

CONCURRENT SESSION

Land Use & Oil and Gas Activities: Continuing Conflict or Peaceful Coexistence?

1:30 p.m.—2:40 p.m.
Friday, April 22, 2005
Sturm College of Law

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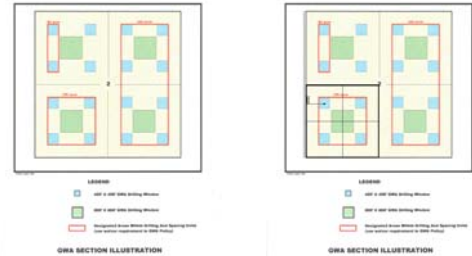
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SURFACE AND MINERAL CONFLICTS: THE LANDOWNER AND DEVELOPER PERSPECTIVE

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THE LANDOWNER/DEVELOPER TRACT



WHAT LAW GOVERNS SPLIT ESTATES

- **CONTRACT LAW:** Review the Lease, Addenda, and other documents including Surface Use Agreements
- **REAL PROPERTY LAW:** Separate Surface and Mineral Estates do exist; Created by Reservation or Grant
- Surface Estate is subject to an Implied Easement so that Mineral Owner may use that portion of Surface reasonable and necessary to extract minerals

MAGNESS

- Operator may not destroy, interfere with or damage the surface owner's **Correlative** rights to the Surface
- Use of the surface that is not reasonable and necessary to development of the minerals is a **Trespass**
- Surface Owner continues to enjoy all rights and benefits of proprietorship consistent with the burden of the easement
- Both Estates must exercise their rights in a manner consistent with the other (both estates are mutually dominant and mutually servient)
- This "due regard" concept requires the operator to accommodate the surface owner to the fullest extent possible
- The nature of the accommodation by the operator is fact driven based on the surface uses and on alternatives available to the operator

THUNDERHEAD

- Trespass requires more than just inconvenience to the surface – there must be a material interference with the surface use
- Operator need not accommodate speculative, future uses of the Surface
- Operator well locations that were consistent with the lease, COGCC and County permits, state statutes and regulations were upheld
- Surface owner's alternate well locations which would have required setback waivers from neighbors and directional drilling were not reasonable

H.B. 05-1219

- Expand duties of Operator before obtaining a permit to drill:
 - Negotiate in good faith with surface owner for a surface use agreement regarding, without limitation:
 - Location of facilities
 - Interim and final reclamation
 - Minimization of surface damages
 - Compensate surface owners for loss of value to surface resulting from mineral operations
 - Select an appraiser to value the surface if no agreement is reached
 - Arbitrate if agreement cannot be reached from the appraisal
- Operators' view: Too much cost and delay to obtain permit, No prior legal requirement to pay any damages for use of surface or to go to arbitration
- Landowners/Developers' view: Bill would level the playing field in surface use negotiations; Operators who never intend to drill and just shake down the developer for money will have less bargaining power

SURFACE USE AGREEMENTS

- Ascertain the operators and all working interest owners
 - Developer who applies for a land use change must comply with H.B. 01-1088
 - Application for preliminary or final plat, PUD, or similar land use designation, including general development plan and special use permit
 - Notice to mineral owners and mineral lessees not less than 30 days prior to initial public hearing
 - Time, place, nature and location of hearing
 - Requires a county records search by qualified person (similar to a mineral title opinion)
 - Following notice, surface owner is relieved of liability to mineral owners and lessees for any legal or equitable remedy as a result of surface development or impediment to mineral operations unless mineral owner/lessee:
 - Prior to government approval of the application, provides notice to the local government and developer of objection to approval, or
 - Commences an action for money damages prior to the later of 1 year after approval of the application or 60 days after the earliest to occur of construction with heavy equipment or posting of notice at the property that there is final approval of the application

SURFACE USE AGREEMENTS

- There may be different working interest owners for different formations (Sussex, Shannon, Niobrara, Codell, J-Sand, D-Sand, Dakota, Lyons)
- Access – location and dimensions of access to well site and surface equipment
- Operations areas – exclusive to Operator and specify setbacks
- Flowlines and pipe lines – specify easements and relocation provisions
- Payment – surface damages, relocation expenses and marginal cost of directional drilling
- Surface Release – The portion of the surface that will not be used by the Operator
- Covenant running with the land, successors and assigns, term and indemnification

**SURFACE AND MINERAL CONFLICTS:
THE LANDOWNER AND DEVELOPER PERSPECTIVE**

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A. Setting the Stage

The farmer or landowner, just having finished an inspection of the property, is generally pleased that in her 160 acre quarter section (SW1/4), located in Adams County, there exists only one oil and gas well producing in the J-sand, Codell and Niobrara formations. The production pad is no more than 20' x 20' (located in the center of the NW1/4SW1/4 of the section), and the tank battery and other above-ground production fixtures and equipment are way out on the edge of the property next to the County Road. So, she's thinking that mineral production will not unduly hamper surface development of her quarter section into a residential subdivision with parks, open space, and maybe a school site or some commercial/retail for a small convenience center.

The farmer/landowner decides to enter into a contract to sell the property and appurtenant water rights to a developer for upwards of \$10,000/acre. The developer options the property but requires the farmer/landowner to "clear title to the place", including mineral title, so that no more of the surface will be used for mineral exploration, development and production. The developer and the landowner agree to reasonably cooperate in whatever steps need to be taken with the mineral owner and lessee(s).

They contact a real estate attorney with experience in oil and gas matters who arranges a meeting with the oil and gas operator to share development plans from both the surface and mineral perspectives. The developer has her land use planner and architect lay out a preliminary development plan ("PDP") with some high density, a school site, a regional park, streets, curb and gutter, a convenience center (some shopping, office and pad sites on 10 acres), and the balance as four to six detached units/acre. The well site and surface equipment locations are located within circles having a 200' radius described on the PDP as a no build zone. Access over public streets is provided to these circles.

The attorney and developer explain the PDP to the operator. The operator pulls out a copy of the spacing diagram for the Greater Wattenburg Area, Exhibit "A" to these materials, and indicates that the operator, and possibly other working interest owners in other formations, may need one or more drill site locations in each of the five windows. The developer and

landowner turn to the attorney and ask what's next? The attorney wishes to consult privately with his clients and suggests a follow up meeting with the operator and other working interest owners to attempt to negotiate a mutually acceptable surface use agreement.

B. Reasonable Accommodation

Surface and mineral estate issues result from the principle that separate surface and mineral estates, as interests in real property, do exist. These separate estates may be created by either reservation or grant.¹ The mineral estate then may be leased to an operator who will conduct operations upon the surface to explore for, drill, develop and produce the oil, gas and other minerals. The numerous issues that occur include access, extraction operations, subsidence, use of surface resources and environmental issues. Because both real property law and contract law will be applicable, the oil and gas lease and any addenda or amendments, including surface use agreements, should be reviewed when negotiating with an operator. The careful attorney will want to look for lease addenda, lease amendments, surface use agreements or other documents and instruments that may not have been filed or recorded in the real property records. These documents frequently adjust the rights of the surface owner and mineral lessee.

Although statutes, rules and regulations exist to govern the production of oil and gas in Colorado², the common law developed from judicial decisions is applied to disputes between surface owners and mineral lessees. The cases generally involve claims based on negligence and trespass. In general, the surface estate is subject to an implied easement for the benefit of the mineral estate so that the mineral owner may utilize that portion of the surface estate as is reasonable and necessary to extract minerals.

1. Magness

In Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913 (Colo. 1997) the Colorado Supreme Court addressed a conflict between the surface owner and mineral lessee regarding reasonable use of the surface estate for mineral exploration, development and production. There, the operator sued the landowner for an injunction to prevent the surface owner from interfering with oil and gas operations. Magness had purchased approximately 1300 acres where the minerals had been previously severed from the surface. The minerals had been leased 13 years prior to the purchase by Magness. Gerrity notified Magness of a 4-well drilling program and the

¹ For an excellent publication on severed minerals and split estates, see Rocky Mountain Mineral Law Foundation, Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations, Mineral Law Series, Vol. 2005, No. 1 (2005).

² Oil and Gas Conservation Act, §§ 34-60-101, *et. seq.*, C.R.S. (2004). Rules and Regulations of the Colorado Oil and Gas Conservation Commission ("COGCC"), http://oil-gas.state.co.us/RR_Docs/RulesComplete.pdf. The COGCC has published policies regarding surface and mineral issues. Attached as Exhibit "B" to these materials is the COGCC's Information for Oil and Gas Operations, Surface Owners and Surface Tenants (revised Oct. 11, 2004). Attached as Exhibit "C" to the materials is the COGCC's Typical Questions from the Public About Oil and Gas Development in Colorado. Attached as Exhibit "D" to the materials is the COGCC's Policy for Onsite Inspections on Lands where the Surface Owner Did Not Execute a Lease or is Not a Party to a Surface Use Agreement, (Jan. 10, 2005, Amended Feb. 14, 2004).

parties met to lay out well locations that would minimize crop damage and disruption to livestock operations. At the request of Magness, Gerrity did move a drill site from its initial proposed location. After one drill site location had been agreed to, Gerrity proposed a second well but Magness would not permit entry for conducting operations on any future wells.

Then, Gerrity sued for a TRO and preliminary injunction against Magness' efforts in preventing access and to order Magness to remove equipment and other materials. The trial court granted the TRO and preliminary injunction. By the time the case went to the permanent injunction phase, Gerrity had completed all four wells. Magness counterclaimed for a declaratory judgment based on Gerrity's negligence and trespass - failed restoration and remediation, drilling mud and foreign substances left in excavated pits and depositing hazardous and toxic substances. Magness also alleged that Gerrity did not follow COGCC rules on notice and consultation. The trial court did not grant a permanent injunction and also denied Magness' declaratory judgment, holding that the parties had not disputed access and finding the dispute to be factual and not amenable to declaratory judgment. The trial court noted a distinct lack of expert testimony on oil and gas operations and, hence, could not find that Gerrity's operations were negligent.

The Court of Appeals reversed finding that a new trial was necessary to evaluate whether the operations were negligent, rejecting the notion that expert testimony is needed for that adjudication. It also held that the oil and gas statutes created a private right of action in those surface owners injured by the failure of an operator to comply with regulatory requirements. The Supreme Court granted certiorari to consider (a) the private right of action, (b) whether reasonableness of the operator's conduct is relevant to trespass, (c) whether expert testimony is necessary to adjudicate breach of the operator's duty and (d) whether the Court of Appeals erred in holding that the trial court's finding that Magness suffered no damage as a result of Gerrity's operations was tainted by the Court's erroneous findings on liability.

With respect to the use of the surface for mineral extraction operations, the Court held that even though a private right of action does not exist under the oil and gas statutes, Section 34-60-114, 14 C.R.S. (1995) does recognize that an aggrieved surface owner may bring a common law action in tort against an operator who has used the surface in an unreasonable manner. *Id.* at 926. The Court also held that when trespass is alleged for an excessive surface use, then the trier of fact must consider "whether the operator's use of the surface was reasonable and necessary." *Id.* The Court noted that a mineral owner or lessee "is privileged to access the surface and 'use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest.'" *Id.* quoting *Notch Mountain Corp. v. Elliot*, 898 P.2d 550, 556 (Colo. 1995). This "rule of reasonable surface use" does not include the right to destroy, interfere with or damage the surface owner's correlative rights to the surface. *Id.* citing *Colorado Fuel & Iron Corp. v. Salardino*, 125 Colo. 516, 522, 245 P.2d 461, 464 (1952), overruled on other grounds, *Gladin v. Von Engeln*, 195 Colo. 88, 575 P.2d 418 (1978). "[U]nless the conduct of an operator in accessing, exploring, drilling, and using the surface is reasonable and necessary to the development of the mineral interest, the conduct is a trespass." *Id.* at 927 citing *Frankfort Oil Co. v. Abrams*, 159 Colo. 535, 545, 413 P.2d 190, 194 (1966). The right of access to the mineral

estate is in the nature of an implied easement over the surface estate since it enables the mineral owner to a limited right to use the surface to reach and extract the minerals. As such, the surface owner continues to enjoy all rights and benefits of proprietorship consistent with the burden of the easement (the surface owner may not preclude exercise of the lessee's privilege). Id. In footnote 8 of the opinion, the Court notes that although it has referred to the mineral estate as the dominant estate and the surface estate as the servient estate, "both estates must exercise their rights in a manner consistent with the other. Hence, in a practical sense, both estates are mutually dominant and mutually servient because each is burdened with the rights of the other." Id. at Note 8.

The Court further stated that " 'each owner must have due regard for the rights of the other in making use of the estate in question.' " Id. citing Grynberg v. City of Northglenn, 739 P.2d 230, 234 (Colo. 1987). The "due regard concept" requires mineral owners to accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate. Id. The nature of the accommodation by the mineral owner is fact driven based upon the surface uses and on alternatives available to the mineral owner for exploitation of the underlying mineral estate. Where the operator's operations would "preclude or impair uses by the surface owner, and when reasonable alternatives are available to the lessee, the doctrine of reasonable surface use requires the lessee to adopt an alternative means." Id. citing 6 American law of Mining §200.02 [1][6][iii] (Rocky Mountain Mineral Law Foundation, ed. 1996).

With respect to trespass, because the operator is legally privileged to make such use of the surface as is reasonable and necessary to develop the minerals, a trespass exists when the operator exceeds the legal authorization permitting mineral operations. Id. Because the scope of the easement is determined by reasonableness and necessity, reasonableness of use is relevant and essential to an adjudication of any trespass claim. Trespass fails where there is no finding that the operator's conduct was not reasonable and necessary to the extraction of minerals.

On the issue of expert testimony, the Court held that expert testimony is not required for a surface owner to establish a trespass claim because the claim itself does not require evidence of an applicable standard of care. Id. at 929, 933. Under a negligence theory, if the standard of care for a rules violation is within the common knowledge and experience of ordinary persons, then expert testimony would not be required. Id. The Court did, however, go on to hold that violation of a COGCC rule does not establish negligence, *per se.*, requiring consideration of whether the rules violating conduct was unreasonable and unnecessary. Id. at 931. The Court determined that the standards included in the COGCC rules and regulations were not intended to abrogate the doctrine of reasonable and necessary surface use, unless the rule or regulation itself incorporates a reasonableness standard. Id. The COGCC rules and regulations, nonetheless are evidence of the standard of care for operators. If the standard is not within the common knowledge and experience of the ordinary person, then expert testimony of industry standards would be relevant additional evidence of that standard. Id.

2. Thunderhead

Amoco Production Co. v. Thunderhead Investments, Inc., 235 F. Supp. 1163 (D. Colo. 2002) also involved a dispute between the operator of an oil and gas lease from a severed mineral interest and the surface owner who acquired its interest in the property subject to the lease. The surface owner's property was also subject to an access easement on the northern boundary for the benefit of some neighboring property. The surface was vacant and being used for hay production and grazing horses.

The surface owner had started the procedure to plat and subdivide the property and to annex it to the Town of Bayfield. Those efforts were not completed because the cost of a road access to the southern portion of the property was prohibitive. Amoco obtained drilling permits from COGCC and La Plata County. It drilled a well per COGCC location and setback requirements and constructed an access road to the well site. Amoco brought this diversity action against the surface owner seeking a declaratory judgment that the surface owner's alternate locations were outside the permitted drilling window and that they would violate COGCC setback requirements. Amoco also claimed that it accommodated the present use of the surface and possible future development at great cost to Amoco. It also claimed that use of the road for access and Amoco's sound mitigation were reasonable.

The surface owner counterclaimed for a declaratory judgment based on trespass for actual, unreasonable use of the surface. The surface owner believed that water and gas lines located outside the access easement were unreasonable. It also claimed that the well location was unreasonable when considering the alternate locations proposed by the surface owner. It also claimed that Amoco would have reasonable access to the well over subdivision roads and trails.

Amoco had obtained from the COGCC generalized permission to drill this well and other wells called "infill" wells to result in recovery of more of the state's natural resources. A 23-acre spacing window was established in each 320 acre drilling unit. Amoco had drilled 140-150 infill wells with surface use agreements in La Plata County except for this one well. The COGCC conducts inspections of the proposed locations where there is no surface use agreement. The inspection was done by COGCC with Amoco, Thunderhead, County, Town and School District representatives present. None of the neighbors waived setbacks for Thunderhead's proposed alternate locations of the well, except that the County was willing to waive its own 400' setback from the nearest residence and Amoco used that alternate location for the well. The COGCC also imposed conditions on the well including quieter electric motors and low profile equipment. Amoco paid \$10,000 total to neighbors to pay for their own visual mitigation landscaping. The surface owner also proposed alternate locations in open space of its subdivision, but that proposal would have required an exception by the COGCC and directional drilling by Amoco. The infill wells spacing order noted that directional drilling was not cost effective or technically feasible to hit the coal seams for coalbed methane gas.

Relying on Gerrity, the Court recited the law regarding reasonable accommodation in the oil and gas context. It noted that statutes, regulations and lease terms would be applied to resolve the dispute and that the mineral owner must have due regard for the rights of the surface owner. Id. at 1171. The Court also noted that the surface owner, to make a prima facie case of trespass, must establish a material interference with surface use. Inconvenience to the surface owner is not enough. The surface owner must have a reasonable alternative location. Even so, a material interference with the surface use could occur if the operator's conduct is reasonable and necessary. Id.

