

Colorado Supreme Court Affirms Preemption of Fracking Bans

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On May 2, 2016, the Colorado Supreme Court issued two anticipated opinions that are important to the oil and gas industry in Colorado, and could be precedent for similar efforts pending in a number of states where local governmental entities are trying to rein in fracking. Specifically, the Court affirmed district court decisions that held fracking bans implemented by two Colorado cities, Longmont and Fort Collins, to be preempted by state law and therefore invalid and unenforceable.

The rulings in *City of Longmont et al. v. Colo. Oil & Gas Ass'n et al.* and *City of Ft. Collins v. Colo. Oil & Gas Ass'n* overturn a patchwork of city and county anti-fracking ordinances in Colorado that have made drilling difficult. The rulings will have undoubtedly widespread effects in Colorado, where several Colorado cities and one Colorado county have enacted bans or moratoria on fracking within their limits, including the cities of Fort Collins, Broomfield, Lafayette, Longmont and Boulder, as well as Boulder County.

Notably, the Court signaled that even a temporary ban or moratorium on fracking, such as that passed by Fort Collins, is likely to be preempted by Colorado state law. This could undermine even more limited local efforts to delay oil and gas development. Fort Collins had passed a five-year moratorium on fracking on the basis that it needed time to study the impact of fracking on property values and human health.¹ Longmont went further and passed a permanent ban out of concern for “local health, local safety, the local environment, local property values, the local social fabric, and the resources of the local government.”² In the Longmont case, TOP Operating Company, a local oil and gas company, and the Colorado Oil and Gas Conservation Commission (“**COGCC**”) joined the case along with the Colorado Oil and Gas Association as plaintiffs. Both Longmont and Fort Collins are “home rule” cities, or cities granted broad but specific self-governing authority by the Colorado Constitution.³

The Colorado Supreme Court cited “well-established preemption principles” in finding both bans to be operationally preempted by state law.⁴ While COGCC Rule 201 allows local governments to regulate land use related to oil and gas operations, that regulation is only permissibly implemented where it is not in operational conflict with the Colorado Oil and Gas Conservation Act or COGCC regulations.⁵

The Court concluded that the fracking bans implicated a matter of mixed state and local concern, and rejected arguments that changes in technology have reduced the need for uniform state law. The Court stated that “the record before us demonstrates that many operators have determined that fracking is necessary to ensure the productive recovery of oil and gas. For these operators, banning fracking would result in less than optimal recovery and a corresponding waste of oil and gas.”⁶ Further, the Court stated that “it appears undisputed that fracking is now standard for virtually all oil and gas wells in Colorado,” and found persuasive the fact that COGCC’s “rules and regulations comprehensively regulate the fracking process.”⁷

In the case of Fort Collins' five-year ban, the Court rejected arguments that a temporary moratorium is safe from preemption: "Fort Collins's moratorium freezes a practice that, . . . has come to be prevalent across the state."⁸ The Court declined to opine on a moratorium of "materially shorter duration."⁹ But the principle seems to impose a heavier burden on demonstrating the rational need for a temporary ban.

The full opinions are available on the [Colorado Supreme Court's website](#).

If your company is encountering resistance in obtaining local government permits or approvals to initiate or continue oil and gas development, these decisions should provide powerful authority for the local agencies to promptly implement what is now the law in Colorado. Our firm has experience in working with local authorities to facilitate your operations, and we can be available as needed to help in the process.

If you have any questions, please contact one of the lawyers listed below.

¹ APPELLANT CITY OF FORT COLLINS' OPENING BRIEF at 2, *City of Ft. Collins v. COGA*, No. 2014CA001991 (Colo. Ct. App. Feb. 6, 2015).

² OPENING BRIEF OF DEFENDANT-APPELLANT CITY OF LONGMONT at 19, *City of Longmont v. Colo. Oil and Gas Assoc.*, No. 2013CV63 (Colo. Ct. App. Jan. 15, 2015).

³ Colo. Const. art. XX, § 6.

⁴ *City of Longmont et al. v. Colo. Oil & Gas Ass'n et al.*, 2016 CO 29 at 3 (May 2, 2016) [*Longmont*]; *City of Ft. Collins v. Colo. Oil & Gas Ass'n*, 2016 CO 28 at 2 (May 2, 2016) [*Ft. Collins*].

⁵ 2 Colo. Code & Regs. §§ 404-1:201.

⁶ *Longmont* at 23 (May 2, 2016).

⁷ *Ft. Collins* at 29; see also *Longmont* at 53.

⁸ *Ft. Collins* at 34.

⁹ *Ft. Collins* at 40.