IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SWEPI LP, A DELAWARE LIMITED
PARTNERSHIP,

Plaintiff**,**

Case No. 14-cv-0035 LH/RHS

v.

MORA COUNTY, NEW MEXICO
et al.,

Defendants**.**

SWEPI'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS[1]

Pursuant to Federal Rule of Civil Procedure 12(c), plaintiff SWEPI LP ("SWEPI") moves this Court for judgment on the pleadings as to its First, Second, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth claims for relief based on the following:

INTRODUCTION

The Ordinance in this case legalizes invidious discrimination against corporations. Not only does the Ordinance prohibit corporations from engaging in all activities relating to the exploration for or extraction of hydrocarbons, it also purports to strip corporations of their rights as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution. By its express terms, the Ordinance contravenes over two hundred years of Supreme Court precedent squarely establishing that corporations have protected constitutional rights and that such rights may not simply be cast aside out of animosity or disdain toward the corporate form. This Court should declare the Ordinance unconstitutional.

[1] Pursuant to D.N.M. Local Rule 7.1(a), counsel for Defendants were consulted on their position on this motion and have stated that this motion is opposed.

The Ordinance violates SWEPI's constitutional rights. By declaring that the terms of the Ordinance take precedence over any conflicting or contrary provision of federal law or the United States Constitution, the Ordinance violates the Supremacy Clause. By explicitly depriving SWEPI of its property rights for an entirely arbitrary reason, namely its status as an incorporated entity, the Ordinance violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution. And by completely eliminating all economically valuable use of SWEPI's property located in Mora County, the Ordinance takes SWEPI's property without just compensation. Finally, the sweeping evisceration of SWEPI's constitutional rights under the First and Fifth amendments to the United States constitution is simply indefensible as a matter of constitutional law.

Nor does the Ordinance's infirmity stop at these flagrant violations of SWEPI's constitutional rights. By purporting to impose and enforce local zoning laws on State lands, the Ordinance is ultra vires and violates New Mexico law. By dictating the use and effective abandonment of State oil and gas minerals that have been leased by the State to SWEPI and others, the Ordinance violates New Mexico law. And by depriving SWEPI of its right to explore for and extract hydrocarbons pursuant to its fee and State leases, the Ordinance violates SWEPI's property and contract rights under the New Mexico Constitution. For all of these reasons, the Court should grant SWEPI's motion and invalidate the Ordinance in its entirety.

BACKGROUND

On April 29, 2013, the Mora County Board of County Commissioners ("MCBOCC") passed the "Mora County Water Rights and Self-Government Ordinance" (the "Ordinance"). Complaint ("Compl.") ¶ 1. The Ordinance purports to criminalize virtually any corporate activity relating to the exploration for, or development of, hydrocarbons within Mora County. *Id.* ¶¶ 34-45. In addition, it explicitly strips corporations that engage in, or seek to engage in, any such

activity of virtually all rights otherwise afforded to them under the United States Constitution, including their rights to freedom of speech, equal protection, and due process. *Id.* ¶ 41.

SWEPI LP is a Delaware limited partnership and a lessee under several fee and State oil and gas leases located in Mora County, New Mexico. *See id.* ¶¶ 4-5. SWEPI seeks to, and is prepared to engage in, activities that are currently prohibited by the Ordinance. *See id.* ¶¶ 6-7. As such, SWEPI has suffered, and continues to suffer, an injury in fact as a result of the enactment of the Ordinance. To redress these past and continuing injuries, SWEPI has filed this lawsuit and now moves for partial judgment on the pleadings on several of its claims.

ARGUMENT

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings should be granted when "the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." *Park Univ. Enters. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006).

I. The Ordinance's Attempt to Disavow Federal Law and Divest Corporations of Substantive Rights is a Clear Violation of the Supremacy Clause.

Because the Ordinance explicitly strips corporations of numerous constitutional rights, purports to invalidate other protections afforded by federal law, and issues a thinly veiled threat of secession from the United States, it violates the Supremacy Clause of the United States Constitution. A state or local law is held invalid under the Supremacy Clause if such law "conflicts with federal law or stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 260 (1985) (internal quotation marks and citation omitted). Under the Supremacy Clause, states

"lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 736 (2009).[2]

Beyond simply conflicting with federal law, the Ordinance expressly disavows the applicability and supremacy of federal law, including fundamental provisions of the United States Constitution. The Ordinance states, both absurdly and unlawfully, that its terms take priority over federal law. *See* Compl. Ex. 1 at § 5.8 (noting that the United States constitution is only preemptive to the extent it is consistent with the terms of the Ordinance). In other words, according to the Ordinance, if a conflict exists between the United States Constitution and the Ordinance, the Ordinance will trump the United States Constitution. Such an assertion violates the very essence of the Supremacy Clause. *See Russo v. Ballard Med. Prods.*, 550 F.3d 1004, 1011 (10th Cir. 2008) ("The Supremacy Clause of the Constitution provides that federal law trumps, or preempts, contrary state laws.").

