ 13.

In *Rayellen*, the Court found that “because no individual property rights were being adjudicated by [omitted] the listing, personal notice was not required” and constructive notice was sufficient. *Rayellen*, ¶ 27. Defendant’s notice of the cultural listing was adequate because the commission made reasonable efforts to provide individual and constructive notice to adversely affected property owners, of which there were hundreds. *Rayellen*, ¶¶ 27, 28. Actual notice to every effected person would have been too burdensome on the commission, and therefore, unreasonable to require. *Id.* at 27.

The granting of a drilling permit under the proposed ordinance would be an adjudicatory action as in *Uhden* because the people most likely to have legitimate affected property interests would be a small and identifiable number. For example, the surface property owner and adjacent property owner. As in *Uhden*, actual notice would likely be required.

The proposed AO does not currently require that actual notice be provided to any individuals in District A. The AO articulates that notice of permit applications will be provided through publication in a local newspaper and on the Sandoval County Commission website.

Unlike the administrative process occurring in *Rayallen*, the AO prescribes notice regarding an adjudicative action. The *Rayallen* court held constructive notice is reasonable and appropriate when administrative action affects a general population that is not easily discernable. However, in this case, permit approvals are an adjudicative action that will likely not affect a general population. Instead, permit adjudication will affect limited and identifiable individuals, such as adjacent property owners or surface right owners. Because such individuals may in some circumstances have viable claims that they are being deprived of legitimate property interests, these individuals should be afforded actual notice.

iii. **Individuals of District A may be entitled to a hearing.**

The United States Supreme Court has consistently held that “some form of hearing is required before an individual is finally deprived of a property interest.” *Mathews v. Eldridge*, 424 U.S. at 333. “Procedural due process requirements are not static, and the extent of a hearing is determined on a case-by-case basis.” *Mills v. New Mexico State Bd. of Psychologist Examiners*, 1997-NMSC-028, ¶ 19. A hearing does not necessarily need to provide all, or even most, protections afforded by trial. *Camuglia v. The City of Albuquerque*, 448 F.3d 1214, 1220 (10th Cir. 2006). Whether an administrative procedure is constitutionally adequate requires an analysis of the governmental and private interests that are affected. *Eldridge*, at 334. Within this test there are three factors to consider: (1) the private interest that will be affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the value of additional safeguards; and (3) the governmental interest in imposing the burdens of the procedure at issue. *Mills*, 1997-NMSC-028, ¶ 19.

In *Mills*, the petitioner appealed the New Mexico Board of Psychology’s reinstatement procedure, which required the petitioner to take an oral examination in order to reinstate her psychology license. *Mills*, 1997-NMSC-028, ¶¶ 4-7. The Board informed the petitioner the exam was to assure that she was in good mental health to practice. *Id.* ¶ 4. In response, the petitioner submitted affidavits from her doctors and colleagues to attest to her mental health standing. *Id.* However, the Board continued to insist on an oral examination and refused to grant the petitioner a hearing to address the issue. *Id.* The New Mexico Court of Appeals held that procedural due process was violated when the Board denied petitioner a hearing. *Id.* ¶ 20. It reasoned that the petitioner was at risk of losing a significant property interest (her profession) over an oral exam, and that a hearing could diminish this risk. *Id.* Furthermore, a delay from a hearing would not impose any suffering to the public or the Board. *Id.*

In this case, the AO does not afford a hearing to any interested parties in the process of well permit approval in District A. It only affords a written comment period. In *Mills*, the petitioner was allowed to submit affidavits of good health yet was denied the opportunity to defend her property interest when the Board denied her request for a hearing. Similarly, affected parties in District A have an opportunity to submit comments to the Director, but they do not have the opportunity to be heard and to defend against deprivation of property due to adjudicative action by the County. The County might choose not to provide a hearing for District A in order to maintain an efficient permitting process for operators.

The likelihood that a court would find that a hearing is required depend in part on what deprivation of property is asserted and what value a hearing would provide in safeguarding against an erroneous deprivation. It is possible that a court would find that the County's interest in an efficient process does not outweigh an individual's fundamental right to protect deprivation of property. As such, the AO may be at risk of due process challenges if it denies a hearing to individuals with legitimate property interests at risk of deprivation.

In sum, in order to bring a procedural due process challenge individuals must allege deprivation of a legitimate property interest. While grants of a drilling permit under the AO ordinance would not implicate any property interest broadly held by all District A residents, some property owners near the drilling operation may be able to allege deprivation of a legitimate property interest. For those individuals, actual notice may be required because the approval of oil and gas drilling permits may only affect the property interests of a limited number of readily identifiable individuals. Finally, whether or not a hearing is required for individuals alleging a deprivation of a legitimate property interest will likely depend on the nature of the allegation. If the property deprivation is substantial, it is likely a court would find that a hearing was required.

B. Does the AO violate equal protection by prescribing different due process procedure and permitting processes between districts?