The Court found that Amoco's well location was in compliance with state statutes, local regulations, state and local permits, and the lease. Id. at 1172. It also concluded that Amoco's well location was reasonable and necessary in conformity with standard industry customs and practices. Id. The Court reached the same conclusions with regard to the water and gas gathering lines and the access road. With respect to the potential use of subdivision roads and trails for access, the Court found that this access was too speculative since it was unclear whether there would ever be a subdivision. The lease included a right for an access road and the Court held that road to be reasonable and necessary because it was installed in a reasonable manner and at a location in compliance with COGCC and county permits. Id. at 1173.

The Court found a Texas case, Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tx. 1971) persuasive authority for the proposition that the operator need not accommodate speculative future uses of the surface. Id. This conclusion was based on the speculative nature of the potential subdivision attributed to the lack of access from the south over private property.

The Court also found that directional drilling would not be a reasonable alternative because setback waivers would be required and because directional drilling was not feasible. The waivers of setbacks could not be obtained from the School District and other property owners. Id. at 1173-74. In summary, the Court held that (a) the operator reasonably accommodated the surface owner's request for a legal well location and did move the well from the original permitted location, (b) the permits contained conditions imposed by both COGCC and the County, (c) the operator considered many alternatives for well locations, and (d) the surface owner's development plans were speculative and far from final approval. With no threat of imminent development, the operator had reasonably accommodated present surface use of the property. Id. at 1174.

C. **Proposed Legislation** H.B. 05-1219.

This bill, introduced by Rep. Curry, would seek to impose additional duties on an operator prior to the granting of an application for a permit to drill. It has been supported by the land owner and development community, but not surprisingly, vigorously opposed by the oil and gas industry.³

³ Summary of hearings held before the House Agriculture Committee on February 14, 2005, in Glenwood Springs and on February 16, 2005, in Denver.

The bill would require operators to negotiate in good faith with surface owners, prior to obtaining a COGCC permit to drill, for a surface use agreement regarding, without limitation:

- (a) location of facilities relating to the proposed location;
- (b) interim and final reclamation requirements; and
- (c) minimization of surface damages.

The bill would also require operators to compensate surface owners for the loss of value associated with damages to the surface resulting from mineral operations taking into account loss of agricultural production and income, loss of land value, loss of land use, loss of improvements and location of facilities.

If the operator has not obtained either a surface use agreement or waiver from the surface owner, a procedure is set up for the operator to select an appraiser to estimate the value of surface lost associated with damages expected to be caused by the mineral operations of the operator. If an agreement thereafter cannot be reached between the operator and surface owner, then a procedure is established to go to arbitration.

A copy of the bill is attached as Exhibit "E" to these materials.

D. Surface Use Agreements⁴

The following are suggested items to be considered and negotiated as part of a typical surface use agreement:

(1) Working Interests. It is imperative that you know who the operators and other working interest owners are. Any working interest owner has the right to drill, so all such owners should be made parties to the agreement. The developer who will be seeking a land use change must comply with H.B. 01-1088 and provide notice to all owners and lessees of a mineral estate underlying the surface estate that is subject to an application for development. §§24-65.5-101 *et. seq.*, C.R.S. (2004), a copy of which is attached as Exhibit "F" to these materials. This process usually involves obtaining a mineral title opinion following an examination of the county real property records. *Id.* at §103(2)(a).

An application for development includes an application for a preliminary or final plat for a subdivision, a planned unit development, or any similar land use designation that is used by a local government. It also includes applications for general development plans and special use permits where such applications are in anticipation of new surface development, but does not include building permit applications, applications for change of use for an existing structure, applications for boundary adjustments, applications for platting of an additional single lot,

⁴ See Paper 15 from Note 1. See also D. Patton, Negotiating a Surface Use Agreement for Private Lands, Rocky Mountain Mineral Law Foundation Special Institute (Nov. 4-5, 2004).

applications for lot site plans, or applications with respect to electric lines, natural gas pipelines, steam pipelines, chilled and other water pipelines, or appurtenances to said lines or pipelines. Id. at §102(2)(a).

The surface owner who files an application for development must, not less than thirty days prior to the initial public hearing by a local government (city, county, town, city and county or a territorial charter city) send notice to the mineral estate owners and lessees, and the local government. The notice should contain the time and place of the hearing, the nature of the hearing, the location of the property and the name of the applicant. The notice to the local government should contain the name and address of the mineral owners and lessees. Notice of subsequent hearings are to be provided by the local government to mineral owners and lessees who register for notice of subsequent proceedings. Id. at §103(1) and (1.5).

The applicant is not liable for errors or omissions in the public records. Id. at §103(2)(b). As a condition to approval of the application for development by the local government, the applicant is required to certify that notice has been provided to the mineral estate owners and lessees pursuant to statute. If the notice is provided according to the real property records search, then the surface owner is relieved of any liability to the mineral owners and lessees for any legal or equitable remedy or relief arising from the application for development, any development activities commenced upon the surface of the property, any inability, impediment or other hindrance to drilling or other development of the mineral estate or any actual failure to receive any notice required under §24-65.5-103 or 31-23-215, unless:

(a) Prior to approval of the application, the mineral owner provides notice to the surface owner and local government any objection to the approval of the application, in which event the mineral estate owner may seek legal or equitable relief; or

(b) A mineral owner or lessee commences an action in Court seeking compensatory money damages prior to the later of the following to occur (A) one year after final approval of the application by the local government or (B) 60 days after the earliest to occur of the commencement of development activities with heavy equipment or the posting on the surface with notice that the local government has given final approval, which posting shall be visible from all public roads abutting the surface of the real property. Id. at §104(2).

It is also important to keep in mind that there may be different working interest owners for different formations. They will be entitled to notice and should be made parties to any surface use agreement.

(2) Access. The surface owner and operator should clearly define access to the well site, any future well sites and surface equipment. If temporary access will be used, then permanent access (such as over subdivision streets) should also be specified. Streets will need to accommodate the excessive weight of drilling rigs.

(3) Operations Areas. The oil and gas operation areas should be defined to include the areas that will have exclusive operator use, such as surface equipment, tank batteries and the well site(s). Some joint use may be permitted, but only for landscaping and, perhaps, utilities. There may be setbacks specified for equipment and the well bore stated in this section, as well. Advance notice, hours of operation, and any advance consultation or meetings should be specified in this section of the agreement as well.

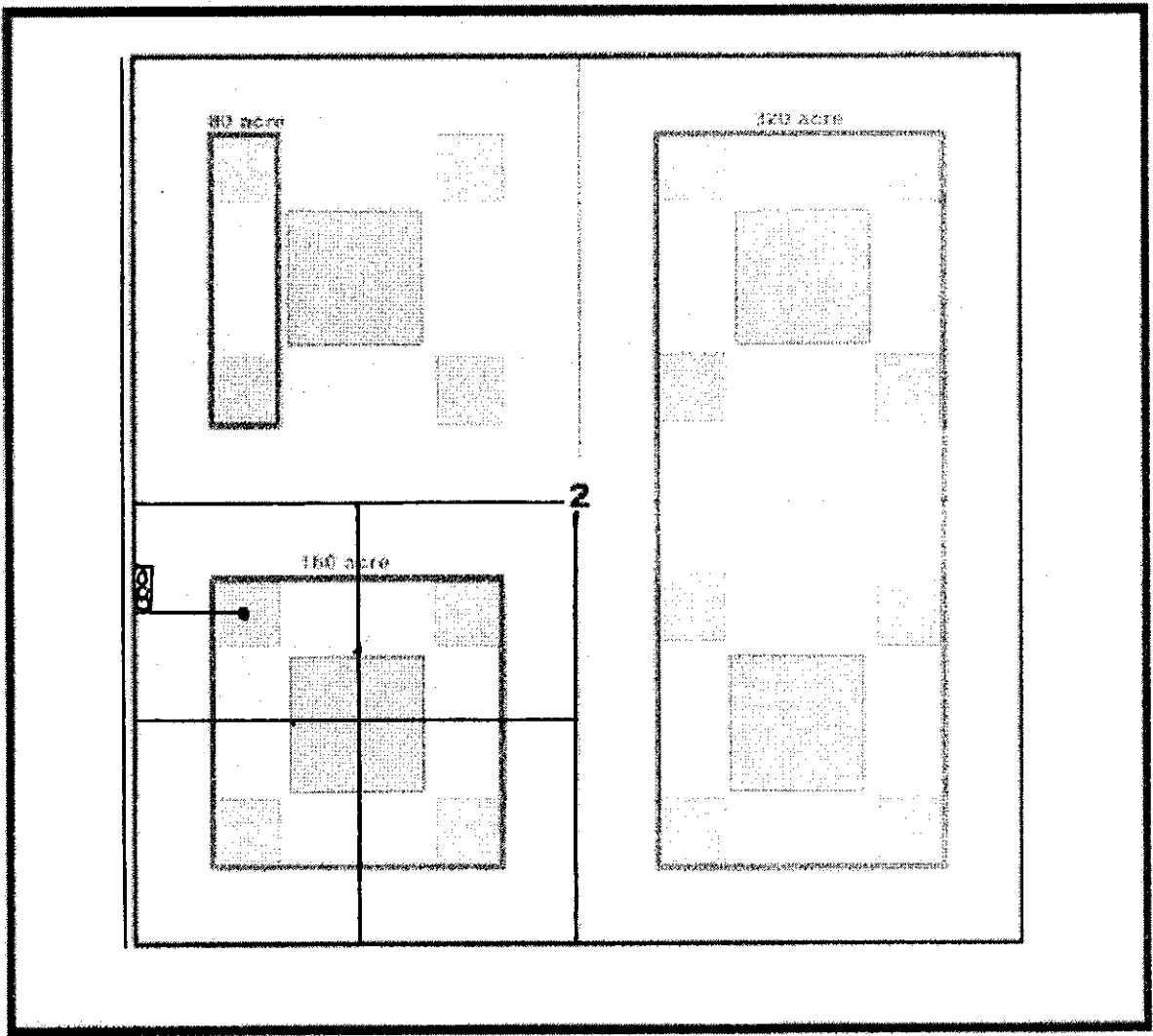
(4) Flowlines and Pipelines. The location and specifics of all existing and future flowlines, pipelines and/or gas gathering lines should be specified in this section of the agreement. Provisions for this section of the agreement should also address depth, location, width and description of the easement, and the procedure for relocating flowlines, pipelines and gas gathering lines that will interfere with surface development. If a cost for relocating will be incurred, then the agreement should specify how the cost is determined and which party will bear the cost.

(5) Payment. If any payments are to be made by the mineral owner for surface damages, then they should be included in this section of the agreement, along with an allocation between the owner and any lessee of the owner such as a farm tenant. If any payments or deposits are to be made by the surface owner to the operator for facilities relocations and/or directional drilling incremental costs, then they should also be specified in this section of the agreement.

(6) Surface Release. The landowner and developer will want to have the operator release and quit claim back to the surface owner those portions of the property that will not be used by the operator for access, pipeline and flowline easements and operations areas. If the operator is not willing to release and quit claim, then the owner or developer should insist upon a covenant against use by the operator and the covenant should be made to touch and concern the property and run with it.




(7) Miscellaneous.

- (i) Term. The term of the agreement should be specified. Usually, the term will be consistent with the duration of the oil and gas lease.
- (ii) Successors and Assigns. A clause should be included in the agreement indicating that it inures to the benefit of and binds successors and assigns of the parties. There may need to be exceptions to the binding nature of the agreement so that future homeowners are not obligated to pay the operator for facilities' relocations or directional drilling costs.
- (iii) Mutual Indemnification. It is helpful to include provisions providing for mutual indemnification by one party of the other for the first party's use of the property.



COGCC, April 1999

LEGEND

-  400' X 400' GWA Drilling Window
-  800' X 800' GWA Drilling Window
-  Designated Areas Within Drilling And Spacing Units
(see waiver requirement in GWA Policy)

GWA SECTION ILLUSTRATION

EXHIBIT

A

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Colorado Department of Natural Resources

OIL AND GAS WELL NOTIFICATION, CONSULTATION, AND RECLAMATION RULES

INFORMATION FOR OIL AND GAS OPERATORS, SURFACE OWNERS AND SURFACE TENANTS

DISCLAIMER: Surface owners are advised to obtain legal advice as may be appropriate to their particular circumstances. Landowners may or may not own the mineral rights underlying their property. In either case, surface owners and tenants may be faced with oil and gas mineral owners exercising their right to drill and produce wells on the property. This brochure is designed to describe the key points of the regulations for the reclamation of land disturbed by oil and gas activity. These regulations are enforced by the Colorado Oil and Gas Conservation Commission.

This brochure is a summary only, and is not to be used as a substitute for the complete rules and regulations.

revised 02/11/2004

EXHIBIT

B

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STATEWIDE OIL AND GAS RECLAMATION RULES



The Colorado Oil and Gas Conservation Commission's (COGCC) statewide reclamation rules are designed to ensure that the surface of the land is restored as closely as possible to its pre-development condition. These rules respect the surface owner's need to request waivers of certain requirements under special circumstances.

The rules were developed with input from the oil and gas industry, the agricultural industry, the environmental community, and local governments. The COGCC also consulted with the Colorado Agricultural Commission as the rules were being written.

CROP LAND OR NON-CROP LAND?

The requirements for notification by oil and gas operators to surface owners, as well as site construction and reclamation requirements, depend on whether or not the wellsite and access road are built on **Crop Land or Non-Crop Land**.

Crop Land—Lands which are cultivated, mechanically or manually harvested, or irrigated for vegetative agricultural production.

Non-Crop Land—Lands which are not defined as Crop Land, including range land.

SURFACE OWNER NOTIFICATION BY THE OIL AND GAS OPERATOR

Before drilling, the oil and gas operator is required to

- mail or deliver a notice to the surface owner, and
- post a notice on the drillsite.

Notice is also required:

- if future operations are planned at an existing well site that cause significant surface disturbances, and
- before final reclamation of the wellsite and access roads.

The notice timing requirements depend on the type of oil and gas operations:

OPERATION	CROP LAND	NON-CROP LAND
Drilling	30 Days	30 Days
Additional Notice of Drilling on Irrigated Crop Land	14 Days	Does Not Apply
Future Well Operations	7 Days	7 Days
Final Reclamation	30 Days	30 Days

PURPOSE OF NOTICE

The purpose of the surface owner notice is to inform the surface owner about when and where the oil and gas operations are to take place so that the surface owner and tenant can make plans to coordinate their own land use with the oil and gas operations.

The COGCC rules require an oil and gas operator to ask the surface owner if they want to be consulted about the timing of the operations and the locations of the wellsite and access road, as well as the final reclamation operations.

SURFACE TENANT NOTIFICATION

It is the surface owner's responsibility to notify the surface tenant about the proposed oil and gas operations.

SURFACE OWNER CONSULTATION

The oil and gas operator is required to offer to consult with the surface owner about the locations of wellsites and access roads, and about final reclamation. **The operator has no obligation to consult with a surface tenant unless the surface owner appoints a tenant for consultation.**

Local government representatives may also participate in the consultation about wellsite and access road locations if they desire. Local governments receive notice of wells to be drilled if they request to participate in the COGCC local governmental designee program.

SITE PREPARATION

FENCING

On all lands: *At the surface owner's request*, and where livestock is in the immediate area, the operator is required to fence the drilling mud reserve pit on wells that are being drilled—and the wellhead, pit, and production equipment on producing wells.

On Crop Land: *At the surface owner's request*, the oil and gas operator is required to mark the boundaries of drillsites and access roads with berms, single strand fences, or other equivalent methods to minimize surface disturbance.

SOIL SEGREGATION WHILE EXCAVATING

On Crop Land: While performing all excavations, the oil and gas operator is required to segregate all A (topsoil), B, and C soil horizons, and stockpile each of these soils separately. Deeper soil horizons are segregated to a depth of six feet.

On Non-Crop Land: The A (topsoil) horizon, or the top six inches of soil (whichever is deeper) is required to be segregated and stockpiled separately at all excavations.

If soil horizons are too rocky or too thin to segregate, the topsoil is segregated as much as possible and stored separately. On crop land, other deeper soil layers are segregated as much as possible to a depth of three feet.

MINIMIZING SURFACE DISTURBANCE DURING DRILLING OPERATIONS

On all lands: Drilling locations are required to be designed and constructed in a manner that minimizes the total disturbed area. Steep slopes are to be avoided where possible, and deep cut and fills are to be constructed to the least possible slope. Existing access roads are to be used where possible, and oil and gas operators are encouraged to share access roads when developing a field. Operators are required to limit their travel to within original access road boundaries to reduce land damage.

RECLAMATION BEGINS SOON AFTER A WELL IS DRILLED AND COMPLETED

After a well is drilled, all areas which were disturbed by the drilling operations, and which are not needed for production operations, are to be reclaimed as close to their original condition as possible.

This "interim reclamation" is required to take place:

On Crop Land: No later than three months after a well is completed.

On Non-Crop Land: No later than twelve months after a well is completed.

On all lands: Interim reclamation includes:

- removing drilling waste materials and filling of pits and holes;
- removing compaction from the soil in areas no longer needed for oil and gas operations by cross-ripping the soil to a depth of eighteen inches;
- closing drilling pits by drying out the pit and backfilling it by replacing the soil layers in their original positions.