The Ordinance is not limited to a generalized repudiation of federal constitutional law. In very specific, concrete, and alarming terms, Section 5.5 of the Ordinance purports to divest "corporations . . . seeking to engage in activities prohibited by this ordinance" of a variety of constitutional rights, including "rights under the 1st or 5th amendments to the United States constitution." *Id.* at § 5.5. The unconstitutionality of such an enactment is beyond debate. *See Julian v. Hanna*, 732 F.3d 842, 847-48 (7th Cir. 2013) (Posner, J.) (noting that "[d]efense counsel exceeded the bounds of responsible advocacy by arguing . . . that the Indiana legislature, provided only that it complied with its procedures governing legislative enactment, could with impunity strip residents of Indiana of all their federal and state constitutional rights."). In even more alarming terms, Section 5.6 of the Ordinance purports to close the courthouse door to

[2] The Tenth Circuit has held that "[a] party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004). Thus, even if Section 1983 does not provide a private right of action for violation of the Supremacy Clause, SWEPI may nonetheless properly bring such a claim before the Court.

corporations aggrieved by this abrogation of their constitutional rights. *See id*. at § 5.6 (stating that individuals or corporations seeking to engage in prohibited activities "shall not possess the authority or power to . . . challenge or overturn County ordinances adopted by the Mora County Commission . . ."). By seeking to deny access to justice for aggrieved corporations, such a provision is plainly unconstitutional. *See Haywood*, 556 U.S. at 736.

Finally, by its own terms, the Ordinance provides that any attempt to "preempt, alter, amend or overturn" its provisions may result in the consideration of "actions to separate the County from other levels of government used to preempt, amend, alter or overturn the provisions of th[e] Ordinance." Compl. Ex. 1, § 11. Such contemplation of secession from the United States or the State of New Mexico is plainly unconstitutional. *See Daniels v. Tierney*, 102 U.S. 415, 418 (1880) ("That the ordinance of secession was void is a proposition we need not discuss. The affirmative has been settled by the arbitrament of arms and the repeated adjudications of this court.").

II. The Ordinance Violates SWEPI's Rights to Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution.

The Equal Protection clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, sec. 1. The Supreme Court has established that corporations are "persons" within the meaning of the Equal Protection Clause and are entitled to its protections. *See Metro Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) ("It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment."); *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.").

"[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination . . ." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) ("The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility.") (citation omitted). Where, as here, the challenged law does not involve a suspect classification, the applicable test is whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

Although the Equal Protection clause of the United States Constitution affords a state significant deference in shaping its laws, a state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 446 (1985); s*ee Romer v. Evans*, 517 U.S. 620, 633 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause"). Similarly, a state law motivated by animus and directed at a politically unpopular group cannot survive even a rational relationship test. *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (ruling that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (emphasis in original).

By prohibiting corporations,[3] but not individuals, from engaging in virtually any activity related to oil and gas exploration or production, the Ordinance violates SWEPI's right to equal protection of the laws. The Ordinance's prohibition on corporate activity alone is invidious and bears no rational relationship to any legitimate governmental interest. Moreover, as made clear from the legislative findings supporting the Ordinance, and statements contained within the Ordinance itself, the classification at issue is motivated by nothing more than a disdain for the corporate form.

A. The disparate treatment of individuals and corporations under the Ordinance bears no rational relationship to any legitimate governmental interest.

