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I. Introduction

In the relevant time period of this update, there were three Colorado Supreme Court cases, and one Colorado appellate court case, that significantly impact the oil and gas industry and the same are discussed in detail herein. Two such cases focus on permissible deductions: *BP America Production Co. v. Colorado Department of Revenue*[1] discussed whether oil and gas companies may claim severance tax deductions for cost of capital associated with natural gas processing and transportation, and *Lindauer v. Williams Production Rocky Mountain Company*[2] discussed whether lessees may deduct the costs of transporting gas to downstream markets from royalty payments. The two remaining cases pertain to local bans on hydraulic fracturing. *City of Longmont v. Colorado Oil and Gas Association*[3] and *City of Fort Collins v. Colorado Oil and Gas Association*[4] are two companion cases that each discussed whether the Oil and Gas Conservation Act preempts local bans and moratoriums on hydraulic fracturing (referred to herein as "fracking"). Additionally, three other cases are briefly mentioned in the "Additional Case Summaries" subsection:

1. 2016 CO 23, 369 P.3d 281; *see also Colorado*, 1 Tex. A&M L. Rev. 129 (2014).
2. 2016 COA 39.
3. 2016 CO 29, 369 P.3d 573.
4. 2016 CO 28, 369 P.3d 586.

Rocky Mtn. Expl., Inc. v. Davis Graham and Stubbs LLP;[5] *Owens v. Tergeson*;[6] and *Kinder Morgan CO2 Co., L.P. v. Motezuma County Board of Commissioners*.[7]

Six bills intended to materially affect the oil and gas industry were also proposed in the legislative session during the update period for this article. Of these six bills, only one was passed and it has no adverse effects on oil and gas operations. Specifically, Senate Bill 16-218 made certain amendments and additions to, *inter alia*, Colorado's severance tax statute pertaining to refunds and the allocation of revenues held in certain funds.[8]

Further, as a result of recommendations to the Governor made by Colorado's Oil and Gas Task Force various regulatory updates occurred during the relevant update period. Pursuant to Recommendations #17 and #20, as discussed in further detail below, the 100, 300 and 600 Series of Rules for the Colorado Oil and Gas Conservation Commission were amended to "define Large Facilities within Urban Mitigation Areas ("UMA"), outline an enhanced local government consultation process when siting Large UMA facilities, and include registration with local governments to promote increased communication and advance planning."[9]

Lastly, four Ballot initiatives were proposed for inclusion on the November 2016 ballot that would adversely affect the oil and gas industry. But it now appears none of these Ballot initiatives, being #40, #63, #75 and #78, will actually appear on the November 2016 ballot;[10] however, their key objectives are outlined herein.

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5. 2016 COA 33 ("[A] petition for rehearing in the court of appeals or a petition for certiorari in the supreme court may be pending.").

6. 2015 COA 164, 363 P.3d 826 (Colo.App. 2015).

7. No. 15SC595, 2016 WL 768449 (Colo. 2016).

8. S.B. 16-218, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (responding to the Supreme Court Ruling in *BP Am. Prod. Co. v. Colo. Dep't of Revenue*).

9. *COGCC Oil and Gas Task Force Rulemaking Summary*, Colo. Oil & Gas Ass'n., http://www.coga.org/wp-content/uploads/2016/03/COGCC-Oil-Gas-TF-Rulemaking-Summary-Whitepaper.pdf.

10. Titles and petition formats were approved for Ballot Initiatives #40 (Local Governance), #63 (Right to Healthy Environment), #75 (Local Government Authority to Regulate Oil and Gas Development) and #78 (Mandatory Setback for Oil and Gas Development) during the spring of 2016. But signatures were only submitted to the Colorado Secretary of State on August 8, 2016, for Ballot Initiatives #75 and #78. On August 29, 2016, the Colorado Secretary of State announced that, based on the required random sampling by state officials, it appears the required number of signatures have not been timely filed to place either Ballot Initiative #75 or #78 on the November ballot. Registered voters may challenge the Secretary of State's determination by filing an action in Denver District Court on or before September 28, 2016. *See* 2015-2016 Proposed Initiatives,

II. Case Law

A. Permissible Deductions

Two cases were decided during this update period addressed what costs may be claimed as deductions (1) under Colorado's severance tax statute and (2) from royalty payments due under an oil and gas lease. Both cases are discussed in detail below.

1. Cost of Capital as Deduction under Severance Tax Statute

In *BP America Production Co. v. Colorado Department of Revenue*, the Colorado Supreme Court considered the question of whether Colorado's severance tax statute, codified at Colorado Revised Statutes ("C.R.S.") § 39-29-101, *et. seq.*, permits the deduction of the "cost of capital" associated with natural gas transportation and processing facilities.[11] The court ultimately found that the plain language of the statute unambiguously authorizes the deduction of such "cost of capital" and reversed the Court of Appeals' holding.[12]

Income that is generated from the extraction of non-renewable resources from the ground in Colorado is taxed under the above referenced statute. The severance tax statute permits taxpayers to deduct "'*any* transportation, manufacturing, and processing *costs* borne by the taxpayer."[13] The goal of the severance tax is to tax the value of the resource at the time it is extracted, referred to as the "wellhead value."[14] Because resources are not sold at the wellhead, it is necessary to "look back and calculate a resource's wellhead value after it has been processed, transported, and sold"; this look-back calculation is generally known as the "netback approach" and results in the taxpayer being taxed only on the resource's wellhead value rather than its full sale price.[15]

"Cost of capital" is generally defined as "the amount of money that an investor could have earned on a different investment in a similar risk."[16] "In this case, the cost of capital is the amount of money that BP America Production Company's ("BP") predecessors could have earned had they

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http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard.index.html (last visited Sept. 1, 2016).

11. 2016 CO 23, ¶ 1, 369 P.3d 281, 282.
12. *Id.*¶ 2, 369 P.3d at 283.
13. *Id.* ¶ 2 (quoting COLO. REV. STAT. § 39-29-102(3)(a)).
14. *Id.* ¶ 11, 369 P.3d at 284.
15. *Id.* ¶¶ 11-12, 369 P.3d at 284-85.
16. *Id.* ¶ 1, 369 P.3d at 282 (internal citation omitted).

invested in other ventures rather than in building transportation and processing facilities."[17] Specifically, such "cost of capital" is "the difference between the amount of cost recovery that the predecessors actually received from constructing the facilities, and the amount of cost recovery or deductions that the predecessors could have received if they had invested in existing facilities or paid a third party."[18] The actual amount of the BP's "cost of capital" is not disputed as the parties stipulated to the amount; however, the issue on appeal was whether such amount qualifies as a "transportation, manufacturing and processing cost" under the severance tax statute.[19]

In considering this question, the court reviewed the language of the statute to determine whether it is ambiguous and examined the meaning of "costs" under said statute and whether "cost of capital" is included therein. When interpreting a statute, the court's goal is to give effect to the legislative intent by first giving the words used in the statute their "ordinary and commonly accepted meaning."[20] In the case of construing a tax statute, generally all doubts will be construed in favor of the taxpayer; however, "'deductions and exemptions in taxation are recorded as a matter of legislative grace … and they are not allowed unless clearly provided for.'"[21] The court found that Colorado's severance tax statute is unambiguous in allowing the deduction of "*all* transportation, manufacturing and processing costs."[22] It distinguished many cases relied upon by the Court of Appeals in reaching its contrary decision by highlighting that such cases interpreted the term "cost" or "costs" on its own, without the preceding modifier of "any," stating that "omitting the adjective 'any' changes the context of the word 'costs'"[23] and "'when used as an adjective in a statute, the word 'any' means 'all.'"[24]

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17. *Id*.
18. *Id*. ¶ 23, 369 P.3d at 287.
19. *Id*. The District Court ruled that such cost of capital was a permissible deduction because the severance tax statute allows for the deduction of "any" costs, and absent language to the contrary, cost of capital is included within such parameters. The Court of Appeals reserved, finding that the severance tax statute was ambiguous as to the meaning of "costs," and in the absence of express language from the legislature, costs of capital are not deductible. *Id*. at ¶¶ 6-7, 369 P.3d at 284-85.
20. *Id*. ¶ 15, 369 P.3d at 285.
21. *Id*. ¶ 15, 369 P.3d at 285(internal citations omitted).
22. *Id*. ¶ 18, 369 P.3d at 286 (emphasis added).
23. *Id*. ¶ 17, 369 P.3d at 286.
24. *Id*. ¶ 18, 369 P.3d at 286 (internal citations omitted).

