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

MARY L. VERMILLION, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Case No. 1:13-cv-01095 CEG/GBW
v.	)	
	)	
MORA COUNTY, NEW MEXICO; *et al.*	)	
	)	
Defendants.	)	

WESTERN ENERGY ALLIANCE'S AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

The Western Energy Alliance ("Alliance") has no parent corporation and no publicly held corporation owns more than 10% of its stock.

STANDARD OF REVIEW

Interpretation of a county ordinance is a question of law that is reviewed *de novo*. Alba v. Peoples Energy Res. Corp., 94 P.3d 822, 826 (N.M. App. 2004).

STATEMENT OF INTEREST

Western Energy Alliance is a nonprofit trade association representing more than 480 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members develop these resources throughout the West, including in New Mexico.

Amici are concerned by Mora County Ordinance, Mora County Ordinance 2013-01 (hereinafter "Ordinance" or "Ordinance 2013-01"). The Ordinance oversteps jurisdictional bounds, improperly usurps state authority and undermines the legislative, state-wide program that provides uniform, consistent guidance and regulatory oversight for responsible, safe and effective oil and natural gas development. Regulation of hydraulic fracturing in development of oil and natural gas resources is squarely within the purview of state jurisdiction.

The Alliance respectfully submits the foregoing brief to protect the economic and property interests of land and mineral owners in Mora County, support the state in providing a uniform and robust regulatory climate, protect the rights of entities and individuals with both current and future interests in oil and gas development and production, and assist the Court in

understanding factual and legal issues that impact Alliance members and the people of New Mexico.

I. INTRODUCTION

This case centers on whether Mora County Ordinance 2013-01, a broadly written anti-oil and gas development ordinance enacted by the Mora County Commission, was lawfully issued. The Ordinance purports to ban all oil and natural gas exploration and development in Mora County along with all ancillary activities such as water use and disposal, transportation of these resources, and related activities. The stated targets of the Ordinance are corporations and other business entities along with their individual directors, managers, and officers, but it also affects individual property owners.[1] The Ordinance largely supersedes previous ordinances and declares an intent to preempt state and federal law.

The Ordinance makes no distinction between public and private lands,[2] between municipal and non-municipal areas,[3] between the provisions pertaining to infrastructure, water, or transportation limitations apart from purpose or use,[4] and also singles out "corporations" for application of the laws.[5] These provisions raise serious complications with the New Mexico and

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[1] See Footnote 5, *infra.*

[2] The county lacks the authority to enforce the ordinance on state-owned lands, as even its express grant of zoning authority does not extend to such lands. County of Santa Fe v. Milagro Wireless, LLC, 32 P.3d 214, 216 (N.M. 2001) (county zoning ordinances cannot override the state's authority to regulate the use of its own land).

[3] N.M. STAT. ANN. § 4-37-2 limits the application of ordinances to areas outside the limits of any incorporated municipality. Wagon Mound, one of three villages within Mora County, is incorporated. The Ordinance is silent with respect to the independence of Wagon Mound.

[4] For example, the prohibitions bar the use of infrastructure in connection with the production of oil, natural gas, or other hydrocarbons. These prohibitions contain no stated connection to nuisances, weight or capacity limitations, or other criteria.

[5] This is in violation the Equal Protection Clauses found under U.S. CONST. art. V, and N.M. CONST. art. II, § 18. For example, Mora County's Ordinance specifically bans corporations from

U.S. Constitutions as well as New Mexico Statutes. Each of these infirmities are fatal to the Ordinance.

Issues of authority and preemption are primarily addressed in this brief. In summary, Mora County, an entity whose powers must be expressly granted by the State, lacks the power to enact Ordinance 2013-01. Oil and natural gas development is a matter of state-wide concern and New Mexico fully occupies this regulatory area, preempting the Ordinance. The Ordinance is preempted both because the State has clearly indicated an intention to occupy the field and because Mora County's Ordinance directly conflicts with the State statutory and regulatory scheme. The Ordinance also violates the New Mexico and United States Equal Protection clauses. For these reasons, the Ordinance is invalid and should be declared void *ab initio*.