It is unlikely the AO violates equal protection. Equal protection “focuses on the validity of legislation as it equally burdens all persons in the exercise of a specific right.” *ACLU of NM v. City of Albuquerque*, 2006-NMSC-089, ¶ 17. When an ordinance is challenged on equal protection grounds, one of three levels of review is applied based on the status of the group affected. *ACLU*, ¶ 19. “Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty—such as first amendment rights, freedom of association, voting, interstate travel, privacy, and fairness in the deprivation of life, liberty or property—which the Constitution explicitly or implicitly guarantees.” *Marrujo v. New Mexico State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 757, 887 P.2d 747, 751. “Strict scrutiny also applies under an equal protection analysis if the statute focuses upon inherently suspect classifications such as race, national origin, religion, or status as a resident alien.” *Marrujo*, 1994-NMSC-116, ¶ 10. Under strict scrutiny, “the burden is placed upon the state to show that restriction of the delineation of suspect class supports a compelling state interest, and that the legislation accomplishes its purposes by the least restrictive means.” *Id.* Intermediate scrutiny will apply for a quasi-suspect class such as gender. *ACLU*, ¶ 19. However, such a class is not at issue in this case. When a fundamental right or suspect class is not alleging discrimination, rational basis review will be applied. *Id.* An ordinance analyzed under rational basis review need only demonstrate that there is a reasonable relationship between the enacted law and a legitimate government purpose. *Marrujo*, ¶ 12. Furthermore, the burden is upon the opponent to the legislation to prove that the law is arbitrary and unreasonable. *Id.*

The AO may have potential to be challenged under an Equal Protection Clause claim because District A has higher proportioned amount of Native American and Hispanic/Latino populations per capita compared to Districts B and C. The effect of the AO's zoning may create a disparate impact negatively affecting minority racial groups in District A, a suspect class for equal

protection purposes. Suspect classes are entitled to strict scrutiny review by the court. This review will determine if the law intended to discriminate against the suspect class, and if so, the Equal Protection Clause is violated. If a court were to find that discrimination against a suspect class in District A was not intended, then rational basis review would be applied to AO. Under rational basis, the court would determine if the law fulfills a legitimate government interest. If so, the law will be upheld. As such, the two issues in this matter are whether the AO intended to discriminate against a suspect class, and if not, under rational basis review, despite non-suspect class discrimination, does the AO further a legitimate government interest.

i. Does the Adang Ordinance intend to discriminate against a suspect class?

In *Village of Arlington Heights*, the court determined that petitioner's evidence failed to demonstrate race discrimination pertaining to a city's denial to rezone property that would be used to construct a low-income apartment complex. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977). In *Arlington*, the petitioner requested a rezoning from a single-family home to a multi-family home in order to construct a low income housing apartment complex. *Arlington Heights*, at 557. The city commission denied the petitioner's request to rezone on the grounds that the city intended the area to stay zoned for single-family homes. *Id.* at 258-59. Petitioner alleged that the denial to rezone was based on discrimination because the denial to rezone disproportionately affected African-Americans. *Id.* at 552. However, the Supreme Court reasoned that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 266. Disparate impact may be a starting point to evidence legislative discrimination, but impact alone is not determinative. *Id.* A commission's departure from normal procedure and the commission's administrative history may offer guidance as to the intent of the commission. *Id.* at 267-68. The Court found that the city was undeniably committed to single-family homes as its dominant residential land use, *Id.* at 269, which was reflected in the commission's official minutes. *Id.* at 270. As such, the Court held that the commission's decision was not based on race but instead based on historical zoning procedures. *Id.* Accordingly, the petitioner failed to establish the requisite intent to discriminate despite a disparate impact on African-Americans. *Id.*

In this case, the Adang Ordinance may disproportionately impact minority groups by creating a more liberal drilling permitting process for District A in comparison to Districts B and C. However, if a disparate impact were alleged, it is unlikely that the court would find evidence of intentional discrimination based on race that would give rise to a strict scrutiny analysis. In *Arlington*, the court found the city lacked the requisite discriminatory intent in its denial to rezone for low-income apartment complex, despite disproportionately affecting African-Americans. As such, the zoning decision did not violate equal protection. Similarly, the AO findings section indicates that the county's process may be more lax in District A because of the uniform strata formations in the area provide for a safer environment to frack. As such, even if there was a disparate impact to a suspect class, a court would likely hold that the AO lacks the legislative intent to discriminate to give rise to an equal protection claim.

ii. Under rational basis review, does the AO violate the Equal Protection Clause?

In *ACLU of New Mexico v. City of Albuquerque*, the petitioners asserted that equal protection was violated when the City of Albuquerque passed a sexual predator ordinance requiring sex offenders to register with the Albuquerque Police Department. *ACLU*, ¶ 22. The court determined sexual offenders are not part of a suspect class; as such it was appropriate to review the matter under a rational basis standard. Under rational basis, the opponent of the legislation must demonstrate the law is arbitrary and unreasonable. *Marrujo*, ¶ 12. This ordinance required different reporting provisions contingent upon whether the offender was a resident or non-resident of the State. *ACLU*, ¶ 28. The Court found that the ordinance violated equal protection because it did not require state resident sex offenders to register with APD, but required out of state sex offenders to register. *Id.* ¶ 29. This demarcation treated similarly situated people differently and did not further the objective of the city ordinance to register sex offenders. *Id.* ¶ 28. Accordingly, the court found an equal protection violation.