The court also found that "cost of capital" was a covered "cost" under the severance tax statute. The Department's argument that "the cost of capital is not an actual cost; instead, it is a mere 'benefit forgone to pursue a different opportunity'"[25] was rejected based upon the plain language of the statute.[26] Additionally, the court identified other authorities which have determined that "cost of capital" is in fact a "cost." For example, the tax statute governing oil and gas leaseholds states that the value of such lands is calculated by deducting "gathering, transportation, manufacturing and processing costs" pursuant to the administrator's guidelines,[27] and the guidelines established under that statute provide that "the cost of capital, identified as 'return on investment,' is a deductible cost in valuing oil and gas resources."[28] Additionally, "the Tenth Circuit has held that, absent a lease provision to the contrary, oil and gas lessees can deduct the cost of capital attributable to transportation facilities" from royalty payments.[29] As a result of this holding, companies that own facilities used for manufacturing, transporting, and processing of oil and gas may deduct their "cost of capital" from severance taxes.

2. Downstream Market Transportation Costs as Deduction from Royalty Payments

The opinion in *Lindauer v. Williams Production RMT Company*[30] materially affects the oil and gas industry in Colorado. This case addressed two issues which were previously undecided in Colorado, framed by the court as follows:

> First, must costs incurred to transport natural gas to markets beyond the first commercial market "enhance" the value of that gas, such that the actual royalty revenues increase, in order to be deductible from royalty payments? Second, if the enhancement test applies to such transportation costs, must the enhancement,

25. *Id.* ¶ 24, 369 P.3d at 287.
26. *Id.* ¶ 25, 369 P.3d at 287.
27. *Id.* ¶ 26, 369 P.3d at 288 (citing to COLO. REV. STAT. § 39-7-101(1)(d)).
28. *Id.* (citing 3 *Assessors' Reference Library*, § VI at 6.44 (rev. Jan. 2016)).
29. *Id.* ¶ 27, 369 P.3d at 288 (citing Atl. Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1154 (10th Cir. 2000)).
30. 2016 COA 39 ("[A] petition for rehearing in the Court of Appeals or a petition for Certiorari in the Supreme Court may be pending.").

> and the reasonableness of the costs, be shown on a month by month basis?[31]

The court answered the first question in the negative, and therefore, did not opine on the second.[32]

This case involved a class action suit against WPX Energy Rocky Mountain, LLC ("WPX"), with plaintiffs being royalty owners under oil and gas leases covering lands in the Piceance Basin.[33] Each of the plaintiff's leases was silent as to the allocation of transportation costs.[34] The parties stipulated that transportation costs incurred with moving the extracted resources from the wellhead to the point of sale (specifically, the "tailgate" of the processing plant) were not deducted from the royalties paid to the plaintiffs.[35] WPX then incurred additional costs in transporting the processed gas from the tailgate to "downstream" markets where it was able to secure a higher price of sale.[36] There were two components to WPX's downstream transportation costs: (1) the "'demand charge,' which was a charge paid by WPX to reserve space in the mainline pipelines . . . paid by WPX whether or not it uses the pipeline to ship gas" and (2) the "'commodity charge,' which was paid by WPX per unit volume actually shipped on the pipeline."[37] WPX deducted the commodity charge from royalty payments in all instances; additionally, it deducted the demand charge only in months where gas was shipped.[38]

Plaintiffs alleged that the deduction of any costs incurred beyond the first commercial market, *i.e.* both the demand charge and the commodity charge, was improper.[39] Specifically, they argued that downstream transportation costs may only be deducted if it can be shown that "(1) the costs are reasonable and (2) the actual royalty revenues increase in proportion with the costs assessed against the royalties."[40] Here, the only element in dispute is the second prong of the Plaintiff's purported test.[41] Essentially, the plaintiffs asserted that a test known as the "enhancement test" applied to

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31. *Id.* ¶ 1.
32. *Id.*
33. *Id.* ¶ 3.
34. *Id.* ¶ 8.
35. *Id.* ¶ 5.
36. *Id.* ¶ 6.
37. *Id.* ¶ 7.
38. *Id.* ¶ 9.
39. *Id.* ¶ 4.
40. *Id.*
41. *Id.*

this scenario, which test was first set out by the court in *Garman v. Conoco, Inc.*[42] as follows:

> Upon obtaining a marketable product, any additional costs incurred to enhance the value of the marketable gas, such as those costs conceded by the [royalty owners], may be charged against nonworking interest owners. *To the extent that certain processing costs enhance the value of an already marketable product the burden should be placed upon the lessee to show such costs are reasonable, and that actual royalty revenues increase in proportion to the costs assessed against the nonworking interest.*[43]

Additionally, the Plaintiffs contended that enhancement must be shown on a month-to-month basis through comparison of the price in the Piceance Basin to the price obtained in the downstream market.[44] Conversely, WPX argued first, that the enhancement test did not apply to downstream market transportation costs, and second, if it did apply, then the determination of enhancement should be based upon the "prudent operator rule" and not a month-to-month comparison.[45] Ultimately, the court agreed with WPX's first argument.[46]

The court considered the cases relied upon by the District Court, being *Garman*[47] and *Rogers v. Westerman Farm Co.*,[48] and found the same "do not require post-marketability transportation costs to meet the enhancement test," and therefore, such costs "are deductible, if they are reasonable."[49] Furthermore, "lessees are not required to establish that such costs enhance the value of the gas or increase the royalty revenues."[50]

The rule in the *Garman* case was that all costs incurred by the lessee in making gas marketable must be borne entirely by the lessee and may not be deducted from royalty payments.[51] The court in *Lindauer* noted that the

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42. 886 P.2d 652 (Colo. 1994).
43. *Lindauer*, 2016 COA 39, ¶ 24 (quoting *Garman*, 886 P.2d at 661).
44. *Id.* ¶ 10.
45. *Id.* ¶ 11.
46. *See id.* ¶¶ 12-15 (finding that the enhancement test did apply to downstream market transportation costs and that such enhancement should be determined on a month to month comparison).
47. Garman v. Conoco, Inc., 886 P.2d 652 (Colo. 1994).
48. 29 P.3d 887 (Colo. 2001).
49. *Lindauer*, 2016 COA 39, ¶ 18.
50. *Id.*
51. *Id.* ¶ 21 (citing *Garman*, 886 P.2d at 659, 661).

Garman decision focused on the "implied covenant to market" that is contained in every oil and gas lease, specifically holding that "'the implied covenant to market obligates the lessee to incur those post-production costs necessary to plate gas in a condition acceptable for market' and that '[o]verriding royalty interest owners are not obligated to share in these costs.'"[52] Additionally, the court highlighted that the "enhancement test" as set forth in *Garman* was limited to "'*processing* costs [that] enhance the value of an already marketable product.'"[53] "Transportation costs" are not the same as, or included within the meaning of, "processing costs"; in fact, the royalty owners in the *Garman* case agreed that transportation costs were deductible without any enhancement requirement.[54] Additionally, the next sentence in the *Garman* opinion specifically addressed "'expenses incurred to process, transport, or compress already marketable gas'," showing clear indication that the court treated such "transportation costs" separately from "processing costs."[55] Based upon the foregoing, the *Lindauer* court concluded that *Garman* did not apply the enhancement test to post-marketability transportation costs.[56]

The ruling of *Garman* was reaffirmed in *Rogers*, where the court found that in the context of a lease that is silent on the issue of permissible deductions, the lessee must bear all costs of marketability under the implied covenant to market.[57] Specifically, the *Rogers* court phrased its summary of the *Garman* decision as follows: "'We also determined [in *Garman*] … that in those circumstances where the gas was marketable, and subsequent *production costs* were incurred to enhance the value of the already marketable gas, such subsequent costs may be shared by the lessors and lessees provided that certain conditions are met'," the referenced conditions being both prongs of the enhancement test (*i.e.* reasonableness and increased revenues).[58] Performing a similar analysis, the *Lindauer* court noted that the *Rogers* decision did not apply generally to all post-marketability costs, but rather only to "production costs,"[59] and further noted that there was no indication that such "production costs" were intended to have a contrary meaning to those costs identified in *Garman*,

52. *Id*. (citing *Garman*, 886 P.2d at 659).
53. *Id*. ¶ 27 (citing *Garman*, 886 P.2d at 661).
54. *Id*. ¶ 28.
55. *Id*. ¶ 29.
56. *Id*. ¶ 30.
57. *Id*. ¶ 31.
58. *Id*. (citing Rogers v. Westerman Farm Co., 29 P.3d 887 (Colo. 2001)).
59. *Id*. ¶ 32.

