

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS

ANSCHUTZ EXPLORATION CORPORATION,

Petitioner-Plaintiff,

-against-

For a Judgment Pursuant to Articles 78 and 3001
of the Civil Practice Law and Rules,

TOWN OF DRYDEN and TOWN OF DRYDEN
TOWN BOARD,

Respondents-Defendants.

**AFFIDAVIT OF
GREGORY H. SOVAS**

Index No.:

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

Gregory H. Sovas, being duly sworn, deposes and says as follows under the penalties of perjury:

1. My name is Gregory H. Sovas. I am over 21 years of age, and I am competent in all respects to make this Affidavit.

2. I hold a Master of Science degree in Environmental Engineering from the University of Massachusetts and a Bachelor of Science in Management Engineering from Worcester Polytechnic Institute. I also am a licensed professional engineer in the State of New York (dormant at present).

3. From 1968 until my retirement in 2001, I was employed by New York State in the predecessor agency and the Department of Environmental Conservation ("Department") since its creation in 1970. As such, I am a charter member of the Department and served more than thirty-two years in state service. I retired from the Department in January 2001.

4. During my tenure with the Department, I had the honor of serving as the first Division Director for the Division on Mineral Resources and held this position from 1983 until my retirement. Prior to that, I served as Chief of the Bureau of Mineral Resources from 1979 to 1983 when the Bureau was organizationally within of the Division of Lands and Forests.

5. In my capacity as Bureau Chief and then Division Director, I managed the policy development and implementation of the New York State Oil, Gas and Solution Mining regulatory program with overall responsibility for 14,000 active wells, permitting of approximately 200 new wells drilled per year, the storage of natural gas in some 25 active underground storage reservoirs, the solution mining of salt, and the leasing of state lands, among other responsibilities.

6. Currently, I am the President of XRM, LLC, an environmental consulting firm. I am also a Governor's Appointee to the New York State Oil, Gas and Solution Mining Advisory Board, a Governor's Appointee to the Legal and Regulatory Affairs Committee of the Interstate Oil and Gas Compact Commission; and a member of the Air and Water Management Association, the Independent Oil and Gas Association of New York (the oil and gas industry trade association in New York), the Pennsylvania Oil and Gas Association, and the Independent Petroleum Association of America. Additionally, I am a Director and Principal of Lake Country FracWater Specialists, and the primary consultant to the Twin Tiers Landowners Coalition.

7. I was the primary author of the Amendments to the New York's Oil, Gas and Solution Mining Law in 1981, and responsible for implementation of those amendments. The 1981 Amendments address specifically the role of municipalities concerning oil and gas exploration and development.

8. Because of my public service, I am personally familiar with the legislative intent and purpose of the oil and gas program, how New York's Oil, Gas and Solution Mining Law was implemented, and how the Department interprets and enforces the provisions of that law.

9. I have reviewed the Town of Dryden's Resolution No. 126 of 2011, "Resolution in Support of Adopting Amendments to the Town of Dryden Zoning Ordinance Clarifying the Town's Prohibition of Natural Gas Exploration and Extraction," which seeks to prohibit all natural-gas exploration and extraction activities in the Town of Dryden (the "Resolution").

10. For the reasons set forth herein, the Resolution is preempted in accordance with ECL § 23-0303(2) of the Environmental Conservation Law ("ECL"). I therefore submit this affidavit in support of Anschutz Exploration Company's Verified Petition and Complaint seeking an annulment of the Resolution and declaration that the Resolution is preempted.

New York's Oil, Gas and Solution Mining Law

11. New York's Oil, Gas and Solution Mining Law first became effective in 1963. Codified in Article 23 of the ECL, it was enacted to appropriately regulate in a uniform manner across New York the development, production and utilization of oil and gas resources in order to prevent waste and protect the correlative rights of all landowners and the general public. I was told that the 1963 law was based upon recommended statutory language from the Interstate Oil Compact Commission (now Interstate Oil and Gas Compact Commission), a multi-state government agency comprised of producing states Congressionally authorized to ensure that the nation's oil and natural gas resources are conserved and maximized while protecting health, safety and the environment, of which New York State is a member.

12. After its enactment, in the 1970s, New York experienced many problems with the regulatory program for the oil and gas industry. This situation arose because of major

state budget cuts in the 1960s and the resultant reduction in oil and gas staff. As a result, many local municipalities began their own regulatory initiatives to monitor and enforce regulations on the oil and gas industry. This local regulation of the oil and gas industry resulted in many problems, including, for example: (1) safety concerns resulting from untrained local staff going onto well sites; (2) the significant costs to hire proper professional petroleum engineering staff that was often too burdensome for local municipalities; (3) a patchwork of local regulation, which resulted in differing requirements for drilling not based on geology; (4) financial security at both the local and state levels; (5) conflicts between municipal boundaries and setbacks; and (6) exorbitant local taxation.