II. ARGUMENT

A. Mora County Lacks Authority to Enact the Ordinance

Ordinance 2013-01 exceeds Mora County's authority to legislate. Counties are purely creations of the State and are dependent upon the state legislature for their power to act. Allstate Leasing Corp. v. Bd. of County Comm'rs, 450 F.2d 26, 28 (10th Cir. 1971) ("A county in New Mexico is a creation of state and derives all of its powers therefrom."). Counties "are subject to

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engaging in the extraction of oil, natural gas, and hydrocarbons, but places no such limit on individuals. ORDINANCE 2013-01, § 5.1. Presumably, a family ranch constituting some form of entity other than an individual would be precluded from developing its private oil and gas mineral estate. By limiting the right to produce oil and gas to individuals to the exclusion of all others, the Ordinance both fails to treat similarly situated entities and persons equally. There is no rational basis for this distinction and it also violates New Mexico's constitutional guaranty against the granting of exclusive privileges to any person or corporation under the Privileges and Immunities clause. N.M. CONST. art. IV, § 26 ("The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state.).

almost unlimited legislative control" and county ordinances must be consistent with state laws. CJS COUNTIES § 74. See also Stephenson v. Bartlett, 562 S.E.2d 377, 385 (N.C. 2002) ("Counties are creatures of the General Assembly and serve as agents and instrumentalities of State government.").

Mora County does not enjoy the benefits of autonomy granted to municipalities that have adopted home rule charters. Mora County's powers are only contiguous with non-home-rule municipalities. See City of Albuquerque v. New Mexico Pub. Regulation Comm'n, 79 P.3d 297, 300 (N.M. 2003) (contrasting powers of home rule with non-home rule municipality). Under N.M. STAT. ANN. § 4-37-1, the legislature provided:

> All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in this grant of powers to the counties are those powers 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. The board of county commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties.

As such, county powers are limited to express grants of authority and are not without limits.

In 1970, New Mexico established the right of citizens of a municipality to adopt a home rule charter. State ex rel. Haynes v. Bonem, 845 P.2d 150, 153-54 (N.M. 1992); N.M. CONST. art. X, § 6. "A municipality adopting such a charter becomes a 'home rule municipality' and may then 'exercise all legislative powers and perform all functions not expressly denied by general law or charter.'" N.M. CONST. art. X, § 6(D) . Significant autonomy is conferred on home rule municipalities, such as: (1) the blanket authority to act as long as the legislature has not expressly denied that authority, and (2) a limited form of autonomy from state interference in

matters of local concern. Id. at 154 (1992); see also New Mexicans for Free Enter. v. Santa Fe, 126 P.3d 1149, 1158 (N.M. App. 2005). "Thus, home rule municipalities do not look to the legislature for a grant of power to legislate, but only look to statutes to determine if any express limitations have been placed on that power." Bonem, 845 P.2d at 154 (citing Apodaca v. Wilson, 525 P.2d 876, 881 (N.M. 1974)).

The powers of non-home rule municipalities and counties are limited, instead depending upon the legislature for their power to act:

> … By contrast [with a home rule municipality], "[i]t is well settled that municipalities have no inherent right to exercise police power; their right must derive from authority granted by the State." Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 142, 646 P.2d 565, 569 (1982). Similarly, "[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." El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs, 551 P.2d 1360, 1364 (1976); see N.M. STAT. ANN. 1978, § 4-37-1 (1975) ("All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties.").

City of Albuquerque v. New Mexico Pub. Regulation Comm'n, 79 P.3d 297, 300 (N.M. 2003). Thus, for New Mexico counties, there is no independent source of authority to enact law beyond that expressly granted by the State. Bd. of County Comm'rs v. Benavidez, 292 P.3d 482, 484 (N.M. App. 2012) (beyond county authority to restrict freely roaming livestock in unincorporated or open areas of their jurisdictions where no intent by the Legislature evidenced).