"namely, 'certain processing costs' that enhance the value of the marketable gas."[60] It likewise found that the *Rogers* court later specifically addressed transportation costs.[61] Significantly, the language applicable to transportation costs in the *Rogers* case provided that the same would be deductible from royalty payments so long as the costs were reasonable; proof of increase of royalty revenues was not referenced.[62] According to the above, the *Lindauer* court concluded that *Rogers* does not mandate the application of the enhancement test to post-marketability transportation costs, but instead requires only that such transportation costs be reasonable.[63]

Apart from distinguishing the *Garman* and *Rogers* cases as explained above, the court also identified several other factors that weigh against requiring transportation costs to meet the enhancement test. First, imposing an enhancement requirement on downstream transportation costs "ignores the 'commercial realities of the marketplace'."[64] Second, the enhancement test "fails to take into account the long-term nature of decisions to market gas downstream," such as entering into long-term transportation contracts.[65] Third, requiring operators to prove that a downstream market would enhance the value of the gas prior to deducting such costs "could discourage them from pursuing a downstream marketing strategy" that would ultimately benefit both lessor and lessee.[66] Because the plaintiffs in this case conceded that WPX's downstream transportation costs were reasonable, the court found that such costs were deductible from royalty payments;[67] "transportation costs beyond the first commercial market need not enhance the value of the gas . . . to be deductible from royalty payments."[68]

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60. *Id.* ¶¶ 32-33.

61. *Id.* ¶ 34.

62. *Id.* ¶ 34 (quoting *Rogers*, 29 P.3d at 906) ("Once a product is marketable, however, additional costs incurred to either improve the product, or transport the product, are to be shared proportionately by the lessor and lessee. All costs must be reasonable.") (internal quotation marks omitted).

63. *Id.* ¶ 40.

64. *Id.* ¶ 40 (quoting *Rogers*, 29. P.3d at 905).

65. *Id.* ¶ 46 (noting that "a month by month enhancement requirement is inconsistent with the long-term nature of the downstream marketing strategy and its long-term benefits").

66. *Id.* ¶ 48 (finding such a rule would allow lessors to have a "'free ride'," enjoying the long-term benefits of downstream markets without paying their proportionate share of the costs).

67. *Id.* ¶ 54.

68. *Id.* ¶ 53.

B. Local Bans on Hydraulic Fracturing

In both *City of Longmont*[69] and *City of Fort Collins*,[70] the Colorado Oil and Gas Association ("COGA") brought suit against the respective home-rule cities and sought injunctions against enforcement of each city's regulations relating to bans on fracking.[71] While the arguments put forth were slightly different, the court applied the same rationale and reached the same conclusion in each case. The portions of the court's analysis which are common to both cases are discussed herein, with the specifics of each city's ordinance and case-specific items being discussed in more details under the two subsections below.

The majority of the court's analysis in determining whether local governments were permitted to regulate fracking revolved around Colorado's law of preemption. First, the court noted that the state Constitution recognizes the sovereignty of home-rule cities, quoting the following language:

> The people of each city or town of this state … are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
>
> *Such charter and ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.*[72]

Thus, a home-rule ordinance will supersede a conflicting state statute in a matter purely of local concern.[73] If, however, the subject matter is of purely state, or mixed state and local, concern, the state law will supersede a conflicting home-rule ordinance.[74] If no conflict exists between the state and local law, then both may coexist.[75]

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69. 2016 CO 29, 369 P.3d 573.

70. 2016 CO 28, 369 P.3d 586.

71. *Id*.; *City of Longmont*, 2016 CO 29.

72. *City of Longmont*, 2016 CO 29, ¶ 16, 369 P.3d at 579; *City of Fort Collins*, 2016 CO 29, ¶ 12, 369 P.3d at 591.

73. *City of Longmont*, 2016 CO 29, ¶ 17, 369 P.3d at 579; *City of Fort Collins*, 2016 CO 29, ¶ 13, 369 P.3d at 591.

74. *City of Longmont*, 2016 CO 29, ¶ 18 369 P.3d at 579; *City of Fort Collins*, 2016 CO 29, ¶ 14, 369 P.3d at 591.

75. *City of Longmont*, 2016 CO 29, ¶ 18; *City of Fort Collins*, 2016 CO 29, ¶ 14, 369 P.3d at 591.

The first inquiry in a preemption analysis is whether the subject matter of the relevant home-rule ordinance "involves a matter of statewide, local, or mixed state and local concern."[76] The "'relative interests of the state and the municipality in regulating the particular issue'" must be considered "on a case-by-case basis considering the totality of the circumstances" when making this determination.[77] Additionally, the following factors, *inter alia*, should guide the court's inquiry: "(1) the need for statewide uniformity of regulation, (2) the extraterritorial impact of the local regulation, (3) whether the state or local governments have traditionally regulated the matter, and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation."[78] In applying the above analysis, the court concluded that the home-rule cities' regulations seeking to regulate fracking involved a matter of mixed state and local concern because it implicates the need for uniform statewide regulation and the extraterritorial impact of a fracking ban, on the one hand, and the local government's traditional authority to exercise its zoning authority over land where oil and gas development occurs, on the other."[79]

When a local ordinance touches a matter of statewide concern, the next inquiry is whether such ordinance conflicts with state law; if such conflict exists, the state law will preempt the local ordinance.[80] Preemption may occur in one of three ways: express, implied, or operational conflict.[81] Express and implied preemption are "'primarily matters of statutory interpretation'."[82] Express preemption occurs when the legislature "clearly and unequivocally states its intent to prohibit a local government from exercising its authority over the subject matter at issue."[83] Implied preemption occurs when there is evidence of "legislative intent to

76. *City of Longmont*, 2016 CO 29, ¶ 19, 369 P.3d at 579 (internal citations omitted); *City of Fort Collins*, 2016 CO 29, ¶ 15, 369 P.3d at 591. (internal citations omitted).

77. *City of Longmont*, 2016 CO 29, ¶ 20, 369 P.3d at 580 (internal citations omitted).

78. *City of Longmont*, 2016 CO 29, ¶ 20; *City of Fort Collins*, 2016 CO 29, ¶ 15, 369 P.3d at 591.

79. *City of Longmont*, 2016 CO 29, ¶¶ 21-31, 369 P.3d at 580-81; *City of Fort Collins*, 2016 CO 29, ¶ 16, 369 P.3d at 591.

80. *City of Longmont*, 2016 CO 29, ¶ 32, 369 P.3d at 581; *City of Fort Collins*, 2016 CO 29, ¶ 17, 369 P.3d at 591.

81. *City of Longmont*, 2016 CO 29, ¶ 33, 369 P.3d at 582; *City of Fort Collins*, 2016 CO 29, ¶ 18, 369 P.3d at 591.

82. *City of Longmont*, 2016 CO 29, ¶ 33; *City of Fort Collins*, 2016 CO 29, ¶ 18, 369 P.3d at 591.

83. *City of Longmont*, 2016 CO 29, ¶ 34, 369 P.3d at 582 (internal citations omitted); *City of Fort Collins*, 2016 CO 29, ¶ 19, 369 P.3d at 592 (internal citations omitted).

completely occupy a given field by reason of a dominant state interest."[84] In ascertaining whether such intent exists, the language of the statute, together with the scope of purpose of the statutory scheme, must be considered.[85] Finally, the court acknowledged that in prior cases they had articulated different standards to determine whether a conflict by operational law exists,[86] but clarified in these cases that preemption by operational conflict exists when "the effectuation of a local interest would materially impede or destroy a state interest."[87] The court further explained that such an analysis requires assessment of "the interplay between the state and local regulatory schemes," which generally will involve "a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes 'on the ground.'"[88]

None of the parties in either case alleged that state law expressly preempted local governments from regulating oil and gas development or fracking.[89] In both cases, the court disagreed with COGA's assertion that Colorado's Oil and Gas Conservation Act ("Act") impliedly preempted the home-rule regulations at issue, stating that "[t]o the contrary, the General Assembly has recognized the propriety of local land-use ordinances that relate to oil and gas development."[90] Thus, the question of whether preemption existed here turned on whether there was operational conflict between the home-rule regulation and the Act.[91]

The state's interest in oil and gas development, and the legislature's intent in enacting the Act, is explicitly stated as follows:

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84. *City of Longmont*, 2016 CO 29, ¶ 35, 369 P.3d at 582 (internal citations omitted); *City of Fort Collins*, 2016 CO 29, ¶ 20, 369 P.3d at 592 (internal citations omitted).

85. *City of Longmont*, 2016 CO 29, ¶ 35, 369 P.3d at 582; *City of Fort Collins*, 2016 CO 29, ¶ 20, 369 P.3d at 592. (finding mere enactment of a statute addressing certain activities is insufficient to infer the intent required for implied preemption); *City of Fort Collins*, 2016 CO 29, ¶ 20, 369 P.3d at 592.

86. *City of Longmont*, 2016 CO 29, ¶ 16, 369 P.3d at 582.

