

Silica Sand Mining

Minnesota sands, state preemption and implications for other jurisdictions

In November 2016, the Winona County Board of Commissioners banned silica sand mining within the Minnesota county in order to address environmental and health concerns brought by constituents.¹ Though fracturing does not currently take place in Minnesota, the state has large deposits of silica sand, generally regarded as higher quality than Texas sand for frac'ing purposes due to its size and hardness. Silica sand is a main ingredient of proppant used in the frac'ing process. The increase in frac'ing in the United States has increased demand for silica sand, and businesses have moved to take advantage of the resources in Minnesota.²

One such business was Minnesota Sands LLC, which acquired leases to remove silica sand from property in Winona County in February 2012 during a county-imposed moratorium on silica sand mining pending completion of a land-use study.³ At the time, Winona County issued conditional-use permits for approved mining operations, including silica sand mining, as required by the then-current zoning ordinance. Minnesota Sands applied for conditional-use permits for two of the sites, as required by the zoning ordinance effective at that time, but ultimately failed to satisfy the environmental diligence efforts required by the county and never received such permits.⁴ In late 2016, the board updated the zoning ordinance, effectively prohibiting silica mining except for uses already legally established prior to such amendment.⁵ Minnesota Sands sued over the updated ordinance and argued that it violated both the U.S. and Minnesota constitutions.

CONSTITUTIONAL CHALLENGES TO THE BAN

In 2017, Minnesota Sands challenged the Winona County ordinance as a violation of the dormant Commerce Clause and the Takings Clause. The District Court found in favor of the county, and the Minnesota Court of Appeals affirmed the decision in 2018. The Minnesota Supreme Court found the ordinance to be constitutional on March 11, 2020, and affirmed the Court of Appeals for the following reasons.

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- 1 See Karen Zamora and Josephine Marcotty, "Winona County Passes Frac Sand Ban, First in the State to Take Such a Stand," *Minneapolis Star Tribune*, Nov. 22, 2016, <https://www.startribune.com/winona-county-passes-frac-sand-ban-first-in-the-state-to-take-such-a-stand/402569295/>.
 - 2 See Minnesota Legislature website, *Minnesota Issues Resource Guides, Silica (Frac) Sand Mining*, <https://www.leg.state.mn.us/lrl/guides/guides?issue=fracsands>.
 - 3 *Minnesota Sands LLC v. Cty. of Winona*, 940 N.W.2d 183, 189 (Minn. 2020).
 - 4 *Id.* at 189-90.
 - 5 *Id.* at 190.



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its silica sand mining business, a business which sent its products out of state.¹¹ Minnesota Sands noted that because its silica sand was to be sent and used outside of Minnesota, the ordinance had the effect of an export ban. The court pushed back against this interpretation of the ordinance, instead viewing the ban as a land-use regulation which affected all landowners in the same manner.¹² A landowner wishing to mine and sell silica sand within Winona County would face the same burdens as any out-of-state person. Ultimately the court found that there was no unequal burden on out-of-state businesses nor any discriminatory purpose behind the ban and, as such, that the ordinance did not violate the dormant Commerce Clause.

Commerce Clause Challenge

Article I, § 8 of the Constitution provides that Congress may regulate commerce among the states.⁶ This federal authority, known as the Commerce Clause, is also understood as a limitation on states' rights to interfere with interstate commerce. This limitation is known as the dormant Commerce Clause, and there is a three-part test to determine whether a state or local statute is in violation.⁷ The first step of the test is determining whether the law is discriminatory on its face. If it is, then the law is unconstitutional. Minnesota Sands argued that because no frac'ing took place in the state, the ban on mining silica sands was discriminatory to out-of-state business.⁸ The court noted that the ban applied equally

to people in state and out of state and determined that, as such, the ordinance was facially neutral.⁹

If the law is not facially discriminatory, the next question is whether the law burdens interstate commerce with discriminatory purpose or effect. In certain cases, such laws will still be found valid if there is a legitimate health or safety purpose behind the law's implementation.