In the instant case, the New Mexico Legislature has not granted or delegated authority that would enable Mora County to enact Ordinance 2013-01. For example, ORDINANCE 2013-01 purports, among other things, to:

- Prohibit any corporation from engaging "in the extraction of oil, natural gas, or other hydrocarbons within Mora County." ORDINANCE 2013-01, § 5.1.
- Prohibit any corporation or its directors, officers, owners or managers, from engaging "in the extraction of water from any surface or subsurface source within Mora County for use in the extraction of oil, natural gas, or other hydrocarbons…" ORDINANCE 2013-01, § 5.2.
- Prohibit any corporation or its directors, officers, owners or managers, from importing "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." ORDINANCE 2013-01, § 5.2.
- Prohibit any corporation or its directors, officers, owners or managers, from using 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." ORDINANCE 2013-01, § 5.3.
- Prohibit any corporation or its directors, officers, owners or managers, from using 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." ORDINANCE 2013-01, § 5.4.

- Divest corporations of their Constitutional rights under both the U.S. Constitution and New Mexico Constitution. ORDINANCE 2013-01, § 5.5.
- Declare that the County Ordinance preempts any state or federal law or permit that conflict with its provisions. ORDINANCE 2013-01, §§ 5.6-7. This extends to the U.S. and New Mexico Constitutions as well. ORDINANCE 2013-01, § 5.8.
- Empower the citizens of Mora County to enforce the provisions of the Ordinance. ORDINANCE 2013-01, § 8.3.

None of these actions are within the powers granted to Mora County by the State.

While a county has certain zoning powers, these powers are strictly cabined. For example, a county may limit the height of structures, determine the percentage of a lot that may be occupied, set open space requirements, zone for population density, and determine the location and use of buildings, structures and land for trade, industry, residence or other purposes. N.M. STAT. ANN. § 3-21-1(A). A County also may divide the territory under its jurisdiction into districts, regulate or restrict the construction, repair or use of buildings, structures or land, declare by ordinance that a village, community, neighborhood or district is a "traditional historic community," and accommodate multigenerational housing by creating a mechanism to allow up to two kitchens within a single-family zoning district. N.M. STAT. ANN. § 3-21-1(B, D-F). The Mora County Ordinance is not directed to issues traditionally of local concern such as traffic

congestion, zoning, or subdivision platting. See generally Bd. of Comm'rs v. Graecen, 3 P.3d 672, 678 (N.M. 2000) (discussing power to adopt local traffic ordinances that do not conflict with state law); N.M. STAT. ANN. § 3-21-1(zoning); N.M. STAT. ANN. § 47-6-9 to 11 (subdivisions); cf. San Pedro Min. Corp. v. Bd. of County Comm'rs, 909 P.2d 754, 759 (N.M. App. 1995); but see Town of Frederick v. North American Res. Co., 60 P.3d 758, 761-62 (Colo. App. 2002) (setback, noise abatement, and visual impact provisions of municipal ordinance prohibiting drilling of oil and gas wells within limits preempted on basis of operational conflict unless special use permit first obtained). The scope of the Ordinance is patently broader and far exceeds the scope of authority afforded to New Mexico counties by the State. Mora County lacks the power to: ban oil and gas development and associated activities, declare its Ordinance paramount, declare that corporate rights are nonexistent, or bind future commissions by limiting the ability to repeal the ordinance.[6] ORDINANCE 2013-01, §§ 5.5, 5.8. Mora County Ordinance 2013-01 is void *ab initio*.

B. Mora County Ordinance 2013-01 is Preempted by New Mexico Law

Assuming, *arguendo*, that Mora County was empowered by the legislature to enact the Ordinance, the Ordinance cannot stand if it is inconsistent with or preempted by state law. "[U]nder New Mexico law, there are three ways a state statute can preempt a local ordinance: 1) expressly, because the statute contains language stating that it preempts local ordinances; 2) impliedly, because the ordinance and the state statute conflict; or 3) impliedly, because the statute demonstrates an intent to occupy the entire field." Rancho Lobo, Ltd. v. Devargas, 303

[6] In addition, the Ordinance provisions restraining the ability to repeal the Ordinance also is in conflict with N.M. STAT. ANN. § 4-37-6, which provides that an existing county ordinance shall be amended or repealed by a majority vote.