87. *City of Longmont*, 2016 CO 29, ¶ 42, 369 P.3d at 583; *City of Fort Collins*, 2016 CO 29, ¶ 21, 369 P.3d at 592.

88. *City of Longmont*, 2016 CO 29, ¶ 42, 369 P.3d at 583; *City of Fort Collins*, 2016 CO 29, ¶ 21, 369 P.3d at 592.

89. *City of Longmont*, 2016 CO 29, ¶ 44, 369 P.3d at 583; *City of Fort Collins*, 2016 CO 29, ¶ 23, 369 P.3d at 592.

90. *City of Longmont*, 2016 CO 29, ¶ 46, 369 P.3d at 583; *City of Fort Collins*, 2016 CO 29, ¶ 25, 369 P.3d at 592. *See City of Longmont*, 2016 CO 29, ¶¶ 45-47, 369 P.3d at 583-84, for a more detailed discussion of whether implied preemption exists.

91. *City of Longmont*, 2016 CO 29, ¶ 48, 369 P.3d at 584; *City of Fort Collins*, 2016 CO 29, ¶ 26, 369 P.3d at 592.

> It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including protection of the coequal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom.[92]

Under the Act's authority, the Colorado Oil and Gas Commission ("COGCC") promulgates rules, regulations and orders covering a number of topics, including "the 'drilling, producing, and plugging of wells and all other operations for the production of oil or gas,' the 'shooting and chemical treatment of wells,' and the spacing of wells"[93] for the purpose of preventing waste and conserving oil and gas resources while protecting the public health, safety and welfare.[94] Ultimately, the court held in each case that the Act and the COGCC's rules and regulations evidenced a strong state interest and control over numerous aspects of fracking and that each respective local regulation "materially impedes the effectuation of the state's interest."[95]

1. Longmont

In 2012, the residents of Longmont voted to add Article XVI to Longmont's home-rule charter, providing as follows:

> It shall hereby be the policy of the City of Longmont that it is prohibited to use hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Longmont. In addition, within the City of Longmont, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the

92. *City of Longmont*, 2016 CO 29, ¶ 50, 369 P.3d at 584 (quoting COLO. REV. STAT. § 34-60-102(1)(b) (2015)); *City of Fort Collins*, 2016 CO 29, ¶ 27, 369 P.3d at 593 (quoting COLO. REV. STAT. § 34-60-102(1)(b) (2015)).

93. *City of Longmont*, 2016 CO 29, ¶ 51, 369 P.3d at 584 (citing COLO. REV. STAT. §§ 34-60-105(1);34-60-106(2)(a)-(c) (2015)); *City of Fort Collins*, 2016 CO 29, ¶ 28, 369 P.3d at 592 (citing C.R.S. §§ 34-60-105(1) and 34-60-106(2)(a)-(c) (2015)).

94. *City of Longmont*, 2016 CO 29, ¶ 52, 369 P.3d at 584 (internal citations omitted); *City of Fort Collins*, 2016 CO 29, ¶ 29, 369 P.3d at 592 (internal citations omitted).

95. *City of Longmont*, 2016 CO 29, ¶ 53, 369 P.3d at 585; *City of Fort Collins*, 2016 CO 29, ¶¶ 29-30, 369 P.3d at 592.

> hydraulic fracturing process, including but not limited to flowback or produced wastewater and brine.[96]

COGA sued Longmont, seeking a permanent injunction enjoining, and a declaratory judgment invalidating, Article XVI.[97] The District Court granted both motions but stayed its order, pending appeal; Longmont residents and citizen intervenors appealed and the case was thereafter transferred to the Colorado Supreme Court.[98] Specifically, Longmont argued on appeal that the District Court's preemption analysis was in error, and that "the inalienable rights provision of the Colorado Constitution trumps any preemption analysis and requires [the court] to conclude that Article XVI supersedes state law."[99]

As discussed hereinabove, the court agreed with the District Court's analysis that the state law in fact preempted the local charter due to operational conflict. In addition, the court was not persuaded by the citizens' inalienable rights proposition.[100] The "inalienable rights" provision of the Colorado Constitution is found in Article II, Section 3, and reads as follows: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."[101] Under the proffered reading of this provision, "no local regulation alleged to concern life, liberty, property, safety, or happiness could *ever* be preempted, and thus, such local regulations would *always* supersede state law. Such a result would arguably render the home-rule provision of our constitution, art. XX, § 6, unnecessary, and we cannot countenance such a result."[102] The court made reference to certain Pennsylvania precedent and an amendment to their constitution which established a public trust doctrine, but explained that no such constitutional provision or doctrine existed in Colorado.[103] Additionally, the court also noted that the citizens conceded that there is no authority in Colorado to support the application of the inalienable rights provision of the constitution to the preemption analysis.[104]

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96. *City of Longmont*, 2016 CO 29, ¶ 4, 369 P.3d at 577.
97. *Id.* ¶ 5, 369 P.3d at 577.
98. *Id.* ¶¶ 6-7, 369 P.3d at 577.
99. *Id.* ¶ 7, 369 P.3d at 577.
100. *Id.* ¶ 57, 369 P.3d at 585.
101. *Id.* ¶ 58, 369 P.3d at 577 (internal quotation marks omitted).
102. *Id.* ¶ 59, 369 P.3d at 586.
103. *Id.* ¶¶ 60-62, 369 P.3d at 586.
104. *Id.* ¶ 58, 369P.3d at 586.

2. Fort Collins

In 2013, the residents of Fort Collins voted in favor of the following citizen-initiated ordinance:

> An ordinance placing a moratorium on hydraulic fracturing and the storage of its waste products within the City of Fort Collins or on lands under its jurisdiction for a period of five years, without exemption, in order to fully study the impacts of this process on property values and human health, which moratorium can be lifted upon a ballot measure approved by the people of the City of Fort Collins and which shall apply retroactively as of the date this measure was found to have qualified for placement on the ballot.[105]

The municipal code of Fort Collins was also amended to provide that "'[t]he use of hydraulic fracturing to extract oil, gas or other hydrocarbons, and the storage in open pits of solid or liquid wastes and/or flowback created in connection with the hydraulic fracturing process, are prohibited within the City.'"[106] COGA sued Fort Collins, seeking a permanent injunction enjoining, and a declaratory judgment invalidating, the aforesaid ordinance.[107] The District Court granted COGA's motions; Fort Collins residents and a number of other interested parties appealed and the case was thereafter transferred to the Colorado Supreme Court.[108] Specifically, Fort Collins argued on appeal that the District Court's preemption analysis was in error[109] and that "a five-year moratorium is sufficiently different from a perpetual ban [and] that the former may be a valid exercise of zoning authority even if the latter constitutes a material impediment to the effectuation of the state's interest."[110]

The District Court found that the state law impliedly preempted the local ordinance;[111] the Supreme Court disagreed that the preemption was implied, but did find that that local ordinance was preempted by operational conflict as discussed in more detail above. In support of its second argument, Fort Collins asserted that fracking was a nonessential portion of production and that the moratorium was akin to a "temporary 'time-out'," which was

105. City of Fort Collins v. Colo. Oil & Gas Ass'n, 2016 CO 28, ¶ 3, 369 P.3d 586, 589.
106. *Id.* ¶ 4, 369 P.3d at 589 (internal citations omitted).
107. *Id.* ¶ 5, 369 P.3d at 589.
108. *Id.* ¶¶ 6-7, 369 P.3d at 589.
109. *Id.* ¶ 7, 369 P.3d at 590.
110. *Id.* ¶ 31, 369 P.3d at 593.
111. *Id.* ¶ 6, 369 P.3d at 589-90.

permitted in *Williams v. City of Central*.[112] The court addressed these assertions separately. First, it held that "even though it may be possible to produce oil and gas without fracking while the moratorium is in effect, the moratorium interferes with the many operators who have determined that fracking is necessary to ensure productive recovery."[113] The result of the foregoing was that the state's goal of permitting maximum and efficient production of each oil and gas pool in Colorado was materially impeded.[114] Second, the court was not persuaded that the length of the moratorium should have the local ordinance from preemption. In comparison to *Williams*,[115] which discussed a 10-month moratorium, the moratorium at issue here was for five years; "we view such a lengthy moratorium as different in kind from a brief moratorium that is truly a 'temporary time-out.'"[116] The court found *Claridge House One, Inc. v. Borough of Verona*[117] to be more analogous, wherein a one-year moratorium on rental condos being converted into condominiums was preempted by state law because (1) the regulation did not regulate, but forbid, the practice, and (2) even though only for one year, the moratorium had a deleterious effect on a statewide program of regulation.[118]

Highlighting that the moratorium at issue in Fort Collins is not merely a regulation, but a prohibition, the court held that the local ordinance likewise deleteriously affected a statewide program of regulation and impeded the goals of the state's Act and its interest in fracking.[119] It is important to note, however, that the court also specifically stated that "[w]e express no view as to the propriety of a moratorium of materially shorter duration."[120] Consequently, if a local government attempts to enforce a moratorium that is shorter than the moratorium at issue in *Fort Collins*, it is unclear what result the court would reach if the same were to be challenged.[121]

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112. *Id.* ¶ 32, 369 P.3d at 593 (citing Williams v. City of Central, 907 P.2d 701 (Colo. App. 1995)).