The Supreme Court has clearly held that disparate treatment between individuals and corporations bears no rational relationship to a legitimate state interest and therefore violates the Equal Protection clause. For example, in *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515 (1929), the Court considered the constitutionality of an Oklahoma law concerning the regulation and licensing of cotton gins. Under the legislative scheme at issue in *Frost*, an individual who wished to obtain a license to operate a cotton gin was required to make a "satisfactory showing of public necessity." 278 U.S. at 517. By contrast, a co-operative corporation having a subscription of at least 100 members could obtain such a license without a showing of public necessity. *Id.* Thus, "an individual[] is forbidden to engage in business unless he can first show a public necessity in the locality for it; while corporations . . . may engage in the same business in the same locality no matter how extensively the public necessity may be exceeded." *Id*. at 523. Finding that this licensing scheme violated the Equal Protection clause, the

[3] Section 3.1 of the Ordinance broadly defines a "corporation" as "any corporation, limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or under the laws of any country, and any other business entity that possesses State-conferred limited liability attributes for its owners, directors, officers, and/or managers." Thus, the crux of the Ordinance's definition of "corporation" is its status as an entity whose owners enjoy limited liability under state law.

Court explained that "[a] classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual." *Id*. at 522.[4] The principle underlying the decision in *Frost* applies here. As in *Frost*, the Ordinance forbids corporations from engaging in conduct that individuals or unincorporated associations may freely undertake. Such disparate treatment between individuals and corporations or other limited liability entities bears no rational relationship to any legitimate state interest.

B. The Ordinance's prohibitions against corporate activities constitutes invidious discrimination.

State laws violate the Equal Protection clause when they are based on an invidious classification or are motivated by a desire to harm a politically unpopular group. *Moreno*, 413 U.S. at 534. Here, the express language of the Ordinance makes clear that the disparate treatment of corporations as compared to individuals is motivated not by a desire to achieve a legitimate governmental interest, but by a gross antipathy toward the corporate form. For example, the Preamble to the Ordinance makes clear its discriminatory purpose as to corporations when it notes that "industrial use of water supplies in this county placing the control of water in the hands of a corporate few, rather than the county, would constitute abuse and usurpation." Compl. Ex. 1 at Preamble. Likewise, the Preamble notes that "two centuries worth of governmental conferral of constitutional powers upon corporations has deprived people of the authority to govern their own communities." *Id.* The Ordinance also states its intention to achieve its objectives, in part, "by eliminating legal privileges and powers from corporations violating the

[4] The only context in which the Court has affirmed the disparate treatment of corporations as opposed to individuals is taxation. Those cases explicitly recognize that this area of law is different and cannot be expanded beyond that specific context. *See Lehnhausen v. Lake Shore Auto Parts Co*, 410 U.S. 356, 362 (1973) ("The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals.")

Ordinance." *Id.* The list goes on, as the Ordinance is replete with gratuitous derogatory references to corporations and the corporate form. *See, e.g., id.* at § 12 (calling for a constitutional amendment that "elevates community rights above corporate property rights"). These statements provide ample evidence of the discriminatory intent underlying the Ordinance.

The invidious intent underlying the Ordinance is further established by the scope of the prohibitions contained therein. In addition to prohibiting any oil and gas related activity by corporations themselves, the Ordinance also prohibits a variety of related activities when undertaken by "any director, officer, owner, or manager of a corporation." *See* Compl. Ex. 1 at § 5.2 (prohibiting such individuals from "import[ing] water or any other substance . . . into Mora County for use in the extraction of subsurface oil, natural gas, or other hydrocarbons."). In other words, such activities are not just illegal as to corporations, but as to anyone even remotely associated with an incorporated entity. By its terms, this prohibition would extend to an individual who undertakes these activities in an individual capacity, but who happens to own shares in a publically traded company. That the Ordinance's prohibitions extend in such a manner makes clear that its true intent is not to advance a legitimate governmental objective, but is in fact a vindictive effort to disempower and punish corporations and anyone who is in any way affiliated with an incorporated entity.

The Supreme Court has recognized this type of invidious discrimination as violating the Equal Protection clause. In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court considered the constitutionality of a provision of the federal Food Stamp Act providing that groups of unrelated people living together could not qualify for food stamps. 413 U.S. at 538. Applying a rational basis test, the Court held that such a provision violated the Equal Protection clause. *Id.* at 538. The Court explained that, based on legislative history, the "amendment was intended to prevent so-called 'hippies' and 'hippie communes' from

participating in the food stamp program." *Id.* at 534. The Court went on to explain that the "challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.*

Applying the same principle almost 25 years after *Moreno*, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down an amendment to the Colorado constitution that would have prohibited local governmental action designed to protect homosexuals from discrimination. Concluding, as it did in *Moreno*, that the law was "born of animosity toward the class of persons affected" the Court held, under a rational relationship test, that the amendment violated the Equal Protection Clause. *Romer*, 517 U.S. at 634. The Court further noted that "a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id*. at 635.

