

# Oil and Gas, Natural Resources, and Energy Journal

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Volume 3 | Number 3  
*The 2017 Survey on Oil & Gas*

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September 2017


## Colorado

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### Recommended Citation

Diana S. Prulhiere, David R. Little & Casey C. Breese, *Colorado*, 3 OIL & GAS, NAT. RESOURCES & ENERGY J. 663 (2017), <http://digitalcommons.law.ou.edu/onej/vol3/iss3/4>

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# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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VOLUME 3

NUMBER 3

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COLORADO



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*I. Introduction*

In the relevant time period of this update, one Colorado Supreme Court case and two Colorado Court of Appeals decisions were issued that significantly impacted the oil and gas industry. In *Kinder Morgan CO<sub>2</sub> Co. v. Montezuma Cty. Bd. of Comm’rs*, the Colorado Supreme Court affirmed a retroactive tax assessment imposed by a county assessor based on a determination that oil and gas production had been underreported.<sup>1</sup> *Martinez v. Colorado Oil & Gas Conserv. Comm.*, a controversial decision by the Colorado Court of Appeals now being further appealed, addressed the statutory duties and responsibilities of the Colorado Oil and Gas Conservation Commission (“Commission”).<sup>2</sup> Finally, in *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*, the Colorado Court of Appeals reaffirmed the primary jurisdiction of the Commission over certain issues defined by statute affecting non-consenting mineral owners.<sup>3</sup> Noteworthy district court decisions and ballot measures are discussed as well.

This update also highlights four significant bills which, if enacted, would have materially affected the oil and gas industry; however, none of these

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1. 2017 CO 72, 396 P.3d 657 (Colo. 2017).

2. 2017 COA 37, 2017 WL 1089556 (Colo. App. Mar. 23, 2017).

3. 2016 CO 178, 2016 WL 7009138 (Colo. App. Dec. 1, 2016).

bills were passed. Finally, recent regulatory and executive actions responding to a recent incident involving oil and gas flowlines in a Colorado municipality are discussed.

## II. Case Law

### A. Retroactive Oil and Gas Assessments

In *Kinder Morgan CO<sub>2</sub> Co. v. Montezuma Cty. Bd. of Comm'rs*, the Colorado Supreme Court considered whether the statutory scheme set forth in Colorado Revised Code (“C.R.S.”) § 39-5-125(1) authorizes “retroactive taxation where an operator underreports the selling price at the wellhead of the oil and gas it produces.”<sup>4</sup> Additionally, the court considered whether certain parties were “related” for purposes of determining the extent to which transportation deductions may be used to calculate the value of oil and gas at the wellhead, being the value upon which assessments are levied.<sup>5</sup>

Kinder Morgan CO<sub>2</sub> Company, L.P. (“Kinder Morgan”) operated leaseholds covering oil and gas interests in Montezuma County, Colorado.<sup>6</sup> In 2009, the county assessor conducted an audit and retroactively assessed over two million dollars (\$2,000,000.00) in property taxes after determining that Kinder Morgan had underreported the value of the gas produced from those leaseholds.<sup>7</sup> Kinder Morgan paid the taxes under protest and sought reimbursement, but the Montezuma County Board of Petitioners denied their petitions.<sup>8</sup> Thereafter, Kinder Morgan appealed to the Colorado Board of Assessment Appeals and the Colorado Court of Appeals, both of which affirmed the Board’s decision.<sup>9</sup> The Colorado Supreme Court granted Kinder Morgan’s petition for a writ of certiorari, but ultimately affirmed the Board’s decision.<sup>10</sup>

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4. 2017 CO 72, ¶ 1, 396 P.3d at 659.

5. *See id.* ¶¶ 7-8, 396 P.3d at 660-61 (“If [an] operator enters into a bona fide, arm’s-length transaction with an unrelated party to perform [gathering, processing and transportation] services, then the operator may deduct the full amount paid for these services from its final, downstream sales price” to calculate the wellhead selling price of produced oil and gas. *Id.* ¶ 9. However, “[i]f the operator instead enters into a transaction with a related party . . . then it may deduct only a portion of the amount paid” for such services. *Id.*).

6. *Id.* ¶ 1, 396 P.3d at 659.

7. *Id.*

8. *Id.* ¶ 17, 396 P.3d at 663.

9. *Id.* ¶¶ 18-19.

10. *Id.* ¶ 20.

