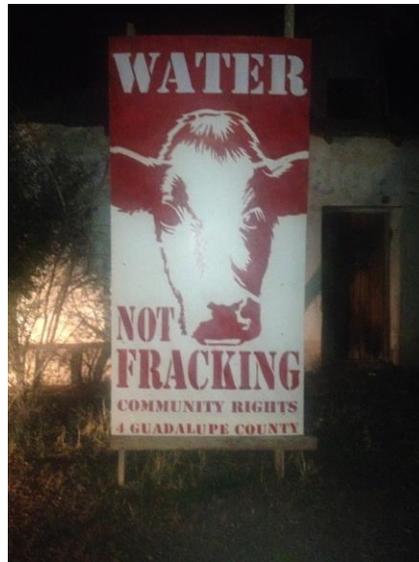


Fracking Bans May Impact Ranchers

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Mora County, New Mexico, population 4,700, recently passed a ban on oil and gas production in the county that has pitted neighbors against each other.

Signs across the county contain a photo of a cow and read either “Farming Not Fracking” or “Water Not Fracking.”



Supporters of the ban worry that oil and gas production will harm groundwater that is currently used to water livestock on cattle ranches, the major source of income for Mora County residents.

Not surprisingly, the ban has been challenged in court, by area mineral owners who wish to lease their mineral rights to oil and gas companies, and by oil and gas companies who want the right to lease these mineral rights and produce oil and gas.

This is a complicated issue and one where cattle ranchers may be found on both sides of the debate.

Local fracking bans have been in the news across the country throughout the last year. Two New York towns passed fracking bans which were upheld by the state's highest appellate court. In November, voters in Denton, Texas, passed a ban on fracking within the city limits. A lawsuit was filed by the Texas Oil and Gas Association within 24 hours. A court ruling in Pennsylvania that prohibited oil and gas production on a farm located near a residential area angered farmers and delighted neighbors.

In light of this, it is important that landowners and mineral owners understand the issues currently being litigated across the country and consider the effect this litigation could have on their rights and their livelihood.

Fracking refers to an oil and gas production technique where fluid (predominantly water) and proppants (usually sand) are injected under high pressure into the wellbore, creating small fractures in the geologic formation that allows oil and gas to be more easily obtained. Fracking has been used in the oil and gas industry for decades but has gained commercial popularity over the last several years, particularly in areas of shale gas plays. This process increases the productivity of wells, allowing production from formations and areas once not obtainable, and led to the oil boom currently ongoing across much of the U.S.

This technique, however, is not without critics. Opponents argue that fracking is dangerous, poses potential contamination of drinking water supplies and may cause earthquakes.

In light of this opposition, several local municipalities and counties across the nation have passed laws prohibiting the use of fracking within their jurisdiction. These laws, however, have created extensive controversy.

There are three common legal challenges to local fracking bans: taking of private property without just compensation, violation of due process and pre-emption by state law.

- *Takings claims* – Mineral owners often claim that bans on oil and gas production are a taking of their private property right in the mineral estate. Pursuant to the U.S. Constitution, where a taking of private property occurs, just compensation must be paid to the property owner. Mineral owners argue that by prohibiting the production of their

mineral estate, the law deprives them of all economic value of their property and, therefore, just compensation must be paid.

- *Due process claims* – The due process clause of the Fourteenth Amendment prohibits a state from depriving a person of property without due process of law. Challengers of local fracking bans argue that these bans deprive mineral owners of their private-property right to lease their mineral estate without offering the mineral owners any adequate legal remedy to prevent such harm.
- *Pre-emption claims* – Oftentimes challenges to local fracking laws rest upon the argument that control over oil and gas production was placed in the hands of state regulators and, as such, state regulations trump contrary local laws. The theory behind this legal challenge is that where state regulators have not enacted bans on oil and gas production, local laws doing so are contrary to the state-level laws regarding oil and gas. This argument was rejected by the New York appellate court but was recently accepted by trial court judges in Colorado.

Cattle ranchers should be aware of this ongoing controversy and understand how it may impact their operations. Oftentimes, surface owners are concerned with the impact of oil and gas production on pastureland and the use of fresh groundwater in the production process.

Conversely, ranchers who also own mineral interests may be concerned with the impact bans could have on their ability to profit from mineral leases with oil and gas companies. It is a complex issue of which ranchers should be aware.