113. *Id.* ¶ 33, 369 P.3d at 593.

114. *Id.*

115. Williams v. City of Central, 907 P.2d 701 (Colo. App. 1995).

116. *City of Fort Collins*, 2016 CO 28, ¶ 35, 369 P.3d at 594.

117. 490 F. Supp. 706 (C.N.J. 1980, *aff'd* 633 F.2d 209 (3d Cir. 1980).

118. *City of Fort Collins*, 2016 CO 28, ¶ 36, 369 P.3d at 594.

119. *Id.* ¶ 37, 369 P.3d at 594.

120. *Id.* ¶ 40, 369 P.3d at 594.

121. Based upon the court's persuasion by the one-year prohibition contained in *Claridge House One*, 490 F. Supp. 706, it appears likely that a moratorium affecting the oil and gas industry would need to be shorter than one year in length in order to possibly be upheld.

C. Additional Case Summaries

Three additional cases which also affect the oil and gas industry are discussed briefly herein. First, in *Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP*,[122] the seller of certain oil and gas interests sued the law firm representing the buyer's principal, alleging that they had engaged in misconduct such as conspiracy to use a strawman purchaser, aiding and abetting of breach of fiduciary duty, tortious interference with business expectancy, and aiding and abetting fraud by failing to disclose that the buyer was acting as an agent for another undisclosed entity.[123] The court upheld the lower court's findings, *inter alia*, that the use of a strawman in the mineral acquisition was not fraudulent and that the seller did not state a claim that the law firm had a duty to disclose that it represented the undisclosed principal.[124] Sellers also asserted that the creation of an area of mutual interest ("AMI") in the purchase and sale agreement amounted to the creation of a joint venture between the parties; however, the court found that, based upon the plain language of the agreement, no joint venture existed (*e.g.* ". . . 'It is not the intention of the parties to create, nor shall this agreement be construed as creating, a . . . joint venture . . . or to render the parties liable as partners, co-ventures, or principals . . . .'").[125]

Second, in *Owens v. Tergeson*,[126] the court reaffirmed the validity of mineral reservations contained in habendum clauses of deeds. In dispute in this case was whether a mineral reservation referenced only in a habendum clause was effective since it was not included in the granting clause of the deed.[127] Referencing rules of construction[128] and precedent within the state, the court concluded that a reservation of interest set forth in the habendum clause was in fact valid (*e.g.* "[I]n most jurisdictions a clear and special designation of the particular estate conveyed, whether contained in the

122. 2016 COA 33 ("[A] petition for rehearing in the court of appeals or a petition for certiorari in the supreme court may be pending.").

123. *Id*.

124. *Id*. ¶¶ 1, 4.

125. *Id*. ¶¶ 2, 42.

126. 2015 COA 164, 363 P.3d 826.

127. *Id*. ¶¶ 2-6, 363 P.3d at 828-829.

128. Some rules of construction referenced by the court include the terms as written in a deed must be given effect; ambiguities in reservations of oil and gas must favor the grantee; language in the deed must be construed in harmony with its plain and generally accepted meaning; the overall intend of the deed should control, etc. *See id*. ¶¶ 15-19, 363 P.3d at 830-31.

granting or in the habendum clause, will prevail over conflicting but merely general or formal language of the opposite clause.").[129] The court also held that a specific person does not need to be identified in the reservation in order for the same to be valid as the reservation may be presumed to be unto the grantors. "[A]n unadorned reservation clause evidences an intent by the grantors to reserve for themselves the mineral rights in the land."[130]

Lastly, the Supreme Court of Colorado granted a writ of Certiorari in a case which may affect taxation of oil and gas. On February 29, 2016, the court granted certiorari in *Kinder Morgan CO2 Co., L.P. v. Montezuma County Board of Commissioners*,[131] one issue for consideration being whether the lower court properly determined that House Bill 90-1018 amended C.R.S. § 39-10-107(1) to allow retroactive assessment of property taxes on the value of oil and gas leaseholds which were omitted due to the underreporting of the selling price of the oil or gas, or quantity sold, therefrom.[132]

III. Legislation

A. Overview of Bills That Did Not Pass

During the 2016 legislative session, six bills were introduced which affected the oil and gas industry. Four of these bills were submitted by the House of Representatives ("House") and two of these bills were submitted by the Senate. Notably, only one bill, being Senate Bill 16-218, was signed by the Governor. The other five bills did not pass; however, a brief summary of each is provided below for informational purposes.

First, House Bill 16-1310 concerned the liability for the conduct of oil and gas operation. This proposed bill would have amended the current governing relations between oil and gas operators and surface owners to "allow proof that the operator's oil and gas operations harmed the surface owner's use of the surface of the land, caused bodily injury to the surface owner or any person residing on the property of the surface owner, or damaged the surface owner's property."[133] It also would have held

129. *Id*. ¶ 20, 363 P.3d at 830 (internal quotation marks omitted). The court also expressed the differences between the habendum clause and a warranty clause. *See id.* ¶¶ 24-26, 363 P.3d at 832-33.

130. *Id*. ¶ 28, 363 P.3d at 833.

131. No. 15SC595, 2016 WL 768449 (Colo. 2016).

132. *Id*.

133. H.B. 16-1310, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016).

operators strictly liable if their conduct, including fracking, caused an earthquake that damaged property or injured a person.[134]

Second, House Bill 16-1355 concerned the ability of local governments to exercise land use authority over oil and gas facilities used in oil and gas operations in a manner analogous to the siting of other industrial facilities. Specifically, it would have repealed the limitation that "local governments have so-called 'House Bill 1041' powers . . . only if the Colorado oil and gas conservation commission has identified a specific area for designation."[135] Additionally, it would have granted local governments the specific authority to regulate the siting of oil and gas facilities and specified that the COGCC's authority to regulate oil and gas does not preempt local governments' siting authority.[136]

Third, House Bill 16-1430 concerned the implementation of the recommendation for an oil and gas task force regarding the sharing of oil and gas operators' development plans with affected local governments. This bill proposed codification of the "essential elements" of one of the task force's two recommendations by requiring operators to share their development plans with municipalities affected by their proposed operations.[137]

Fourth, House Bill 16-1468 concerned costs that may be deducted by a taxpayer as transportation, manufacturing, and processing costs for purposes of calculating the net amount realized by the taxpayer for the sale of oil and gas. This proposed bill limited the costs that a taxpayer may deduct for the purpose of calculation excise tax on the severance of oil and gas to "the direct costs actually paid by the taxpayer for transporting, manufacturing, and processing," rather than "any" costs borne by the taxpayer; it further provided that "any compression downstream of the meter or measurement point is deductible as a component of transportation."[138]

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134. *Id*.

135. H.B. 16-1355, 70th Gen. Assemb., 2d Reg. Sess. (Colo 2016).

136. *Id*.; *but see* II. CASE LAW, B. *Local Bans on Hydraulic Fracturing* above for a summary of two cases which reach the opposite conclusion of the proposals contained in this introduced bill, *i.e.* the state law preempted the local regulations.

137. H.B. 16-1430, 70th Gen. Assemb., 2d Reg. Sess. (Colo 2016) ("engrossed"); *see* IV. REGULATION herein for a discussion of the recommendations of the task force and the rules promulgated pursuant thereto.