On Crop Land: Additional interim reclamation requirements include:

- guy line anchors for drilling and completion rigs are to be removed if requested;
- all bentonite drilling fluid is to be removed from the drilling pit before drying, and a minimum backfill cover of three feet must be placed over any remaining contents in the pit;

- subsidence over any reclaimed area, including a closed drilling pit, is required to be corrected by the oil and gas operator by adding additional topsoil during the life of the well.

On Non-Crop Land: Subsidence over the closed drilling pit only is required to be corrected by the operator for two years following pit closure by adding additional topsoil.

INTERIM RESTORATION AND REVEGETATION

On all lands: The oil and gas operator is required to replace all soils to their original positions and contour, and to adequately till the soil.

On Crop Land: The operator is required to prevent weeds and erosion, and to re-establish perennial crops that were present before drilling.

On Non-Crop Land: The operator is required to re-seed the disturbed area in the first favorable season. Re-seeding is done according to a surface owner agreement or in consultation with the local soil conservation district in the absence of an agreement. Re-seeding with a species consistent with the adjacent plant community is encouraged.

FINAL RECLAMATION

Final reclamation takes place after oil and gas wells are plugged and abandoned. All final reclamation work is required to be completed:

On Crop Land: No later than three months after a well is plugged and abandoned.

On Non-Crop Land: No later than twelve months after a well is plugged and abandoned.

On all lands: An oil and gas operator is required to

- remove all production equipment and debris;
- remove or treat any remaining production waste or contamination from spills or releases following COGCC rules;
- backfill all production pits by replacing the soils in their original positions;
- correct subsidence over closed production pit locations by adding additional topsoil;
- close access roads to plugged and abandoned wells and associated facilities;
- re-grade and re-contour the wellsite and access roads;
- perform compaction removal, restoration, and revegetation on wellsites and access roads to the same standards as those for interim reclamation on both Crop Land and Non-Crop Land.
- comply with all COGCC rules unless a surface owner waiver or Commission variance is obtained.

FLOWLINE INSTALLATION AND RECLAMATION

On all lands:

- All oil and gas well flowlines are required to be buried deep enough to protect them from damage.
- Flowlines may be installed above ground if certain difficult conditions prevent burial or by agreement with the surface owner.

On Crop Land:

- Flow lines must be covered by a minimum of three feet of soil unless prevented by certain difficult burial conditions, or the surface owner agrees to a shallower depth.
- When excavating trenches wider than twelve inches, the operator is required to segregate topsoil and backfill trenches to return the soils to their original positions and contour.
- Efforts are to be made to run flowlines parallel to crop irrigation rows on flood irrigated land.

MAINTENANCE

On all lands: Flowline trenches are to be maintained to correct subsidence and prevent erosion, with interim and final reclamation being performed to the same standards as for well sites and access roads. To prevent flowline leaks, flowlines are to be pressure tested upon installation, and then each year afterward.

FLOWLINE ABANDONMENT

On all lands: When flowlines are abandoned:

- the lines are emptied of oil and gas;
- the lines are cut off below the ground surface;
- the lines are capped at the ends.

OIL AND GAS WELL AND TANK BATTERY SIGNS

Oil and gas operators are required to post permanent signs at wells and tank batteries that identify the operator and provide location and emergency notification information. Signs must be posted within sixty days after the COGCC approves a change of operator.

COGCC COMPLAINT PROCESS

If a surface owner or tenant has a complaint about an oil and gas operation, the COGCC encourages them to first contact the operator to see if a solution can be found that works for both parties. If no satisfactory solution can be found, a surface owner or tenant may file a complaint, preferably in writing on a COGCC Complaint Report (Form 18), with the COGCC. The COGCC staff includes field inspectors, engineers and environmental specialists who are available to investigate complaints and take enforcement action if rule violations are found. If the COGCC

enforcement process does not adequately address a surface owner or tenant complaint, an application can be filed for a Commission hearing.

COGCC HEARING APPLICATION PROCESS

Surface owners and tenants may file an application for hearing before the Commission for the following purposes:

- to seek a variance from the COGCC Rules if the Director does not grant a variance request administratively
- to seek an Order Finding Violation if they object to the COGCC staff's formal resolution of their complaint

Applications for Commission hearings are required to include a written description of the requested relief and the factual grounds for the relief. All hearing applications are to be filed at least fifty days in advance of the desired hearing date. No application fee is required. Contact the COGCC Hearings Manager for further information on hearing application procedure.

The COGCC has several offices located throughout the state:

Main Office:

1120 Lincoln Street, Suite 801
Denver, CO 80203
(303) 894-2100 - phone (303) 894-2109 - FAX
Toll-free Complaint Line to Denver:
(888) 235-1101

Sterling: (970) 522-6747 - phone

Greeley: (970) 506-9834 - phone

Trinidad: (719) 846-4715 - phone

Grand Jct: (970) 256-9000 - phone

Parachute: (970) 285-9000 - phone

Durango: (970) 259-4587 - phone

Visit the COGCC Internet Website at:

www.oil-gas.state.co.us

Information available on the website includes:

- COGCC Rules and Regulations and the Oil and Gas Conservation Act
- A listing of Local Governmental Designees
- A listing of all pending and approved applications to drill
- A calendar of COGCC Hearings and other events
- The COGCC Information System including a Geographic Information System (GIS) Map interface
- Typical Questions from the Public About Oil and Gas Development

TYPICAL QUESTIONS FROM THE PUBLIC ABOUT OIL AND GAS DEVELOPMENT IN COLORADO

1. HOW CAN WE STOP OIL AND GAS DEVELOPMENT IN COLORADO?

STOPPING OIL AND GAS DEVELOPMENT IN GENERAL

Question 1.a.: I own only the surface and have no interest in the oil or gas underlying my land. How can I stop oil and gas development on my property or in my area of the state? What can the Colorado Oil and Gas Conservation Commission (COGCC) do to stop additional oil and gas development?

Answer 1.a.: Colorado, like all other western states, recognizes separate ownership of the surface estate and the mineral estate and the distinct private property rights associated with each. Often, different parties own the surface and the subsurface, commonly referred to as severed or split estate lands. The different ownership may have been created through the reservation of the minerals to the government when the lands were originally patented, or may result from a decision by a previous landowner to separately sell or lease the subsurface mineral interest.

Because each party has property rights associated with the ownership of their respective estate, oil and gas companies that have purchased or leased mineral rights are entitled to exercise their property rights to develop the resource. Colorado law recognizes that access to the mineral estate from the surface estate is necessary in order to develop the mineral interest. The law provides for access to the mineral estate by allowing subsurface owners "reasonable use" of the surface estate. The COGCC did not create these legal relationships, and it does not have the statutory authority to alter these private property rights. Instead, surface and mineral interests are created or transferred through private party contracts, including deeds and leases.

In contrast, the COGCC is a state regulatory agency created by the Colorado General Assembly to promote development of the oil and gas resources throughout the state, consistent with the protection of public health, safety and welfare. Thus the COGCC may suspend operations if it finds a company is violating COGCC rules, or to protect the public from significant injury, but the COGCC cannot interfere with the private party contracts establishing the surface and mineral owners' rights to the property.

STOPPING OIL AND GAS DEVELOPMENT TO PROTECT AN INDIVIDUAL'S PROPERTY VALUE OR QUALITY OF LIFE

Question 1.b.: If COGCC is obligated to protect public health, safety and welfare, why won't they stop oil and gas development that threatens my property values or my quality of life?

Answer 1.b.: The law that created the COGCC and empowers their regulation of the oil and gas industry provides for the COGCC to promulgate rules to protect the health, safety and welfare of the general public in the conduct of oil and gas operations. The law is intended to keep the general public safe when drilling and development occurs, and is not directed at protecting individual property values or a preferred quality of life.

An example of COGCC rules enacted to protect public health, safety and welfare are the "high density rules" that apply significant restrictions on oil and gas development in areas where there is dense surface residential development on 2 acre or less equivalent lot sizes. In some cases these rules essentially preclude new oil and gas development because of safety concerns.

STOPPING OIL AND GAS DEVELOPMENT WITH RULES FOR PREVENTION AND PROTECTION

Question 1.c.: The COGCC says it has authority and rules to prevent and mitigate significant adverse environmental impacts and to provide certain types of "protection". Why won't the COGCC use those rules to stop oil and gas development?

Answer 1.c.: The COGCC's authority to prevent and mitigate significant environmental harm does not negate its obligation to encourage development of the oil and gas resource. Generally, the COGCC's authority requires it to find solutions that prevent or mitigate significant adverse environmental impacts as well as provide for oil and gas development. The COGCC therefore focuses on environmentally safe operations. In this regard, the COGCC often conditions its drilling permits to include environmental protections, and otherwise enforces its rules to prevent and mitigate significant adverse environmental impacts. In rare cases if there is no identifiable solution to prevent or mitigate significant adverse environmental impacts or to meet its "protection" type charges, the COGCC does prohibit oil and gas development by denying drilling permit application approval or through Commission orders.

2. WHY DOESN'T THE COGCC DO MORE FOR SURFACE OWNERS?

SURFACE OWNER COMPENSATION AND SURFACE DAMAGE BONDS

Question 2.a.: I thought the COGCC was supposed to "balance" oil and gas development with surface development. Why doesn't the COGCC require the oil and gas companies to pay me for the economic loss I suffer when the oil company uses part of my property for oil and gas development? Why does the COGCC grant companies permits to drill on my property when I haven't signed a surface use agreement with them?

Answer 2.a.: An oil company's right to use the surface is created by the oil and gas lease or other contract that establishes the company's right to drill. The COGCC does not create these interests and it is not authorized to interfere with these interests unless it has evidence that the operations are in violation of COGCC rules and regulations.

The law creating the COGCC requires oil companies to post a bond with the COGCC that is intended to protect surface owners from "unreasonable crop losses or land damage from the use of the premises" when a company and the surface owner have not otherwise reached

agreement on surface use compensation. The COGCC's statute recognizes the existing law that provides for reasonable surface use to access the mineral estate. Therefore, only if crop losses or land damages are "unreasonable" based on what is needed to access the mineral estate does the law provide for compensation to the surface owner. No surface owners have claimed compensation under a surface damage bond for unreasonable crop loss in several years.

In practice, companies generally pay surface owners for access despite the fact the law permits reasonable access without compensation. The surface use payments companies voluntarily make to surface owners may or may not be equivalent to the economic losses perceived by those surface owners. The COGCC is not authorized however to order companies to compensate surface owners for crop loss or land damage considered "reasonable."

REQUIRING DIRECTIONAL DRILLING OR PITLESS DRILLING SYSTEMS

Question 2.b.: Why doesn't the COGCC prevent or mitigate environmental impacts by requiring companies to spend more money for special equipment and technology such as directional drilling or pitless drilling systems?

Answer 2.b.: The law empowers the COGCC "to regulate oil and gas operations so as to prevent and mitigate significant adverse environmental impacts ... resulting from oil and gas operations to the extent necessary to protect public health, safety and welfare, taking into consideration cost-effectiveness and technical feasibility." Because of the statutory requirement that the COGCC take into consideration cost-effectiveness and technical feasibility the COGCC has to consider the costs of any condition imposed for environmental purposes. In some rare instances the COGCC has required directional drilling or pitless drilling systems. Generally, the COGCC does not impose these requirements because there has been no showing that the requested method is cost-effective, technically feasible, and necessary to protect the public health, safety and welfare. A surface owner may file an application for Commission hearing to make a showing that directional drilling or pitless drilling systems are necessary to protect the public health, safety and welfare taking into consideration cost-effectiveness and technical feasibility.

REQUIRING MINERAL RIGHTS HOLDERS TO ACCOMMODATE SURFACE OWNERS

Question 2.c.: In its 1997 decision in *Gerrity Oil and Gas Corp. v. Magness* the Colorado Supreme Court discussed the relationship between surface owners and mineral owners and stated that "[t]his 'due regard' concept requires mineral rights holders to accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate." How does this decision affect the COGCC's regulatory authority?

Answer 2.c.: The COGCC receives its regulatory authority from the General Assembly. The Colorado Supreme Court Decision does not change the COGCC's statutory grant of authority, nor did the decision reinterpret the COGCC statute as it applies to surface and mineral owners. A legislative change to the Oil and Gas Conservation Act would be necessary to affect COGCC's regulatory authority.

The Magness decision more closely affects the private party contractual relationships between surface and mineral owners discussed above, providing that accommodation concepts be

incorporated into the analysis of the reasonableness of the company's access. The decision may also affect the way lower courts decide future litigation between surface owners and mineral rights holders.

Much of the COGCC's existing statutory charge and many COGCC rules are consistent with the Magness decision. It is important to note however that the COGCC statute has not been changed to include authority to regulate the extent to which mineral rights holders must accommodate surface owners.

3. WHY IS THE COMMISSION COMPRISED OF PEOPLE FAMILIAR OR ASSOCIATED WITH THE OIL AND GAS INDUSTRY?

Question 3.a.: Can the Commission makeup be changed to include more environmentalists and surface owners so that it will be more likely to vote to stop oil and gas development?

Answer 3.a.: In 1994 the COGCC's law was amended to provide that the Commission's promotion of resource development is consistent with the protection of public health, safety and welfare. At the same time the General Assembly expanded the makeup of the Commission. The COGCC includes members with experience in the oil and gas industry, agriculture, real estate, range management, land reclamation and other environmental areas. In spite of these changes the Commission is sometimes viewed as unresponsive to surface owners and unwilling to stop oil and gas development.

Since the 1994 legislation the COGCC has promulgated some of the most comprehensive state oil and gas regulations with respect to environmental protection, reclamation, local governmental coordination, and public participation in the United States. The COGCC has acted to the extent of its current statutory authority to address surface owner concerns and control oil and gas operations. Further changing the Commission makeup without fundamentally changing and expanding its statutory authority would not make it more responsive to surface owners, or allow it to stop drilling more often. Accordingly, as long as there is severed mineral interest ownership in Colorado and law which protects the property rights of mineral rights holders to access their mineral estate, and as long as the COGCC's statute charges the COGCC with promotion of oil and gas development, the COGCC will be limited in its ability to satisfy surface owners or to stop oil and gas development, regardless of Commission makeup.

COMMISSIONER INDUSTRY EXPERIENCE REQUIREMENTS AND RELIANCE ON STAFF

Question 3.b.: The COGCC has a staff of specially trained and experienced petroleum engineers, geologists, environmental protection specialists, and field inspectors as well as legal advice from an experienced oil and gas attorney in the Attorney General's office. Why does the Commissioner makeup need to include so many industry experienced professionals? Couldn't the Commission be made up mainly of people without professional expertise or industry experience who would rely on staff advice in making technical decisions?

Answer 3.b.: The Commission functions in two types of roles; as a legislative "rule-making" body and as a court-like "adjudicatory" body. Each role requires the Commission to assess complex technical engineering, geologic, legal, operational, and economic oil and gas issues.

The Commission must also have a thorough understanding of these issues in order to fulfill its statutory charges. Although staff is available in an advisory capacity, the Commissioners must exercise independent judgment on complex technical and legal issues which requires substantial experience and expertise. Accordingly, it is very typical for the General Assembly to require state boards and commissions to be composed of individuals with experience and expertise in the businesses they oversee. It would be inappropriate and in some instances illegal for staff to substitute its judgment for that of the appointed Commission officials.

COMMISSIONER CONFLICTS OF INTEREST.

Question 3.c.: Because there are so many industry-experienced professionals that serve as COGCC Commissioners isn't there a danger of conflicts of interest leading to a "fox guarding the hen house" situation?

Answer 3.c.: All appointed officials are required by law to separate their personal interest from the state interests they represent. In addition, the COGCC has promulgated rules that require very high standards of professional conduct and comprehensively address conflicts of interest which meet and exceed those contained in state statutes. In practice, the Commissioners are thorough and deliberate in disclosing potential conflicts of interest and appropriately removing themselves when relevant matters come before the Commission.

4. HOW DOES THE COMMISSION PROTECT THE SAFETY OF THE GENERAL PUBLIC?

The COGCC applies a multitude of rules and permit conditions to protect the safety of the general public including: safety setbacks from dwellings for wells and production equipment; blowout prevention equipment; well and equipment safety specifications and design standards; security fencing in high density areas; and special operations safety procedures. Copies of the Commission Rules are available at no cost from our web site at www.oil-gas.state.co.us or they can be ordered through the mail by calling our main number, 303.894.2100, or sending an e-mail to dnr.ogcc@state.co.us. Moreover, cases of public safety impacts from oil and gas operations are extremely rare and generally non-existent in Colorado.

5. HOW DOES THE COMMISSION'S AIR AND WATER QUALITY REGULATION FIT IN WITH THAT OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT (CDPHE)?

The COGCC has broad statutory authority with respect to "...impacts on any air, water, soil, or biological resource resulting from oil and gas operations...". The CDPHE Air Pollution Control Division (APCD) regulates air quality over the entire state to minimize emissions from a variety of sources, and to ensure air quality on a statewide basis meets federal air quality standards. In addition, the COGCC has a few air-related rules specific to oil and gas operations such as flaring gas wells. The COGCC also cooperates and coordinates closely with CDPHE-APCD with respect to oil and gas operations, with the COGCC generally deferring to the expertise of CDPHE-APCD on air quality issues such as emissions and potential health impacts.

