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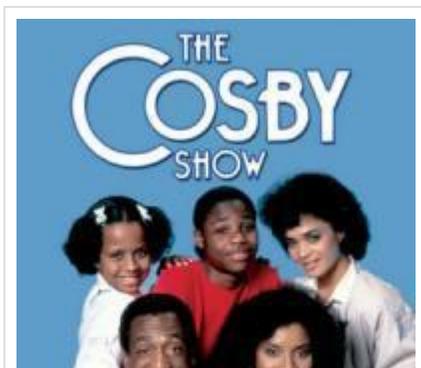
# State vs. Local Oil and Gas Regulation: “Who’s the Boss” of the Booming “Dynasty” and How Their “Diff’rent Strokes” for Dealing with the Industry Cause “Growing Pains”.

Posted on [September 13, 2012](#) by [olls](#)

by Jennifer Berman

You’re thinking “*Gimme a Break*, I can’t learn anything about state versus local oil and gas regulation from 1980’s television shows.” But let’s take a *Quantum Leap* of faith together and I’ll guide you to the *Head of the Class* on the issue of preemption by using a 1980’s television show analogy.

Despite the obvious choices of *Dynasty* and *Dallas*, we’ll focus instead on Clair and Cliff Huxtable from *The Cosby Show*.



### Cheesy television analogy

It’s a beautiful Saturday in Brooklyn and Clair Huxtable (we’ll liken her to the state) has told her son, Theo (he’s our oil and gas operation), that he can go out that night, but only if he spends



the day taking his sister Rudy to the park. As Theo's parent, Clair has the authority to impose this condition on him. Likewise, the state, under the Oil and Gas Conservation Act, has the authority to impose conditions on oil and gas operations. See section 34-60-101, C.R.S. et seq. The state exercises its authority through regulations promulgated by the Colorado Oil and Gas Conservation Commission (COGCC) created in section 34-60-104, C.R.S.

Now, in classic 1980's sitcom fashion, Theo has separately asked his dad, Cliff (he's our local government), if he can go out that night in hopes that Cliff will say yes with zero conditions attached. Cliff responds that Theo can go out that night, but only if Theo stays home all day to clean the house. Like Clair, Cliff has the authority to impose this condition on Theo. Like Cliff, local governments may regulate oil and gas operations, and they do it through: (1) their authority to regulate land use under section 29-20-104, C.R.S.; (2) their zoning authority set forth in part 1 of article 28 of title 30, C.R.S., (county planning and building codes) and part 2 of article 23 of title 31, C.R.S., (municipal planning and zoning); and (3) their permitting authority ("1041" authority) under part 1 of article 65.1 of title 24, C.R.S.

And, now, back to our show. What is Theo to do?

He can't abide by both Clair's and Cliff's conditions because their conditions conflict with one another. Whose condition controls?



Let's recall that Clair is the state in this analogy, so she has the power to preempt Cliff from regulating Theo. The preemption doctrine establishes a priority between potentially conflicting laws enacted by various levels of government. [Bd. of County Comm'rs v. Bowen/Edwards, 830 P.2d 1045, 1055 \(Colo. 1992\)](#). There are three categories of preemption: express preemption, implied preemption, and preemption by operational conflict. Thus, there are three ways in which Clair could override Cliff's condition:

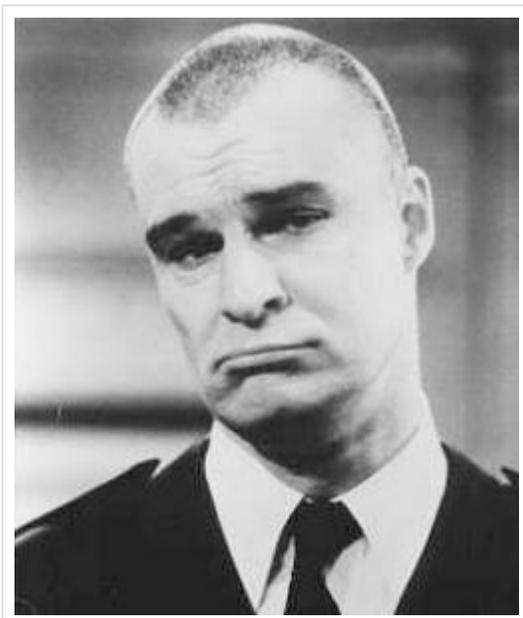
- First, Clair could state that she prohibits Cliff from exercising any authority over Theo. This would be express preemption, and, in the context of the state and local

government, it would involve a state statute expressly providing that local governments shall not regulate a specific matter.

➤ Second, it could be determined that Clair intends to occupy completely a certain field of control over Theo (like, how he spends his Saturdays) by reason of having a dominant interest over Cliff's interest in that field. This would be implied preemption and it exists where the respective interests of various levels of government are "irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes."  
Bowen/Edwards, 830 P.2d at 1058.

