States, Local Government Battle for Control over Fracking

By Rebekah Fitzgerald [1]
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While the country has been enjoying a surge in domestic energy production due to hydraulic fracturing, it has led to more development of wells close to homes and, in some cases, within city limits. Some cities are pushing back.

Residents of the city of Denton, Texas, in November 2014 passed a ballot to ban hydraulic fracturing—often called fracking—within city limits, making it the first major Texas city to do so and igniting a public policy debate.

In Texas, state law gives the railroad commission authority and jurisdiction over oil and gas wells. State law, however, also gives local governments the power to impose reasonable health and safety regulations—a specific concern cited in the ballot initiative language for the ban.

State verses local control is not a new issue, but it is an important one for the nation’s top oil and gas producer and is likely to be settled by the courts or the state legislature.

This session, the Texas legislature, has four bills concerning who has ultimate authority over where fracking can take place and they all underline the position state regulation pre-empt local regulations.

“State regulators are the ones with the expertise, knowledge and experience to make the technical decisions related to oil and gas drilling,” said Carol Booth, communications manager for the Interstate Oil and Gas Compact Commission, a multistate agency that advocates for states’ rights to govern petroleum issues within their borders.

“The Texas railroad commission has the geologists, engineers—all the necessary technical expertise—who know what to look for when determining an area is safe to drill and geologically sound,” said Booth. “The locals don’t usually have that background or expertise.”

The legality of the ban is being litigated in Texas courts. Multiple parties have filed suit, including the Texas General Land Office, which is arguing that due to the current economics of oil and gas, the ban on fracking amounts to a ban on all drilling, therefore denying mineral owners their property rights.

This isn’t the first time state courts have weighed in on this issue. Similar bans across the country have been met with varying responses from courts.

The Ohio Supreme Court in February ruled by a one-vote margin the state has “exclusive authority” and that cities and counties cannot ban or regulate fracking through zoning ordinances. Conversely, bans have been upheld in New York, which now has a statewide prohibition on hydraulic fracturing.
Colorado communities have had three bans struck down by district court judges and two remain in effect, in Boulder and Broomfield. Courts in West Virginia have ruled state regulation pre-empts local regulation and the state is responsible for all regulation related to exploration, development, production, storage and recovery of oil and gas.

A Pennsylvania court in 2013 said local jurisdictions can regulate hydraulic fracturing, but not outright ban it.

Litigation is also pending on a recent local fracking prohibition in California.

In January, the first federal court also weighed in on the topic. The U.S. District Court for New Mexico held that an ordinance enacted in 2013 by Mora County prohibiting the extraction of oil and gas was pre-empted by New Mexico state law and struck down the county’s ordinance.

There is strong division on the topic with strong opinions on each side, but Booth said the best thing people can do regarding oil and gas development—especially in a community—is communicate.

“Communication lines need to be open so people can understand what is going on,” she said. “Clearly communicating the accurate information and addressing questions is the most important action that needs to happen when it comes to developing oil and gas resources.”

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