Just as in *Romer* and *Moreno*, the text of the Ordinance itself and the comment from Defendant John Olivas make clear that the Ordinance is "born of animosity" toward the corporate form. As such, it bears no rational relationship to a legitimate governmental interest and violates the Equal Protection Clause.

II. The Ordinance Impermissibly Strips SWEPI of its First Amendment Rights.

SWEPI seeks to, and is prepared to, undertake certain activities relating to the development of oil and gas resources in Mora County. Compl. ¶¶ 4-6. The Ordinance expressly prohibits these activities. *Id.* Ex. 1 at §§ 5.1-5.4. Because SWEPI falls within the purview of and seeks to engage in activities prohibited by the Ordinance, the Ordinance explicitly purports to strip SWEPI of its First and Fifth Amendments rights. *Id.* § 5.5 ("Corporations . . . seeking to

engage in activities prohibited by this ordinance, shall not . . . be afforded rights under the 1st or 5th amendments to the United States constitution . . ."). By purporting to strip SWEPI of its fundamental First and Fifth Amendment rights, the Ordinance is plainly unconstitutional.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Supreme Court has conclusively held that First Amendment protections extend to corporations. *Citizens United v. FEC*, 558 U.S. 310, 342 (2010); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) ("We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.").

The Ordinance's blanket prohibition on all First Amendment activity is analogous to those in *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). In *Jews for Jesus*, the Board of Airport Commissioners for the City of Los Angeles adopted a resolution purporting to ban all First Amendment activity within the central terminal area at Los Angeles International Airport. 482 U.S. at 570. In finding that the resolution ran afoul of the protections afforded by the First Amendment, the Court explained that "[w]e think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575.

Although analogous, the wholesale abrogation of First Amendment rights imposed by the Ordinance is far more egregious than that held unconstitutional in *Jews for Jesus*. First, the resolution in *Jews for Jesus* was limited in its application to an airport terminal, which arguably could be viewed as a non-public forum. *Id.* at 573-74. By contrast, the Ordinance purports to ban

such activity within an entire county, including those portions of the county that are undoubtedly public forums or "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983). Perhaps more importantly, however, the Ordinance represents a selective ban, directed only at those "individuals or corporations in violation of the prohibitions enacted by th[e] ordinance, or seeking to engage in activities prohibited by th[e] ordinance." Compl. at ¶ 42 (quoting Section 5.6 of the Ordinance). This is a clear viewpoint-based restriction, designed to silence those voices that would oppose the substantive prohibitions contained in the Ordinance. Such a select prohibition contravenes the very essence of the First Amendment as it represents an undisguised "effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. Aside from unlawfully purporting to silence the voices of those who oppose the Ordinance, there is no conceivable impetus for the wholesale abrogation of the First Amendment rights of those individuals or corporations that seek to engage in activities prohibited by the Ordinance. The Ordinance is thus plainly unconstitutional.[5]

III. The Ordinance Effects a Regulatory Taking of SWEPI's Property Without Just Compensation.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use without just compensation" U.S. Const. amend, V. That protection applies as against action by a State though operation of the due process clause of the Fourteenth Amendment. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). The Supreme Court's Takings Clause jurisprudence has identified two separate categories of compensable

[5] Because the Ordinance purports to divest SWEPI of all of its First Amendment rights, including the right to petition the government for redress of grievances, the very filing of this lawsuit constitutes a violation of the terms of the Ordinance. *See Duryea v. Guarneiri*, ___ U.S. ___, 131 S.Ct. 2488, 2494 (2011) ("the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."). Indeed, the Ordinance divests SWEPI of precisely this right by holding that such an entity "shall not possess the power or authority . . . to challenge or overturn County Ordinances . . ." Compl. Ex. 1, § 5.6.

takings. The first involves the state's actual appropriation of property, such as a situation in which the state condemns land to build a public road. *Id.* at 537. The second type, generally known as a regulatory taking, occurs when "government regulation of private property [is] so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* At issue here is whether the Ordinance effects a regulatory taking of SWEPI's property; it does.