138. H.B. 16-1468, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016); *see* BP America Production Co. v. Colorado Department of Revenue, 2016 CO 23, 369 P.3d 281, 2016 CO 23 (Colo. 2016) (considering the unaltered language of that statute as discussed in II. CASE

Fifth, Senate Bill 16-129 proposed that the word "foster" be replaced with "administer" in the statute creating the oil and gas task force "so as to require neutral administration by the [COGCC] with respect to oversight of its oil and gas operations."[139]

B. Senate Bill 16-218

Senate Bill 16-218, concerning matters related to state severance tax refunds, was signed by the Governor on June 10, 2016. Although this bill does not directly address the oil and gas industry, as seen in the discussion of *BP America Production Co.*[140] hereinabove, oil and gas operators are impacted by severance taxes. Specifically, this bill added § 107.8 (Refunds) to the severance tax statute.[141] This section requires the State Treasurer to set aside a certain portion of revenue generated from collection of severance tax for the payment of refunds; at the end of each month, any revenues not required for a refund shall be the total gross receipts realized available for allocation under § 108.[142] If, prior to July 1, 2016, the amount in the reserve is less than the amount of refunds to be made from the reserve, the State Treasurer shall credit the reserve with proceeds from the collection of income tax in an amount equal to the amount of the deficit.[143] Additionally, on or after July 1, 2016, but prior to July 1, 2017, the State Treasurer shall credit the reserve with income tax proceeds "in an amount equal to the amount by which the refunds for the tax imposed pursuant to this article that are made for a month exceed fifteen percent of the gross severance tax revenues for the same month";[144] this shall be done on a monthly basis.[145] If there is insufficient revenue to be credited, the State Controller may authorize an advance, unlimited in amount, to the reserve for the purpose of refunds.[146]

In addition to incorporating the above refund provisions, the bill also amended the date of repeal in § 39-29-108(2)(a)(II) (allocation of severance

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LAW, A. *Permissible Deductions*, 1. Cost of Capital as Deduction under Severance Tax Statute, above).

139. S.B. 16-129, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016).

140. BP America Production Co. v. Colorado Department of Revenue, 2016 CO 23, 369 P.3d 281.

141. H.B. 16-218, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016).

142. *Id*.

143. *Id*.

144. *Id*.

145. *Id*.

146. *Id*.

tax revenues) from January 1, 2017 to July 1, 2017.[147] Furthermore, the bill restricted funds in the severance tax perpetual base fund, codified in C.R.S. § 39-29-109(2)(a)(XVII) as follows:

> Notwithstanding any provision of this paragraph (a) to the contrary, an amount equal to Nineteen Million One Hundred Thousand Dollars in the fund is restricted from being used for any purpose whatsoever, until such time as the Joint Budget Committee, by a majority vote, releases the restriction on some or all of the money.[148]

A similar restriction was placed on the severance tax operational fund, in the amount of Ten Million Dollars,[149] and the local government severance tax fund, in the amount of Forty-Eight Million Three Hundred Thousand Dollars.[150] The bill also amended C.R.S. § 39-22-623(1)(b), pertaining to disposition of collections of income tax,[151] and added C.R.S. § 24-75-201.1(1)(d)(XVII), pertaining to the state's use of general funds.[152]

IV. Regulation[153]

A. Overview of Recommendations from Oil and Gas Task Force

On September 8, 2014, Governor John Hickenlooper issued Executive Order B 2014-005, creating the Task Force on State and Local Regulation of Oil and Gas Operations (hereinafter referred to as the "Task Force").[154] The objectives of the Task Force were numerous, focusing on how to reasonably and effectively balance land use issues while minimizing conflicts, protecting communities, and allowing access to private mineral rights.[155] The Task Force was comprised of twenty-one members, six of whom represented the oil and gas, agricultural and home building

147. *Id*.

148. *Id*.

149. *Id*.

150. *Id*. ("It is the General Assembly's intent that the restriction of money in the fund shall not affect the distributions made under paragraph (c) of subsection (1) of this section.")

151. *Id*.

152. *Id*.

153. Any capitalized terms used but not defined herein shall have the meanings ascribed to them in the COGCC Rules.

154. State of Colorado, Office of the Governor, Executive Order B 2014 005, as amended by Executive Order B 2014 006.

155. *See Oil and Gas Task Force*, COLORADO DEPARTMENT OF NATURAL RESOURCES, http://dnr.state.co.us/OGTASKFORCE/Pages/home.aspx (last visited Sept. 20, 2016).

industries, six of whom represented local government and the conservation community, and seven of whom represented "a variety of interests."[156] The Task Force convened monthly from September, 2014 to February, 2015; a report of its recommendations and findings was due to the Governor no later than February 27, 2015, with recommendations regarding new or amended legislation requiring a two-thirds vote of approval.[157] Ultimately, the Task Force submitted nine recommendations to the Governor, two of which (being Recommendations #17 and #20) required implementation via formal rulemaking procedures by the COGCC.[158] Both of the aforesaid recommendations were implemented during the timeframe for this update, with new rules being adopted on January 25, 2016, published by the Secretary of State on February 25, 2016, and effective on March 16, 2016.[159]

The Final Report of the Task Force was submitted to the Governor on February 27, 2015.[160] Such Final Report titles Recommendation #17 as follows: Recommendation to Facilitate Collaboration of Local Governments, Colorado Oil and Gas Conservation Commission and Operators Relative to Oil and Gas Locations and Urban Planning.[161] In summary, "Recommendation #17 calls for the COGCC to define and adopt a process for improved local government involvement during the COGCC permitting process for Applications to Drill (APD) concerning the location of large scale oil and gas facilities in Urban Mitigation Areas (UMA)."[162] Recommendation #20 was titled "Recommendation to Include Future Oil and Gas Drilling and Production Facilities in Existing Local Comprehensive Planning Processes."[163] In summary, "Recommendation #20 proposes that all operators would be required to register in the municipalities in which they have operations and provide information on their planned development and operations within those municipalities."[164]

156. Executive Order B 2014 005 at III(A); Executive Order B 2014 006 at I.

157. Executive Order B 2014 005 at II(E) and IV.

158. *COGCC Oil and Gas Task Force Rulemaking Summary*, COGA, http://www.coga.org/wp-content/uploads/2016/03/COGCC-Oil-Gas-TF-Rulemaking-Summary-Whitepaper.pdf (last visited Sept. 20, 2016).

159. *Id.*

160. *Colorado Oil and Gas Task Force Final Report*, COLORADO DEPARTMENT OF NATURAL RESOURCES, http://dnr.state.co.us/ogtaskforce/Documents/OilGasTaskForceFinalReport.pdf (last visited Sept. 20, 2016).

161. *Id.* at 5.

162. *COGCC Oil and Gas Task Force Rulemaking Summary*, *supra.*

163. *Colorado Oil and Gas Task Force Final Report*, *supra*, at 9.

164. *COGCC Oil and Gas Task Force Rulemaking Summary*, *supra.*

Both Recommendations #17 and #20 were unanimously approved by the Task Force members.[165]

B. Implementation of Rules Pursuant to Recommendation #17

The COGCC Rules implementing Recommendation #17 include additions and amendments to the 100, 300 and 600 Series of rules. Specifically, a definition of "Large UMA Facility" was added to the 100 Series, meaning "any Oil and Gas Location proposed to be located in an Urban Mitigation Area and on which: (1) the operator proposes to drill 8 or more new wells; or (2) the cumulative new and existing on-site storage capacity for produced hydrocarbons exceeds 4,000 barrels."[166] Procedures for the notification of and consultation with local governments regarding Large UMA Facilities were added as Rule 305A. These procedures require operators proposing a Large UMA Facility to provide written notice of intent to construct the same ("Notice") to the local government with land use authority over the proposed location and the Surface Owner of said lands not less than 90 days prior to initiating the Form 2A COGCC permitting process.[167] Such Notice must include the following information:

> (1) A description and depiction of the proposed Oil and Gas Location and the planned facilities;
>
> (2) A description of the siting rationale for proposing to locate the facility within the Urban Mitigation Area, including a description of other sites considered and the reasons such alternate sites were rejected; and
>
> (3) An offer to consult with the local government with land use authority over the proposed location to seek agreement regarding siting the Large UMA Facility, considering alternative locations and potential best management practices.[168]

In regard to consultation, the local government with land use authority over the proposed Large UMA Facility location has thirty days from receipt

165. *Colorado Oil and Gas Task Force Final Report*, *supra*, at 5, 9.

166. *COGCC's Adopted Rules Implementing Governor's Oil and Gas Task Force Recommendation Nos. 17 and 20*, COLORADO OIL & GAS CONSERVATION COMMISSION (Feb. 1, 2016), http://cogcc.state.co.us/documents/reg/Rules/GtfRulemaking/Final%20Rule%20Docs/20160201%20Adopted%20Rules.pdf (last visited Sept. 20, 2016).

167. 2 COLO. CODE REGS. § 404-1:305A(a) (2016).