The court saw no evidence of discriminatory intent based on the meetings of the Board of Commissioners or otherwise, finding the law was not made with discriminatory purpose.¹⁰

Minnesota Sands challenged that the new zoning ordinance had discriminatory effect based on the unique impact the ban had on

Takings Clause

The Fifth Amendment — and more specifically the Takings Clause — provides that no private property may be taken for public use without compensation.¹³ Minnesota Sands challenged the zoning ordinance as a taking since the new regulation eliminated its ability to exercise its leased rights in the property.¹⁴

Determining whether a taking has occurred revolves around the property interest at stake and the manner of government action in question. Zoning ordinances, such as the Winona County ban, often limit a person's use of their land, though courts usually find that such an ordinance does not take away all potential uses of the land.¹⁵ However, in this instance, the court recognized that the property rights in question were limited to mining for silica sand

6 U.S. Const. art. I, § 8.
 7 940 N.W.2d 183 at 194.
 8 *Id.* at 193-94.
 9 *Id.* at 196.
 10 *Id.* at 197-98.
 11 *Id.* at 194.
 12 *Id.* at 195.
 13 U.S. Const. amend. V.
 14 940 N.W.2d 183 at 199-201.
 15 *Id.* at 200-01 citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

per Minnesota Sands' leases. As such, the court assumed that the right to mine for silica sand was a property interest and that such right had been fully extinguished by the zoning ordinance.¹⁶

The court then further explored Minnesota Sands' right to mine silica sands and examined the leases that were the basis for that right. In particular, the court noted a reservation clause that allowed the landowners to continue using all parts of the property not being used for mining operations.¹⁷ These leases granted the property right to Minnesota Sands on the commencement date; however, the court read the reservation clause as reserving actual property rights with the landowners until mining began.

Because the leases were limited to, and in reality commenced on, the date that sand farming began, the court found that Minnesota Sands never actually had a right of possession. If there is no property right, there can be no taking.¹⁸

IMPLICATIONS FOR OTHER JURISDICTIONS, INCLUDING TEXAS AND OKLAHOMA

Similar scenarios have arisen in both Wisconsin and Illinois, which — like Minnesota — have large reserves of silica sand. Local governments in both states have enacted ordinances limiting silica sand mining operations, using zoning and other local regulations. Like the Winona mining ban, these ordinances have been upheld when challenged.¹⁹ However, such local ordinances would still be subject to state preemption in the event state legislatures passed laws preempting these local regulations.²⁰

Citing a danger of patchwork regulations that threaten the oil and gas industry, Texas and Oklahoma state legislatures each passed laws prohibiting local ordinances that attempt to regulate oil and gas activity.²¹ However, the national conversation surrounding local and federal bans of oil and gas activity remains a hot topic of political debate.

Texas

The city of Denton approved an anti-fracturing initiative in 2014.²² Local voters — annoyed with noise, fumes and other frac'ing activities encroaching their backyards —

passed the ban and effectively halted frac'ing activity within the city limits.²³ In response to this local ban on frac'ing, state legislators passed Texas House Bill 40, which clarified that the Texas Railroad Commission would govern all oil and gas regulatory matters. The bill was signed into law May 18, 2015, and prohibited municipalities and political subdivisions from enacting local ordinances that regulate the oil and gas industry.²⁴ Texas House Bill 40 does allow certain local regulations on oil and gas activity when such regulations are commercially reasonable and concern aboveground issues, including fire and emergency response, traffic, lights and noise.²⁵

Oklahoma

While local Oklahoma governments have not yet passed a frac'ing ban similar to the city of Denton, Oklahoma proactively passed a similar law to Texas House Bill 40 to support the industry.²⁶ Oklahoma passed Senate Bill 809 in May 2015, reserving the regulatory rights over oil and gas activity to state regulatory bodies,

16 *Id.* at 201.

17 *Id.* at 202-03.

18 *Id.* at 200 citing *Wensmann Realty Inc. v. City of Eagan*, 734 N.W.2d 623, 635 (Minn. 2007).

19 See *Zwiefelhofer v. Town of Cooks Valley*, 338 Wis.2d 488 (2012).

20 See Joseph M. Russell, "Getting Along: Wisconsin's Frac Sandbox," *Wisconsin Lawyer*, July 2, 2014, <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=87&Issue=7&ArticleID=11679>.