Under established Supreme Court precedent, a plaintiff claiming a regulatory taking may proceed under two separate theories. First, a plaintiff may claim that a regulation "deprives land of all economically beneficial use", which the Supreme Court has recognized as a regulatory taking. *See Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1027 (1992). Alternatively, a plaintiff may proceed under the multi-factor test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 548 (describing various theories of establishing a compensable regulatory taking). For purposes of this motion only, SWEPI is proceeding only under the first theory described above.

A. The Ordinance deprives SWEPI of all economically beneficial use of its property.

Although the Supreme Court's jurisprudence interpreting the parameters and scope of the Takings Clause is both voluminous and intricate, this Court need not engage in an exhaustive review of that case law to find that the Ordinance effects a compensable taking. In fact, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the very case that gave rise to the concept of a regulatory taking, provides a conclusive answer to the question.

In *Mahon,* defendant was a coal company that owned the mineral rights associated with a tract of land in Pennsylvania. *Mahon*, 260 U.S. at 412. The company had previously sold the surface rights to defendants, but had expressly "reserve[d] the right to remove all coal under the same." *Id.* After the effective date of this transfer, the state passed a statute prohibiting "the

mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation." *Id*. at 412-13. The company argued that this statute effected an unconstitutional taking by destroying its ability to mine the coal in which it held a clear property interest. *Id*.

The Supreme Court agreed that such a statute effected a compensable taking under the Fifth Amendment. Justice Holmes' opinion for the Court announced a number of seminal principles that formed the foundation for the Supreme Court's Takings Clause jurisprudence. In particular, Justice Holmes noted that "while private property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Id*. at 416. Justice Holmes further explained that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* Finding the specific statute at issue in *Mahon* constituted a compensable taking, the Court noted that "the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate . . ." *Id.* at 414. In a passage particularly applicable to cases such as this one involving mineral interests, the Court further noted that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.*

These very same principles make *Mahon* virtually identical to the present case. As with the Pennsylvania law at issue in *Mahon*, New Mexico law recognizes a mineral estate as an interest in real property separate and distinct form the surface estate. *See Johnson v. Gray*, 410 P.2d 948, 950 (N.M. 1966). This is an important factor in determining whether the challenged regulation effects a taking of the full value of property. *See Lucas*, 505 U.S. at 1016 n.7 (noting that the answer to whether the owner has been deprived of all economically feasible use "may lie in how the owner's reasonable expectations have been shaped by the States' law of property—

i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.").

Indeed, the Ordinance is even more egregious than that at issue in *Mahon*. Whereas the statute in *Mahon* merely limited the scope of coal mining so as to protect structures present on the surface estate, the Ordinance imposes a blanket prohibition on the extraction of any hydrocarbons within Mora County when undertaken by a corporate entity. By effecting a blanket prohibition on all activity relating to oil and gas exploration and extraction in Mora County, the Ordinance makes it "commercially impracticable" for SWEPI to make any beneficial economic use of its ownership of these mineral interests — the Ordinance prohibits SWEPI from extracting any hydrocarbons whatsoever. *Mahon*, 260 U.S. at 414. ("For practical purposes, the right to coal consists in the right to mine it."). Because SWEPI owns only the mineral estate in the subject properties, the Ordinance extinguishes all beneficial use of SWEPI's property.

IV. The Ordinance Violates SWEPI's Right to Substantive Due Process.

The Due Process clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property without due process of law." U.S. Const. amend XIV, § 1. The Due Process clause contains both a procedural and a substantive component. "Procedural due process ensures the state will not deprive a party of property without engaging fair procedures to reach a decision, while substantive due process ensures the state will not deprive a party of property for an arbitrary reason regardless of the procedures used to reach that decision." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (noting that the due process clause protects against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

SWEPI's interest in its oil and gas leases located in Mora County represent a property interest protected by the Due Process clause of the Fourteenth Amendment. *See McLaurin v. Shell W. E. & P., Inc.*, 778 F.2d 235 (5th Cir. 1985). By prohibiting SWEPI from engaging in any activity related to the exploration for or extraction of any hydrocarbons pursuant to those leases, the Ordinance deprives SWEPI of that property interest. *Id.* ("the cancellation of an oil, gas, and mineral lease is nothing less than a forfeiture of a recognized and protected property interest."). Thus, in determining whether such action comports with substantive due process, this Court must ask whether the deprivation of SWEPI's property interest bears a rational relationship to a legitimate governmental interest. *See Dias v. City & County of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009).