168. *Id*. § 404-1:305A(b).

of the Notice to accept the operator's offer to consult.[169] If such offer is accepted, the operator shall consult with the local government in good faith about the "siting of, and best management practices to be employed at, the proposed location."[170] Surface Owners who receive the Notice may also elect to participate in the consultation process so that their siting requests and concerns may be considered.[171] Similarly, within thirty days of receiving the Notice, if the Surface Owner requests a meeting with the operator and Director regarding the siting of the proposed Large UMA Facility, the Director will schedule such meeting.[172] The Director will also participate in the consultation process if either the operator or the local government so request.[173] Notably, the rules do not prescribe any particular format for the consultation.[174]

If an agreement as to the location of the Large UMA Facility is not reached through the consultation process, "the operator shall offer in writing to engage in mediation with the local government."[175] The local government is not required to accept such offer, but if it does so, the parties shall jointly select a mediator(s) and equally share the cost.[176] The mediation should conclude within forty-five days of the election of mediators, unless the parties agree upon an extension of time.[177] The Director, while not a party to the mediation, may provide technical assistance to the parties or the mediator if requested.[178]

If an agreement is reached through the consultation process, or upon the occurrence of any of the following, the operator may submit its Form 2A to the COGCC: (1) the operator asserts the proposed Large UMA Facility is subject to an exception pursuant to Rule 305A.e.; (2) the local government waives the Rule 305A procedures in writing; (3) the local government fails to respond in writing within thirty days of receipt of Notice; or (4) at least ninety days have passed since the local government and operator engaged in the consultation process but have not reached an agreement.[179] Any Form

169. *Id*. § 404-1:305A(c).
170. *Id*.
171. *Id*. § 404-1:305(c)(1).
172. *Id*. § 404-1:305(d).
173. *Id*. § 404-1:305(c)(2).
174. *Id*. § 404-1:305(c)(4).
175. *Id*. § 404-1:305(c)(3).
176. *Id*. § 404-1:305(c)(3)(A).
177. *Id*. § 404-1:305(c)(3)(B).
178. *Id*. § 404-1:305(c)(3)(C).
179. *Id*. § 404-1:305(f)(1). With respect to (5) as stated above, "the operator may initiate the Form 2A process with its preferred site, but must state on the Form 2A that the local

2A that does not include documentation demonstrating compliance with Rule 305A will be rejected.[180]

Exceptions to the Large UMA Facility notification and consultation process are outlined in Rule 305A.e. Specifically, said Rule provides that an operator is exempt from the Notice and consultation procedures described in Rule 305A.a.-d. in any of four circumstances. First, the local government may "opt out" of the notification and consultation process through written notification to the Director stating that it does not wish to receive Notices for proposed Large UMA Facilities in its jurisdiction.[181] Second, the operator and local government may be parties to an existing agreement which covers the siting of proposed Large UMA Facilities; in this instance, the operator must submit a copy of the relevant agreement provisions with its Form 2A.[182] Third, the proposed Large UMA Facility site is "within an approved site specific development plan (as defined in §24-68-102(4)(a), C.R.S., that establishes vested property rights as defined in §24-68-103, C.R.S.), and which expressly governs the location of Wells or Production Facilities on the surface estate."[183] If so, the operator must likewise submit a copy of the relevant portions of the plan and local government approval with its Form 2A.[184] Fourth, the proposed location of the Large UMA Facility is "within acreage identified as an oil and gas operations area included in an approved 'Application for Development'" as defined in C.R.S. § 24-65.5-101, *et. seq.*[185] In regard to the third and fourth circumstances outlined above, the operator must likewise submit a copy of the relevant portions of the plan and local government approval with its Form 2A.[186] Additionally, as to the second, third, and fourth circumstances, the Director may confer with the local government to determine whether the proposed Large UMA Facility is within the scope of the cited agreement or plan.[187] If, after thirty days, the Director determines that the proposed Large UMA Facility is not within the scope of the same, the Form 2A will be rejected and the operator will be notified to otherwise comply with Rule

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government does not agree with the site for the proposed Large UMA facility." *Id.* § 404-1:305(f)(1)(E). These types of Form 2As will be docketed for a COGCC hearing according to the rules set forth in Rule 305A.f.1.E.i-iii.

180. *Id*. § 404-1:305(f)(2).
181. *Id*. § 404-1:305(e)(1)(a).
182. *Id*. § 404-1:305(e)(1)(b).
183. *Id*. § 404-1:305A(e)(1)(c).
184. *Id*.
185. *Id.* § 404-1:305(e)(1)(d).
186. *Id*. § 404-1:305(c), (d).
187. *Id.* § 404-1:305(e)(2).

305A.a.-d.[188] Finally, all Rule 604.c.(4) requirements apply to Large UMA Facilities, whether or not a particular Large UMA Facility is excepted from Rule 305A.a.-d. under Rule 305A.e.[189]

Rule 604.c.(4) was added to the 600 Rules in the implementation of Recommendation #17. The objective of such Rule was that "Large UMA Facilities should be built as far as possible from existing building units and operated using the best available technology to avoid or minimize adverse impacts to adjoining land uses."[190] In order to achieve this objective, all Rule 604.c.(3) Exception Zone Setback mitigation measures are required for Large UMA Facilities, irrespective of whether the same are located in a Buffer Zone or an Exception Zone.[191] Further, a Form 2A for a Large UMA Facility will not be approved until the Oil and Gas Location Assessment permit for the same incorporates best management practices addressing the following:

> i. Fire, explosion, chemical, and toxic emission hazards, including lightning strike hazards.
>
> ii. Fluid leak detection, repair, reporting, and record keeping for all above and below ground on-site fluid handling, storage, and transportation equipment.
>
> iii. Automated well shut-in control measures to prevent gas venting during emission control system failures or other upset conditions.
>
> iv. Zero flaring or venting of gas upon completion of flowback, excepting upset or emergency conditions, or with prior written approval from the Director for necessary maintenance operations.
>
> v. Storage tank pressure and fluid management.
>
> vi. Proppant dust control.[192]

Moreover, "the Director may impose site-specific conditions of approval to ensure that anticipated impacts are mitigated to the maximum extent

188. *Id.*
189. *Id.* § 404-1:305(e)(3).
190. 2 COLO. CODE REGS. § 404-1:604(c)(4) (2016).
191. *Id.* § 404-1:604(c)(4)(A).
192. *Id.* § 404-1:604(c)(4)(B).

achievable."[193] In determining whether such site-specific conditions of approval are necessary, the Director may consider a number of potential impacts, including but not limited to: noise, ground and surface water protection, visual impacts associated with the placement of wells or production of equipment, and remote stimulation operations.[194]

C. Implementation of Rules Pursuant to Recommendation #20

The COGCC Rules implementing Recommendation #20 include additions and amendments to the 300 and 600 Series of rules. Specifically, Rule 302.c requires operators, beginning on May 1, 2016, to register with local governments (municipal local jurisdiction and county)[195] where it has an approved drilling unit or pending or approved Form 2 or Form 2A.[196] The operator may "register" by following the registration process set up by the municipal local jurisdiction or county, or if there is not one, by delivering current copies of its Form 1 and Form 1A to the Local Government Designee ("LGD"), if applicable, or to the planning department if there is no LGD.[197] An operator may also be requested to submit the following information to the municipal local jurisdiction and the COGCC's Local Government Liaison ("LGL"): (a) a good faith estimate of the number of wells the operator intends to drill in the local jurisdiction over the next five years; (b) a map depicting the following items within the local jurisdiction: existing well sites and related facilities, approved sites or sites with a pending application under Form 2 or Form 2A, and sites identified as part of the current drilling schedule but for which applications have not yet been submitted; and (c) well estimates based upon information known at the time and reasonable business judgment.[198]

Conforming changes to Rule 303.b.(3)K. were made in accordance with Rule 305A(f) as previously discussed herein.[199] Processing times for approvals of Applications for Permit-to-Drill, Form 2s and, on an Oil and Gas Assessment, Form 2As were detailed under Rule 303.c. Such

193. *Id*. § 404-1:604(c)(4)(C).

194. *Id*.

195. 2 COLO. CODE REGS. § 404-1:302(c)(1) (2016) ("'Municipal local jurisdiction' means a home rule or statutory city, town, territorial charter city, or combined city and county.").

196. *Id*. § 404-1:302(c)(2).

197. *Id*.

198. *Id*. § 404-1:302(c)(3) ("Well estimates are subject to the change at any time at the operator's sole discretion.").

199. *See* 2 COLO. CODE REGS. § 404-1:303(b)(3)(K) (2016).

processing time and procedures for hearings depend on whether the facility proposed is a Large UMA Facility.