In *Jacobs*, the Court found that a city ordinance treated two similarly situated developers differently, but equal protection was not violated because the city had a legitimate purpose for the distinction between developers. *Jacobs*, 715 F. Supp., 1118-19 (D. Kan. 1989). The trial court reasoned that the developers in question were dissimilar because each sought rezoning approval in different locations. *Jacobs*, at 1118. The Court of Appeals disagreed, determining that a difference solely based on location did not mean that the developers were differently situated. *Jacobs*, at 1119. However, under rational basis review, the city's interest of retaining vitality of the downtown area by limiting commercial retail development outside the downtown area was a legitimate interest that was reasonably adjudicated through the denial to rezone a developer's property. *Id.*

Similar to opponents of the city ordinance in *ACLU* or the zoning decision in *Jacobs*, an opponent of the AO would need to demonstrate that requiring different notice and hearing requirements or permit application procedure between districts is arbitrary and unreasonable. There only needs to be a reasonable relationship between legislation and the government's objective for a court to uphold the legislation. The AO identifies that the distinction between districts is necessary because District A groundwater is safe from contamination related to hydraulic fracking. Therefore, providing actual notice and public hearing for every permit is unnecessary. Whereas District B and C fracking activity poses a high threat of groundwater contamination. As such, a more stringent notice and hearing process is reasonable. Because the ordinance's objective focuses on groundwater protection and provides scientific support for the permitting distinction, it is likely a court will not find that a different notice and hearing requirement between districts is arbitrary and unreasonable.

However, a violation of equal protection might be raised because the AO findings articulate that fracking in the San Juan Basin is safe. It appears that District B—the transition zone—may also include some of the San Juan Basin, yet District B has more stringent requirements for notice and hearing and District A has less stringent permitting application requirements. In *ACLU*, the petitioners claimed the Equal Protection Clause was violated when a city ordinance prescribed divergent treatment of similarly situated sex offenders. Similar to the city ordinance

in *ACLU*, the AO notice and hearing requirements and permitting processes in the San Juan Area across districts might be arbitrary and unreasonable since different laws apply to similarly situated permit applicants in the San Juan Basin. Accordingly, an individual, whether a citizen or operator in the San Juan Basin, may raise a violation of equal protection. However, under rational basis review, the high burden to prove the ordinance is arbitrary because it does not further a governmental interest remains. It is likely that a court will find the protection of ground water is a legitimate government interest that is reasonably legislated through the AO.

In summary, the AO most likely will not be found to meet the requirement of intentional discrimination against a suspect class, and would therefore not be reviewed under strict scrutiny. As such, an equal protection challenge would be analyzed under rational basis review. Under rational basis review, a court will uphold legislation as long as it is rationally and reasonably related to a governmental objective. The AO's objective is to protect ground water contamination related to fracking by requiring more stringent permitting applications and more varying notice and hearing requirements across districts. Thus, under a rational basis review, a court might find merit in an equal protection challenge pertaining to the demarcation of similarly situated people within the San Juan Basin between districts. However, the review would hinge on whether the distinction in procedure furthers a legitimate government objective, and it is likely a court would find that the protection of groundwater is reasonably legislated through the AO. Accordingly, an equal protection violation would be denied.

Thank you for allowing the University of New Mexico School of Law, Natural Resource and Environmental Law Clinic to represent the Sandoval Citizens Working Group, Ordinance Team.

Sincerely,



Meaghan Baca
NREL Clinical Law Student



Prof. Gabe Pacyniak
NREL Supervising Attorney

Aquifer Water Protection & Oil and Gas Ordinance

Citizens Working Group (CWG) Ordinance Team

LEGAL CASE

SWEPI, LP v. Mora County et al.
Case No. 1:14-cv-00035-JB-SCY
Filed Jan. 19, 2015

Federal District Court Judge James O. Browning

This is an attachment to the CWG Ordinance Team's ordinance
that was submitted to the Sandoval County New Mexico
Planning & Zoning Commission

Oil and Gas Development State Preemption
statements are highlighted

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

SWEPI, LP, a Delaware
Limited Partnership,

Plaintiff,

vs.

No. CIV 14-0035 JB/SCY

MORA COUNTY, NEW MEXICO;
MORA COUNTY BOARD OF COUNTY
COMMISSIONERS; PAULA A. GARCIA,
Mora County Commissioner; JOHN P. OLIVAS,
Mora County Commissioner; and ALFONSO J.
GRIEGO, Mora County Commissioner,

Defendants,

and

LA MERCED DE SANTA GETRUDIS DE LO
DE MORA, a Land Grant; and JACOBO E.
PACHECO, an Individual,

Defendant-Intervenors.

MEMORANDUM OPINION AND ORDER

B STATE LAW PREEMPTS THE ORDINANCE.

New Mexico state law impliedly preempts the Ordinance, because it conflicts with state law. State law may either expressly or impliedly preempt a county ordinance. See San Pedro Mining Corp. v. Bd. of Cnty. Comm’rs, 1996-NMCA-002, ¶ 9, 909 P.2d 754, 758. To expressly preempt local laws, the State “legislature must clearly state its intention to do so.” Rancho Lobo, LTD v. Devargas, 303 F.3d at 1201. There are two doctrines under which state law may impliedly preempt a local law: (i) field preemption; and (ii) conflict preemption. See San Pedro Mining Corp. v. Bd. of Cnty. Comm’rs, 1996-NMCA-002, ¶ 11. Field preemption occurs when “it is evident from the language of the New Mexico law at issue that the legislature ‘clearly intended to preempt a governmental area.’” Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204 (quoting Casuse v. City of Gallup, 1987-NMSC-112, ¶ 6, 746 P.2d 1103, 1105). Conflict preemption examines “whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits.” Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205 (citing Inc. Cnty. of Los Alamos v. Montoya, 1989-NMCA-004, ¶ 16 (“Rather, the tests are whether the stricter requirements of the ordinance conflict with state law, and whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits.”)). **Merely requiring**

³⁹While the Court is willing to issue a permanent injunction, enjoining the Defendants from enforcing the Ordinance on state lands, because the Court will invalidate the Ordinance, in its entirety, such an injunction would be moot.

greater restrictions than state law, however, does not necessarily make the ordinance invalid. See Inc. Cnty. of Los Alamos v. Montoya, 1989-NMCA-004, ¶ 16. SWEPI, LP argues that state law impliedly preempts the Ordinance through either field or conflict preemption. State law does not entirely preempt the oil-and-gas field. The Ordinance conflicts, however, with state law and is, thus, invalid because of conflict preemption.