With respect to water quality the COGCC coordinates its monitoring and enforcement with the CDPHE Water Quality Control Commission (WQCC) which sets water quality standards and classifications statewide. The COGCC is responsible (and accountable to the CDPHE-WQCC) for implementing those standards and classifications with respect to ground water. The COGCC requires that operators design and construct wells and facilities to protect ground water from contamination during oil and gas operations. If oil and gas operations entail discharges to surface waters the operator must obtain a permit prior to discharging from the CDPHE-WQCC. As an additional safeguard, the COGCC has several rules aimed at preventing unpermitted discharges to surface waters.

6. HOW ARE OIL AND GAS IMPACTS TO WILDLIFE AND AGRICULTURAL LANDS ADDRESSED?

Oil and gas development generally affects relatively small areas averaging roughly 2 acres per well. Therefore, impacts to wildlife habitat and agricultural lands are generally relatively small. The COGCC has reclamation rules that require impacted lands to be restored to their original condition after the well is abandoned. Those rules have recently been expanded and strengthened.

Compared to other forms of land use, such as rural residential development, oil and gas development is relatively benign in its impact on wildlife and agriculture. It is temporary in that after the well is abandoned the lands can be reclaimed for wildlife habitat and agriculture. Rural residential development is generally more permanent. Wildlife biologists from the Colorado Division of Wildlife (CDOW) have advised that there are generally more impacts to wildlife from a typical rural residence than from a typical oil and gas well. State law in Colorado restricts regulation of rural residential land development to parcels smaller than 35 acres. The CDOW wildlife biologists have confirmed that gas wells developed at one well per 40 acres typically have less impact on wildlife than 35 acre ranchette development does. The COGCC considers impacts to wildlife in its regulation, and in certain cases issues orders or applies permit conditions to prevent or mitigate impacts to wildlife.

The National Environmental Policy Act (NEPA) provides for a defined "cumulative impacts" analysis for proposed projects classified as "federal actions". Colorado law does not provide for a NEPA "cumulative impacts" analysis for projects proposed on private or state-owned lands. The COGCC can consider cumulative impacts within the limits of its authority under state law.

A wildlife policy has been adopted by the oil and gas industry trade associations and many companies operating in Colorado. The CDOW and the COGCC encourage voluntary commitment to measures that prevent and mitigate impacts to wildlife.

7. WHAT IS THE BASIS FOR THE COMMISSION'S SOUND RULES AND HOW ARE THEY APPLIED?

The state noise law specifies levels of sound that the courts use to determine the extent to which the noise constitutes a public nuisance. The Commission has adopted sound rules which incorporate the same levels of sound specified in the state noise law.

The Commission's field inspectors are equipped with sound level meters and frequently take field measurements in response to complaints. If sound levels measured from oil and gas operations exceed those specified under Commission rules, enforcement action is initiated to bring them into compliance.

8. HOW ARE THE COMMISSION RULES ENFORCED?

The Commission staff initiate enforcement actions as a result of alleged violations encountered through inspections and complaints. If the operating company fails to voluntarily agree to appropriate corrective action or an order setting fines, a hearing is scheduled for the Commission to determine if a violation exists and to order appropriate corrective actions and assess fines. From 1994 to 2000, the Commission issued 110 penalty orders assessing one million dollars in fines.

2/10/05 AMENDED
Colorado Oil and Gas Conservation Commission Policy For Onsite Inspections On
Lands Where The Surface Owner Did Not Execute a Lease
Or Is Not A Party To A Surface Use Agreement
(Effective for APDs submitted after February 15, 2005)

BOLD CAPITAL LETTERS = 2/10/05 AMENDMENT

THE FOLLOWING POLICY SHALL NOT APPLY TO OIL AND GAS WELLS DRILLED ON LANDS WHERE THE SURFACE OR MINERAL ESTATE IS OWNED BY THE UNITED STATES.

Initiation of An Onsite Inspection

The Director will conduct an onsite inspection in advance of issuing an approved Application for Permit-to-Drill, Form 2 ("APD") at the request of the surface owner of the lands on which the well is proposed, when:

1. The surface owner did not execute a lease or is not a party to a surface use or other relevant agreement for the proposed well;
2. The surface owner contends that the impacts of the proposed well may not be adequately addressed by the rules and regulations of the COGCC; and
3. The request for the onsite inspection is made by the surface owner within ten (10) business days of the good faith consultation provided for under COGCC Rule 306.

Purpose of Onsite Inspection

The purpose of the onsite inspection shall be to determine whether technical or operational conditions of approval should be attached to the APD in order to:

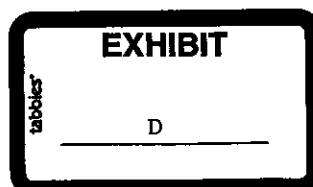
1. Avoid potential unreasonable crop loss or land damage;
2. Address potential health, safety and welfare or significant adverse environmental impacts within COGCC jurisdiction regarding the proposed surface location that may not be adequately addressed by COGCC rules or orders, or
3. Otherwise ensure compliance with the COGCC's rules relating to advance notice and good faith consultation with respect to timing of operations and location of facilities.

The onsite inspection shall not address matters of surface owner compensation, property value diminution, future use of the property or any private party contractual issues between the operator and the surface owner.

Notice to Surface Owner of Onsite Inspection Policy

The advance notice of drilling operations that is provided to the surface owner by the operator as required under COGCC Rule 305. shall include a copy of this COGCC Onsite Inspection Policy.

Conducting An Onsite Inspection



Prior to the surface owner requesting an onsite inspection under this policy, the surface owner shall have participated in a good faith consultation in a timely manner with the operator in accordance with Rule 306. The operator shall indicate the date on which the Rule 306. consultation occurred on the APD when it is submitted. The operator may also indicate on the APD that the surface owner executed the lease, if applicable.

If the COGCC Rule 306. good faith consultation between the operator and the surface owner does not resolve operational issues related to the proposed well, the surface owner may request the COGCC to conduct an onsite inspection. The request shall be made within ten (10) business days following the first day of the consultation provided for under COGCC Rule 306. The request shall be in writing on the attached "Onsite Inspection Request Form" to the COGCC Permit Supervisor preferably by facsimile or alternatively by first class mail. The request shall be received within ten (10) business days of the COGCC Rule 306. consultation date provided on the APD. The surface owner shall include in the request the following information:

1. Two (2) dates on which the surface owner is available to meet on location, such dates to be within thirty (30) days of requesting such onsite inspection; and
2. The surface owner's preference for having the Local Governmental Designee invited to participate in the onsite inspection; and
3. A brief description of the unresolved issues related to the proposed well.

A request from a surface owner for an onsite inspection that is made prior to the submittal of an APD by an operator will be accepted by the COGCC.

The Director shall withhold approval of all APDs until the expiration of the ten (10) business day period provided above, except under the following circumstances:

1. That the surface owner executed the lease; or
2. That a surface use agreement has been executed; or
3. That the COGCC Rule 306. consultation has been waived by the surface owner.

When the Director conducts an onsite inspection as described herein, the Director shall invite the representatives of the surface owner and the operator to attend. If the operator or the surface owner has requested that the local governmental designee ("LGD") be invited, the Director shall also invite the LGD to the onsite inspection. The Director shall attempt to select an acceptable time for the representatives to attend the onsite inspection, which shall be, to the extent practicable, on one of the two (2) dates that the surface owner requested in his/her response to the Director.

Permit Conditions Resulting From An Onsite Inspection

Following the onsite inspection, the Director may apply appropriate site specific drilling permit conditions, if necessary, to avoid potential unreasonable crop loss or land damage, or to prevent or mitigate health, safety and welfare concerns, including potential significant adverse environmental impacts. Any such conditions of approval shall be consistent with

applicable Commission spacing orders and well location rules, and shall take into account cost-effectiveness, technical feasibility, protection of correlative rights and prevention of waste. Under COGCC rules, the Director is not authorized to require an operator to use an exception location, to utilize directional drilling techniques, or otherwise compromise its reasonable geologic and petroleum engineering considerations.

Examples of the types of impacts and conditions that might be applied if determined necessary by the Director at the onsite inspection include (this list is not prescriptive or all inclusive):

1. **visual or aesthetic impacts** - moving the proposed surface well site location or access road to take advantage of natural features for screening; installing low profile artificial lift methods; constructing artificial features for screening
2. **surface impacts** - moving or reducing the size, shape, or orientation of the surface well site location or access road to avoid disturbance of natural features or to enhance the success of interim and final reclamation activities; controlling noxious weeds and undesirable species in disturbed areas, utilizing an existing surface well site location or access road to avoid the impacts of new construction; utilizing a closed drilling fluid system instead of reserve pits to avoid impacts to sensitive areas
3. **noise impacts** - installing electric motors where practicable; muffling, locating or orienting motors or compressors to reduce noise; installing insulated buildings or sound barriers to achieve compliance with COGCC rules
4. **dust impacts** - watering roads as necessary to control dust during drilling and completion operations
5. **ground water impacts** - collecting and analyzing water and gas samples from existing water wells or springs; installing monitoring wells, collecting samples, and reporting water, gas and pressure data
6. **safety impacts** - soil gas sampling and analysis; residential crawl space gas sampling and analysis; installing security fencing around wellheads and production equipment
7. **wildlife impacts** - limiting drilling and completion operations during certain seasonal time periods when specific site conditions warrant

If the operator objects to any of the conditions of approval applied under this policy, the Director shall stay the issuance of the drilling permit and properly notice and set the matter for the next regularly scheduled Commission hearing at which time the Commission may determine conditions of drilling permit approval.

Colorado Oil and Gas Conservaton Commission (COGCC)
Onsite Inspection Request Form
(Effective for APDs submitted after February 15, 2005)

As the surface owner(s) where a proposed well is being drilled, I/we are requesting that the COGCC conduct an onsite inspection. I/we did not execute a lease nor did I/we execute a surface use or other relevant agreement for the proposed well. I/we understand that good faith consultation with the operator as required under COGCC Rule 306. is required to have occurred prior to making this request to the COGCC to conduct an onsite inspection, and that this onsite inspection request must be received by the COGCC within ten (10) business days of the first day of the Rule 306. consultation.

Surface Owner Contact Information:

Name: _____
Address: _____
Telephone No. _____
Cell Phone No. _____

Well Operator and Location Information:

Operator: _____
Well Name: _____
Location: _____
County: _____

Quarter/Quarter	Section	Township	Range

First date Rule 306. consultation occurred: _____
Date

Proposed two (2) dates for the COGCC onsite consultation (must be within thirty (30) days of the request)
1st date _____ 2nd date _____

I would prefer to have a representative of the appropriate Local Government (COGCC Local Governmental Designee) invited to attend the onsite inspection? ___yes___no

Briefly describe the unresolved issues related to the proposed well (**The onsite inspection shall not address matters of surface owner compensation, property value diminution, future use of the property or any private party contractual issues between the operator and the surface owner.**)

Signature(s) _____ Date _____

Please fax or first class mail this request for an onsite inspection to:

Colorado Oil and Gas Conservation Commission
Attn: Permit Supervisor
1120 Lincoln Street Suite 801
Denver, CO 80203
FAX (303) 894-2109

First Regular Session
Sixty-fifth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 05-0500.01 Thomas Morris

HOUSE BILL 05-1219

HOUSE SPONSORSHIP

Curry, and Larson

SENATE SPONSORSHIP

(None),

House Committees

Senate Committees

Agriculture, Livestock, & Natural Resources

A BILL FOR AN ACT

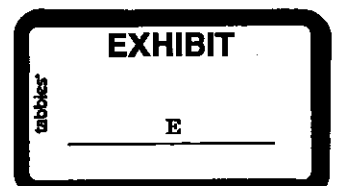
101 CONCERNING THE PROTECTION OF THE RIGHTS OF A SURFACE OWNER
102 RELATING TO OIL AND GAS OPERATIONS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Requires oil and gas operators and surface owners to negotiate concerning compensation to be paid by the operator to the surface owner for loss of value associated with damages to the surface that are reasonably anticipated to result from proposed drilling operations. Establishes a procedure, to be used if the parties fail to reach agreement, whereby an appraisal is performed to identify the lost value. Establishes a procedure for arbitration.

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.



1 PURCHASE ALL OR PART OF THE SURFACE ESTATE.

2 **34-60-202. Negotiation of surface use agreements.** (1) AFTER
3 A SURFACE OWNER'S RECEIPT OF A NOTICE RELATING TO THE
4 COMMENCEMENT OF OIL AND GAS OPERATIONS REQUIRED UNDER SECTION
5 34-60-106 (14) AND PRIOR TO ISSUANCE OF A PERMIT UNDER SECTION
6 34-60-106 (1) (f), AN OPERATOR SHALL ENTER INTO GOOD FAITH
7 NEGOTIATIONS WITH THE OWNER TO REACH A WRITTEN SURFACE USE
8 AGREEMENT REGARDING, WITHOUT LIMITATION:

9 (a) THE LOCATION OF FACILITIES RELATED TO THE PROPOSED
10 OPERATIONS;

11 (b) INTERIM AND FINAL RECLAMATION REQUIREMENTS; AND

12 (c) THE MINIMIZATION OF DAMAGES TO THE SURFACE EXPECTED TO
13 BE CAUSED BY THE OPERATOR'S PROPOSED OPERATIONS.

14 (2) AN OPERATOR SHALL REASONABLY COMPENSATE THE SURFACE
15 OWNER FOR THE LOSS OF VALUE ASSOCIATED WITH DAMAGES TO THE
16 SURFACE RESULTING FROM ITS OPERATIONS ON THE SITE. FACTORS THAT
17 MAY BE CONSIDERED INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF
18 AGRICULTURAL PRODUCTION AND INCOME, LOSS OF LAND VALUE, LOSS OF
19 LAND USE, LOSS OF VALUE OF IMPROVEMENTS, AND LOCATION OF
20 FACILITIES.

21 **34-60-203. Appraisal - arbitration.** (1) PRIOR TO COMMISSION
22 APPROVAL OF AN APPLICATION FOR A PERMIT TO DRILL, THE OPERATOR
23 SHALL CERTIFY TO THE COMMISSION THAT A NOTICE HAS BEEN PROVIDED
24 IN ACCORDANCE WITH SECTION 34-60-106 (14) AND THAT EITHER:

25 (a) A WRITTEN SURFACE USE AGREEMENT BETWEEN THE OWNER
26 AND OPERATOR PURSUANT TO SECTION 34-60-202 HAS BEEN REACHED; OR

27 (b) THE OPERATOR HAS RECEIVED A WRITTEN WAIVER FROM THE

1 OWNER FOR ACCESS TO THE SURFACE WHILE NEGOTIATIONS CONTINUE.

2 (2) (a) IF THE PARTIES HAVE NOT EXECUTED A SURFACE USE
3 AGREEMENT WITHIN NINETY DAYS AFTER RECEIPT OF NOTICE PURSUANT TO
4 SECTION 34-60-106 (14) OR WHENEVER NEGOTIATIONS BECOME
5 DEADLOCKED, WHICHEVER IS EARLIER, THE OPERATOR MAY SELECT A
6 CERTIFIED GENERAL APPRAISER FROM AN APPROVED LIST MAINTAINED BY
7 THE BOARD OF REAL ESTATE APPRAISERS PURSUANT TO PART 7 OF ARTICLE
8 61 OF TITLE 12, C.R.S., TO ESTIMATE THE AMOUNT OF SURFACE VALUE
9 LOST ASSOCIATED WITH DAMAGES, IF ANY, THAT ARE EXPECTED TO BE
10 CAUSED BY THE OPERATOR'S PROPOSED OPERATIONS.

11 (b) THE APPRAISER SHALL MEET THE REQUIREMENTS OF A
12 CERTIFIED GENERAL APPRAISER AS ESTABLISHED PURSUANT TO SECTION
13 12-61-706, C.R.S., AND POSSESS THE NECESSARY QUALIFICATIONS,
14 ABILITY, AND EXPERIENCE TO EXECUTE THE APPRAISAL AND VALUATION OF
15 REAL PROPERTY AND THE VALUE OF IMPROVEMENTS ON SUCH REAL
16 PROPERTY. NO SUCH APPRAISER SHALL BE A CURRENT DIRECTOR, OFFICER,
17 PARTNER, EMPLOYEE, CONSULTANT, ATTORNEY, ACCOUNTANT, OR
18 RELATIVE OF THE OPERATOR OR OWNER.

19 (c) THE APPRAISER SHALL INSPECT THE SITE AND SHALL FILE WITH
20 THE PARTIES A SIGNED, WRITTEN REPORT WITHIN SIXTY DAYS AFTER THE
21 SELECTION OF THE APPRAISER. THE REPORT SHALL SET FORTH THE
22 SURFACE AREA, BOUNDARIES, AND VALUE OF THE SITE AND THE AMOUNT
23 OF LOST VALUE ASSOCIATED WITH DAMAGES IN ACCORDANCE WITH
24 SECTION 34-60-202 (2) THAT IS EXPECTED TO BE CAUSED BY THE
25 OPERATOR'S PROPOSED OPERATIONS. TO THE EXTENT THAT SUCH LOST
26 VALUE INCLUDES THE DIMINUTION OF THE SITE'S PROPERTY VALUE, SUCH
27 VALUATION SHALL BE CALCULATED IN ACCORDANCE WITH THE CURRENT

1 FAIR MARKET VALUE OF THE SITE. THE REPORT SHALL RECOMMEND THE
2 AMOUNT OF MONEY, IF ANY, TO BE PAID BY THE OPERATOR TO THE OWNER
3 IN COMPENSATION FOR THE LOST PROPERTY VALUE ASSOCIATED WITH
4 SUCH DAMAGES.