13. In response to these problems, in 1980, as the then Bureau of Mineral Resources in the New York State Department of Environmental Conservation (the “Department”), my staff and I presented a comprehensive legislative proposal to mitigate a number of problems in both the regulation and the economic development of the oil and gas industry.

14. One of the important provisions for the Department was the imposition of new fees to hire additional state staff to oversee the industry. These additional fees allowed the Department to hire the staff necessary to monitor and enforce all aspects of oil and gas exploration and development and allowed us to address the problems noted above relative to local regulation. To overcome the problems associated with a patchwork of conflicting local requirements and to implement the policy objectives of the ECL regarding the full recovery of the resource and the protection of correlative rights, the legislation included the following provision:

The 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.

15. This provision was codified at ECL § 23-0303(2). It was meant to be a broad, all encompassing directive that would limit the regulation of oil, gas and solution mining industries to the exclusive jurisdiction of the state through the Department.

16. By its plain language, the statute's express exclusion of two discrete subject areas (i.e., roads and property taxes) renders all other matters that are related or subject to the oil, gas and solution mining industry, including when and where drilling is permissible in a particular area, within the scope of this supersedure provision.

17. The primary negotiators of the legislative proposal were Frank Murray, who was in the Governor's Office and is now with NYSERDA ("New York State Energy Research and Development Authority"), Assembly Majority Leader Dan Walsh who later became the President of the Business Council and now retired, and Senator Jess Present, a long-term senator and advocate for the oil and gas industry in western NY who has since passed away. There was no question about legislative intent – by the Governor's Office, the Department represented by me as the Chief of the Bureau of Mineral Resources, and the Assembly – that the supersedure clause eliminated the right of municipalities to regulate *any* aspect of oil and gas development including the right to zone oil and gas wells.

18. Shortly after passage of the bill, the issue of zoning was raised to me again, and I called Senator Present to confirm our "Democratic" view of the supersedure clause with regard to zoning. The Senator unequivocally agreed that the law was intended to and did preempt local zoning.

19. There was never any intent to allow a local government to extinguish the mineral rights of any landowner by zoning out oil and gas development. On the contrary, the supersedure provision strengthened the right of the landowner to recover his mineral resources beneath his property unfettered by any local regulation that was inconsistent with the provisions, policy, and mandates of the New York Oil, Gas, and Solution Mining Law.

Resolution

20. The Resolution purports to amend the Town of Dryden Zoning Ordinance as follows:

Section 2104. Prohibited Uses

- 1) Prohibition against the Exploration for or Extraction on Natural Gas and/or Petroleum.

No land in the Town shall be used: to conduct any exploration for natural gas and/or petroleum; to drill any well for natural gas and/or petroleum; to transfer, store, process or treat natural gas and/or petroleum; or to dispose of natural gas and/or petroleum exploration or production wastes; or to erect any derrick, building, or other structure; or to place any machinery or equipment for any such purposes.

- 2) Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Materials.

No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production materials.

- 3) Prohibition against the Storage, Treatment and Disposal of Natural Gas and/or Petroleum Exploration and Production Waste.

No land in the Town shall be used for: the storage, transfer, treatment and/or disposal of natural gas and/or petroleum exploration and production wastes.

- 4) Prohibition against Natural Gas and/or Petroleum Support Activities.

No land in the Town shall be used for natural gas and/or petroleum support activities.

- 5) Invalidity of Permits.

No permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town.

21. The Resolution is clearly preempted under the plain language of ECL § 23-0303(2). Moreover, it is exactly the type of local law or ordinance that the legislature intended to preempt when it amended New York's Oil, Gas and Solution Mining Law in 1981 to add the supersedure provision. Of particular egregiousness is the Resolution's declaration that any state permit to drill an oil or gas well in the Town of Dryden would be deemed invalid. Under the statutory and regulatory program within the Department's purview, applications for drilling permits undergo a rigorous environmental, geological and engineering review and are subject to ongoing state monitoring and regulation oversight. This further validates why local governments need not to be involved in the siting of an oil or gas well (or, as in the case of the Town of Dryden, prohibition of the siting) and indeed, are without jurisdiction to do so.

22. The Resolution also directly conflicts with Article 23 of the ECL and further frustrates the law's purpose by purporting to use zoning principles to prohibit oil and gas drilling within the municipal boundaries of the Town.

23. The purpose and policy objectives of New York's Oil, Gas and Solution Mining Law purpose have been legislatively declared to include: "prevent[ing] waste," providing for the "greater ultimate recovery of oil and gas" and protecting correlative rights. ECL § 23-0301. Consistent with this statutory directive, the ECL contains exacting requirements concerning the location and size of geologically-sound spacing units and the location and siting of well pads. ECL §23-0501. As such, any suggestion that municipalities can regulate the location of oil and gas wells or exclude oil and gas extraction in a municipality or any portion thereof based upon zoning principles directly conflicts with and frustrates the purpose of the statutory scheme in the ECL.