21 Texas enacted House Bill 40 on May 18, 2015, limiting the regulatory authority of municipalities and political subdivisions over oil and gas operations to commercially reasonable regulations. See Act of May 18, 2015, 84th Leg. R.S., ch. 30, § 2, Tex. Gen. Laws 971, http://www.lrl.state.tx.us/scanned/sessionLaws/84-0/HB_40_CH_30.pdf; see also Railroad Commission of Texas website, Oil & Gas FAQs, <https://www.rrc.state.tx.us/about-us/resource-center/faqs/oil-gas-faqs/house-bill-40-faq/>. Oklahoma passed Senate Bill 809 on May 28, 2015, an act that similarly limited municipality and county regulatory authority. See Bill Information for SB 809, *Versions*, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB809&Session=1500#:~:text=Oil%20and%20gas%3B%20authorizing%20regulation.political%20subdivisions%3B%20prohibiting%20certain%20regulations>.

22 See Jim Malewitz, "Dissecting Denton: How a Texas City Banned Fracking," *Texas Tribune*, Dec. 15, 2014, <https://www.texastribune.org/2014/12/15/dissecting-denton-how-texas-city-banned-fracking/>.

23 See Jim Malewitz, "Curbing Local Control, Abbott Signs 'Denton Fracking Bill,'" *Texas Tribune*, May 18, 2015, <https://www.texastribune.org/2015/05/18/abbott-signs-denton-fracking-bill/>.

24 See Jim Malewitz, "With HB 40 Signed, Denton Fracking Resumes," *Texas Tribune*, May 22, 2015, <https://www.texastribune.org/2015/05/22/despite-ban-fracking-resume-denton/>.

25 See Railroad Commission of Texas website, Oil & Gas FAQs, <https://www.rrc.state.tx.us/about-us/resource-center/faqs/oil-gas-faqs/house-bill-40-faq/>; see also Act of May 18, 2015, 84th Leg. R.S., ch. 30, § 2, Tex. Gen. Laws 971, http://www.lrl.state.tx.us/scanned/sessionLaws/84-0/HB_40_CH_30.pdf.

26 See Joe Wertz, "Gov. Fallin Signs Bill to Prevent Towns, Cities and Counties from Banning Fracking," *State Impact Oklahoma*, June 1, 2015, <https://stateimpact.npr.org/oklahoma/2015/06/01/gov-fallin-signs-bill-to-prevent-towns-cities-and-counties-from-banning-fracking/>.



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including the Oklahoma Corporation Commission's Oil and Gas Conservation Division. However the law does include certain common sense exceptions for implementing "reasonable" restrictions on traffic issues, noise, fencing and setbacks.²⁷

Federal

Though state legislatures have taken action to reduce the threat of local frac'ing bans, localized restrictions on oil and gas activity in

Texas and Oklahoma remain a hot topic of political debate at both the local and national level.²⁸ Democratic representatives proposed legislation meant to ban frac'ing this past February: The Ban Fracking Act²⁹ would limit, and prohibit in some cases, federal permits for any new frac'ing operations and operations near certain locations.

Other potential local restrictions on oil and gas use and development have emerged in cities in California

and the Northeast, where politicians have proposed bans on using natural gas as an energy source in buildings.³⁰ The issue of local oil and gas regulations clashing with state regulatory bodies remains relevant and will continue to evolve on the local, state and national level throughout the November election cycle and beyond. ▲

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27 See Oklahoma State Legislature website, Bill Information for SB 809, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB809&Session=1500#:~:text=Oil%20and%20gas%3B%20authorizing%20regulation,political%20subdivisions%3B%20prohibiting%20certain%20regulations>.

28 See Sergio Chapa, "'We Aren't Going Away': Oil Drilling Inside City Limits Remains Thorny Issue for Many Texans," *Houston Chronicle*, July 10, 2020, <https://www.houstonchronicle.com/business/energy/article/Oil-drilling-within-Texas-city-limits-issue-law-15397223.php>.

29 See Maya Weber and Brian Scheid, "Sanders Unveils Fracking Ban Proposal With Sweeping Prohibitions on Pipelines, Crackers," *S&P Global*, Feb. 4, 2020, <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/020420-sanders-unveils-fracking-ban-proposal-with-sweeping-prohibitions-on-pipelines-crackers>.

30 See Nicola Groom, Richard Valdmanis, "As Climate Fight Intensifies, U.S. States Seek to Block Local Natural-Gas Bans," *Reuters*, March 5, 2020, <https://www.reuters.com/article/us-usa-climatechange-naturalgas/as-climate-fight-intensifies-us-states-seek-to-block-local-natural-gas-bans-idUSKBN20S1G8>.