1. **New Mexico State Law Does Not Impliedly Preempt the Entire Oil-And-Gas Field.**

New Mexico state law does not impliedly preempt the entire oil-and-gas field. SWEPI, LP directs the Court to a 1986 New Mexico Attorney General advisory letter in which the Attorney General opined that the entire field of oil-and-gas regulation was occupied by the State -- i.e. the State of New Mexico impliedly preempted the entire oil-and-gas field. See Motion at 20 (citing N.M. Att’y Gen. Op. 86-2, 1986 WL 220334). However, “Attorney General opinions and advisory letters do not have the force of law.” United States v. Reese, 2014-NMSC-013, ¶ 36, 326 P.3d 454, 462. Moreover, the advisory letter is almost thirty years old, and there has been intervening case law that indicates that field preemption does not apply.⁴⁰

In the advisory letter, the Attorney General’s Office, through Assistant Attorney General Barbara G. Stephenson, considered whether the County of Santa Fe could regulate oil-and-gas operations. See N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *1. Ms. Stephenson opined that

⁴⁰Several additional concerns caution against relying on the advisory letter. First, the letter appears to be an informal “advisory letter” rather than a formal Attorney General Opinion. During his time in office, New Mexico Attorney General, Paul Bardacke, the Attorney General in 1986, issued very few formal Attorney General Opinions. See Hal Stratton & Paul Farley, Office of the Attorney General State of New Mexico: History, Powers & Responsibilities 1846-1990 119 (1990)(showing that, in 1986, less than five Official Attorney General Opinions were issued while over seventy-five were issued in 1987, after Mr. Bardacke left office). Second, and related to the first, Mr. Bardacke did not sign the 1986 advisory letter. See N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *1. Assistant Attorney General Barbara G. Stephenson signed it. See N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *3. The lack of the New Mexico Attorney General’s signature on the letter cautions against giving too much weight to the letter.

it could not regulate oil-and-gas operations, because the county regulations conflicted with Oil Conservation Division regulations, and because “the county is preempted from adopting zoning regulations relating to oil and gas production.” N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *1. Specifically, Ms. Stephenson opined that “[t]he legislature has vested” the regulation of oil-and-gas production with the Oil Conservation Division “with the intention that the state agency occupy the entire field of regulation.” N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *1. Ms. Stephenson noted that the county has only those powers that the Legislature provides, and that the county’s zoning authority is subject to statutory or constitutional limitations. See N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *2. Ms. Stephenson opined that one such limitation comes from Section 70-2-36 of the New Mexico Statutes Annotated. See N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *2.

- A. The [Oil Conservation Division] shall have, and is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil and gas operations in this state. It shall have jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil and gas operations.

N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *2 (quoting N.M. Stat. Ann. § 70-2-36)(emphasis in N.M. Att’y Gen. Op. 86-2 but not in source). Based on this statute, Ms. Stephenson concluded that the Oil Conservation Division, “therefore, occupies the entire area of oil and gas regulation and a county cannot, by ordinance, attempt to regulate this area.” N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *2. The Attorney General discussed cases from Washington, Missouri, and Alaska in which the courts found that the state law preempted the areas of prison construction, location of intercity electric transmission lines, subdivisions, and mobile home construction standards. See N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *2 (citing Snohomish Cnty. v.

State of Washington, 648 P.2d 430 (Wash. 1982)(en banc)(prison location); Union Elec. Co. v. City of Crestwood, 562 S.W.2d 344 (Mo. 1978)(en banc)(location of intercity electric transmission lines); Kenai Peninsula Borough v. Kenai Peninsula Bd. of Realtors, Inc., 652 P.2d 471 (Alaska 1982)(subdivisions); Snohomish Cnty. v. Thompson, 577 P.2d 627 (Wash. Ct. App. 1978)). Additionally, Ms. Stephenson opined that the county ordinance was further invalid, because it “applies requirements to oil and gas production beyond those imposed by OCD and thus prohibits, that which OCD permits.” N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *3. Finally, Ms. Stephenson concluded that “[c]oncurrent jurisdiction does not appear possible.” N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *3.

Since the Attorney General’s Office issued the advisory letter, New Mexico courts and the Tenth Circuit have reined in New Mexico’s field-preemption doctrine. In San Pedro Mining Corp. v. Board of County Commissioners, the Court of Appeals of New Mexico considered whether the New Mexico Mining Act, N.M. Stat. Ann. §§ 69-36-1 through 69-36-20, preempts a county’s ability to regulate mining activity within its jurisdiction. See 1996-NMCA-002, ¶ 4. The Court of Appeals of New Mexico first concluded that the Mining Act does not expressly preempt local mining ordinances. See 1996-NMCA-002, ¶ 10. Concerning implied field preemption, the Court of Appeals of New Mexico noted that the Mining Act’s, and subsequent regulations’, primary focus is on “the minimization of damage to the land being mined.” 1996-NMCA-002, ¶ 12. The Court of Appeals of New Mexico noted, however, that

neither the Act nor the regulations contain any mention of development issues with which local governments are traditionally concerned, such as traffic congestion, increased noise, possible nuisance created by blasting or fugitive dust, compatibility of mining use with the use made of surrounding land, appropriate distribution of land use and development, and the effect of the mining activity on surrounding property values.