F.3d 1195, 1201 (10th Cir. (N.M.) 2002) (internal citations omitted); accord San Pedro, 909 P.2d at 758 (N.M. App. 1995) ("A local government is presumed to retain the power to exercise its normal authority over an activity, so the intention of the [L]egislature to preempt local control must be clearly stated if express preemption is to result.") While the New Mexico and Oil and Gas Act, N.M. STAT. ANN. § 70-1-1 et seq., does not expressly prohibit counties from banning the development and production of oil and natural gas, the Ordinance is preempted both because the State occupies the field and because the provisions of the Ordinance directly conflict with New Mexico statutes.

1. New Mexico State Law Preempts the Mora County Ordinance Because the State Occupies the Field

By enacting the New Mexico Oil and Gas Act in 1978, the legislature expressly granted the New Mexico Oil Conservation Division ("NMOCD") and the New Mexico Oil Conservation Commission (NMOCC) "jurisdiction and authority over all matters relating to the conservation of oil and gas." N.M. STAT. ANN. § 70-2-6. The relevant statute provides that:

> A. The 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.
>
> B. The commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law. In addition, any hearing on any matter may be held before the commission if the division director, in his discretion, determines that the commission shall hear the matter.

Id. New Mexico provides a comprehensive scheme for state regulation of oil and gas exploration, development, extraction, storage, transmission, and related activities. The New Mexico legislature evidenced an intent to completely occupy the field. No authority to regulate is granted to local government.

The purpose of the Act is to broadly protect oil and gas reserves and ensure their beneficial use. The Act focuses particularly on "two major duties" the avoidance of "waste" and protection of correlative rights, each of which relate to development of oil and natural gas. Santa Fe Exploration Co. v. Oil Conservation Comm'n, 835 P.2d 819, 828 (N.M. 1992); see also Continental Oil Co. v. Oil Conservation Comm'n, 373 P.2d 809, 814 (N.M. 1962) (commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico). Section 70-2-11(A) empowers the NMOCD and NMOCC "to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." By enacting a law of uniform application, New Mexico has manifested a clear intent to preempt the field.

In Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992), the Colorado Supreme Court considered a similar ban on oil and natural gas production activities and whether the field was impliedly preempted by the Colorado Oil and Gas Commission. The Colorado Supreme Court found persuasive that the regulation of oil and gas was traditionally a matter of state rather than local control dating back to 1915. Id. at 1068. The Court found that "the state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits." Bd. of

County Comm'rs v. Bowen/Edwards Assoc., Inc., 830 P.2d 1045 (Colo. 1992). See also Colorado Oil and Gas Ass'n v. Longmont, 2014 WL 3690665, *2+ (Trial Order) (Colo. Dist. Ct. Jul 24, 2014) (finding on summary judgment that the City of Longmont's ordinance conflicted with the Oil and Gas Conservation Commission's authority to regulate oil and gas activity where it prohibited hydraulic fracturing and the storage and disposal of hydraulic fracturing waste which are permitted by the state); but see Anschutz Exploration Corp. v. Dryden, 940 N.Y.S.2d 458 (N.Y.Supp. 2012) aff'd sub. nom Wallach v. Dryden, 16 N.E.3d 1188 (N.Y. 2014) (finding local ban on hydraulic fracturing was not preempted by state law); Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855 (Pa. 2009) (finding oil and gas Act did not preempt local zoning ordinance but emphasizing that the holding should not be understood to imply that any and all regulation of oil and gas development under the Ordinance would be permissible simply because it is zoning legislation enacted pursuant to the MPC).

Like Colorado, New Mexico's Oil Conservation Commission has been in place for over 60 years and exercises complete control over oil and gas exploration and development activities. Humble Oil & Ref. Co. v. United States, 198 F.2d 753, 754 (10th Cir. 1952) ("New Mexico has enacted a comprehensive oil conservation law for the prevention of waste of oil and gas and to protect correlative rights therein."). Under the New Mexico Administrative Code, the Oil Conservation Division regulates among other things, permitting, production, waste disposal, well spacing and location, and treatment of produced water. See N.M. ADMIN. CODE § 19.15.2 et seq. (2008). New Mexico's Water Quality Control Commission also regulates water discharge and any contaminants under New Mexico's Water Quality Act. N.M. STAT. ANN. § 74-6-1 et seq. (1978); N.M. ADMIN. CODE § 20-6-2 et seq. (2001). The scheme is highly detailed and

comprehensive. See generally Hartman v. Texaco Inc., 937 P.2d 979, 984 (N.M. App. 1997) ("… in New Mexico, oil conservation is carefully regulated by statute and administrative procedure … This is an area of paramount public concern where the legislature and the appropriate administrative agency have spoken in some detail.") (internal citations omitted). As the regulation of oil and gas impacts the public interest in the State's oil and gas reserves, impacts the entire State, and calls for uniformity in application of the laws, the State has chosen to occupy this field and the Mora County Ordinance is preempted.