5 (3) (a) AFTER RECEIPT OF THE REPORT, THE PARTIES SHALL AGAIN
6 ENTER INTO GOOD FAITH NEGOTIATIONS FOR A SURFACE USE AGREEMENT.

7 (b) IF THE PARTIES REACH A WRITTEN SURFACE USE AGREEMENT
8 WITHIN THIRTY DAYS AFTER RECEIPT OF THE APPRAISER'S REPORT, THE
9 COMMISSION MAY PROCEED WITH FINAL APPROVAL OF THE APPLICATION
10 FOR A PERMIT TO DRILL PURSUANT TO SECTION 34-60-106 (1) (f).

11 (c) IF THE PARTIES FAIL TO REACH A WRITTEN AGREEMENT WITHIN
12 THIRTY DAYS AFTER RECEIPT OF THE REPORT:

13 (I) EITHER PARTY MAY PROVIDE THE OTHER PARTY WITH WRITTEN
14 NOTICE OF SUCH FAILURE;

15 (II) WITHIN TEN DAYS AFTER RECEIPT OF A WRITTEN NOTICE OF
16 FAILURE TO REACH AN AGREEMENT, EITHER PARTY MAY PROVIDE NOTICE
17 TO THE OTHER PARTY PURSUANT TO SECTION 13-22-209, C.R.S., OF THE
18 INITIATION OF BINDING ARBITRATION TO BE CONDUCTED PURSUANT TO THE
19 "UNIFORM ARBITRATION ACT OF 1975", PART 2 OF ARTICLE 22 OF TITLE
20 13, C.R.S. IF NOTICE IS GIVEN PURSUANT TO THIS SUBPARAGRAPH (II), THE
21 PARTIES SHALL BE DEEMED TO HAVE AGREED TO SUBMIT TO ARBITRATION
22 PURSUANT TO SUCH ACT REGARDING THE COMPENSATION AND THE OTHER
23 DISPUTED TERMS OF THE SURFACE USE AGREEMENT. AFTER INITIATION OF
24 ARBITRATION, THE OPERATOR CAN APPLY FOR FINAL APPROVAL OF THE
25 PERMIT TO DRILL UPON SUBMISSION OF PROOF TO THE COMMISSION OF
26 SUCH INITIATION. IF THE SURFACE OWNERS PROVES THAT THE OPERATOR
27 DID NOT SEEK TO MINIMIZE DAMAGES TO THE SITE AFTER ACCESSING THE

1 SITE DURING THE ARBITRATION PROCESS, THE ARBITRATOR SHALL AWARD
2 DOUBLE THE AMOUNT OF SUCH DAMAGES TO THE SURFACE OWNER.

3 (d) THE PARTIES SHALL PAY THEIR PRO RATA SHARE OF THE COSTS
4 OF APPRAISAL AND ARBITRATION, WITH THE OPERATOR PAYING HALF AND
5 THE SURFACE OWNER OR OWNERS HALF.

6 **34-60-204. Construction.** NOTHING CONTAINED IN THIS PART 2
7 SHALL BE CONSTRUED TO IMPAIR EXISTING CONTRACTUAL RIGHTS OR TO
8 EXPAND, LIMIT, OR AFFECT LOCAL GOVERNMENT AUTHORITY. NOTHING IN
9 THIS PART 2 SHALL BE CONSTRUED TO PRECLUDE ANY ACTION, EITHER AT
10 LAW OR IN EQUITY, THAT THE PARTIES MAY OTHERWISE HAVE.

11 **SECTION 2.** 34-60-106 (3.5), Colorado Revised Statutes, is
12 amended to read:

13 **34-60-106. Additional powers of the commission.** (3.5) The
14 ~~commission shall require the furnishing of reasonable security with the~~
15 ~~commission by lessees of land for the drilling of oil and gas wells, in~~
16 ~~instances in which the owner of the surface of lands so leased was not a~~
17 ~~party to such lease, to protect such owner from unreasonable crop losses~~
18 ~~or land damage from the use of the premises by said lessee.~~ The
19 commission shall require the furnishing of reasonable security with the
20 commission, to restore the condition of the land as nearly as is possible
21 to its condition at the beginning of the lease and in accordance with the
22 owner of the surface of lands so leased.

23 **SECTION 3. Effective date - applicability.** This act shall take
24 effect July 1, 2006, and shall apply to oil and gas operations commencing
25 on or after said date.

26 **SECTION 4. Safety clause.** The general assembly hereby finds,

- 1 determines, and declares that this act is necessary for the immediate
- 2 preservation of the public peace, health, and safety.

Document 1 of 4**Source:**

Colorado Statutes/TITLE 24 GOVERNMENT - STATE/PLANNING - STATE/ARTICLE 65.5 NOTIFICATION OF SURFACE DEVELOPMENT/24-65.5-101. Legislative declaration - intent.

24-65.5-101. Legislative declaration - intent.

The general assembly recognizes that the surface estate and the mineral estate are separate and distinct interests in real property and that one may be severed from the other. The general assembly further recognizes that if the surface estate and mineral estate are severed, the owners of these estates shall be entitled to the notice specified in section 31-23-215 or 34-60-106 (14), C.R.S. It is the intent of the general assembly that this article provide a streamlined procedure for providing notice to owners of mineral interests concerning impending surface development. Further, it is the intent of the general assembly to include local governments in the notification process without creating additional liabilities for local governments.

Source: L. 2001: Entire article added, p. 486, § 2, effective July 1.

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Document 2 of 4**Source:**

Colorado Statutes/TITLE 24 GOVERNMENT - STATE/PLANNING - STATE/ARTICLE 65.5 NOTIFICATION OF SURFACE DEVELOPMENT/24-65.5-102. Definitions - legislative declaration.

24-65.5-102. Definitions - legislative declaration.

As used in this article, unless the context otherwise requires:

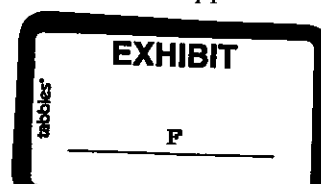
(1) "Applicant" means a person who submits an application for development to a local government.

(2) (a) "Application for development" means an application for a preliminary or final plat for a subdivision, a planned unit development, or any other similar land use designation that is used by a local government. "Application for development" includes applications for general development plans and special use permits where such applications are in anticipation of new surface development, but does not include building permit applications, applications for a change of use for an existing structure, applications for boundary adjustments, applications for platting of an additional single lot, applications for lot site plans, or applications with respect to electric lines, natural gas pipelines, steam pipelines, chilled and other water pipelines, or appurtenances to said lines or pipelines.

(b) (I) The general assembly hereby finds that:

(A) Pursuant to section 2-4-202, C.R.S., statutes are presumed to have only prospective effect, and under applicable case law this presumption applies unless the general assembly's contrary intent is clearly expressed; and

(B) House Bill 01-1088, which enacted this article, did not contain an applicability clause and was



silent with regard to the issue of whether the requirements of this article apply to applications for development that were pending on July 1, 2001, the effective date of House Bill 01-1088.

(II) The general assembly hereby determines that, notwithstanding the fact that House Bill 01-1088 did not clearly express any intent of the general assembly that the requirements of this article would apply retroactively, there is uncertainty concerning whether such requirements should apply retroactively.

(III) To clarify its intent, the general assembly hereby declares that this article was intended to apply, and should only be applied, to applications for development that were filed on or after July 1, 2001.

(3) "Local government" means a county; a home rule or statutory city, town, or city and county; or a territorial charter city.

(4) "Mineral estate" means a mineral interest in real property that is shown by the real estate records of the county in which the real property is situated and that is not owned as part of the full fee title to the real property.

(5) "Mineral estate owner" means the owner or lessee of a mineral estate underneath a surface estate that is subject to an application for development.

(6) "Surface estate" means an interest in real property that is less than full fee title and that does not include mineral rights as shown by the real estate records of the county in which the real property is situated.

(7) "Surface owner" means the owner of the surface estate and any person with rights under a recorded contract to purchase all or part of the surface estate.

Source: L. 2001: Entire article added, p. 486, § 2, effective July 1. L. 2002: (2) and (4) amended, p. 891, § 1, effective August 7. L. 2003: (2) amended, p. 3, § 1, effective February 26.

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Document 3 of 4

Source:

Colorado Statutes/TITLE 24 GOVERNMENT - STATE/PLANNING - STATE/ARTICLE 65.5 NOTIFICATION OF SURFACE DEVELOPMENT/24-65.5-103. Notice requirements.

24-65.5-103. Notice requirements.

(1) Not less than thirty days before the date scheduled for the initial public hearing by a local government on an application for development, the applicant shall send notice, by first class mail, to:

(a) The mineral estate owner. Such notice shall contain the time and place of the initial public hearing, the nature of the hearing, the location of the property that is the subject of the hearing, and the name of the applicant.

(b) The local government considering the application for development. Such notice shall contain the

name and address of the mineral estate owner.

(1.5) If an applicant files more than one application for development for the same new surface development with a local government, the applicant shall only be required to send notice pursuant to subsection (1) of this section of the initial public hearing scheduled for the first application for development to be considered by the local government. Local governments shall, pursuant to section 24-6-402 (7), provide notice of subsequent hearings to mineral estate owners who register for such notification.

(2) (a) The applicant shall identify the mineral estate owner by examining the records in the office of the county clerk and recorder of the county in which the real property is located. Notice shall be sent to the last-known address of record of the mineral estate owner if the records in the office of the county clerk and recorder establish:

(I) The identity and address of record of the owner of the mineral estate; or

(II) That an applicable request for notification form pursuant to subsection (3) of this section is of record; or

(III) That the mineral estate owner has recorded an instrument satisfying any applicable dormant mineral interest act.

(b) If such records do not identify any mineral estate owners, including their addresses of record, the applicant shall be deemed to have acted in good faith and shall not be subject to further obligations under this article. The applicant shall not be liable for any errors or omissions in such records.

(3) A mineral estate owner or mineral estate owner's agent may file in the office of the county clerk and recorder of the county in which the real property is located a request for notification form that identifies the mineral estate owner's mineral estate and the corresponding surface estate by parcel number and by section, township, and range numbers. The clerk and recorder shall file request for notification forms in the real estate records for the county and shall also keep an index of request for notification forms.

(4) Local governments shall, as a condition of approval of an application for development, require the applicant to certify that notice has been provided to the mineral estate owner pursuant to subsection (1) of this section.

(5) A mineral estate owner may waive the right to notice under this section in writing to the applicant.

(6) Before completing the sale of a mineral estate, a mineral estate owner who has received notice as the owner of the mineral estate of a public hearing with respect to an application for development pursuant to this section shall notify the buyer of the mineral estate of the existence of the application for development.

Source: L. 2001: Entire article added, p. 487, § 2, effective July 1. **L. 2002:** (1.5) and (6) added and IP(2)(a), (2)(a)(I), and (2)(b) amended, p. 892, § 2, effective August 7.

ANNOTATION

Law reviews. For article, "Tension Beneath the Surface: The Evolving Relationship Between Surface and Mineral Estates", see 30 Colo. Law. 67 (December 2001).

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Document 4 of 4

Source:

Colorado Statutes/TITLE 24 GOVERNMENT - STATE/PLANNING - STATE/ARTICLE 65.5 NOTIFICATION OF SURFACE DEVELOPMENT/24-65.5-104. Enforcement.

24-65.5-104. Enforcement.

(1) Mineral estate owners entitled to notice pursuant to section 24-65.5-103 or 31-23-215, C.R.S., shall have standing to enforce the notice requirements of those sections and, subject to the provisions of subsections (2) and (2.5) of this section, to make claims as may be available at law or equity for noncompliance.

(2) If no mineral estate owner or agent has filed a request for notification form pursuant to section 24-65.5-103 (3), in determining those mineral estate owners entitled to notice pursuant to section 24-65.5-103 or 31-23-215, C.R.S., any surface owner required to provide such notice shall be entitled to rely on a listing of such parties prepared by an attorney licensed to practice law in the state of Colorado, a title insurance company licensed to do business in the state of Colorado, a certified professional landman certified by the American association of professional landmen, or a title insurance agent licensed in such capacity by the state of Colorado. The provisions of any law to the contrary notwithstanding, if a surface owner provides the required notice in a timely manner to a party named in such listing or whose identity is disclosed in a request filed pursuant to section 24-65.5-103 (3) at the address of such party as that address appears in such listing, such party shall be deemed to have constructively received the required notice, and the surface owner shall be deemed to have otherwise complied with the notice requirements of sections 24-65.5-103 and 31-23-215, C.R.S. In such event, the surface owner shall not have any liability to any mineral estate owner or other party deemed to have constructively received such notice for any legal or equitable remedy or relief arising from, in connection with, or otherwise relating to the application for development, any development activities commenced on the surface of the real property, any inability or impediment or other hindrance to drilling operations or other development of the mineral estate or any portion thereof, or any actual failure to receive any notice required by section 24-65.5-103 or 31-23-215, C.R.S., unless:

(a) Prior to final approval of the application for development by the local government, a mineral estate owner provides written notice to the surface owner and to such local government setting forth the nature of any objection such mineral estate owner may have to the approval of such development application; in which event such mineral estate owner and all other parties may seek any legal or equitable remedy or relief that may be available to such parties; or

(b) (I) A mineral estate owner commences an action in a court of competent jurisdiction seeking compensatory monetary damages prior to the later of the following to occur:

(A) One year after the final approval of the application for development by the local government; or

(B) Sixty days after the earliest to occur of the commencement of development activities with heavy

equipment or the posting of the surface of the real property with notice that the local government has given final approval of the application for development, which posting shall be made in the manner that would be required by the local government to provide notice of an application for a change in zoning classification, but, in all events, which posting shall be made facing, and reasonably visible from, all public roads abutting the surface of the real property.

(II) Such action shall allege, at a minimum, that:

(A) The provisions of section 24-65.5-103 or 31-23-215, C.R.S., require notice to have been sent to such mineral estate owner; and

(B) The required notice was not sent to such mineral estate owner in compliance with the requirements of section 24-65.5-103 or 31-23-215, C.R.S.

(III) If the mineral estate owner commences such an action in a court of competent jurisdiction on or before the last day described in subparagraph (I) of this paragraph (b), such mineral estate owner may seek to recover compensatory monetary damages in connection with the failure of the surface owner to provide the notice required by section 24-65.5-103 or 31-23-215, C.R.S., but such mineral estate owner shall not be entitled to recover special, punitive, or other extraordinary damages, nor shall such mineral estate owner be entitled to any equitable remedy or relief. A finding by such court that the allegations of such mineral estate owner described in subparagraph (II) of this paragraph (b) are accurate and materially complete shall be a condition precedent to the recovery of any such compensatory monetary damages by such mineral estate owner.

(2.5) With respect to any application that was granted on or after August 7, 2002, for a change of use for an existing structure, a boundary adjustment, the platting of an additional single lot, a lot site plan, or with respect to electric lines, natural gas pipelines, steam pipelines, chilled and other water pipelines, or appurtenances to said lines or pipelines:

(a) A mineral estate holder who claims entitlement to notice pursuant to section 24-65.5-103 but who alleges that the applicant failed to provide such notice shall be limited to only the remedy set forth in paragraph (b) of subsection (2) of this section; and

(b) No failure as alleged in paragraph (a) of this subsection (2.5) shall rescind, curtail, abrogate, or otherwise restrict any final approval of an application specified in this subsection (2.5).

(3) If a surface owner certifies to the local government that such surface owner has complied with the notice requirements of section 24-65.5-103 or 31-23-215, C.R.S., and no mineral estate owner has provided the written notice required by paragraph (a) of subsection (2) of this section to the surface owner and to the local government, no development or related activities contemplated by the application for development, no permit or other approval by such local government, and no permit or other approval by any other local government or agency that approves or permits such development or related activities or any aspect thereof shall, subsequent to the final approval of such application, be rescinded, curtailed, abrogated, or otherwise restricted in connection with any purported noncompliance with the notice requirements of section 24-65.5-103 or 31-23-215, C.R.S., that may be alleged by any party.

Source: L. 2001: Entire article added, p. 488, § 2, effective July 1. L. 2002: IP(2) amended, p. 892, § 3, effective August 7. L. 2003: (1) amended and (2.5) added, p. 4, § 2, effective February 26.

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Challenge to Gunnison County’s Oil and Gas Regulations
Summary of Federal and State Case Law Governing Preemption

Mark Mathews and Wayne Forman
Brownstein, Hyatt & Farber, PC

I. Board of County Commissioners v. BDS International LLC, et al., Case No. 03CV76, Gunnison County District Court

The Gunnison County Board of Commissioners (the “Board”) brought a lawsuit against BDS International, LLC (“BDS”) on July 17, 2003, seeking an order requiring BDS to comply with the County's Temporary Regulations for Oil and Gas Regulation (the “Temporary Regulations”) and to cease recompletion work on two of its gas wells (the “Wells”). The Temporary Regulations comprise an exhaustive set of application requirements and performance standards for oil and gas operators that reserve to the County ultimate discretion over virtually every aspect of oil and gas operations.

