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4th Circ. Uranium Mining Ruling Narrows Federal Preemption


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Law360, New York (March 8, 2017, 10:44 AM EST) --It is obvious to even the most casual observer that the Trump administration plans to pursue a much different agenda for environmental regulation and domestic energy production than the prior administration. Similarly, it is predictable that conflicts will arise between the new administration and "blue" states like California, New York and Massachusetts. These conflicts inevitably will result in litigation; indeed, the "red" states previously sought protection from the courts to limit the scope and reach of the Obama U.S. Environmental Protection Agency in the name of federalism. Now the situation is reversed, and the current administration may find itself in need of the federal preemption doctrine to limit state and local attempts to regulate activities that the federal government appears to favor, such as fracking, coal mining, pipelines and mineral development.

In the absence of clear language preempting state power, Congress can preempt state law in two ways. Field preemption applies if Congress intends "to foreclose any state regulation in the area," regardless of any inconsistency between the state regulation and federal standards.[1] Conflict preemption happens when it is impossible to comply with both federal and state requirements, or state law stands in the way of federal compliance.[2] Most states follow a similar preemption doctrine in deciding between state and local rules.

In the past couple of years, states have used preemption to battle counties and cities that have tried to impose limitations on oil and gas development. On May 2, 2016, the Colorado Supreme Court found that state law preempting fracking bans implemented by two Colorado cities.[3] Courts in New Mexico, Louisiana, West Virginia and Ohio have reached similar results.[4] These courts generally conclude that states' traditional regulation of oil and gas development preempts all local regulations in that field. States like Oklahoma and Texas have recently passed laws specifically to create preemption in this space.[5]

Conversely, New York and Pennsylvania courts reached the opposite conclusion, rejecting field preemption and finding that state regulations and law regulate only "how" fracking can take place, not where it can occur.[6] In New York, the courts considered New York's Oil, Gas and Solution Mining Law, which provided that "[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." Even though this provision appears designed to occupy the field except in a few excepted areas, the court

found that the provision only preempted the regulation of oil and gas operations, not local ordinances determining where the operations may take place.[7]

Concerning the federal preemption of state regulation, two recent decisions follow the narrower view of preemption adopted by the New York and Pennsylvania state courts. The decisions permit states to limit mining in certain areas despite the existence of established and robust federal law and regulation in which Congress arguably attempted to occupy the regulatory sphere.

On Feb. 17, 2017, the Fourth Circuit decided Virginia Uranium v. John Warren, upholding a lower court decision that approved a Virginia law banning uranium mining despite the Atomic Energy Act's (AEA) preemptive scope.[8] The majority opinion was written by Judge Albert Diaz, and joined by Judge Pamela Harris.

The Atomic Energy Act regulates nearly every aspect of the uranium fuel cycle. It requires any person to obtain a license from the Nuclear Regulatory Commission and comply with its safety regulations if they wish to "transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import or export" any radioactive "byproduct material" — which includes "the tailings or wastes produced by the extraction or concentration of uranium."[9]

The U.S. Supreme Court previously held in Pacific Gas that the AEA occupies the field of radiological safety of uranium production, including the wastes generated from uranium mining.[10] States can regulate nonsafety aspects of nuclear power production, but not safety regulations. The majority opinion in Virginia Uranium avoided the application of field preemption by ruling that the AEA does address traditional mining on nonfederal lands. The AEA expressly covers in-situ mining and mining on federal lands, but it is silent on traditional mining on private lands (save for the regulation of mining waste). Thus, Virginia's ban on such activity, even though the commonwealth conceded that it was concerned only with the safety of the mining activity, survived the preemption analysis. The court also found that the ban on mining did not conflict with the AEA's express purpose of encouraging national uranium development, citing the fact that 90 percent of enrichment activities in the United States consisted of recycled and foreign obtained uranium.

Judge William Byrd Traxler disagreed with the opinion and wrote a lengthy and detailed dissent. He found Virginia's admission that it was prohibiting mining due to safety concerns fatal under the Pacific Gas framework. Citing a number of previous circuit opinions that broadly interpreted AEA preemption over radiological safety issues, he argued that the state ban was both field and conflict preempted. Because the AEA occupies the safety field, including the regulation of mining wastes, the fact that its fails specifically regulate traditional uranium mining is of no import. Since it is a safety issue, it falls under the jurisdiction of federal law. Similarly, the act's specific purpose is the promotion of uranium production, which Virginia's ban frustrates.