If the proposed facility is not a Large UMA Facility, the Director shall approve or deny such applications within 30 days of a determination that the application is complete.[200] If the Director has not issued a decision within 75 days of such determination, an operator may request a hearing before the COGCC.[201] Such hearing shall not be held until 20-days notice and newspaper notice are provided, unless after the newspaper notice all entitled waive the 20 day notice requirement).[202]

If the proposed facility is a Large UMA Facility, and the same is consistent with a Comprehensive Drilling Plan, or a local government comprehensive plan that specifies locations for oil and gas facilities, the Director shall approve or deny such applications within 90 days of determination that the application is complete.[203] An operator may request a hearing before the COGCC according to the following timeline: (1) if the Form 2A identifies that the operator and local government reached an agreement regarding the site of the proposed Large UMA Facility, the Form 2A was excepted from the Rule 305A consultation process, or the local government waived the 305A procedures in writing or failed to timely respond, a hearing may be requested if the Director has not issued a decision with 90 days of determination that the application is complete;[204] or (2) if the Form 2A indicates that the operator and local government had not reached an agreement regarding the site of the proposed Large UMA Facility, a hearing may be requested if the Director has not issued a decision with 120 days of determination that the application is complete.[205] Such hearing shall not be held until 20-days notice and newspaper notice are provided, unless after the newspaper notice all entitled waive the 20 day notice requirement).[206]

Additionally, pre-application notification procedures were implemented in Rule 305.a. similar to the procedures added under Rule 305A. With respect to Oil and Gas Locations proposed within an UMA or within the Buffer Zone Setback, an Operator must provide a notice of intent to conduct oil and gas operations (also "Notice") not less than thirty days prior

200. *Id*. § 404-1:303(c)(1).
201. *Id*. § 404-1:303(c)(2)(A).
202. *Id*. § 404-1:303(c)(3).
203. *Id*. § 404-1:303(c)(1).
204. *Id*. § 404-1:303(c)(2)(B)(i).
205. *Id*. § 404-1:303(c)(2)(B)(ii).
206. *Id*. § 404-1:303(c)(3).

to submitting a Form 2A to the Director.[207] For Oil and Gas Locations within an UMA, the operator must provide Notice to the local government, either through the LGD or the planning department.[208] Such Notice shall include "a general description of the proposed Oil and Gas Facilities, the anticipated date operations (by calendar quarter and year) will commence, and that an additional notice pursuant to Rule 305.c. will be sent by the Operator."[209] This Notice will "serve as an invitation to the local government to engage in discussions with the Operator regarding proposed operations and timing, local government jurisdiction requirements, and opportunities to collaborate regarding site development."[210] Notably, this Notice requirement does not apply if the local government received Notice and accepted the offer to consult with the operator pursuant to Rule 305A.a.[211]

In the case of a Large UMA Facility, the operator must notify any home-rule or statutory city, town, territorial charter city, combined city and county, or county (known herein as "Proximate Local Governments" or "PGL") within 1,000 feet of the proposed site.[212] Such Notice shall be provided not less than forty-five days prior to submitting a Form 2A.[213] Local governments may waive their right to receive this notice at any time when such waiver is given to the Director and the operator in writing.[214] This Notice shall include the following information: "the operator's contact information; a description of the location and a general description of the proposed Large UMA Facility; and state that the [PGL] may provide comments as provided in Rule 305.d."[215] If the PGL provides comments pertaining to "specific best management practices reasonably related to potential significant adverse impacts to public health, safety and welfare," the Director shall respond to the same in writing.[216]

Rule 305.d. identifies the comment period for Large UMA Facilities and non-Large UMA Facilities. The comment period for a Form 2 or Form 2A for an Oil and Gas Location that is not a Large UMA Facility is twenty

207. 2 COLO. CODE REGS. § 404-1:305(a) (2016).
208. *Id*. § 404-1:305(a)(1).
209. *Id*.
210. *Id*.
211. *Id*.
212. *Id*. § 404-1:305(a)(3)
213. *Id*.
214. *Id*.
215. *Id*. § 404-1:305(a)(3)(A).
216. *Id*. § 404-1:305(a)(3)(B).

days from posting pursuant to Rule 305.b.[217] For a Large UMA Facility, the comment period is forty days from posting.[218] The Director may extend or re-open either comment period in his sole discretion for no more than twenty days.[219]

Additional consultation with the Colorado Department of Public Health and Environment ("Department") is also provided for in Rule 306.d.(1). The COGCC shall consult with the Department in three circumstances: (1) if the LGD requests the Department's participation in the COGCC's consideration of an application within fourteen days of notification pursuant to Rule 305;[220] (2) if the operator seeks a variance from a provision of Rules 317B, 325, 603, 604, 608, 805, 900-Series or 1002.f, or consultation is otherwise permitted or required under those rules;[221] or (3) the operator submits a Form 1A for a Large UMA Facility.[222]

Finally, Rule 604.b.(1) allows the Director to grant an exception to the setback distance requirements provided in Rule 604 within a Designated Setback Location if a Well or Production Facility is proposed within an existing or approved Oil and Gas Location.[223] The Director may grant such an exception if he determines that "alternative locations outside the applicable setback are technically or economically impracticable, mitigation measures imposed in the Form 2 or Form 2A will eliminate, minimize or mitigate noise, odors, light, dust, and similar nuisance conditions to the extend reasonably achievable; the operator has complied with the notice and consultation requirements of Rule 305A, if applicable; the proposed location complies with all other safety requirements of these Commission Rules; and (a) an existing or approved Oil and Gas Location is within the Designated Setback Location solely as a result of the adoption of Rule 604.a., above, which established Designated Setback Locations, or (b) the Oil and Gas Location is within a Designated Setback Location solely as a

217. *Id*. § 404-1:305(d)(1). If the LGD, Colorado Department of Public Health and Environment, Colorado Parks and Wildlife, Surface Owner or any owner of surface property who received Notice requests an extension in writing, the Director shall extend the comment period to thirty (30) days. *Id*. § 404-1:305(d)(1)(A). If the Oil and Gas Location is within an UMA or within 500 feet of a building, the comment period shall be extended to no more than forty days if requested in writing by the LGD within the original twenty-day period. *Id.* § 404-1:305(d)(1)(B).

218. *Id*. § 404-1:305(d)(2).

219. *Id*. § 404-1:305(d)(3)

220. 2 COLO. CODE REGS. § 404-1:306(d)(1)(A)(i) (2016)

221. § 404-1:306(d)(1)(A)(ii).

222. § 404-1:306(d)(1)(A)(iii).

223. 2 COLO. CODE REGS. § 404-1:604(b)(1) (2016).

result of Building Units Constructed after the Oil and Gas Location was approved by the Director."[224]

V. Ballot Initiatives

Section 1(1) of Article 5, the Colorado Constitution reserves to the people of Colorado "the power to propose laws and amendments to the constitution and to enact or reject them at the polls independent of the general assembly . . . ." As noted above, during 2016 voters submitted a number of proposed initiatives directed at oil and gas industry. Four of these initiatives advanced to the point of having titles set and the form of voter petitions approved. Each of these initiatives essentially proposed to overrule Colorado Supreme Court's state preemption holdings in the *City of Longmont* and *City of Fort Collins* cases discussed above.

Proposed Ballot Initiative #40 would have recognized "an inherent and inalienable right of local community self-government in each county, city, town and other municipality" to use "prohibitions and other means" to protect the health, safety and welfare of "natural persons" as opposed to corporations or other business entities.[225] In contrast, proposed Ballot Initiative #63 would have empowered citizens, by pursuing lawsuits, and local governments, by enacting ordinances which would not have been preempted by contrary state laws, to seek to enforce the "inherent, indefeasible, and inalienable right" of natural persons "to a healthy environment."[226] The proponents of Ballot Initiatives #40 and #63 failed to return any signatures to the Colorado Secretary of State, so these measures will not be on the November 2016 ballot.[227]

Ballot Initiative #75 proposed to expressly grant to local governments, "without risk of state preemption," the authority "to prevent or mitigate detrimental impacts on public health, safety and welfare, and the environment" by imposing "restrictions on oil and gas development."[228] Proposed Ballot Initiative #78 took a different approach. It would have required oil and gas wells and other facilities to be located at least 2,560 feet from an "occupied structure or areas of special concern," defined as "public and community drinking water sources, lakes, rivers, perennial or

224. *Id*.

225. *See 2015-2016 Proposed Initiatives*, http://www.sos.state.co.us/pubs/elections/Initiatives/timeline/2015-2016InitiativesTimeline.html (last visited Sept. 22, 2016).

226. *Id*.

227. *Id*.

228. *Id*.

intermittent streams, creeks, irrigation canals, riparian areas, playgrounds, permanent sports fields, amphitheaters, public parks and public open space."[229] On August 8, 2016, proponents of these measures submitted signatures to the Colorado Secretary of State in support of these two measures.[230] On August 29, 2016, the Colorado Secretary of State announced that random sampling required by state law had revealed that these petitions had failed to garner the minimum number of signatures required to be placed on the November 2016 ballot.[231] Voters have until September 28, 2016, within which to file a lawsuit in Denver District Court challenging the Colorado Secretary of State's determination.[232]

229. *Id*.
230. *Id*.
231. *Id*.
232. *Id*.