24. In short, to interpret the ECL supersedure provision to allow local municipalities to enforce zoning and/or other land use laws as to oil and gas drilling would

obviate the collective interest and policy of the state. It would also conflict with statewide spacing requirements and the need to site wells based upon geology and environmental considerations, not municipal boundaries, local zoning, and setbacks.

25. Indeed, one of the reasons for the ECL's broad preemption relative to oil and gas drilling is because decisions about the size of drilling units and where they are formed must be decided by state professionals through geologic interpretation and not based upon a patchwork of often inconsistent and perhaps, politically driven, local land use policies that could prevent landowners from recovering the mineral resources from beneath their property.

26. To reach a contrary conclusion would bring back the problems the 1981 amendments to New York's Oil, Gas and Solution Mining Law was meant to eliminate; namely, a patchwork approach to energy resource development and enforcement in the state.

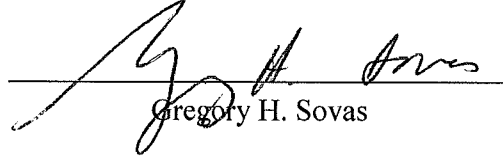
27. It would also run counter to the Department's long-standing interpretation of § 23-0303(2).

28. For over thirty years, the Department interpreted ECL § 23-0303(2) to completely preempt local municipalities from regulating the oil and gas industry, whether through zoning or other local laws and ordinances putatively based on public health, safety and welfare.

29. By way of example, the Department has a long-standing history of sending letters to local municipalities asserting the exclusive jurisdiction over oil and gas exploration and development and reminding local municipalities of ECL § 23-0303(2)'s broad preemptive scope. A true and accurate copy of one of the many letters is attached hereto as Exhibit A.

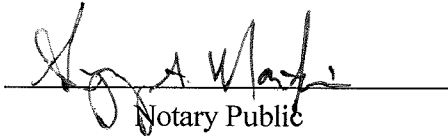
30. For the foregoing reasons, I urge this Court to grant Anschutz's petition, annul the Resolution and declare the Resolution preempted.

Dated: September 12, 2011
Albany, New York



Gregory H. Sovas

Sworn to before me
this 12 day of September, 2011

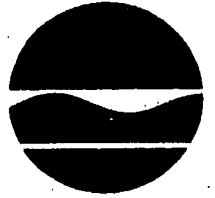


Notary Public

GREGORY A. MOUNTAIN
Notary Public, State of New York
Qualified in Columbia County
No. 02MO6054126
Commission Expires January 29, 2014

Exhibit A

New York State Department of Environmental Conservation
50 Wolf Road, Albany, New York 12233-0001



Henry G. Williams
Commissioner

March 28, 1984

The Honorable William O. Smith
Mayor of the City of Olean
Olean Municipal Building
Olean, New York 14760

*Oil & Gas:
Local
Authority*

Dear Mayor Smith:

This Department recently became aware of the City of Olean's proposed ordinance to regulate the drilling and maintenance of oil and gas wells within the City limits and regulating strip mining and pit mining within the City limits. Among other things, this ordinance requires mining and well operators to obtain permission from the City to operate a mine or well within the City's borders and to file indemnity bonds or public liability insurance for the benefit of the City.

The New York State Mined Land Reclamation Law and its regulations [ECL Article 23, Title 27 and 6 NYCRR Parts 420-426] permit local governments to regulate the mining industry, provided the local requirements are at least as strict as the State requirements. With respect to regulation of the oil and gas industry, however, I respectfully draw your attention to subdivision 2 of §23-0303 of the Environmental Conservation Law which states:

The 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.

Hence, only the State, through the Department of Environmental Conservation, has the authority to regulate the oil and gas industry, except as to matters concerning local roads and real property taxation. See Envirogas, Inc. v. Town of Kiantone, 112 Misc. 2d 432, 447 N.Y.S.2d 221 (Sup.Ct., Erie Co., 1982), aff'd 454 N.Y.S.2d 694 (4th Dept., 1982). The Department's regulations concerning the oil and gas industry are contained in Parts 550-558 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York. I also draw your

attention to ECL 23-0305.13, which requires every person granted a permit to drill to give notice by certified mail to any local government affected and to any landowner whose surface rights will be affected by drilling operations of the location of the drilling site before starting those operations.

In summary, then, while it has the power to regulate the mining industry at least as strictly as is those provided for in State law and regulations, the City of Olean is without statutory authority to regulate any of the matters set forth in the proposed ordinance pertaining to oil and gas wells.

If you have any questions on this matter, please do not hesitate to contact me.

Sincerely yours,



Charles E. Sullivan, Jr.
Senior Attorney

cc: William J. O'Reilly, Esq.
bcc: G. Sovas
J. Corr
J. Spagnoli
L. Nelson
B. McGranahan