BDS’s wells in Gunnison County are located on the Grand Mesa, Uncompahgre and Gunnison National Forests (the "GMUG"). Beginning in 1993, BDS and its predecessors had received a myriad of federal and state approvals to construct, operate, and redevelop the Wells and to construct and operate natural gas pipelines. BDS operates the Wells under mineral leases with the United States, as administered through the United States Department of Interior, Bureau of Land Management (the "BLM"), pursuant to the Mineral Leasing Act for Acquired Lands of 1947 and the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (collectively, the “MLA”), 30 U.S.C. §§ 181-287. BDS also held special use authorizations for these facilities from the United States Forest Service (the "USFS" or "Forest Service"), issued pursuant to its authority under the National Forest Management Act (“NMFA”), 16 U.S.C. §§ 1600-1614, as well as state permits to drill from the Colorado Oil and Gas Conservation Commission (the

"COGCC"), issued under the Colorado Oil and Gas Conservation Act ("COGCA"), C.R.S. § 34-60-102(1).

Notwithstanding this array of comprehensive federal and state approvals, the Board filed a lawsuit and sought a preliminary injunction order requiring BDS to submit to a third-tier permitting process under the Temporary Regulations. BDS filed counterclaims against the Board (1) seeking a declaration that the Temporary Regulations and the LUR were preempted by federal and state oil and gas laws and could not be lawfully applied to the Wells, and (2) asking the court to enjoin the Board from enforcing the Temporary Regulations and the LUR against BDS. The Colorado Oil and Gas Conservation Commission ("COGCC") intervened, arguing that the Temporary Regulations were preempted under state law.

II. Federal and State Preemption Case Law Argued by BDS

A. Federal Case Law

The leading case interpreting federal preemption under the MLA is Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), aff'd mem., 100 S.Ct. 1598 (1980). Ventura County sought a declaratory judgment that it had the authority to require Gulf Oil Corporation ("Gulf") to obtain a land use permit to conduct oil exploration and development activities on the Los Padres National Forest. Like BDS, Gulf's activities were taken pursuant to a federal mineral lease, and the BLM, the Forest Service, and the appropriate state agency had issued all necessary approvals.

The Court rejected Ventura County's efforts to regulate Gulf, holding that Congress had preempted local government regulations concerning oil and gas drilling on federal lands. The Ninth Circuit first cited to the "extensive regulation of oil exploration and drilling under the [MLA]," id. at 1083, and the "extensive regulations governing oil and gas leasing (43 C.F.R. part

3100) and both sub-surface and surface operations (30 C.F.R. Part 221) promulgated by the Secretary of Interior.” Id. at 1084. The Ninth Circuit also cited to the comprehensive lease between the federal government and Gulf, as well as the numerous permits and approvals Gulf obtained from several federal agencies.

Based on the extensive regulations, the lease, and the permits, the court held that the local ordinance impermissibly conflicted with federal jurisdiction:

Despite this extensive federal scheme reflecting concern for the local environment as well as development of the nation's resources, Ventura demands a right of final approval. Ventura seeks to prohibit further activity by Gulf until it secures an Open Space Use Permit which may be issued on whatever conditions Ventura deems appropriate, or which may never be issued at all. The federal Government has authorized a specific use of federal lands and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

Id. at 1084.

The court was "reassured" in the correctness of its holding by the requirements of the National Environmental Policy Act ("NEPA"), which mandates extensive cooperation between federal, state and local governments concerning the environmental impacts of federal action under the MLA: "Our decision does not mean that local interests will be unheard or unprotected. In rejecting a local veto power while simultaneously guarding local concerns under NEPA, local interest can be represented, the integrity of the federal leases and drilling permits reconciling national energy needs and local environmental interests can be protected, and the ultimate lessee will be responsible to a single master rather than conflicting authority." Id. at 1086.

In the leading decision since Ventura County discussing federal preemption, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 584 (1987), the Supreme Court addressed whether the Mining Act of 1872, the FLPMA, and the NMFA preempted a California state

agency's imposition of a permit requirement on unpatented mining claims in a national forest. The Court assumed, without deciding the issue, that federal laws pertaining to hard rock mining preempted state land use regulations because the FLPMA and the NMFA limit states to merely an advisory role in federal land management decisions. Id. at 587-88.

A 5-4 majority held, however, that these federal statutes and regulations did not preempt reasonable state environmental regulations. In reaching this holding, the Court relied upon specific Forest Service regulations requiring operators within the National Forests to comply with state standards for air quality, water quality, and the disposal and treatment of solid wastes. Id. at 589. The Court also relied upon a provision in the FLPMA requiring that the federal land-use plan must "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." Id. (quoting 43 U.S.C. § 1712 (c)(8)). The Court concluded that its holding was "narrow," id. at 593, and that state environmental regulations would be preempted if they overlapped with the federal land-use monopoly. Id. at 588 (observing that environmental and land-use regulations are distinct unless there is an "actual conflict between the two ... in a particular case") and at 589 (stating that "reasonable" state environmental regulation is not preempted).

Although the Granite Rock decision did not address federal preemption of local regulations or consider the extensive regulation of oil and gas activities under the MLA, it was nonetheless helpful in determining whether federal laws have preemptive effect. The Supreme Court held that federal preemption will be found when the governing statute and regulations pervasively regulate activities and do not carve out areas for state or local authority. Where those statutes and regulations do grant specific authority to states by requiring consent or

approvals from state agencies – as FLPMA does for compliance with state environmental laws – then federal preemption will not be found.

B. State Case Law

Under Colorado law, counties are not independent sovereigns. Rather, they are “political subdivision[s] of the state, existing only for the convenient administration of the state government, created to carry out the will of the state.” Board of County Comm'rs v. Bainbridge, Inc., 929 P.2d 691, 699 (Colo. 1996). “As political subdivisions of the state, counties only have those powers that are expressly granted to them by the Colorado Constitution or by the General Assembly.” Board of County Comm'rs v. Gartrell Investment Co., LLC, 33 P.3d 1244, 1247 (Colo. App. 2001)(county lacked power to require that developer obtain a permit prior to seeking to annex land to a municipality).

The State of Colorado has enacted the COGCA, a comprehensive statutory scheme designed to regulate oil and gas development. See C.R.S. § 34-60-101, et seq. The General Assembly has proclaimed it a State policy to promote development of oil and gas resources, see C.R.S. §34-60-102(1), and created the COGCC to regulate oil and gas activities within the State. Local governments' general land-use and police powers are limited by this specific grant of power to the COGCC. Oborne v. Board of County Comm'rs, 764 P.2d 397 (Colo. App. 1989)(“Where the General Assembly has delegated a general power to a local government, its powers to act may, nevertheless, be restricted by a legislative grant of power over a specific subject to another agency.”).

The Colorado Supreme Court and the Colorado Court of Appeals have, after considering the breadth of the COGCA, held that local governments have no authority to regulate technical aspects of oil and gas operations. In Board of County Comm'rs v. Bowen/Edwards Assoc., Inc.,

830 P.2d 1045 (Colo. 1992) the Colorado Supreme Court addressed regulations governing oil and gas development enacted by La Plata County under its land use authority. The Court first found no clear or implied intent in the Act to completely preempt a local government from exercising its land use authority over oil and gas activities within its boundaries. 830 P.2d at 1055. The Court further determined, however, that local regulation must yield when it materially impedes or destroys the state's interest, such as by regulating in technical areas related to oil and gas development where the state has a strong interest in uniform regulations. Id. at 1060. The Bowen/Edwards Court enumerated examples of the specific technical activities a local government cannot regulate because of the state's overriding interest:

There is no question that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration. Oil and gas production is closely tied to well location with the result that the need for uniform regulation extends also to the location and spacing of wells.

Id. at 1058, citing Voss v. Lundvall Bros. Inc., 830 P.2d 1061, 1067-68 (1992).

Other "technical" areas listed by the Court which the COGCC is solely authorized to regulate include the pollution of fresh water supplies by oil, gas or salt water, the furnishing of reasonable security for drilling, posting of security for drilling operations and land restoration. 830 P.2d at 1049 n.1 citing C.R.S. § 34-60-106(1)(a).

The Court concluded that county regulations would be preempted if they imposed requirements on the technical aspects of oil and gas operations:

[T]here may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety

regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.

Id. at 1060.

The Court remanded the decision to the district court to afford Bowen/Edwards the opportunity to specify those particular county regulations which it claimed operationally conflicted with state law and, if necessary, to develop an evidentiary record on the preemption issue. Id.

The Colorado Court of Appeals had previously reached the same conclusion in Oborne v. Board of County Comm'rs, 764 P.2d 397 (Colo. App. 1989), which the Colorado Supreme Court approved in Bowen/Edwards as "turning on a narrow operational conflict between the conditions imposed by the county on the technical aspects of oil and gas operations within the county and the regulatory authority vested in the [COGCC] over the very same technical matters." Bowen/Edwards, 830 P.2d at 1060 n. 7.

In Oborne, the plaintiffs challenged a decision by Douglas County denying them a permit for a use by special review to drill three exploratory wells on a 21,000-acre parcel within the county. The county denied the application on the ground that plaintiffs had refused to comply with a zoning resolution requiring oil and gas operators, as a condition for a permit to drill an exploratory well, to protect underground water supplies, to provide a bond to cover reclamation and damage to surrounding water supplies, and to undertake monitoring and technical advice for the drilling and plugging operations. 764 P.2d at 400.

The court upheld the trial court's finding that COGCC's exclusive jurisdiction over these issues preempted the Board from denying a permit on these grounds: The [COGCA] grants to the [COGCC] specific jurisdiction to prevent pollution of water supplies, to prevent fires, to require

reclamation of the land, and to require security from the operator to accomplish these purposes. . . . To the extent that plaintiffs' drilling operations may present problems in these areas, the General Assembly has determined that it is the [COGCC], and not the counties, that should address those problems." Id. at 401.

More recently, the Colorado Court of Appeals in Town of Frederick v. North American Resources Co., 60 P.3d 758 (Colo. App. 2002), examined whether the COGCA preempted a land use ordinance enacted by the Town. The court first determined that the Town could require an oil and gas operator to obtain a special use permit on private lands prior to drilling a well, and upheld ordinance provisions imposing obligations to obtain building permits for above-ground structures, construct access roads, and pay emergency response costs. Id. at 763-64. The court found that the town retained authority to regulate these non-technical areas of oil and gas operation, particularly since no corresponding state rule that gave rise to an operational conflict on these issues. Id. at 764 (provisions of the ordinance “governing access roads and fire protection plans, do not purport to regulate technical aspects of oil and gas operation, even though they may give rise to operational conflicts with a state regulation addressing the same subject and thus be preempted for that reason.”)

The court also found, however, that the COGCA did preempt certain sections of the ordinance regulating technical areas under the Bowen/Edwards test. Id. (“[C]ertain provisions of the Town’s ordinance do regulate technical aspects of drilling and related activities and thus could not be enforced.”); id. at 765 (Under Bowen/Edwards, “the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulation, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that local regulations yield to the

state interest.”) For this reason, the court struck down ordinance provisions imposing setback requirements for the location of wells, noise abatement requirements, and visual impact requirements. Id. The court also struck down all portions of the ordinance that incorporated COGCC regulations and allowed the town to assess penalties for violations of these provisions. Id. at 765-66.

Thus, under these decisions, courts have allowed local governments to impose regulations with respect to certain non-technical areas such as emergency response, fire protection plans, construction and maintenance of access roads, and permitting of above-ground structures. Colorado courts will uphold regulation of non-technical areas by local governments on private land, so long as the local regulation does not conflict with state regulations. Id. By contrast, however, it is clear that in technical areas of oil and gas production – including environmental restoration, potential impacts on groundwater supplies, environmentally safe drilling and pumping practices, and other technical areas listed in Bowen/Edwards – the COGCA and the COGCC regulations operationally preempt local regulation. This preemption occurs regardless of whether the local regulation contradicts or mirrors the corresponding state regulation, or whether the local regulation seeks to regulate an area not covered by the COGCC regulations. Bowen/Edwards, 830 P.2d 1060; Town of Frederick, 60 P.3d at 765-66. In all these circumstances, Colorado courts have consistently preempted local government regulation that strays into technical areas of oil and gas development and operation.

III. How Federal and State Case Law Affected the Gunnison County Regulations.

Based on the foregoing federal and state preemption case law, we made the following arguments to support BDS’s challenge to the Gunnison County Temporary Regulations:

A. Technical and Other Aspects of Oil and Gas Activities Are Expressly Preempted by Federal and State Laws.

Detailed federal and state regulations already occupy, and expressly contradict, the Temporary Regulations and LUR with regard to oil and gas operations on federal lands as they pertain to: water quality impacts, reclamation of surface, drainage and erosion controls, wildlife and wildlife habitat analysis, cultural and historic resources, recreation impacts, livestock and grazing, wildfire hazards, geologic hazards, emergency response requirements, impact mitigation, financial guarantees, and setback requirements. Under federal and state case law, these areas are expressly preempted. Further, many of these performance standards regulate technical areas – including the standards addressing water quality impacts, reclamation of surface, drainage and erosion controls, impact mitigation, financial guarantees, and setback requirements – are explicitly preempted by state law under Bowen/Edwards, Oborne, and Town of Frederick.

B. Open-Ended Performance Standards Conflict with Federal and State Law.

Not only does the County seek to regulate in areas already extensively covered by federal and state regulation, it also seeks to give itself complete discretion in the permitting process. An operator will not be able to engage in oil and gas operations within the County if it fails to comply with any one of these standards, even if the operator has obtained all necessary permits from the federal and state governments. And each of the performance standards is completely open-ended, giving the County absolute discretion in determining whether an application meets a standard. For example, the County can deny an application if it finds, in its sole discretion, that the proposed operation will cause significant degradation in the quality or quantity of surface water or public or private water wells. Unlike the applicable federal and state regulations, the Temporary Regulations do not establish a specific pollution concentration standard or any

sampling or point of compliance criteria to guide the Board's decision. Similarly, the Board can deny an application if it concludes that the proposed project will cause erosion or sedimentation, significantly impacts wildlife or sensitive wildlife habitat, or degrades the quality or quantity of recreational activities or cultural and historic resources in the County, even though all of the federal and state permitting agencies have already determined, as in BDS's case, that no significant adverse impacts will occur.

C. Financial Requirements Conflict with Federal and State Law.

The Temporary Regulations also establish a complex financial guaranty mechanism that is preempted by federal and state law. Under the Temporary Regulations, an operator must enter into a Security Agreement and a Development Improvement Agreement with the County under which the operator pledges to perform all required mitigation and establishes a schedule for any such mitigation. The operator must also provide financial security acceptable to the County no less than 125% of the estimated cost of the conditions to be performed under the permit upon which the County may draw in its sole discretion. These onerous requirements crystallize the need for preemption, because these local requirements conflict with federal and state regulations.

D. Procedural Requirements Conflict with Federal and State Law.

The Temporary Regulations also impose formidable procedural hurdles. For example, applications for major oil and gas operations – which would almost certainly be required for activities associated with the Wells – are considered within forty-five calendar days after being deemed complete at a joint public hearing before the Board and the Planning Commission. The Temporary Regulations also impose no deadline under which either the Planning Commission must make its recommendation to the Board or the Board must make its final decision.

IV. Judge Patrick's Decision.

On April 27, 2004, Judge Patrick issued his Order on the Motions for Summary Judgment, a copy of which is attached. Addressing the state preemption issue first, the court confirmed that Colorado law does not expressly or impliedly preempt the County's Temporary Regulations. (Order at 6.) The court plainly held that the County may not regulate in areas of technical oil and gas operations. (Id.) In applying the operational conflict test of Bowen/Edwards and Town of Frederick, the court concluded that it was required to compare the COGCC's regulations and statutory authority with the Temporary Regulations, and therefore appended Table 1 to the Order which contained a side-by-side comparison of the two regulatory schemes.

Initially, the court found that the County could require an appellant to provide basic information on its proposed oil and gas operations and to the extent such requirements were informational in scope, they did not conflict with the COGCC's requirements. (Order at 6-7.) The court did find that the County's requirements that an application contain wildlife and wildlife habitat analysis, vegetation analysis, water quality analysis, and a drainage and erosion control plan conflicted with areas expressly within the COGCC's jurisdiction. (Order at 7.) With regard to the performance standards contained in the Temporary Regulations, the court found preempted the County's attempt to regulate technical, biological and scientific aspects of BDS' operations, including wildlife, livestock, and water quality impacts, and spacing requirements. (Order at 8.) The court continued that with respect to wildfire hazards, impact fees and financial guarantees, the COGCC has explicit rules governing each of those areas which preempted the County's regulations. (Order at 9.) With regard to the regulation of cultural and historic resources, the court found that the broad authority granted under the COGCA § 34-60-106(11)

preempted the County's regulations. (Id.) The court further ruled that the County's six-month permit duration conflicted with the state's one-year permit period and that the County permit duration must be the same as the states to avoid conflict. (Id.)

The court rejected the County's reliance on its so called "off ramp," a provision in its regulations that reserved to the County the authority to determine whether any of its regulations are in conflict with state or federal law, finding that the County could not reserve to itself the authority to determine whether any particular regulations were preempted. (Order at 10-12.)

The court then proceeded to resolve the federal preemption issue and, based principally on its interpretation of the Granite Rock decision, determined that federal law did not entirely preempt application of the Temporary Regulations on federal lands. (Order at 12-15.) The court ruled that federal law provided no additional grounds for preemption than those already covered under the court's state law analysis. (Order at 15)

Accordingly, Judge Patrick struck a majority of the County's application requirements and nearly all of its performance standards as being operationally in conflict with the COGCC's authority to regulate oil and gas operations in general and, in particular, to regulate technical aspects of oil and gas activities. Appeals of Judge Patrick's Order are now pending in Case No. 04CA1679 and will probably be resolved sometime in 2006.