Separately, in August of last year, the California Supreme Court in People v. Rinehart considered whether California's prohibition of gold suction mining could apply to mining claims on federal land, or whether the federal mining law from 1872 promoting mining preempted it.[11] The decision overturned the lower court of appeals opinion, which had found the moratorium preempted under the Supreme Court's Granite Rock decision because the suction mining ban "rendered mining on [Rinehart's] commercially impracticable."[12] The California Supreme Court found that the federal mining laws "contain no express preemption provision, do not occupy a relevant field that would foreclose state regulation, and do not impose obligations that would make it impossible to comply simultaneously with state and federal law."

To reach this conclusion, the court parsed the text and legislative intent of several federal mining statutes, and concluded that none expressly prohibited the California ban, permitting state regulation in this case. It also distinguished a host of prior decisions that broadly applied the preemptive impact of the mining laws on federal land. It also recognized that its decision arguably conflicted with a prior Eighth Circuit decision, South Dakota Mining Association v. Lawrence County, that found the federal Mining Law of 1872 preempted a county ordinance in South Dakota banning surface metal mining.[13] Unlike the Rinehart decision, the Lawrence County decision found broad federal preemption in this area. The defendant in Rinehart has filed for certiorari, and given the apparent conflict between it and Lawrence County, a grant is more likely than usual.

Both Virginia Uranium and Rinehart demonstrate a narrowing of preemption in areas that were traditionally held to the dominion of federal law — federal regulation of radiological safety under the AEA, and of federal lands under the Mining Act and the U.S. Constitution's property clause. In both cases, the courts permitted state bans of mining activity because they found no express conflict, potentially ignoring both field preemption and the fact that prohibiting activity entirely frustrated an express federal purpose.

Further development in this area of the law is expected over the next several years as state and local jurisdictions pursue agendas different than the new administration.

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[1] Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).

[2] Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[3] City of Longmont v. Colorado Oil & Gas Assoc., 369 P.3d 573 (Colo. 2016).

[4] SWEPI, LP v. Mora Cnty., No. 14-CV-00045 (D.N.M. Jan. 19, 2015). On June 17, 2016, the Louisiana Supreme Court refused to hear an appeal from a lower court that had struck down a local ordinance passed by St. Tammany Parish seeking to prohibit fracking, leaving in place the ruling that found it conflicted with state regulations. In Northeast Natural Energy LLC v. City of Morgantown, the Circuit Court of Monongalia County struck down Morgantown's ban on fracking based on the preemptive force of comprehensive regulations passed by the West Virginia Department of Environmental Protection governing natural gas extraction. In State ex rel. Morrison v. Beck Energy Corp., the Ohio Supreme Court confirmed that five municipal laws were in contravention of Ohio Revised Code 1509 (O.R.C. 1509), which provides uniform, statewide rules on oil and gas operations.

[5] In reaction to localities banning oil and gas development, Texas and Oklahoma passed laws expressly preempting any local ordinance prohibiting hydraulic fracturing. Texas's HB 40 was signed on May 18, 2015, and Oklahoma's SB 809 was signed on May 29, 2015.

[6] In Pennsylvania, the state legislature responded to cases decided in 2012 that allowed local fracking bans by passing a law that preempted local zoning laws affecting statewide oil and gas recovery operations. In late 2013, the Pennsylvania Supreme Court invalidated the zoning portions of the law based on the Pennsylvania constitution's Environmental Rights Amendment. Robinson Twp. v. Pennsylvania, 83 A.3d 901 (Pa. 2013). Pennsylvania municipalities therefore retain zoning rights to limit activity within their borders, but state law still preempts zoning laws to the extent they conflict with state regulations governing drilling itself.

[7] In re Wallach, 23 N.Y.3d 728 (N.Y. 2014), aff'g Norse Energy Corp. v. Town of Dryden, 108 A.D.3d 25 (N.Y. App. Div. 2013), and Cooperstown Holstein Corp. v. Town of Middlefield, 106 A.D.3d 1170 (N.Y. App. Div. 2013).

[8] https://www.law360.com/articles/893755/virginia-s-uranium-mining-ban-upheld-by-fourth-circuit. The uranium deposit in Virginia is one of the nation's largest.

[9] 42 U.S.C. §§ 2111(a), 2014(e)(2); see also 42 U.S.C. § 2111(b).

[10] Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190, 203–04 (1983)(finding that state laws were preempted even in the absences of a conflict because "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.")

[11] People v. Rinehart, 377 P.3d 818 (Cal. 2016).

[12] California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 587 (1987).

[13] S.D. Mining Ass'n v. Lawrence Cty., 155 F.3d 1005 (8th Cir. 1998).