2. New Mexico State Law Preempts the Mora County Ordinance Because they Conflict

A county's ability to regulate in an area may be preempted due to a conflict between the local body's ordinances and the contents, purposes, or pervasive scheme of the statute. San Pedro Min. Corp. v. Bd. of County Comm'rs, 909 P.2d 754, 758 (N.M. App. 1995); see also Titus v. Albuquerque, 252 P.3d 780, 790 (N.M. App. 2011); cf. Stennis v. Santa Fe, 176 P.3d 309, 316 (N.M. 2008) (home rule municipality's ordinance was not preempted by state law where ordinance for well permits was less restrictive than state statute and did not conflict).

The New Mexico Supreme Court articulated the test for identifying a conflict between state law and a local ordinance as "whether the ordinance permits an act the general law prohibits, or vice versa." Graecen, 3 P.3d at 678 (quoting State ex rel. Coffin v. McCall, 273 P.2d 642, 644 (1954)); see also Bd. of County Comm'rs v. Benavidez, 292 P.3d 482, 484 (N.M. App. 2012); New Mexicans for Free Enter. v. Santa Fe, 126 P.3d 1149 (N.M. App. 2005); City of Hobbs v. Biswell, 473 P.2d 917, 922 (N.M. App. 1970). If an ordinance is stricter than state law, "The analysis to apply is whether the stricter requirements of the ordinance conflict with state law..." Graecen, 3 P.3d at 678 (quoting Gould v. Santa Fe County, 37 P.3d 122 (N.M. App.

2001). An ordinance that is "antagonistic" to state law rather than complementary to it is invalid. Id. See, e.g., Bd. of County Comm'rs v. Benavidez, 292 P.3d 482, 484 (N.M. App. 2012) (county ordinance restricting free range of animals conflicted with state statute).

The Mora County Ordinance plainly prohibits a number of activities that are expressly allowed by New Mexico law.

First, New Mexico law plainly allows oil and gas drilling and hydraulic fracturing throughout the State. See N.M. STAT. ANN. Chapter 70, art. 1, 2; N.M. ADMIN. CODE §§ 19.15.16 to 22. . The permitting, administration, and regulation of these activities are governed by the Oil and Gas Division in extensive detail. N.M. ADMIN. CODE §§ 19.15.1 et seq. New Mexico law plainly allows for the regulated activities that Mora County purports to ban. Mora County's Ordinance prohibits any corporation from engaging "in the extraction of oil, natural gas, or other hydrocarbons within Mora County." ORDINANCE 2013-01, § 5.1. A facial ban on activities that are permitted under New Mexico's laws is a plain conflict and also violates the Equal Protection clauses.

Second, a complete ban is impermissible because it directly conflicts with New Mexico's interest in efficient production and development of oil and gas resources in a manner preventing waste and protecting the rights of property owners and producers. N.M. STAT. ANN. § 70-2-6; N.M. ADMIN. CODE § 19.15.3.3 (the Commission has "jurisdiction and authority over all matters relating to the conservation of oil and gas …"). The Ordinance is particularly antithetical to one of the primary purposes of New Mexico's Oil and Gas Act: to protect correlative rights, i.e., the competing rights of oil and natural gas mineral and lease owners. By banning the recovery of

these resources, there is no means to protect the correlative rights of competing owners and interests.

In Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992), the Colorado Supreme Court examined and rejected similar local ordinances that also purported to ban oil and gas development in its entirety. Greeley Ordinance No. 89 was approved by the electorate of Greeley and prohibited "[t]he drilling of any well for the purpose of exploration or production of any oil or gas or other hydrocarbons within the corporate limits of the [c]ity." GREELEY ORDINANCE NO. 89, §§ 1 & 2 (1985);. Voss, 830 P.2d at 1063. The Greeley City Council enacted a nearly identical ordinance. Lundvall Brothers, Inc., a Colorado corporation engaged in oil and gas development, had obtained a permit from the city to drill four gas wells on property located in a multi-family residential zone in Greeley several months before the ordinances were enacted. Lundvall Brothers challenged the ordinance on state preemption and other grounds. The Colorado Supreme Court looked at four factors: "whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation." Voss, 830 P.2d at 1066-67.

In its analysis, the Court specifically considered that the drilling ban would prevent the productive recovery of oil and natural gas resources. Because "[o]il and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern… certain drilling methods are necessary for the productive recovery of these resources.… It is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and

because each well will only drain a portion of the pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas." Accordingly, by banning drilling in city limits, Greeley's ordinance conflicted "with the Oil and Gas Conservation Commission's express authority to divide a pool of oil or gas into drilling units and to limit the production of the pool so as to prevent waste and to protect the correlative rights of owners and producers in the common source or pool to a fair and equitable share of production profits." Id. at 1067. The Court found that "the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within the city limits." Id. The ban also had the effect of increasing production costs by limiting production to only one portion of a pool outside the city limits, "with the result that the total drilling operation may be economically unfeasible." Id. This impacted the ability of *nonresident* owners of oil and gas interests in pools below both the city and land outside the city to obtain an equitable share of production profits. If a home rule city may not ban development of oil and gas, then *a fortiori,* a non-home rule county may not enact such a ban.

The same factors analytical factors apply in evaluating the Mora County Ordinance. See, e.g., Santa Fe Exploration Co. v. Oil Conservation Comm'n, 835 P.2d 819, 828-29 (N.M. 1992) (upholding NMOCC's authority to place production penalty on pool located beneath three tracts of land in order to protect correlative rights of other lease owners against depletion of pool by a surface well); N.M. STAT. ANN. § 70-2-6 (11-14). By banning hydraulic fracking activities county-wide, a less than optimal recovery and a corresponding waste of oil and gas will

necessarily result. See generally N.M. ADMIN. CODE §§ 19.15.12 to13 et seq. (classifying and defining pools and regulating the determined limits of each pool; compulsory pooling).

Third, the New Mexico Oil and Gas Commission and Division are specifically directed to allocate and distribute the allowable production among the fields within the State. The provision states:

> Whenever, to prevent waste, the division limits the total amount of crude petroleum oil to be produced in this state, it shall allocate or distribute the allowable productions among the fields of the state. Such allocation or distribution among the fields of the state shall be made on a reasonable basis, giving, if reasonable under all circumstances, to each pool with small wells of settled production, an allowable production which will prevent a general premature abandonment of the wells in the field.

N.M. STAT. ANN. § 70-2-15. By banning all production activities in Mora County, the Ordinance irreconcilably conflicts with the State's authority to allocate production to any fields within Mora County to "prevent a general premature abandonment of the wells in the field." Id.

Fourth, the use of water has long been a common feature in oil and natural gas production. Regulations governing the disposal of produced water and regulation of impoundments and injection wells make this evident. N.M. ADMIN. CODE §§ 19.15.17.12(F), 19.15.35.13, 19.15.36.17. In fact, N.M. ADMIN. CODE § 70-2-12.1 specifically provides that "No permit shall be required from the state engineer for the disposition of produced water in accordance with rules promulgated pursuant to N.M. STAT. ANN. § 70-2-12 (1978) by the oil conservation division of the energy, minerals and natural resources department." The statute and relevant regulations clearly establish the conditions under which the use and disposal of water in oil and natural gas recovery may be accomplished. The State is specifically empowered "to regulate the disposition of water produced or used in connection with the drilling for or

producing of oil or gas or both and to direct surface or subsurface disposal of the water, including disposition by use in drilling for or production of oil or gas, in road construction or maintenance or other construction, in the generation of electricity or in other industrial processes, in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the state engineer." N.M. STAT. ANN. § 70-2-6 (15). Similarly, New Mexico regulates "the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment." N.M. STAT. ANN. § 70-2-6 (21). Accordingly, the Commission has enacted a number of administrative codes to regulate and permit these activities. N.M. ADMIN. CODE §§ 19.15.26, 19.15.34 to 36. It is evident that the State has established a robust regulatory scheme for addressing these aspects of development and production.

