

WHY ARE FRACKING HOPEFULS SUING A COUNTY IN NEW MEXICO?



Colonization is not a foreign concept in Mora County, New Mexico. First it was the Spaniards, in 1598, then Mexico in 1821 and finally, after the Battle of Mora in 1847, the United States laid claim. Now the fossil fuel industry wants a turn. But Mora's people won't have it.

Last spring Mora became the first county in the United States to strip the legal personhood of corporations involved in hydrocarbon extraction. Citizens spent years replacing every member of Mora's county commission in an effort to protect the county's water and environment, and finally, in April 2013, the commission passed the "Mora County Community Water Rights and Local Self-Government Ordinance."

It not only outlaws corporate extraction of oil, gas and other hydrocarbons, but also introduces the right to water, the right to water for agriculture, the right to a sustainable energy future, the rights of natural communities, the rights of la Querencia de La Tierra—local indigenous people’s conception of homeland—and the right to local self-governance. Most subversively: these rights are elevated above corporate “rights,” should they ever conflict. The county has now been challenged.

In two federal court cases that are the first of their kind, hydrofracking hopefuls are suing Mora for passing the ordinance. The plaintiffs in the first case are three landowners hoping to lease their property to oil and gas corporations for hydrofracking exploration, along with a trade association representing corporations hoping to frack on private lands. The second case involves a subsidiary of Royal Dutch Shell that wants to frack on public, state-owned lands it is leasing for twenty-five cents an acre. In both cases the plaintiffs denounce the county’s authority and claim their Fourteenth Amendment rights are being violated. Banning fracking, they plead, is tantamount to seizing property without due process.

The community’s support for the ordinance has deep roots. Much of the land proposed for fracking in Mora, a place where 80 percent of residents are Hispanic or Latino, once belonged to a group of families who were granted common grazing

and timber land by Mexico in 1835. Through a series of cases from 1891 to 1904, however, much of the land was privatized or transferred to state or federal ownership. The heirs of these families have filed as interveners in the Shell subsidiary case. Claiming authority under the Treaty of Guadalupe Hidalgo, which settled the Mexican-American War and honored the land grant, the heirs have filed as “beneficiaries of the rights established and recognized by the Ordinance.”

“It is our feeling that we also have rights, we have community rights, to govern how we live our lives here,” says Jacobo Pacheco, an heir of the Mora Land Grant. “Particularly because our basic resources are going to be affected.”

But the law is not on their side. Corporations’ “rights” are protected from government—including county—intrusion. If you ask Mora County Chairman John Olivas, that’s the point. “For well over a century now, corporations have used [their] ‘rights’ to stop efforts, like ours, which seek to use local lawmaking to protect our communities from harmful corporate activities,” Olivas wrote in a recent public letter defending the ordinance. The ordinance removes privileges corporations have enjoyed as far back as 1819—like constitutional Contracts and Commerce clause protections and Fifth and Fourteenth amendment rights. And by claiming authority to govern extraction, Mora also confronts legal structures that define US counties, and localities more generally, as only possessing the powers state legislatures grant them.

New York City, for example, has the authority to raise taxes and regulate rent because the state says it can. This means the powers that localities are given can be taken back, as seen in Michigan's suspension of Detroit's city government. It's no surprise fracking companies are suing. "We expected this," Olivas tells me.

More than 150 townships and municipalities in the US have passed laws similar to Mora's—and in a way, being taken to federal court is a sign of progress. "If we never even take the first baby step to [go to] court, we [will] always [be] behind the eight ball," says Kathleen Dudley, a Mora resident and organizer with the Community Environmental Legal Defense Fund (CELDF), whose lawyers offer pro bono legal council to the communities in drafting and defending their laws. "We will never ever make it to a place of changing law."

County Chairman John Olivas agrees. "If they don't crush us and tell us that we need to go away then we could set the precedent for a lot of communities across the country," he told me. The opposition knows this too: "This is the first test of this issue in the country, it's very important," says William Pendley, president of Mountain States Legal Foundation, the law firm representing Vermillion.

"We're actually working...across the country, from state to state, to change constitutional law," explains Dudley of CELDF. The "Constitution is a political reflection of the time," she adds. "It is not sacrilegious to change it."

That’s why we have twenty-seven amendments.” Mari Margil, CELDF’s associate director, draws a comparison to the LGBTQ movement’s use of lawmaking at the local and then state levels. “Now they’re driving into the courts,” Margil says. “That’s how real change gets made, especially to secure and expand rights, and that’s what this is about.”

And Mora is far from alone. In Colorado, a CELDF-drafted initiative to amend the state constitution is being proposed to empower local communities to eliminate the “rights, powers, and duties of corporations,” should they conflict with local “health, safety and welfare.” The amendment clarifies, however, that such local lawmaking shall not weaken or restrict the protections and rights of “individuals, their communities, or nature.” Similarly, Mora’s ordinance does not infringe on Vermillion’s “right to frack,” Olivas tells me—it only outlaws corporate extraction. Related efforts are underway or well established in Ohio, Pennsylvania, Oregon, Washington, Illinois and New Hampshire.

Critics say the ordinances won’t hold up in court. Such laws are “experimental and untested,” says Paula Garcia, executive director of the New Mexico Acequia Association, which advocates on behalf of New Mexico’s vast network of centuries-old communal irrigation ditches. Garcia is the one Mora Commissioner who voted against the Ordinance.

Though committed to banning fracking, Garcia told me she is skeptical Mora can “persuade the courts to overturn decades or centuries of case law.” “The bottom line,” Pendley says, “is it’s unconstitutional.”

But Supreme Court decisions can change the way the Constitution is interpreted. In a baby step, a county judge in Pennsylvania ruled in 2013 that corporations “do not exist in the manner that humankind exists....They cannot be ‘let alone’ by government, because businesses are but grapes, ripe upon the vine of the law, that the people of this Commonwealth raise, tend, and prune at their pleasure and need.” Mora is hoping for a similar decision in federal court.

Until then, these tactics will remain legally ambiguous. For Margil, these laws are a form of collective civil disobedience. “Martin Luther King said we have to fill up the jails...[now] we have to fill up the court houses, not because we expect the court to necessarily come out with favorable rulings, but because it’s absolutely essential to lifting the veil on how the structure of law works,” she says.

Mora’s cases are expected to drag on for years, but if the county loses, the way the seven-page Ordinance is phrased would force the courts to explain—line by line—why the legal rights Mora’s citizens claim to possess are subordinate to corporations’ “rights.” This could shed light on legal structures and inform the wording of future ordinances.

Communities in seven states are beginning to form community rights networks to share such information and “to drive the change to the state level,” Margil of CELDF tells me.

“If people want to remove me from office to stop this fight, they’ll have the opportunity to do that,” Olivas says. But Olivas was elected on a mandate to protect the county’s water, which doesn’t mix with hydrocarbons. All signs suggest the fight has just begun.

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