Kinder Morgan first argued that, although the aforementioned statute authorizes retroactive assessments for property that had been “omitted from the assessment roll,” it does not authorize retroactive assessments when an operator correctly reports the volume of oil and gas sold but underreports the selling price at the wellhead of that oil and gas.<sup>11</sup> The court rejected the argument, identifying two statutes that vest county assessors with the authority to retroactively assess taxes on “omitted” property.<sup>12</sup>

C.R.S. § 39-5-125 provides that:

[W]henever it is discovered that *any taxable property has been omitted from the assessment roll* of any year or series of years, the assessor shall immediately determine the value of such omitted property and shall list the same on the assessment roll of the year in which the discovery was made . . . .<sup>13</sup>

C.R.S. § 39-5-125(1) states:

[If] the treasurer discovers *that any taxable property then located in the treasurer’s county has been omitted from the tax list and warrant* for the current year or for any prior year . . . , the treasurer shall forthwith list and value such property for assessment in the same manner as the assessor might have done.<sup>14</sup>

Thus, the question becomes whether underreporting the value of produced oil and gas constitutes “omitted property” under the foregoing statutes.<sup>15</sup>

The court focused on two aspects of the statutory scheme: “[ (1) ] the legislature’s amendments to the statutory scheme and the self-reporting procedure for valuation of oil and [ (2) ] gas leaseholds in Colorado.”<sup>16</sup> The court acknowledged that the 1990 approval of House Bill 90-1018 demonstrated strong evidence in support of the underreported oil and gas value receiving treatment as “omitted property.”<sup>17</sup> That bill amended the statutory language to identify the underreporting of the selling price of oil

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11. *Id.* ¶ 35, 396 P.3d at 666.

12. *See id.* ¶¶ 35-37, 396 P.3d at 666-67.

13. *Id.* ¶ 25, 396 P.3d at 664 (quoting COLO. REV. STAT. § 39-5-125 (2016)) (emphasis added and quotations omitted).

14. *Kinder Morgan*, 2017 CO 72, ¶ 25. (quoting COLO. REV. STAT. § 39-5-125(1) (2016)) (emphasis added and quotations omitted).

15. *Id.* ¶ 26.

16. *Id.*

17. *Id.* ¶ 27, 396 P.3d at 664-65.

and gas as an omission from the assessment roll in certain circumstances.<sup>18</sup> First, the bill amended the language to provide that “revenues received as taxes paid on oil and gas leaseholds and lands that had been previously omitted from the assessment roll due to underreporting of selling price or the quantity of oil or gas sold therefrom” would not count towards a taxing entity’s limit.<sup>19</sup> Second, the bill provided that the general rule regarding timing for apportioning, crediting, and distributing taxes would not apply to taxes collected for any prior tax year on oil and gas leaseholds and lands previously “omitted from the assessment roll due to underreporting the selling price or the quantity . . . .”<sup>20</sup> Because the legislature provided “special procedures for handling taxes that had been retroactively assessed based on underreported selling price or volume, the legislature necessarily intended for such taxes to be retroactively assessed.”<sup>21</sup>

With respect to the second aspect, the court pointed out that the assessor relied on information provided by the taxpayer to initially assess the value of leasehold property.<sup>22</sup> Necessarily, “the assessor must be able to issue corrective assessments to avoid under-taxation caused by an operator’s errors in reporting.”<sup>23</sup> Additionally, the court clarified that the audit procedures afforded to assessors in reviewing oil and gas leasehold taxation would be incomplete if the assessors lacked authority to correct issues uncovered while conducting these audits.<sup>24</sup> This, in essence, would violate the rules of equity.<sup>25</sup> The court concluded that the statutory scheme supported the retroactive assessment of property taxes on underreported selling prices or volumes of oil and gas.<sup>26</sup>

The court also rejected Kinder Morgan’s second argument—that the party with whom it contracted for gathering, processing, and transportation services was not a “related party” and therefore entitled to deduct the full

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18. *See id.*

19. *Id.* (quoting Ch. 277, sec. 39, § 29-1-301(a), 1990 Colo. Sess. Laws 1687) (emphasis added and internal quotations omitted).

20. *Kinder Morgan*, 2017 CO 72, ¶ 27, 396 P.3d at 665 (quoting Ch. 277, sec. 40, § 39-10-107(1), 1990 Colo. Sess. Laws 1687).

21. *Id.* ¶ 28.

22. *Id.* ¶ 31 (citation omitted).

23. *Id.*

24. *Id.* ¶¶ 32-33, 396 P.3d at 666.

25. *See id.* ¶ 39, 396 P.3d at 667 (holding that “[a] taxpayer would never be taxed on the full value of its leasehold property . . . and contravene the constitutional principle that a taxpayer’s property tax liability shall be determined based on the ‘actual value’ of the taxable property.”).