**LOCAL REGULATION OF OIL & GAS DEVELOPMENT IN
COLORADO**
Case Law and Policy Issues

Presented to the Rocky Mountain Land Use Institute*
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Local control over oil and gas activity has been at issue in Colorado since the 1980's and has been the subject of litigation, legislation and regulation. Despite contrary appellate opinions, local governments continue to push the envelope of permissible local regulation. The Colorado Oil & Gas Conservation Commission continues to expand and refine the avenues for local input into its decision-making. This paper reviews these development and attempts to place the dispute within a useful analytical framework.

I. Oil & Gas Activities Do Not Fit the Mold of Local Control

The conflict between local land use regulation and the state interest in oil and gas development is fundamental. This distinction was expressed by the Colorado Supreme Court in the *Bowen/Edwards*¹ case:

While the governmental interests involved in oil and gas development and in land use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of natural resources in this state. A county's interest in land use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns.

If one thinks about the basic questions involved in land use control, it is clear that oil and gas, due to its unique nature, does not fit the mold for local regulation.

These questions are:

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¹ *Bowen/Edwards v. La Plata County*, 830 P.2d 1045 (Colo. 1992)

1. *What are you doing?* The starting point for any land use decision is the submission of information enabling the local authority to classify and consider the activity. With oil and gas, one issue is the extent to which information requirements fit with the activity. Preparation of large-format, detailed, subdivision plats is costly and provides information no more useful than the site plans and maps required to be submitted to the Colorado Oil & Gas Conservation Commission (COGCC). From a governmental efficiency standpoint, industry believes that local governments should accept and utilize the COGCC application for permission to drill (APD; COGCC Forms 2 & 2A). Industry is generally willing to supplement the APD with “operating plans” and “emergency response plans” in order to educate local officials and improve coordination with emergency responders.
2. *Can you do the activity?* The question here is whether oil and gas is “compatible” with a comprehensive plan, or with existing and planned surrounding land uses. It is the rare local government that has considered and provided for existing, much less future, oil and gas development in its land use plans. Moreover, oil and gas wells are generally considered by professional planners, affected neighborhoods and elected officials to be *incompatible* with any surrounding land use other than industrial or agricultural. On the other hand, denial of the right to drill would clearly constitute a taking of property, since no other use of the oil and gas mineral estate is possible. And, in Colorado, such denial would be an impermissible conflict with a state-approved activity under the preemption doctrine enunciated in *Bowen/Edwards* and its companion case.²
3. *Where can the activity occur?* The question here is whether oil and gas development is an allowed use in a particular land use zone. Some local jurisdictions (e.g. Weld County) have made oil and gas a “use by right” in agricultural and industrial zones, as opposed to commercial or residential areas. The trend is towards treating oil and gas as a “use by special review” anywhere within a local jurisdiction. However, local control over the location of drilling is highly constrained. Subterranean oil and gas occurrences do not respect political boundaries or zoning categories. Dictating well location contravenes the operator’s common law property right and is preempted by the comprehensive well location regulations administered by the COGCC.
4. *How can the activity be conducted?* The issue here is what sort of permit conditions or other “police power” regulation might be applied to oil and gas by the local jurisdiction. Since the Colorado Supreme Court reserved technical aspects of regulating oil and gas to the COGCC (see next

² *Lundvall v. Voss*, 830 P.2d 1061 (Colo. 1992)

section), it is questionable how much jurisdiction remains for local governments. This is especially so in light of the significant rulemaking conducted by the COGCC following the court decisions and subsequent passage of comprehensive amendments³ to the Oil and Gas Conservation Act (the Act). Another issue is the technical capability of local inspectors to oversee oil and gas development.⁴

In summary, local regulation of oil and gas development must recognize that such operations occur in a very different context from that of other surface uses. Surface operations for oil and gas are incidental to and necessary for the development of the underlying mineral estate, access to which is guaranteed by the common law of property.⁵ The oil and gas owner must be able to develop the resource where it occurs, from the overlying surface. Unlike other surface developers, no alternative land uses are possible. Denying access, or making it prohibitively expensive, is equivalent to condemnation of the property. Denial of all economic use of property is a *per se* taking.⁶

II. *The Colorado Court speaks: is harmony possible?*

The history of industry litigation against overbearing local control dates back to at least the 1980's. In the case of *Oborne & Allegretti v. Douglas County*,⁷ the operator, assisted by the Independent Petroleum Association of Mountain States, sued to prevent the county from imposing a series of technical regulations on its well construction and operation. The district court found in favor of the operator, and, on appeal, the Colorado Court of Appeals held that the field of oil and gas regulation was occupied to the exclusion of local controls. Unfortunately, the county failed to file a timely appeal with the Supreme Court, and the chance to establish a clear preemption standard based on the appellate opinion was lost.

In the early 1990's, two additional lawsuits by operators against local oil and gas ordinances worked their way to the Colorado Supreme Court. One arose from the adoption by the City of Greeley of a ban against drilling in the city limits.⁸ Of note, a "flagpole" annexation by the city had incorporated much of the Bracewell Field and prevented development drilling by a number of operators. Once again, the operator, joined this time by the Rocky Mountain Oil & Gas Association as well as the COGCC, was successful at the district court and court of appeals. The Supreme Court affirmed the lower court rulings that the drilling ban was

³ SB 94-177

⁴ see also CRS 34-60-106(15) which prohibits local "inspection fees" for matters "subject to" COGCC jurisdiction.

⁵ *Frankfort Oil co. v. Abrams*, 413 P.2d 190 (Colo. 1966)

⁶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003(1992).

⁷ 764 P.2d 397 (Colo. App. 1988); *cert. den.* 778 P.2d 1370 (Colo. 1989)

⁸ *Supra* note 2.

invalid, analyzing four factors as to whether oil and gas regulation should be at the state or local level:

1. *The need for statewide uniformity of regulation.* The Court found that this factor “weighs heavily in favor of state preemption” because oil and gas resources do not conform to local jurisdictional boundaries. Prevention of waste and protection of correlative rights require state-approved drilling patterns that cross local government lines.
2. *The extraterritorial effect of the local ordinance.* The Court found that Greeley’s drilling ban would impair the ability of nonresident owners to “obtain an equitable share of production” and that this factor also weighs heavily in favor of statewide regulation.
3. *Regulatory tradition.* The Court found that “the regulation of oil and gas development has traditionally been a matter of state rather than local control,” commencing in 1915.
4. *The Colorado Constitution.* The Court noted that the state constitution is silent on the regulation of oil and gas. However, it found that “because of the important state interest in oil and gas development and operations,” the COGCC’s exercise of authority, even in home rule cities, does not violate the constitution’s local control provisions.

Although the Court invalidated Greeley’s drilling ban based on these factors, it declined to find total preemption of local regulation and reinterpreted the *Oborne* case as a conflict of regulation decision. The Court suggested that local regulation of oil and gas might be sustained so long as it did not frustrate the dominant state interest in development of the resource.

In a companion decision⁹ issued on the same day as *Voss*, the Court elaborated on the nature of permissible local regulation. Certain technical matters were specified by the Court to “require uniform state regulation” by the COGCC:

- Locating wells;
- Spacing wells;
- Drilling wells;
- Pumping wells;
- Plugging wells;
- Prevention of waste;
- Safety precautions;
- Environmental restoration.

⁹ *Supra* note 1.

Outside these enumerated areas, the Court held out the hope that local regulation could “be designed to harmonize oil and gas” activities with land use plans and the state’s interest in development. However, the Court:

Hastened to add that there may be instances where the county’s regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed [by] the state . . . or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.

Accordingly, it seems clear that local governments may *not*: prohibit drilling or use zoning to control well location; adopt regulations that conflict with COGCC regulations; or, adopt regulations in technical areas reserved to the COGCC (even if currently unregulated) if the local ordinance would frustrate the state interest in development. Nor, by statute, may local governments enforce COGCC regulations,¹⁰ impose local inspection fees for matters subject to COGCC oversight, or impose local “occupational privilege” taxes on wells and their associated production facilities.¹¹

Later cases have followed the framework established by the Colorado Supreme Court and provided additional guidance with respect to specific areas of local regulation. For example, the Colorado Oil & Gas Association (COGA) and the COGCC successfully challenged a La Plata County ordinance that purported to grant to surface owners the right to dictate well locations (albeit within the COGCC-established 20 acre drilling window). That District Court decision,¹² however, in *dicta*, suggested considerable sympathy for local regulation in general.

The most significant post-*Bowen/Edwards* case is the Court of Appeals decision in *Town of Frederick v. Narco*.¹³ In this case, the Town sued Narco for drilling a well without obtaining the town permit. Narco cross-claimed, arguing that the Town’s ordinance was preempted. The trial court found, and the Court of Appeals affirmed, that Frederick could require a local permit. However, the courts proceeded to, essentially, gut the local ordinance, finding the Town’s regulation of well setbacks, noise abatement and visual mitigation to be in conflict with state regulation.

¹⁰ *Supra* note 4.

¹¹ HB 96-1045.

¹² Citation pending

¹³ 60 P.3d 758 (Colo. App. 2002), *cert. den.* (2003).

One of the key findings of the decision by the Court of Appeals was that the COGCC's "expanded regulations may give rise to additional areas of operational conflict with analogous local regulations." Thus, the Court recognized that "operational conflict" analysis is dynamic, and must take into account both statutory and regulatory expansion of the COGCC's authority.¹⁴ Moreover, the Court rejected Frederick's argument that local "enforcement of COGCC rules does not conflict with state law ...". Finally, it upheld the local permit requirement on the basis that "although the Town's process may delay drilling, the ordinance does not allow the Town to prevent it entirely or to impose arbitrary conditions ...". Areas that the Court suggested are appropriate for local regulation include building permits, road maintenance and submission of emergency response plans.

Despite this rather clear pronouncement on the scope of allowable local regulation, two Colorado counties have brought subsequent actions relating to their attempts at local control over oil and gas. Delta County lost a District Court decision¹⁵ where the main issue was regulation of alleged potential groundwater quality and quantity impacts. Gunnison County's oil and gas ordinance was found by the District Court¹⁶ to be preempted with respect to its provisions relating to:

- Analysis of wildlife habitat
- Analysis of impacts to vegetation and grazing
- Drainage and erosion control
- Setbacks from water bodies
- Protection of cultural and historic resources
- Wildfire hazards
- Geologic hazards
- Recreational impacts
- Local impact fees
- Financial guarantees
- Access to operator records

Moreover, the Judge declared that the County's regulatory "off-ramps" were an attempt to "bootstrap" otherwise invalid regulations and "does not avoid the operational conflicts." Essentially, the ruling preserved those local requirements that are informational in scope and left in-place an empty local permit requirement.

¹⁴ This was a point urged on the Court in COGA's *amicus* brief.

¹⁵ Citation pending

¹⁶ *Gunnison County v. BDS International*, Gunnison County District Court, Case No. 03CV76 (2004); case on appeal.

Local control advocates gained partial victory in a case brought by La Plata County¹⁷ attacking the COGCC's "permit proviso" indicating that its permit is binding with respect to "any conflicting" local requirement.¹⁸ In a decision that mainly addressed the counties' standing to bring the action for declaratory relief, the Court of Appeals¹⁹ struck down the COGCC's wording as being too broad. The COGCC resolved the matter by simply changing the wording to address "any *operationally* conflicting" local requirement. More significantly, the Court turned down the counties' request to revisit its *Town of Frederick* decision based on this ruling. Nonetheless, local control advocates cite this case as the leading edge of an erosion of local preemption, an unlikely outcome given the subsequent District Court decision in the Gunnison County case.

This legal framework, in conjunction with the comprehensive reach of the COGCC regulations adopted during the past decade, raises the question of whether the field of oil and gas regulation has been effectively occupied by state regulation to the exclusion of meaningful local regulation. On a more fundamental level, given the Court's delineation of the distinct goals of local versus state regulation of oil and gas, was its hope that the separate levels of government could "harmonize" their regulations forlorn from the start?

III. *The COGCC seeks to accommodate local concerns.*

Although the court decisions appear to have left little real scope for local control over oil and gas, the COGCC has adopted numerous rules and procedures to accommodate local governments and to incorporate local citizen concerns in its decisions. First, the COGCC requires that local government "designees" receive advance notice of drilling applications²⁰ and an invitation to participate in an onsite consultation²¹ (with the surface owner) regarding the wellsite location, type and placement of roads and production facilities, and timing of operations. Local governments enjoy a ten day delay²² in the issuance of a drilling permit in order to consider local impacts and comment to the COGCC. This delay may be extended to thirty days upon request, and local concerns with respect to a particular drilling permit may be brought to hearing if not resolved.

Second, a set of special "high density area" regulations²³ were adopted to address local concerns about operations in or near residential or commercial areas, or adjacent to certain public facilities. These special rules impose increased setback requirements and a range of additional safety precautions on operators.

¹⁷ Joined by Archuleta, Las Animas, Routt and San Miguel Counties.

¹⁸ COGCC Rule 303a (since revised)

¹⁹ *La Plata County, et al v. COGCC*, Case No. 02CA1879 (2003)

²⁰ COGCC Rule 303.d

²¹ COGCC Rule 306.a(3)

²² *Supra* note 11.

²³ COGCC Rule 603.b

Third, local governments are given the right to intervene²⁴ in virtually every COGCC proceeding in order to raise issues of “public health, safety and welfare”. This right has taken on particular significance in the context of the COGCC rule for local government and public involvement in drilling density matters,²⁵ whereby county intervention automatically invokes a bifurcation of the proceedings into a “downhole” technical hearing, followed by a “public issues” hearing. This results in delaying the drilling of any new wells found necessary from a resource recovery standpoint until public concerns have been addressed. Conditions of approval, including development plans, onsite inspections, “APD’s” having to go to hearing, and directional drilling requirements may be imposed on the operator.

Experience in these areas, especially drilling density matters, raises the issue of whether these COGCC efforts to provide a forum for local concerns, however well-intentioned, have been effective. It can certainly be argued that the COGCC has simply provided an opening for “NIMBY’ism” and surface owner objections – cloaked in the mantle of public welfare – to influence Commission decisions. It must also be asked whether the members of the Commission are qualified to make decisions on the wide range of “public” concerns being raised. Finally, taking on these contentious issues has exposed the COGCC to considerable media criticism and politicization.

IV. The controversy heats up.

Despite the COGCC’s attempts to be responsive to local concerns, whether expressed directly by citizens groups or through their local elected officials, it has come under increasing attack. Two attempts have been made to enact bills that would impose strict “conflict of interest” standards on the COGCC or to reduce the number of seats requiring industry expertise. This legislation would prohibit Commission service by anyone employed by, or with a financial interest in, the oil and gas industry. Commissioners are already covered by ethical standards that require disclosure of any personal involvement or interest in any particular matter brought before the COGCC. The bill proposals would effectively preclude service by anyone other than academics, industry refugees and retirees, all without any direct investment in oil and gas companies.

Evidently, opponents of oil and gas development believe that a COGCC comprised of members not active in the industry would be more sympathetic to claims of excessive surface owner burdens and environmental impacts – the Act be damned. The legal principle that the COGCC, as a state agency, is a creature of statute and limited authority has become politically incorrect.

Meanwhile, local governments are again becoming more assertive in their own attempts to exercise control over oil and gas activities. Several municipalities

²⁴ COGCC Rule 509.a

²⁵ COGCC Rule 508

have declared drilling moratoria while they consider and adopt new permit ordinances. Pressure from surface developers anxious to delay drilling of any new wells while they, themselves, proceed through local approval procedures for subdivisions, may be responsible for these moratoria. This problem was addressed by COGA-sponsored legislation²⁶ that requires surface developers to notify mineral owners and lessees in advance of local consideration of proposals to might affect existing operations or preclude future development. This statute has been instrumental in facilitating early communication and private resolution of surface and mineral estate conflicts, especially in Colorado's fast growing northern I-25 corridor.

V. What does the future portend? Let's get real.

It is clear that local opposition to resource development, whether directly from citizens or reflected through their elected officials is not confined to drilling for oil and gas. All segments of the energy supply chain – producers, processors, pipelines and power generators – are experiencing the same difficulty. The Denver Business Journal ran a cover story on electricity issues titled “PSCo fights to keep up with power – But NIMBY disputes can foil utility's plans.”²⁷ Xcel Energy has subscribed for 2000 MW of gas-fired power over the past five years. Nationally, 200,000 megawatts of new gas-fired generation capacity has been constructed. Supplying these powerplants, as well as millions of new residential heating customers²⁸, will be an immense undertaking for the domestic natural gas industry under the best of circumstances. Having to deal with NIMBY's and NOPE's²⁹ may well make meeting the challenge impossible.

The new, politically correct “stakeholder” involvement process is a recipe for delay or outright rejection of energy development at every stage of the supply chain. As stated by the city planner for Silverthorne, Colorado, “everybody wants power, but nobody wants it where they can see it”.³⁰ This admission highlights the fatal defect inherent in local control over projects essential to the general welfare. There is no local constituency for major resource development projects. Therefore, local politicians respond to the vocal opposition, at least if they want to be re-elected. This is manifestation of the “free lunch” syndrome.

Several responses will be necessary to address this problem. First, the oil and gas industry, along with its partners in the energy supply chain, must devote substantial resources to public education. How many consumers complaining about high gasoline prices know that not a single new refinery has been built in the United States in over twenty years – and understand the relationship?