➤ Third, with respect to the specific conditions imposed on Theo, a judge (perhaps Judge Harry Stone from Night Court) could determine that Cliff's condition conflicts with Clair's condition to such an extent that Cliff's condition "would materially impede or destroy" Clair's interest, which would mean that Cliff's condition is in operational conflict with Clair's condition. Bowen/Edwards, 830 P.2d at 1059 ("State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest.").

In our scenario, Clair did not expressly prohibit Cliff from exercising authority over Theo, and her general interest in getting Theo to babysit his sister is not patently dominant over Cliff's interest in getting Theo to clean the house. Therefore, Clair has neither expressly nor impliedly preempted Cliff's condition. But Cliff's condition, which would keep Theo at home all day, is in operational conflict with Clair's interest in having Theo take Rudy to the park. Thus, Judge Stone would likely determine that Clair's condition preempts Cliff's condition through operational conflict.



Sorry, Cliff.

#### Case law

In Bowen/Edwards, the Colorado Supreme Court determined that the state has not expressly or impliedly preempted local governments from regulating oil and gas operations. But the court recognized that some local governments' oil and gas regulations may be in operational conflict with the state's interest in "[f]oster[ing] the responsible, balanced development, production, and utilization of the natural

resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.” Courts must make this determination on a case-by-case basis. In [Voss v. Lundvall Bros.](#), 830 P.2d 1061 (Colo. 1992), the court determined that even a home-rule city’s ordinance may be subject to preemption by operational conflict with regard to oil and gas regulation. The court held that the state’s interest in oil and gas production preempted Greeley’s ordinance completely banning all oil and gas drilling within its city limits.

In [Town of Frederick v. North American Resources Co.](#), 60 P.3d 758, 765 (Colo. App. 2002), the Colorado Court of Appeals held that the Town of Frederick’s technical conditions on well drilling, safety requirements, and setback, noise abatement, and visual impact provisions were all preempted on the basis of operational conflict. But the court held that the town’s requirements for special use permits and inspection and application fees were not in operational conflict with state regulations. See also [Bd of County Comm’rs v. BDS Int’l, LLC](#), 159 P.3d 773 (Colo. App. 2006) (county’s ordinance was preempted by operational conflict with respect to provisions concerning fines, financial security, and access to oil and gas operators’ records).

Guided by these cases, the Colorado Department of Local Affairs’ Division of Local Government has [developed a list of regulations](#) likely to be found in operational conflict with state law, including: (1) technical requirements; (2) setback requirements greater than those imposed by the COGCC; (3) fines inconsistent with the Commission’s fine schedule; (4) financial security requirements; (5) noise abatement requirements beyond those imposed by the state; and (6) visual resource requirements different from those required by the state.

### Longmont

Under the land-use, zoning, and permitting authority vested in it by statute, the City of Longmont has recently updated its oil and gas regulations to keep up with new technology in hydraulic fracturing, or “fracking”. Fracking involves pumping a mixture of water, sand, and chemicals deep underground to fracture bedrock and capture the fossil fuels released from the process.

While drafting the ordinance, Longmont received a letter from the Colorado Attorney General, on behalf of the COGCC, requesting that the city “[reject the draft regulations as being in operational conflict with the \[Commission’s\] regulatory regime.](#)” Despite the letter, Longmont passed the ordinance imposing oil and gas regulations on July 17, 2012. Two weeks later, the [COGCC sued Longmont, seeking a declaratory judgment invalidating portions of the ordinance as preempted by state law.](#)

In its complaint, the COGCC argues that the following provisions of the Longmont ordinance are in operational conflict with the Commission's own regulations pertaining to:

- ✎ Technical conditions concerning drilling and well sites;
- ✎ A per se ban on surface operations and facilities in residentially zoned districts;
- ✎ Water sampling requirements beyond those required by the Commission;
- ✎ Riparian setbacks to protect water resources; and
- ✎ Wildlife habitat and species protection provisions.

Anticipating challenges based on operational conflict, Longmont included in the ordinance an "operational conflicts special exception" provision. That provision provides that oil and gas operations may be exempted from provisions of the ordinance if the city determines that those provisions are in operational conflict with the state regulatory scheme. In its complaint, the Commission argues that the special exception provision does not save the ordinance from preemption because it improperly grants the city the authority to make an operational conflict determination and it allows the city the discretion not to grant an exemption even if the city determines that an operational conflict exists.

If the court permits the lawsuit to go forward, it will have to determine whether parts of Longmont's ordinance "would materially impede or destroy" the state's interest in regulating oil and gas development and whether Longmont's preemptive "special exception" provision saves the ordinance from, well, preemption.

Stay tuned ... it's sure to be an exciting courtroom drama...

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