In contrast, Mora County purports to ban extracting water, importing water, storing water, or disposing of water used in connection with the extraction of oil, natural gas, or other hydrocarbons. ORDINANCE 2013-01, §§ 5.2, 5.3. Mora County not only seeks to ban post-extraction waste water from the County (ORDINANCE 2013-01, § 5.3), it also bans the extraction of water for use "in the extraction of oil, natural gas, or other hydrocarbons," and the importation of "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." ORDINANCE 2013-01, § 5.2. In addition to directly conflicting with the State's authority under the Oil and Gas Act, Mora County's prohibitions on virtually every aspect of water and resource usage in connection with oil and natural gas development is in direct conflict with the State's authority in directing

these activities and uses conflict with New Mexico's comprehensive water laws. N.M. CONST. art. XVI, § 1-5 ;N.M. STAT. ANN. § 72-1-1 et seq..

Fifth, New Mexico law also allows for the transportation of these resources across counties and, particularly, via pipelines. N.M. STAT. ANN. § 70-2-(22); N.M. ADMIN. CODE § 19.15.16.20 (authorizing an operator to transport oil or gas from the well); N.M. ADMIN. CODE § 19.15.23 (off lease transport of crude oil and contaminants). The Legislature delegated authority with respect to pipelines to the public regulation commission of New Mexico:

> Pipelines; crossing of railroads and highways
>
> The crossing of any pipeline operated for the conveyance of oil, natural gas, carbon dioxide gas or the products derived therefrom under any railroad or public road or highway in this state, outside of the confines of any municipal corporation, shall be constructed and maintained according to reasonable rules and regulations adopted by the corporation commission [public regulation commission] of New Mexico, not inconsistent, however, with the applicable requirements of the state highway department.

N.M. STAT. ANN. § 70-3-4. Additional powers are afforded to this agency with respect to pipelines under the same chapter. N.M. STAT. ANN. § 70-3-1 et seq. County commissioners are expressly "authorized to grant rights-of-way for laying and maintaining pipelines for oil and gas transportation in, on or over public highways in their respective counties to all applicants upon such terms and conditions as such county commissioners deem to be for the best interests of their respective counties, and as prescribed by the terms of this act." N.M. STAT. ANN. § 70-3-7. However, they do not have the power to entirely ban pipelines or other means of transporting natural resources.

The Mora County Ordinance would disallow all of the essential infrastructure necessary for oil and natural gas extraction activities, including "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." ORDINANCE 2013-01, § 5.4. This plainly conflicts with the State's authority to authorize the building of such infrastructure and regulation thereof.

Sixth, apart from the direct conflict with specific statutes, there is also an operational conflict. By banning the corollary infrastructure and activities of oil and gas development, this necessarily creates an operational conflict with State oil and gas laws. See, e.g., Town of Frederick v. North American Res. Co., 60 P.3d 758, 761-62 (Colo. App. 2002) (Under operational conflicts test, local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts, and requires that local regulations yield to state interest.). By banning activities that are necessary to the extraction of oil and gas - even if they are not part of the extraction process itself - the Ordinance creates an operational conflict, such that permissible activities under the Oil and Gas Act are, as a practical matter, no longer feasible.

In sum, there are a multitude of conflicts between the Mora County Ordinance and New Mexico law. There are both direct conflicts and operational conflicts with the net effect that the two cannot coexist. For these reasons, the Ordinance is impliedly preempted by New Mexico law and cannot stand.

III. CONCLUSION

For the reasons stated above, Mora County lacks the authority to enact ORDINANCE 2013-01 and the Ordinance should be declared void *ab initio*. The County lacks inherent authority to

enact the broad and far-reaching prohibitions stated in the Ordinance. Further, the State has impliedly preempted the Ordinance by occupying the field and by having statutes and regulations in place that directly and operationally conflict with the prohibitions of the Ordinance.

DATED this 3rd day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2014, I electronically filed the foregoing AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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