The answer to that question is "no." SWEPI has been deprived of its contract and property interests for an entirely arbitrary reason, namely, its status as a corporation. *See, supra,* Section II, A; *see also* N.M. Stat. 1978, §§ 70-2-33(H) (recognizing and protecting natural resources developer's right to produce without waste its share of the oil or gas underlying its lands). The decision to abrogate SWEPI's rights under its leases, the New Mexico Oil and Gas Act, and the common law on this basis is not rationally related to any legitimate governmental interest. *Id.*

Not only does the Ordinance lack any rational relationship to a legitimate governmental interest, but it directly violates and is repugnant to the government's interest — and SWEPI's corresponding right, entitlement, and interest — in the safe, responsible, and economic extraction and production of natural resources. The interests of the government, the citizens of New Mexico, and of natural resources developers like SWEPI in producing oil, gas and minerals in New Mexico are codified in the Enabling Act of 1910, the New Mexico Constitution, and the New Mexico Oil and Gas Act.

It is "well settled in New Mexico that under the Enabling Act, our Constitution and the statutes based thereupon, the Commissioner of Public Lands has complete dominion, which is to say complete control, over state lands." *Burguete v. Del Curto*, 163 P.2d 257, 259 (N.M. 1945). "This control includes the right to sell lands and the ***right to lease lands*** for grazing and ***for prospecting, exploration, development and production of minerals, oil and gas***." *Jensen v. State Highway Comm'n*, 642 P.2d 1089, 1090 (N.M. 1982) (emphasis added). Critically, the State Land Commissioner is entrusted with such control because, under "the Enabling Act, certain public lands belonging to the government were granted to the state of New Mexico for certain public purposes, chiefly for educational purposes and for the maintenance of educational institutions, including free public schools." *State ex rel. Otto v. Field*, 241 P. 1027, 1029 (N.M. 1925). In total disregard of the Enabling Act and the Constitution, and contrary to the state of New Mexico's interest in funding free public education to New Mexico's schoolchildren, the Ordinance prohibits the exploration for and development of natural resources everywhere in the County, including on State lands.

The Ordinance also disregards the government's interest in uniformly regulating the safe, responsible, and economic development of natural resources throughout the state of New Mexico, not just on State lands. Under the New Mexico Oil and Gas Act, the Legislature created the Oil Conservation Commission and conferred upon it plenary regulatory authority over oil and natural gas extraction within the state. N.M. Stat. 1978, §§ 70-2-4, 70-2-6, and 70-2-12. The Legislature entrusted the Commission with that authority only after mandating that it be compromised of "persons who have ***expertise in the regulation of petroleum production*** by virtue of education and training." *Id.*, § 70-2-4 (emphasis added). And that authority extends to all facets of oil and gas production, including the conservation of oil and gas, the prevention of waste of oil and gas, and the protection of correlative rights. N.M. Stat. §§ 70-2-11 and 70-2-12.

In total disregard for the Oil and Gas Act, and again contrary to the state of New Mexico's interest in regulating natural resources production based on the expertise of the Oil Conservation Commission's members, the Ordinance prohibits activities entrusted to a State agency that has reviewed and approved the conduct in question.

In light of SWEPI's property rights, and the state of New Mexico's interest in the safe, proper, and economic exercise of those rights, the Ordinance must be struck down as unconstitutional. The Ordinance deprives SWEPI of its property based on the arbitrary classification that it is a corporate actor. That absurd rationale makes this an easy case. But any other rationale would also fail because the County, which is a mere creature of statute possessing only those powers conferred upon it by the Legislature, cannot upend the Enabling Act, the Constitution, and the Oil and Gas Act. Yet, if the Ordinance withstood a due process challenge, it would do just that by undermining the state of New Mexico's interest — and SWEPI's corresponding interest — in natural resources development.

V. The Ordinance Conflicts With Established State Law.

In addition to violating the United States Constitution, the Ordinance also violates established New Mexico law because it purports to apply its restrictions to lands owned by the State of New Mexico, and because it purports to completely regulate the development of oil and gas resources, an area of regulation that is reserved by the State.

