

Oil and Gas Intrastate Preemption and Governance Alternatives

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May 8, 2015

Paul Diller's "Intrastate Preemption"

Occurs when “a city’s authority in a particular area has been supplanted by state law.” 87 B.U. L. REV. 1113, 1114 (2007).

Increasingly common, even in states that typically laud the values of sub-federal experimentation.

Courts

Diller suggests courts are superior institutions to state legislatures in terms of deciding intrastate preemption issues:

- Geographic impartiality
- Some political insulation
- Speed

Courts in **Colorado** (express/conflict preemption) and **West Virginia** (county courts—field preemption), **Ohio** (state supreme court—express/conflict preemption), and **Louisiana** (federal Fifth Circuit—express preemption) have found that local oil and gas laws are preempted by state law.

Legislatures

Texas Substitute House Bill 40, 2015 “relating to the exclusive jurisdiction of the state to regulate oil and gas operations in this state and the express preemption of local regulation of those operations.” Passed House, and then Senate on May 4, 2015.

Reverses a history of extensive local regulation of oil and gas. Cities like Fort Worth and Arlington, Texas have detailed oil and gas ordinances.

The problem

Local governments experience the bulk of the negative externalities, although also many positive ones. *See, e.g.,* David Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351 (2014).

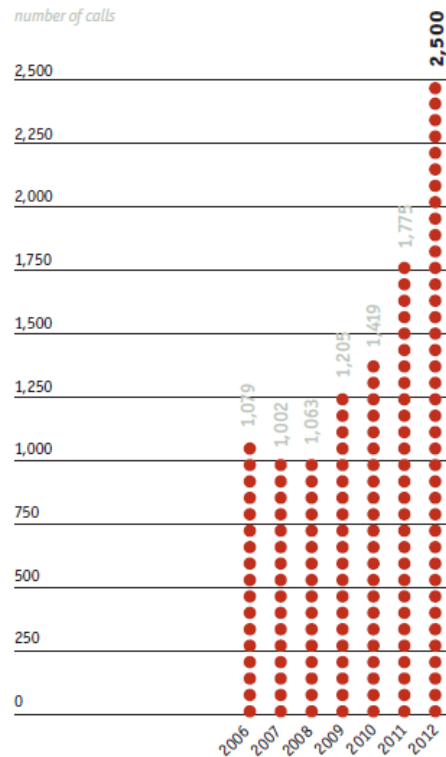
Local governments need mechanisms for addressing these externalities.



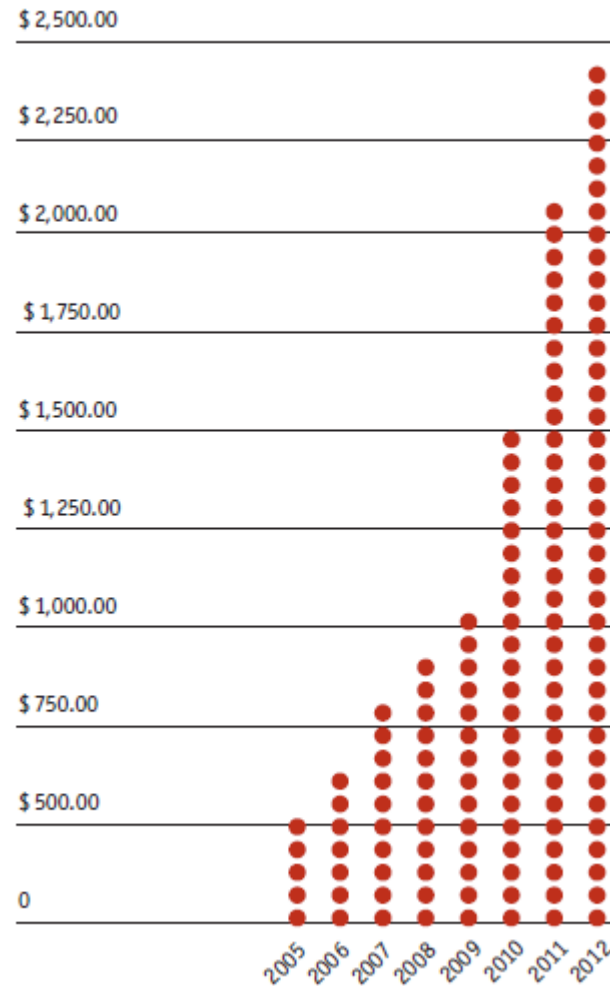
<http://energy.usgs.gov/GeneralInfo/HelpfulResources/MultimediaGallery/HydraulicFracturingGallery.aspx>

- Heightened demand for emergency services, courts.
- Staff attrition – garbage truck drivers and other employees move to higher-paid oil and gas jobs.

City of Williston –
calls for fire service



Williston, ND rent inflation—one/two bedroom apartments



New York's approach

Despite express preemption of local government oil and gas regulation, governments may use *zoning* authority to ban oil and gas development.

Court noted home rule—legislature may preempt home rule, but home rule makes it less likely that courts will find preemption. *Wallach v. Town of Dryden*, 23 N.Y.3d 728 (N.Y. Ct. App. 2014).

If we assume that most states will not follow New York's approach (they haven't so far), alternatives are needed.

Alternatives

- Fees and taxes
- Bargaining, negotiation, mediation with industry; memoranda of understanding
- Local governments as third-party beneficiaries of private contracts? (leases between mineral owners and energy companies)

Fees and taxes

Pennsylvania allows local governments to implement an **unconventional gas well fee**.

Applies annually to every “spudded” (dug) well; fee per well declines over the years. Fee no longer assessed when well is plugged.

Initial fees \$40,000-\$60,000 per well depending on the price of natural gas. 58 Pa. C.S. § 2302.

Distribution of Pennsylvania's unconventional gas well fee

Set amounts (e.g., \$7.5 million to county conservation districts) that increase annually according to the Consumer Price Index for All Urban Consumers.

\$6 million to state environmental agency for air and water programs, additional amounts to other state agencies.

Also substantial contributions to local governments.
See next slide. 58 Pa. C.S. § 2314.

Distribution of gas well fee to local governments

After state distributions, 60% of revenue remaining to counties and municipalities.

Remaining revenue:

36% to *counties with spud wells*

37% to *municipalities with spud wells*

27% to *municipalities in counties with spud wells*

Distribution of gas well fee to local governments, continued

Local governments must use funds for:

- Construction and repair of roads, bridges
- Emergency preparedness
- Environmental programs like trails and parks
- Water, sewer, stormwater
- Affordable housing
- Preservation and reclamation of surface water
- Records management
- Social services
- Judicial services, etc.

Negotiation and mediation

- Local governments regularly negotiate road use agreements with industry. Require industry to widen and repair roads where needed.
- Also negotiate for donations to parks, fire and emergency needs.
- Garfield County, Colorado Oil and Gas Energy Advisory Board.

Could local governments influence private leases?

Mineral owners directly negotiate with industry, but could local governments persuade mineral owners to include certain protections in leases?

Questions of enforceability, but many of the impacts occur on the lease site itself and could be prevented by the mineral owner.

Other options for ameliorating externalities at the well site

Surface Damage Acts: Revise the common law doctrine that allows mineral lessee to use the surface as is reasonably necessary without paying any damages. (Approximately 15 states have these acts.)

Bonding for site restoration: States can require operators to post bond that will provide money for state or local government to restore the site if operator fails to. North Carolina proposed a \$1 million per well bond for environmental damage.

Thank you. Questions?