²⁶ HB 02-1088

²⁷ The Denver Business Journal, October 27-November 2, 2000.

²⁸ Colorado expects a million new residents by 2030.

²⁹ “Not On Planet Earth”

³⁰ Id. at 50A.

Gasoline does not come from the pump, heat does not come from the thermostat, and electricity does not come from a switch on the wall.

Second, the industry must also devote substantial resources to being good corporate citizens. Long before proposing a significant new drilling program or energy facility, company representatives must build a foundation of knowledge, good will, and, hopefully, support among community groups and elected officials, both local and in the statehouse. Local media relations must also be cultivated. And, of course, promises must be kept. Projects must be constructed and operated responsibly, safely and with environmental sensitivity. These goals must be real commitments and not just words in a corporate mission statement.

Unfortunately, all this effort may not be enough, given the depth of anti-corporate fervor among certain activist groups. Industry efforts towards public education and community relations will always be dismissed by some as cynical and self-serving. It will take a concerted effort by state and national opinion leaders, including responsible elected officials, to turn the tide away from parochial interest to the true public interest in secure, reliable domestic energy supplies.. The jury is out on America's energy future.

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**STATE PREEMPTION OF LOCAL
GOVERNMENT REGULATION OF OIL
AND GAS DEVELOPMENT: THE LOCAL
GOVERNMENT PERSPECTIVE**

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Introduction

The regulation of oil and gas development is subject to both local and state regulation in Colorado. Municipal and county governments have utilized their traditional land use authority to regulate construction, well operation and product transportation activities by oil and gas developers. On the other hand, operators must obtain drilling permits through the Colorado Oil and Gas Conservation Commission (COGCC). Predictably, local and state governments have not agreed upon where their respective authority begins or ends. This debate has been left for the judiciary to resolve through the preemption doctrine. The following discusses the major appellate cases, the legal issues created by recent decisions and the potential for adequate judicial line drawing in this area.

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General Framework for Preemption

The current framework for analyzing whether the Colorado Oil and Gas Conservation Act, C.R.S. § 34-60-101, *et. seq.* (the Act) preempts a county's local land use authority is set forth in Bd. of County Comm'rs of LaPlata County v. Bowen/Edwards Assoc., Inc., 830 P.2d 1045 (Colo. 1992)(Bowen/Edwards). As the Court in Bowen/Edwards recognized, there are three ways by which a state statute can preempt a county regulation: First, through express field preemption;

second, through implied field preemption; and third, by operational effect or conflict. Id. at 1056-1057. In the express field preemption analysis, the Court looks to whether there is explicit language in the statute which indicates state preemption over all local authority over the subject matter. Id. In the implied field preemption analysis, a state statutory scheme must be reviewed to see if it impliedly demonstrates a legislative intent to completely occupy the given field by reason of a dominant state interest. Id. Finally, in conducting an operational conflict analysis, the Court must determine whether the local law is partially preempted because its “operational effect would conflict with the application of the state statute.” Id. at 1057.

The Operational Conflict or Partial Preemption Analysis and its Application

In the oil and gas area, the true debate over preemption centers upon whether local regulation operationally conflicts with state regulation. After rejecting the existence of either express or implied total preemption of county land use regulations by the Act, the Bowen/Edwards Court acknowledged that “there may be instances where the county’s regulatory scheme conflicts in operation with the statutory or regulatory scheme.” Id. at 1060. A county’s regulations will be preempted by the state “where the effectuation of a local interest would *materially impede or destroy the state interest.*” Id. at 1059 (emphasis added). In such a situation, the county’s regulations will be preempted to the

³¹ This discussion does not cover the related topic of federal preemption of local government regulation of oil and gas development.

extent of the conflict. Id. In the case of a facial challenge, these situations are limited to local regulations that are facially inconsistent with state regulation or, in other words, inconsistent under “any possible set of permit conditions. California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 579-80 (1987).

Accordingly, courts must analyze whether the local regulations are in operational conflict with the Act or COGCC rules in light of the state interest advanced by the Act. The Bowen/Edwards Court identified the state interest advanced by the Act as “centered primarily on the efficient production and utilization of natural resources in the state.” Id. at 1057. Certainly, the state must consider other interests in implementing the Act, but this does not change the state interest sought to be advanced by the Act.

Some litigants from the oil and gas industry have argued the 1994 amendment of the Act that provided for regulations to “protect the health, safety and welfare of the general public in the conduct of oil and gas activities” as an expansion of the purpose of the Act. Motion at p. 13-14. This is an overly broad reading of the amendment. As recognized by the Bowen/Edwards Court, these powers were extended to the COGCC in 1985. Bower/Edwards, 830 P.2d at 1049 (“Included within the 1985 amendments, as pertinent here, is the [COGCC’s] authority to ‘promulgate rules and regulations to protect the health, safety and welfare of the general public in the drilling, completion, and operation of oil and gas wells and production facilities’”). Accordingly, the Bowen/Edwards ruling is

unaffected by the 1994 amendment, at least with respect to the state interest reflected in the Act.

The limited effect of the 1994 amendment to the Act is also supported by the Colorado Court of Appeals' holding in Town of Frederick v. North American Resources Co., 60 P.3d 758, 765 (Colo. App. 2002)(Town of Frederick). In considering whether the 1994 amendment resulted in implied total preemption of local regulation of oil and gas drilling, the Court of Appeals stated:

We do not agree that these amendments establish that, contrary to Bowen/Edwards, state law now impliedly preempts all local regulation of oil and gas drilling. The amended language itself does not compel such a conclusion. Further, the legislative declaration at the beginning of S.B. 94- 177 includes a statement that 'nothing in this act shall be construed to affect the existing land use authority of local governmental entities.'

Town of Frederick, 60 P.3d at 763. The Court of Appeals did, however, recognize that the expanded regulations promulgated by the COGCC after the 1994 amendment "may give rise to additional areas of operation conflict with analogous local regulations." Although this may suggest that there are additional areas where operational conflict may arise, it does not expand the state interests identified by the Act.

In light of the state interest reflected in the Act, courts must ultimately determine whether the state's interest in the "efficient production and utilization of natural resources" is "materially impeded or destroyed" by the local regulations; in other words, is there an operational conflict between the Act or the COGCC rules and local government land use regulations. Not surprisingly,

this standard is easier to articulate than apply. The oil and gas developers who have litigated preemption tend to take an expansive view of the operational conflict analysis while local governments attempt to utilize a narrower reading of the standard. The following analysis and comments come from my local government perspective in litigating this issue.

An operational conflict does not exist merely because the local regulations and the COGCC rules deal with the same general subject matter; there must be a direct and palpable inconsistency. This is evident in the fact that the Bowen/Edwards Court declined to invalidate certain local land use regulations even though they dealt with the same subject matter as the COGCC rules.

The Bowen/Edwards Court was not able to determine whether there was an operational conflict in that case between the county's land use regulations and the Act because the evidentiary record was not fully developed. Bowen/Edwards, 830 P.2d at 1059. The Bowen/Edwards Court found that it did not have a sufficient basis to conclude that there was an operational conflict with the Act even though the county's land use regulations appeared to regulate areas covered by the Act and the COGCC regulations. The Bowen/Edwards opinion describes the county regulations as follows:

A section of the regulations sets forth three categories of performance standards that all oil and gas facilities must meet as a condition for county approval. The first category contains 'land use coordination standards,' the purpose of which is 'to minimize conflicts between differing land uses.' The land use coordination standards require noise and nuisance mitigation measures and setbacks of wells from residential buildings. The

regulations provide that if compliance with the setback standards promulgated by the Oil and Gas Conservation Commission makes compliance with the county setback standards impossible, the applicant need not comply with the county setback requirements. They also contain spacing requirements in platted subdivisions for minor facilities and major facilities.

The second category of performance standards contains 'environmental quality standards, which are intended 'to balance economic development with protection of the environment and natural resources.' The environmental quality standards require operators of oil and gas facilities to minimize the visual impact of the facilities, to provide for mitigation measures in order to lessen the impact of the facilities on wildlife, and to identify the source of fresh water to be used at the facility and the methods used to deal with waste water.

The third category of performance standards is the 'surface disturbance standards,' which are intended 'to encourage minimal damage to surface activities and surface conditions.' The surface disturbance standards require minor and major facilities to locate so as 'to use only as much of the surface as is reasonably necessary for the operation of [the] facility and to avoid the unreasonable loss of agricultural land.' They also require proper improvement of access roads to accommodate increased traffic to the facility, the removal of all construction-related debris after the facility becomes operational, the maintenance of the facility free of debris and excess materials during the operation, the prohibition against burning of trash without prior notice to the surface owners and the fire district, and the revegetation and reclamation of disturbed lands.

Id. at 1051 n. 3 (emphasis added and citations omitted). Thus, without the context of the actual application of the county's land use regulations to the proposed oil and gas activity, the Colorado Supreme Court declined to rule that county regulations governing visual impacts, wildlife impacts, water usage and disposal, surface disturbance of agricultural land, access road improvement, debris removal, fire restrictions, and disturbed land revegetation and reclamation were preempted by the Act.

The Bowen/Edwards Court, however, did identify some possible areas of operational conflict:

There may be instances where the county's regulatory scheme conflicts an operation with the state statutory or regulatory scheme. For example, the operational effect of the county's regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.

Id. at 1060. It is important to note that the Bowen/Edwards Court limited its example of a situation of operational conflict to "technical conditions" on drilling safety regulation or reclamation requirements; these are clearly areas directly related to the state's interest in the "efficient production and utilization of natural resources." *See id.*

A more limited reading of the operational conflict test set forth in Bowen/Edwards is also supported by subsequent Colorado appellate decisions applying the test. *See Bd. of County Comm'rs of LaPlata County v. Colo. Oil and Gas Conservation Commission (La Plata v. COGCC)*, 81 P.3d 1119 (Colo. App. 2003); *see also Starr Fireworks, Inc. v. West Adams County Fire Dept.*, 903 P.2d 1202 (Colo. App. 1995).

In La Plata v. COGCC, the Board of County Commissioners of La Plata County (La Plata County) sought review of a COGCC rule that provided, "[t]he permit-to-drill shall be binding with respect to *any* conflicting local government permit or local governmental permit or land use approval process." La Plata v. COGCC, 81 P.3d at 1121 (italics added). The Court of Appeals concluded that the

COGCC rule conflicted with the Bowen/Edwards holding. Id. at 1125. In reaching that conclusion, the Court provided further refinement of the operational conflict analysis as follows:

The words 'any conflicting' in the rule have much broader meaning than 'operationally conflicting,' as discussed in Bowen/Edwards and Voss v. Lundvall Bros., *supra*. The word 'any' means 'all.' Thus, on its face amended Rule 303(a) would preempt local government actions beyond those that materially impede or destroy the state interest and would give oil and gas operators license to disregard local land use regulation. This result erodes the delicate balance between local interests and state interests set forth by Bowen/Edwards. Therefore, because the amended rule conflicts with Bowen/Edwards, we must set it aside.

Id. (citation omitted). In other words, the Court of Appeals recognized that a local land use regulation is not preempted merely because there is a COGCC rule that deals with the same subject matter; there must be an actual operational conflict with the COGCC rule for the local land use regulation to be preempted.

The Colorado Supreme Court provided guidance as to when a facial preemption challenge could be successful under the Act in Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992)(Voss). In Voss, the Court held that a complete ban on oil and gas operations within a municipality created an operational conflict with the Act and was thus preempted. Id. at 1067. Clearly, the state's interest in "efficient production and utilization of natural resources" is "materially impeded or destroyed" by a complete ban on drilling under "any possible set of permit conditions." The operational conflict is apparent because the ban effectively negates all COGCC rules related to oil and gas operations.

Subsequent to Bowen/Edwards and Voss, the Supreme Court again addressed the operational conflicts analysis in Bd. of County Commissioners of Douglas County, Colorado v. Bainbridge, Inc., 929 P.2d 691, 712 (1996)(Bainbridge). While Bainbridge arises in the context of school financing and not oil and gas development, the operational conflict analysis is nevertheless applicable. In Bainbridge, the Court stated:

Preemption may also arise due to operational conflict when the effectuation of a local interest would materially impede or destroy the state interest. As discussed above, we conclude that the state and local interests involved in public education and growth-related planning are not irreconcilably conflicting.

In order for a conflict to exist, both the state statute and the local resolution or ordinance must contain express or implied conditions which are inconsistent and irreconcilable with one another. If there is no such conflict, the authority of the empowered state and local entities is to be given effect.

Id. at 712. The Supreme Court's use of the "inconsistent and irreconcilable" language to describe an "operational conflict" further supports the narrower application of the standard.

The Court of Appeals recently applied the operational conflict analysis and found that a town's ordinances imposing additional setback requirements, noise abatement, visual impacts and penalty assessments beyond those of the specific requirements of the COGCC were preempted. Town of Frederick, 60 P.3d at 765. In reaching this conclusion, the Court of Appeals recognized that:

The Bowen/Edwards court did not say that the state's interest 'requires uniform regulation of drilling' and similar activities. Rather, according to the court, it 'requires the uniform

regulation of the technical aspects of drilling' and similar activities. The phrase 'technical aspect' suggests that there are 'nontechnical aspects' that may yet be subject to local regulation.

Id. at 763. The Court of Appeals upheld, and essentially endorsed, the Weld County District Court's analysis with respect to whether operational conflicts existed between the local land use regulations and the Act (except with respect to the imposition of penalty assessments beyond those of the specific requirements of the COGCC).

The Town of Frederick District Court found that the Town regulations dealing with emergency response and fire protection, inspection fees, building permits for above-ground structures, compliance with state environmental standards, geologic hazards, access roads, wildlife impacts, and emergency response costs were not in operational conflict with the Act. Town of Frederick v. North American Resources Co., No. 99CV1082, Order at 6-7 (Dist. Ct. Weld County, March 1, 2001). The District Court, however, found that the setback requirements, noise abatement, and visual impacts were in operational conflict with the Act. These regulations could be deemed in operational conflict with the Act and the COGCC rules because they contained specific requirements that were facially inapposite with specific Act requirements. Town of Frederick v. North American Resources Co., No. 99CV1082, Order at 7-11 (Dist. Ct. Weld County, March 1, 2001). For example, Town of Frederick required a more restrictive noise abatement standard than the state standard.

One could argue that the Town of Frederick decision itself has created more questions than answers. The Court of Appeals did a poor job of articulating its analysis of why the local government regulations were preempted. The Town of Frederick decision did indicate that the Town's setback requirements, noise abatement standards and visual impact regulations were contrary to the specific requirements under the COGCC rules addressing these same areas. *See* 60 P.3d at 765. But the Court of Appeals failed to fully explain how it came to its conclusion. For instance, the decision failed to recite the actual requirements of the Town's or the COGCC regulations that it concluded were inconsistent. Moreover, it is unclear from the decision if the Town's regulations were mandatory or whether they could be applied consistently with the state requirements. Considering that the Town of Frederick case was postured as a facial, not as an as-applied challenge, the Court of Appeals' articulation of how these regulations could not co-exist under any set of conditions would have provided crucial insight as to how to apply the operational conflict analysis in other cases and contexts.

As a result, the Town of Frederick decision's analytical deficiencies leave subsequent litigants to continue debating about what the operational conflict analysis actually means and how to apply it. Many in the industry camp contend that the mere presence of local regulation in an area that could affect the technical conditions on drilling or operations is preempted under Town of Frederick. On the other hand, local governments have argued that Town of

Frederick is wrongly decided and is of little value to subsequent challenges.

Another interpretation of the Town of Frederick holding is that the Court of Appeals invalidated the local regulations on setbacks, visual impacts and noise standards because they were facially in conflict.

Putting It All Together

The preemption analysis rules actually established by the cases discussed above are as follows:

- The only basis for state preemption of local regulations pertaining to oil and gas operations is operational conflict between the state and local regulations.
- Operational conflict occurs “where the effectuation of a local interest would materially impede or destroy the state interest” such as where there are inconsistent local and state standards.
- The state interest advanced by the Act is “centered primarily on the efficient production and utilization of natural resources in the state.”
- There must be a direct conflict for there to be an operational conflict, a local land use regulation will not be preempted merely because it deals with the same subject matter as the state regulations. An operational conflict only occurs where the state and local regulations are “inconsistent or irreconcilable.”
- County land use regulations are preempted based on operational conflict in the area of “technical conditions on the drilling or pumping of wells.”
- A complete ban on drilling will result in preemption in the context of a facial challenge.
- At least absent other factors like a waiver provision, a local regulation specifying particular setback, noise abatement, a visual impact standards that vary from the COGCC regulatory standards will be preempted.

Conclusion and Future Areas of Litigation

The prospects of adequate judicial delineation of the boundary between permissible and preempted local regulation appear slim. First, the operation conflict analysis at this point does not lend itself to obvious conclusions, except at the defined ends of the spectrum. Unfortunately, most questions arise in the grey middle ground that has yet to be defined. Second, the substantive regulations of the state and local government in the oil and gas field are amended and supplemented from time to time creating a fluid field of play for the preemption analysis. For instance, the COGCC has been expanding its rules and regulatory authority. Will the state at some point begin to intrude upon local government's traditionally recognized niche of land use regulation and add a new twist to the analysis? Third, the judiciary will need to address the effect of waiver or off-ramp provisions in local land use codes that allow for the non-application of local regulations in the event of a conflict with state requirements.