1996-NMCA-002, ¶ 12. The Court of Appeals of New Mexico concluded that, “[t]herefore, there is room for concurrent jurisdiction and regulation, with the County’s ordinance regulating aspects of the mining activity that concern off-site safety, compatibility with surrounding property uses, and other matters left unaddressed by the Act and regulations.” 1996-NMCA-002, ¶ 12. Because there was room for concurrent regulation between a county and the Mining Act, the Court of Appeals of New Mexico held that the Mining Act and subsequent regulations do not completely preempt the mining field. See 1996-NMCA-002, ¶ 14. The Court of Appeals of New Mexico noted that portions of Santa Fe County’s ordinance may conflict with the Mining Act, and thus be preempted under conflict preemption, but, because the plaintiff argued only that the ordinance, as a whole, was preempted, the court did not consider which individual provisions might be preempted through conflict preemption. See 1996-NMCA-002, ¶ 13.

In Rancho Lobo, LTD v. Devargas, the Tenth Circuit considered whether the New Mexico Forest Conservation Act, N.M. Stat. Ann. §§ 68-2-1 through 68-2-34, preempted a New Mexico county’s “Timber Harvest Ordinance.” See 303 F.3d at 1197. The Tenth Circuit, in an opinion that the Honorable Mary B. Briscoe, United States Circuit Judge for the Tenth Circuit, authored, and Judges Ebel and McKay joined, held that the Conservation Act did not preempt the ordinance. See 303 F.3d at 1207. The Tenth Circuit noted that there was some support for the argument that the Conservation Act impliedly preempted the entire field; specifically, the Conservation Act created the Forestry Division and granted it with sweeping powers to make rules and regulations concerning timber harvests, and the Forestry Division’s regulations were comprehensive. See 303 F.3d at 1204. The Tenth Circuit concluded, however, that the Conservation Act was “very similar” to the Mining Act in San Pedro Mining Corp. v. Board of County Commissioners. 303 F.3d at 1204. Both acts, it noted, “did not really address the kinds of development issues ‘with

which local governments are traditionally concerned.” 303 F.3d at 1204 (quoting San Pedro Mining Corp. v. Bd. of Cnty. Comm’rs, 1996-NMCA-002, ¶ 12). Specifically, the Tenth Circuit stated that the “Conservation Act’s primary focus is the minimization of damage to the permitted land,” while

the main focus of the Timber Harvest Ordinance is on local issues, such as the amelioration of damage to the surrounding property as the result of timber harvesting, including issues such as the effect of the timber harvest on economic development and local employment, water quality and availability, soil protection, archeological, historic and cultural resources, abatement of noise, dust, smoke and traffic, hours of operation, compatibility with adjacent land uses, cumulative effect when combined with existing harvests.

Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204-05. The Tenth Circuit concluded that, because the Conservation Act “left room for concurrent jurisdiction over local forestry issues,” the Conservation Act does not impliedly preempt “the entire field of regulation relating to timber harvesting in New Mexico.” 303 F.3d at 1205. As for conflict preemption, the plaintiff argued, and the district court concluded, that, because the Conservation Act permits clear cutting⁴¹ but the county ordinance prohibits it, the ordinance conflicts with state law. See 303 F.3d at 1205. The Tenth Circuit, however, held that, because the Conservation Act did not create a right to clear cutting or state that clear cutting is permitted, the ordinance’s prohibition did not conflict with Conservation Act. See 303 F.3d at 1205.

The Oil and Gas Act is focused primarily on the prevention of waste and the drilling and maintenance of oil-and-gas wells. The Oil and Gas Act prohibits the production or handling of oil and gas in a manner that constitutes or results in waste. See N.M. Stat. Ann. § 70-2-2. Waste is interpreted with its ordinary meaning, and the Oil and Gas Act also provides a number of specific examples that can be summed up as the inefficient, excessive, or improper use of oil and gas. See

⁴¹“Clearcutting, clearfelling, or clearcut logging is a forestry/logging practice in which most or all trees in an area are uniformly cut down.” Clearcutting, Wikipedia.org, <http://en.wikipedia.org/wiki/Clearcutting> (last visited Jan. 14, 2014).

N.M. Stat. Ann. § 70-2-3. The Oil and Gas Act provides the Oil Conservation Division with a number of powers concerning the regulation of drilling for, and producing, oil and gas. See N.M. Stat. Ann. § 70-2-12. The Oil and Gas Act, however, does not address “the kinds of . . . issues ‘with which local governments are traditionally concerned.’” Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204 (quoting San Pedro Mining Corp. v. Bd. of Cnty. Comm’rs, 1996-NMCA-002, ¶ 12). The Oil and Gas Act does not address issues such as traffic that oil-and-gas production creates; noise limitations for production near residential areas; potential nuisance issues from sound, dust, or chemical run-off; or the impact of oil-and gas production on neighboring properties.⁴² There is thus “room for concurrent regulation” by Mora County. Rancho Lobo, LTD v. Devargas, 303 F.3d at 1200. Because there is room for concurrent regulation, State law does not preempt the entire oil-and-gas field. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204-05; San Pedro Mining Corp. v. Bd. of Cnty. Comm’rs, 1996-NMCA-002, ¶ 12.