A. The County has no authority under state law to enact zoning restrictions applicable to state lands.

The County, which is a creature of statute, possesses only those powers expressly granted to it by the Legislature together with those necessarily implied to implement express powers. *Board of Comm'rs of Rio Arriba Cnty. v. Greacen*, 3 P.3d 672, 675-76 (N.M. 2000). The Legislature has granted counties the authority to pass zoning ordinances "for the purpose of

promoting health safety, morals or the general welfare. NM. St. 1978, § 3-21-1 (2013).[6] Among those is the power to "regulate and restrict within its jurisdiction the . . . use of . . . land for trade, industry, residence or other purposes. *Id.* § 3-21-1(A)(5). The New Mexico Supreme Court, however, has conclusively held that Section 3-21-1 does not permit a county to enforce its zoning ordinances on lands owned by the State of New Mexico. *See County of Santa Fe v. Milagro Wireless, LLC*, 32 P.3d 214, 216 (N.M. App. 2001). The New Mexico Supreme Court has further held that subject to certain specified restrictions, "the Land Commissioner has complete dominion over State lands", including "the right to sell lands and the right to lease lands for grazing and for prospecting, exploration, development and production of minerals, oil and gas." *Jensen*, 642 P.2d at 1090-91. By its terms, however, the Ordinance creates no exemption or exception for oil and gas exploration or extraction occurring on state lands. In fact, the Ordinance explicitly states that "the ordinance shall apply to any and all extraction of oil, natural gas, or other hydrocarbons in Mora County . . ." Compl. Ex. 1 at § 9. Because there exists no statutory authority permitting Defendants to apply the terms of the Ordinance to lands owned by the State or to supplant the State Land Commissioner's "complete dominion over State lands," the Ordinance is ultra vires and invalid as to such lands.

As a corollary matter, because the Ordinance must be held to be without effect on state-owned lands, the Ordinance may not restrict related activities necessary for oil and gas development on state lands. For example, the Ordinance purports to prohibit any corporation from "construct[ing] or maintain[ing] infrastructure related to the extraction" of hydrocarbons. Compl. Ex. 1, § 5.4. By definition, this includes "pipelines or other vehicles of conveyance of oil, natural gas, or other hydrocarbons." *Id.* The right to explore for and extract hydrocarbons on

[6] As authority for its enactment of the Ordinance, Defendants rely not upon Section 3-21-1 NMSA, but upon "the inherent right of residents of Mora County to govern their own community." Compl. Ex. 1 at § 2. Despite this formulation, SWEPI posits that Section 3-21-1 is nonetheless applicable and limits Defendants' right to enact and enforce local ordinances.

state land is impossible without the construction or maintenance of such infrastructure. Thus, allowing this portion of the Ordinance to stand is tantamount to allowing the Ordinance to have full effect as to state-owned lands.

B. The County cannot enact zoning restrictions that conflict with state law or that prohibit an act the general law permits.

The Ordinance's illegality extends beyond State and federal lands to privately owned lands, too. The Ordinance conflicts with and undermines the government's interests and SWEPI's rights under the Enabling Act of 1910, the New Mexico Constitution, and the New Mexico Oil and Gas Act. *See supra* Section IV. In light of that conflict, the Ordinance is unenforceable. *Chapman v. Luna*, 678 P.2d 687 (N.M. 1984) (holding ordinance in conflict with state law was not enforceable).

The Ordinance's prohibition on oil and gas activities by companies like SWEPI conflicts with the state of New Mexico's interest in the safe, responsible, and economic development of natural resources throughout the state of New Mexico. That conflict arises not only because of the Ordinance's practical implications (barring companies from extracting 100% of the hydrocarbons in the ground), but also by its affront to the state laws themselves. Indeed, based on the Oil and Gas Act, the New Mexico Attorney General has opined that counties cannot regulate oil and gas activities. N.M. Att'y Gen. Opinion No. 515, 1986 N.M. AG LEXIS 6, **2-3 (N.M. AG 1986). The Attorney General concluded that the New Mexico Oil Conservation Division "occupies the entire area of oil and gas regulation and a county cannot, by ordinance, attempt to regulate this area." *Id.* at *2 (opining "county zoning rules affecting oil and gas operations" are "not valid") and *3 (opining that "the county is preempted from adopting zoning regulations relating to oil and gas production" because the "legislature has vested those subjects

with the OCD with the intention that that state agency occupy the entire field of regulation.”). Thus, as a matter of “field” preemption, the Ordinance is invalid and unenforceable.