26. *Id.* ¶ 34, 396 P.3d at 666.

amount paid for such services.<sup>27</sup> The court explained that Kinder Morgan owned a 50% interest in the pipeline partnership that performed these services.<sup>28</sup> Because the Assessor's Reference Library defined "related parties" to include "individuals who are connected by . . . partnerships,"<sup>29</sup> Kinder Morgan was not entitled to deduct the entire amount paid for services enabling sale in a downstream market.<sup>30</sup> Instead, it was entitled to deduct only a portion of the charges, and therefore the county's retroactive assessment of the difference was proper.<sup>31</sup>

### *B. Commission's Authority to Regulate Oil and Gas Development*

#### *1. Overview of Martinez v. Colorado Oil and Gas Conservation Commission*

In *Martinez v. Colorado Oil & Gas Conserv. Comm.*, the court considered the scope of authority granted to the Commission under the Oil and Gas Conservation Act ("Act") to regulate oil and gas production.<sup>32</sup> Martinez and others (collectively, the "Petitioners") filed a petition for rulemaking with the Commission asking it the Commission to adopt the following rules:

[N]ot issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change.<sup>33</sup>

The Commission denied the petition for three reasons. First, it found that the action contemplated in the proposed rule was beyond the scope of authority granted to it by the Colorado General Assembly ("General Assembly") in the Act.<sup>34</sup> Second, it found that the third-party review requested by the Petitioners contradicted its "nondelegable duty to

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27. *Id.* ¶¶ 44-45, 396 P.3d at 668.

28. *Id.* ¶ 44.

29. *Id.* ¶ 45.

30. *Id.* ¶¶ 45-46.

31. *Id.*

32. 2017 COA 37, 2017 WL 1089556 (Colo. App. Mar. 23, 2017).

33. *Id.* ¶ 5, 2017 WL 1089556, at \*2.

34. *Id.* ¶ 7.

promulgate rules” and the Act itself.<sup>35</sup> Third, it concluded the Petitioners’ proposed rule was based on the public trust doctrine, which does not exist in Colorado.<sup>36</sup> The Commission also commented that the Colorado Department of Health and the Environment had been assigned many of the duties by the legislature.<sup>37</sup>

Petitioners appealed the Commission’s decision to the district court, which affirmed the Commission’s decision.<sup>38</sup> The district court found that the Act’s language was “clear and unambiguous and requires a balance between the development of oil and gas resources and protecting public health, safety and welfare.”<sup>39</sup> Petitioners appealed the district court’s decision, alleging that it had erred in interpreting the Act.<sup>40</sup> In a two-to-one decision, the court of appeals reversed, agreeing with Petitioners that the language of the Act “unambiguously supports a conclusion different from that reached by Commission and the district court”<sup>41</sup> and remanded the case “for further proceedings consistent with this opinion.”<sup>42</sup>

In its review, the court of appeals first noted that the Commission has broad authority under the Act “to ‘make and enforce rules, regulations, and orders’ and ‘to do whatever may be reasonably necessary’ to carry out the provisions of the Act.”<sup>43</sup> The Commission also has the power “to regulate ‘the drilling, producing, and plugging of wells and all other operations for the production of oil and gas.’”<sup>44</sup> The clear and unambiguous language referenced by the district court is found in C.R.S. § 34-60-102(1)(a)(I), where “the General Assembly declares that it is in the public interest to:

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35. *Id.*

36. *Id.* The public trust doctrine holds that certain natural resources are preserved, and must be protected by the government, for public use.

37. *Id.* ¶ 8.

38. *Id.* ¶ 9.

39. *Id.* ¶ 10 (applying the two-part test of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

40. *Martinez*, 2017 COA 37, ¶ 11, 2017 WL 1089556, at \*3.

41. *Id.* ¶ 19, 2017 WL 1089556, at \*4.

42. *See id.* ¶ 36, 2017 WL 1089556, at \*8. Notably, the language quoted above was used as part of the court’s rationale in determining the proper meaning of the Commission’s duty to regulate oil and gas “in a manner consistent with” public health and safety. *See id.* ¶¶ 29-31, 2017 WL 1089556, at \*6-\*7.

43. *Id.* ¶ 15, 2017 WL 1089556, at \*3 (quoting COLO. REV. STAT. § 34-60-105(1) (2016)).

44. *Martinez*, 2017 COA 37, ¶ 15 (quoting COLO. REV. STAT. § 34-60-106(2)(a) (2016)).