In the 1986 advisory letter, Assistant Attorney General Stephenson focused on the Oil Conservation Division’s authority and jurisdiction in concluding that the Oil and Gas Act preempted the entire oil-and-gas field. See N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *2. That the Legislature has authorized the Oil Conservation Commission to pass regulations and has passed extensive regulations does not change the conclusion that there is no field preemption. Both the Mining Act and the Conservation Act created state agencies with the authority to enact extensive regulations. See N.M. Stat. Ann. § 69-36-6 (creating the Mining Commission); N.M. Stat. Ann. § 69-36-7 (providing the Mining Commission with authority to enact regulations); N.M. Stat. Ann. § 68-2-16 (noting that the Forestry Division has the authority to enforce and enact rules

⁴²The Surface Owners Protection Act, N.M. Stat. Ann. §§ 70-12-1 through 70-12-10, provides protections to surface owners, but the definition of “surface owner” is limited to the “person who holds legal or equitable title . . . to the surface of the real property on which the operator has the legal right to conduct oil and gas operations.” N.M. Stat. Ann. § 70-12-3(D). Consequently, it does not apply to neighboring properties.

and regulations). The existence of a state agency with regulatory authority, however, did not lead the Tenth Circuit or the Court of Appeals of New Mexico to conclude that the Mining Act or the Conservation Act preempted their respective fields. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204-05; San Pedro Mining Corp. v. Bd. of Cnty. Comm'rs, 1996-NMCA-002, ¶ 12.

Similarly, the existence of the Oil Conservation Division, and its abilities to enact and enforce regulations, does not cause the Oil and Gas Act to preempt the entire oil-and-gas field. Instead, the correct question to ask is whether the Oil and Gas Act left room for concurrent jurisdiction with local governments. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205. To answer this question, the Court must examine whether the Oil and Gas Act addresses the issues with which local governments are traditionally concerned.⁴³ See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204. As the Court has already concluded, it does not address with which local governments are traditionally concerned. There is thus room for concurrent jurisdiction with local

⁴³The statutory provision, on which the Ms. Stephenson relied, gives further evidence that there is no field preemption. That provision states:

The [Oil Conservation Division] shall have, and is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil or gas operations in this state. It shall have jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations.

N.M. Stat. Ann. § 70-2-6. Ms. Stephenson focused on the language that says the Oil and Gas Division has “jurisdiction and authority over all matters,” and over “all persons, matters or things necessary or proper to enforce effectively the provisions of this act.” N.M. Att’y Gen. Op. 86-2, 1986 WL 220334, at *2 (quoting N.M. Stat. Ann. § 70-2-6)(emphasis omitted). The rest of the statutory provision, however, indicates that there is no field preemption. The statute states that the Oil Conservation Division has jurisdiction and authority over “matters relating to the conservation of oil and gas and the prevention of potash as a result of oil and gas operations.” N.M. Stat. Ann. § 70-2-6. This provision, thus, bolsters the argument that the Oil and Gas Act is focused on the prevention of waste and conservation of oil and gas, and not on matters in which local governments are traditionally concerned. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204.

governments. Because of this room for concurrent jurisdiction, the Oil and Gas Act does not completely preempt the field of oil-and-gas production despite Assistant Attorney General Stephenson's contrary conclusion in her advisory letter. Professor Alex Ritchie of the University of New Mexico School of Law, who teaches oil-and-gas law at the Law School, has reached a similar conclusion concerning Ms. Stephenson's advisory letter: "Finally, the New Mexico Attorney General's office authored an opinion in 1986 concluding that county regulation was preempted by the Oil and Gas Act. The opinion has little analysis and predates more current judicial precedent that trends towards concurrent jurisdiction." Alex Ritchie, On Local Fracking Bans: Policy and Preemption in New Mexico, 54 Nat. Resources J. 255, 317 n.349 (2014). Accordingly, the Ordinance is not invalidated under the field preemption doctrine.

2. The Ordinance Conflicts With State Law.

The Ordinance conflicts with New Mexico state law and must be invalidated. The Supreme Court of New Mexico first articulated the conflict preemption test in State ex rel. Coffin v. McCall, 1954-NMSC-076, 273 P.2d 642, where it stated that "the test is whether the ordinance permits an act the general law prohibits, or vice versa." 1954-NMSC-076, ¶ 9. "[G]eneral law" means "a law that applies generally throughout the state, or is of statewide concern as contrasted to local or municipal law." Apodaca v. Wilson, 1974-NMSC-071, ¶ 16, 525 P.2d 876, 881. The Supreme Court of New Mexico later clarified that "an ordinance will conflict with state law when state law specifically allows certain activities or is of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy." Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21, 326, 176 P.3d 309, 315 (quoting New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 43, 126 P.3d 1149, 1166). If a county or municipal law conflicts with state law, it must be invalidated. See Bd. of Comm'rs of Rio Arriba

Cnty. v. Greacen, 2000-NMSC-016, ¶ 17 (invalidating provisions of county ordinance that conflicted with state law). However, “an ordinance is not necessarily invalid because it provides for greater restrictions than state law.” Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205.