Even if the Oil and Gas Act did not occupy the field, the Ordinance would remain invalid and unenforceable on the broader grounds that it prohibits conduct permitted under, among other things, the Oil and Gas Act. “Under New Mexico law, an ordinance is not necessarily invalid because it provides for greater restrictions than state law; rather, ***the test is whether the ordinance*** permits an act the general law prohibits, or ***prohibits an act the general law permits***.” *Rancho Lobo v. DeVargas*, 303 F.3d 1195, 1206 (10th Cir. 2002) (citing *Incorporated County of Los Alamos v. Montoya*, 772 P.2d 891, 895 (N.M. App. 1989)). In this case, the Ordinance violates that “test” because it prohibits companies like SWEPI from exploring for and producing oil and gas resources, even though such acts are permitted — indeed, encouraged — under the Enabling Act, the Constitution, and the Oil and Gas Act. Because the Ordinance prohibits that which the general laws permit, it is preempted and rendered invalid by state law. Accordingly, this Court should strike down the Ordinance in its entirety.

VII. The Ordinance is Not Severable and Must be Declared Unconstitutional in its Entirety.

Because of the Ordinance’s denial of the Supremacy Clause and its wholesale unconstitutional abrogation of SWEPI’s First and Fifth Amendment rights, the Court must proceed to determine whether those provisions of the Ordinance are severable from the small remainder of the Ordinance, such that those portions of the Ordinance that are not patently unconstitutional may remain in force. The answer is “no.” The stated purpose of the Ordinance itself demonstrates that its unconstitutional provisions cannot possibly be severed from the remaining provisions, such that the Ordinance must be stricken in its entirety.

"To determine whether invalid portions of the ordinance[] are severable, the court must refer to state law." *Bd. of County Comm'rs v. Qwest Corp.*, 169 F. Supp. 2d 1243, 1250 (D.N.M. 2001) (citing *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996)). Under New Mexico law, the applicable test for severability is:

> that a part of a law may be invalid and the remainder valid, where the invalid part may be separated from the other portions, without impairing the force and effect of the remaining parts, and if the legislative purpose as expressed in the valid portion can be given force and effect, without the invalid part, and, when considering the entire act it cannot be said that the legislature would not have passed the remaining part if it had known that the objectionable part was invalid.

Bradbury & Stamm Const. Co. v. Bureau of Revenue, 372 P.2d 808, 811 (N.M. 1962). Applying this test to the Ordinance, it is clear that the provisions by which the Ordinance purports to extinguish a variety of constitutional rights possessed by corporations simply cannot be severed from the remainder of the Ordinance while giving effect to its legislative purpose.

The central purpose of the Ordinance is to divest corporations of their rights and to "eliminat[e] legal privileges and powers from corporations . . ." Compl. Ex. 1 at Preamble. The elimination of fundamental constitutional rights belonging to corporations that "seek[ ] to engage in activities prohibited by the Ordinance" is a keystone of that legislative scheme. *Id*. at § 5.5. In fact, the Ordinance itself describes such divestment as a "Prohibition[ ] Necessary to Secure [the] Bill of Rights' Protections." *Id*. at § 5. Without such a prohibition, "the legislative purpose as expressed in the valid portion can[not] be given force and effect." *Bradbury & Stamm Constr. Co.*, 372 P.2d at 811; *see Baca v. N.M. Dep't of Public Safety*, 47 P.3d 441, 445 (N.M. 2002) ("If by sustaining only a part of a statute, the purpose of the act is changed or altered, the entire act is invalid."). Indeed, the resulting Ordinance would be little more than "a Swiss cheese regulation that would not be capable of accomplishing the ordinances' legislative purposes." *Qwest Corp.*, 169 F. Supp. 2d at 1250.

The Ordinance's severability clause does not change this analysis. The New Mexico Supreme Court has made clear that "[t]he presence or absence of a severability clause merely provides one rule of construction which may be considered and may sometimes aid in determining legislative intent, but it is an aid merely; not an inexorable command." *Bradbury & Stamm Constr. Co.*, 372 P.2d at 812. Here, the wording of the severability clause is itself constitutionally suspect because it requires, as a prerequisite to its operation, a "determination that the court's ruling is legitimate." Compl. Ex. 1 at § 13. Although the Ordinance contains no details as to the process by which such a determination would be made, the remaining portions of the Ordinance suggest that the County would likely refuse to recognize such a ruling as a legitimate exercise of the judicial power of the United States. *See, e.g.,* Compl. Ex. 1 at §§ 5.6, 5.8. Thus, any force and effect that the severability clause would otherwise have is entirely undercut by such a contingency.

CONCLUSION

For the foregoing reasons, SWEPI's motion for judgment on the pleadings should be granted in its entirety.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2014 the foregoing was filed electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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