

Recent Court Decisions May Affect Hydraulic Fracturing in New York and Ohio

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Three recent court decisions could affect parties with an interest in hydraulic fracturing, particularly in New York and Ohio. Two New York courts held that New York's Oil & Gas Law does not preempt local zoning ordinances that completely ban hydraulic fracturing, and an Ohio court issued a ruling that could impair stakeholders' ability to conduct hydraulic fracturing operations in that state.

Local Fracking Bans Upheld in New York

New York's Oil & Gas Law preempts "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries." Two lower courts in [Anschutz v. Town of Dryden](#) and [Cooperstown Holstein Corp. v. Town of Middlefield](#) recently held that this language does not preempt local zoning ordinances that completely ban hydraulic fracturing.

Both courts drew a sharp distinction between "where" (land use) and "how" (operational) zoning rules, and went on to narrowly interpret "relating to" as referring only to the latter—*i.e.*, as preempting only local zoning regulations that seek to control *how* oil and gas *operations* are conducted. Because the Dryden and Middlefield zoning rules did not regulate fracking operations per se, but instead

addressed *where* such operations could take place, the courts concluded that the zoning rules did not come within the Oil & Gas preemption language, but were a proper land use restriction reserved to municipalities by New York's Home Rule laws.

Appeals are expected in one or both cases, and it is likely that neither will withstand appellate scrutiny. Both courts failed to recognize critical distinctions in the New York mining law cases on which they relied, and the *Dryden* court in particular cited several non-New York cases that actually contradict the decision it reached. Moreover, a close review of the legislative history makes clear that these decisions undermine the New York Legislature's simple goal in passing the Oil & Gas Law preemption provision: to avoid a patchwork quilt of local regulations that would undermine the efficient development and production of New York's oil and gas resources in a way that prevents waste and protects property rights.

For now, however, the potential import of both rulings cannot be overstated. It is estimated that up to 50 percent of the Marcellus Shale in New York will be put off-limits by the New York State Department of Environmental Conservation's (DEC's) proposed rules, and more than 80 towns and municipalities have passed (or are poised to pass) local bans that could further narrow the available fracking plays. DEC Commissioner Joe Martens has stated publicly that the agency's final rules may account for local zoning ordinances—a potential incentive for municipalities to follow the lead of *Dryden* and *Middlefield*. Overall, fracking stakeholders may find it difficult to commit capital for land leases or acquisitions given the uncertainty that has been created by these two decisions.

Ohio Decision Prohibits Surface Activity to Access Natural Gas

An Ohio court recently interpreted fairly common mineral grant language in a way that could significantly impair stakeholders' ability to conduct hydraulic fracturing operations in that state.

At issue in [*Jewett Sportsmen and Farmer's Club, Inc. v. Chesapeake Exploration, LLC*](#), was a land deed that reserved to the seller all mineral rights beneath the property, as well as the right to go "through and under" the property to access minerals on adjacent lands. The seller had just completed construction of a hydraulic fracturing drilling pad at the property when the surface rights owner moved for an injunction prohibiting all surface activity, including the drill pad.

Interpreting the deed, the court ruled that the seller had a right to reasonably use the property surface to access natural gas located within the property boundaries, but did not have a right to use the surface for purposes of accessing natural gas beneath adjacent tracts of land. Specifically, the court focused on the "and" in the "through and under" language of the deed, and interpreted it to mean, literally, that any oil or gas originating outside the property boundary could only be removed by the seller if the activity remained exclusively beneath the property surface. The court suggested that its ruling might have been different if the deed had been drafted to read "through *or* under."

This decision may pose significant risk to stakeholders looking to do business in Ohio. Mineral rights leased or purchased by stakeholders today are often the

subject of deeds granted decades ago, when the focus was on mining, not natural gas development. These mining deeds commonly used the “through and under” language as a way to limit surface activity (e.g., strip mining) that was deemed antithetical to the interests of property owners. That language, even if correctly interpreted by the court in *Jewett*, poses unique problems in the context of hydraulic fracturing, where large subsurface areas are necessary for adequate well production. The *Jewett* decision may force fracking stakeholders to negotiate new terms with property owners, purchase or lease adjacent properties from which to conduct drilling operations, or extend subsurface operations beyond what is practical from a financial or technical perspective. Because these options drive up exploration and removal costs, they may make otherwise viable fracking plays unprofitable.

Even on large parcels, such as the one at issue in *Jewett* (177 acres), given the extensive length of most horizontally drilled wells and the large subsurface areas that are affected by the fracking process itself, one can imagine a landowner arguing that just about any fracked well will “capture” gas from outside the property—and therefore that the wells or well pad must be located somewhere other than the property itself. Stakeholders holding legitimate mineral deeds may find themselves in costly fights with property owners over surface rights, where the burden of proof will be hard to meet. These battles may make fracking at or from a particular property uneconomical in Ohio.

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