By banning hydrocarbon exploration-and-extraction activities, the Ordinance is antagonistic to state law, because it prohibits activities that New Mexico state law permits. New Mexico courts have generally applied the conflict preemption doctrine when local laws permit conduct that state law prohibits. For example, in Board of Commissioners of Rio Arriba County v. Greacen, the Supreme Court of New Mexico held that a county ordinance, which imposed penalties for driving under the influence (“DUI”) that were more severe than penalties that a state statute expressly limited, conflicted with state law. 2000-NMSC-016, ¶ 18. Additionally, in Protection and Advocacy System v. City of Albuquerque, 2008-NMCA-149, 195 P.3d 1, the Court of Appeals of New Mexico held that a city ordinance, which permitted a court to order an individual to take medication, conflicted with a state law that prohibited forced medications. See 2008-NMCA-149, ¶¶ 58-59.

The Court has been unable to find, and the parties have not cited, any case in which a New Mexico court found conflict preemption based on a local ordinance prohibiting conduct that state law permits. The Court, however, has been unable to find a New Mexico case in which a court considered an ordinance as extreme as this one.⁴⁴ If the Supreme Court of New Mexico’s words that “an ordinance will conflict with state law when state law specifically allows certain activities or is of such a character that local prohibitions on those activities would be inconsistent with or

⁴⁴Other states’ courts that have considered local bans on oil-and-gas extraction activities have reached differing conclusions. Compare Clouser v. City of Norman, 393 P.2d 827 (Okla. 1964)(holding that municipality could not ban all oil-and-gas drilling), and Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992)(en banc)(holding that Colorado state law preempted municipal ordinance banning oil-and-gas drilling), with Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S. 2d 714 (N.Y. App. Div. 2013)(holding that New York state law did not preempt municipal ordinance banning hydrocarbon extraction activities).

antagonistic to that state law or policy” have any meaning, Stennis v. City of Santa Fe, ¶ 21 (citation omitted)(internal quotation marks omitted), they must mean that a county cannot outright ban an activity that is highly regulated by that State and of which the State impliedly encourages. Most ordinances that New Mexico courts have upheld are merely more restrictive than state law without banning an entire area of conduct that is permitted by state law. They concern regulating the drilling and location of water wells, see Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 22; stricter punishments and increased enforcement of DUI offenses, see Inc. Cnty. of Los Alamos v. Montoya, 1989-NMCA-004, ¶ 14-16; higher minimum wage requirements, see New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 43; and stricter timber harvesting regulations, see Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205. No court has considered a ban on an activity that that State heavily regulates. Rather, each case concerns an ordinance affecting an area on which state law is silent. See New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 41 (“For example, where state law is silent on smoking in public places, that silence likely would not be deemed permission by state law such that a municipality could never restrict smoking in public places.”). For instance, state law is silent on whether a person may engage in clear cutting, and, thus, a county may ban it, even if the state has other regulations concerning timber harvesting. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205. Additionally, while state law may require businesses to pay their employees a specific minimum wage, it does not explicitly permit businesses to pay employees that amount; state law only prohibits businesses from paying less than the minimum wage -- i.e. state law is silent on whether businesses can pay at or just above minimum wage. See New Mexicans For Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 43.

State law is not silent on the exploration and extraction of hydrocarbons. The State has created an extensive statutory and regulatory scheme to regulate oil-and-gas production. See generally N.M. Stat. Ann. § 70-2-1. By extensively regulating oil-and-gas production in a manner that is intended to prevent waste, see N.M. Stat. Ann. § 70-2-2, the State has indicated that oil-and-gas extraction is permitted. This focus on preventing waste also highlights the Oil and Gas Act’s focus on the efficient production of oil and gas. Furthermore, if state law did not permit oil-and-gas production, the State would not so heavily regulate oil-and-gas production. A complete ban on oil-and-gas extraction would be “antagonistic” to state law. Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21, 326. As the Supreme Court of New Mexico has stated, state law may be “of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy.” Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21. The Oil and Gas Act is such a state law so that prohibiting all oil-and-gas extraction “would be inconsistent or antagonistic to” state law. Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21. If a complete ban on all hydrocarbon extraction activities does not constitute a county ordinance that conflicts “with state law when state law . . . is of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy,” then no county ordinance will ever fall within this standard. Stennis v. City of Santa Fe, ¶ 21 (citation omitted)(internal quotation marks omitted). Consequently, the Ordinance’s hydrocarbon-extraction ban conflicts with state law.

At the hearing, in addressing SWEPI, LP’s argument that state law preempts the entire oil-and-gas field and that a county cannot regulate oil-and-gas activities, the Defendants argued that the Ordinance does not regulate oil-and-gas extraction, because it bans all such activities. See Tr. at 145:9-19 (Haas, Court). In the field preemption context, a ban rather than a regulation

would be a distinction without a difference, because a county could not legislate in that field regardless how the legislation is characterized. For conflict preemption, however, the distinction makes a difference, and it is a difference that hurts the Defendants' position. If 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. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205 (noting that an ordinance may provide for greater restrictions than state law). As long as the regulations did not prohibit conduct that state law permits or permit conduct that state law prohibits, the regulations would likely be upheld. The Defendants decided, however, to ban all hydrocarbon extraction activities rather than enacting specific regulations. Because the Oil and Gas Act permits oil-and-gas production, such a ban conflicts with state law by prohibiting conduct that state law permits.⁴⁵

Moreover, the Ordinance's ban conflicts with state law by creating waste and not recognizing correlative property rights, which the Oil and Gas Act prohibits. As the University of New Mexico School of Law's oil-and-gas professor, Alex Ritchie, explains:

⁴⁵The Defendants argue that the Oil and Gas Commission lacks the authority to assess civil penalties for violations of the Oil and Gas Act. See Response at 16-18. They also argue that the State is not enforcing the Oil and Gas Act by punishing individuals for oil-and-gas leaks and spills. See Tr. at 92:19-21 (Haas). Even if these assertions are true, they would not affect whether the Ordinance conflicts with state law. "A county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers." Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen, 2000-NMSC-016, ¶ 5 (quoting El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs, 1976-NMSC-029, ¶ 6, 551 P.2d 1360, 1364). If a county lacks a certain authority to enact an ordinance, because the ordinance conflicts with state law, the ordinance is invalid. See Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen, 2000-NMSC-016, ¶ 17. New Mexico courts do not look to the county's justifications for enacting the unlawful ordinance; they just invalidate it. Without authority to enact an ordinance, it is invalid, regardless of a county's justifications for enacting it. The Defendants' arguments concerning the enforcement of oil-and-gas leaks and the authority of the Oil and Gas Commission are best left for the New Mexico Legislature. The Defendants are free to call on the Legislature to grant the Oil and Gas Commission greater enforcement authority, or to more vigorously enforce the Oil and Gas Act. The Defendants may not, however, circumvent state law and enact an ordinance without the authority to do so.

First, an outright ban on oil and gas results in the waste of oil and gas in every pool where such a ban is in place. Opponents might respond that the O&G Act only prohibits waste in connection with “the production or handling of crude petroleum oil or natural gas.” It follows that without production or handling (activities that are banned in Mora County), there can be no prohibited waste. Such an argument, however, fails to recognize that pools do not conform to local boundaries. Instead of drilling in an efficient pattern prescribed by reservoir characteristics, a ban requires an inefficient, irregular pattern of production from outside the local boundary in a manner that impedes the state’s interest in the efficient production of the pool.

Second, the argument that New Mexico law only governs the manner of production, but not the ability to produce at all, ignores the relationship between waste and correlative rights. A ban on production eviscerates the correlative rights of an owner by denying that owner the opportunity to produce her just and equitable share, or any share. While all manner of federal and state laws that protect the environment may impair correlative rights, allowing a local government to ban oil and gas operations fails the basic preemption test. It arguably goes even further by prohibiting not just something that the law allows, but something that an entire agency is bound by state law to protect. A local ban also discriminates against the owners of a common pool with mineral interests inside the boundaries of the locality as owners outside the boundary would effectively have the right to drain the entire pool. Further, because an owner has such an opportunity to produce under state law, it follows that a prohibition on fracking, a lawful method required for the extraction of oil and gas in shale and other tight formations, also wastes oil and gas that cannot be produced by other methods, thereby impairing correlative rights.

A ban allows for no permit, variance, or other procedure, but simply declares illegal an act that New Mexico law permits and comprehensively regulates, and that legislative history declares critically important to the state and its economy.

Ritchie, supra at 310-11 (footnotes omitted). Accordingly, the Ordinance’s ban conflicts with state law.

Because certain provisions in the Ordinance conflict with state law, they must be invalidated. See Bd. of Comm’rs of Rio Arriba Cnty. v. Greacen, 2000-NMSC-016, ¶ 17 (invalidating provisions of county ordinance that conflicted with state law). These provisions include Sections 5.1, 5.2, 5.3, 5.4, and 8.5. These provisions provide:

Section 5.1: It shall be unlawful for any corporation to engage in the extraction of oil, natural gas, or other hydrocarbons within Mora County.

Section 5.2: It shall be unlawful for any corporation to engage in the extraction of water from any surface or subsurface source within Mora County for use in the extraction of subsurface oil, natural gas, or other hydrocarbons, or for any director, officer, owner, or manager of a corporation to use a corporation to extract water from any surface or subsurface source, within Mora County, for use in the extraction of subsurface oil or natural gas or other hydrocarbons. It shall be unlawful for a corporation to import water or any other substance, including but not limited to, propane, sand, and other substances used in the extraction of oil, natural gas, or other hydrocarbons, into Mora County for use in the extraction of subsurface oil, natural gas, or other hydrocarbons; or for any director, officer, owner, or manager of a corporation to do so.

Section 5.3: It shall be unlawful for any corporation, or any director, officer, owner, or manager of a corporation to use a corporation to deposit, store, transport or process waste water, “produced” water, “frack” water, brine or other materials, chemicals or by-products used in the extraction of oil, natural gas, or other hydrocarbons, into the land, air or waters within Mora County.

Section 5.4: It shall be unlawful for any corporation, or any director, officer, owner, or manager of a corporation to use a corporation to construct or maintain infrastructure related to the extraction of oil, natural gas, or other hydrocarbons within Mora County. “Infrastructure” shall include, but not be limited to, pipelines or other vehicles of conveyance of oil, natural gas, or other hydrocarbons, and any ponds or other containments used for wastewater, “frack” water, or other materials used during the process of oil, gas, or other hydrocarbon extraction.

.....

Section 8.5. Reinstatement of Moratorium on Oil and Gas Extraction. In the event that this ordinance is overturned or nullified, for any reason, a moratorium on the extraction of oil and gas within the County of Mora shall become effective on the date that this ordinance becomes inactive. That temporary moratorium shall have a duration of no more than six months, during which the Board of County Commissioners shall adopt another ordinance which permanently bans hydrocarbon extraction within the County of Mora.

Ordinance §§ 5.1-5.4, at 4; id. § 8.5, at 6.