Foster the responsible, *balanced* development, production, and utilization of the natural resources of oil and gas in the state of Colorado *in a manner consistent with* protection of public health, safety, and welfare, including protection of the environment and wildlife resources.”<sup>45</sup>

The crux of the Petitioners’ appeal was the italicized language above. The Commission interpreted this text “as requiring a balance between oil and gas production and public health, safety, and welfare.”<sup>46</sup> This would have required the Commission to “to readjust the balance crafted by the General Assembly under the Act,” thereby causing it exceed its rulemaking authority.<sup>47</sup> The Petitioners disagreed, contending that the Commission’s reading disregarded the “in a manner consistent with” language, and argued the reference to the term “balanced” was solely in relation to the development, production and utilization of natural resources, *i.e.* that those things should be authorized in a balanced manner.<sup>48</sup> Under Petitioners’ interpretation, public health, safety, and welfare, including protection of the environment and wildlife resources, were considerations that must be taken into account when authorizing oil and gas development, but were not interests that such development should be balanced with or against.<sup>49</sup>

The majority ultimately agreed with Petitioners’ reading of the Act, reiterating that the term “‘balanced’ is an adjective that relates to and modifies the nouns ‘development, production, and utilization’” that does not affect the remaining words of the above-quoted statute.<sup>50</sup> Additionally, the majority opined that the phrase “‘in a manner consistent with’ does not indicate a balancing test but rather a condition that must be fulfilled.”<sup>51</sup> The majority went further, stating such phrase actually “denotes more than a mere balancing.”<sup>52</sup> Rather, it is synonymous with the phrase “subject to” within the meaning of the Act, which itself indicates a “balanced, nonwasteful development . . . in the public interest when . . . development is completed *subject to* the [public welfare and environmental protection].”<sup>53</sup> It found that ascribing such understanding to the term “balanced” and the

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45. COLO. REV. STAT. § 34-60-106(2)(a)(I) (2016) (emphasis added).

46. *Marinez*, 2017 COA 37, ¶ 17, 2017 WL 1089556, at \*4.

47. *Id.* (internal quotations omitted).

48. *Id.* ¶ 18.

49. *Id.*

50. *Id.* ¶¶ 19-20.

51. *Id.* ¶ 21, 2017 WL 1098556, at \*5.

52. *Id.* ¶ 23.

53. *Id.* ¶¶ 22-23.

phrase “in a manner consistent with” gives every word of the statute meaning.<sup>54</sup>

Moreover, the majority held that the evolution of the statute supported its conclusion. For decades, according to the Court, the Act did not contain the “balanced” or “in a manner consistent with” language.<sup>55</sup> In 1994, the “in a manner consistent with public health, safety and welfare” language was added to the statute.<sup>56</sup> Thereafter, in 2007, the “balanced” language was added to complete the Act as it reads today.<sup>57</sup> The court found that the plain language of the Act, together with such legislative evolution, evinces the General Assembly’s intent to mandate that “the development of oil and gas in Colorado be regulated subject to the protection of public health, safety, and welfare, including the environment and wildlife resources.”<sup>58</sup>

In addition to rejecting the district court’s reading of the Act, the majority found that the Commission incorrectly determined that it did not have authority to adopt the Petitioner’s proposed rule.<sup>59</sup> The court did not address the merits of the Petitioners’ proposed rule or whether the Commission should adopt the same.<sup>60</sup> Instead, the majority held that, in its view, the case should be remanded to the district court to be returned to the Commission “for further proceedings consistent with this opinion.”<sup>61</sup> While that language is the standard in the instance of reversal and remand, the court did not use that language lightly. Significantly, it highlighted that the intention behind those words “is not to instruct a court on remand to take action in a manner ‘balanced with’ the opinion from the appellate court, but instead instructs that the court on remand must take action subject to the appellate opinion.”<sup>62</sup>

Judge Booras wrote a dissenting opinion, taking issue with “the majority’s interpretation of the phrase ‘in a manner consistent with’ and its reliance on a legislative declaration to find a mandatory duty.”<sup>63</sup> Looking to the definition of “consistent with” in *Webster’s Third New International*

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54. *Id.* ¶ 26, 2017 WL 1098556, at \*6.

55. *Id.* ¶ 28, 2017 WL 1098556, at \*8 (“For decades, the Act read: ‘It is hereby declared to be in the public interest to foster, encourage and promote the development, production and utilization of the natural resources of oil and gas in the State of Colorado[.]’”).

56. *Id.* ¶ 29 (internal quotations omitted).

57. *Id.* (citation omitted).

58. *Id.* ¶ 30, 2017 WL 1089556, at \*7 (citation omitted).

59. *Id.* ¶ 32.

60. *Id.*

61. *Id.* ¶ 36, 2017 WL 1089556, at \*8.

62. *Id.* ¶ 24, 2017 WL 1098556, at \*5.

63. *Id.* ¶ 37, 2017 WL 1089556, at \*8 (Booras, J., dissenting).

*Dictionary*, Judge Booras noted that said phrase means “to be consistent, harmonious, or in accordance”; likewise, said dictionary defines “consistently” as “compatibly,’ ‘congruously,’ ‘in harmony with,’ and ‘in a persistent or even manner.’”<sup>64</sup> Additionally, Judge Booras stressed that a “legislative declaration is used only to interpret a statute that is ambiguous; it cannot override the language of a statute.”<sup>65</sup> Finally, Judge Booras found that the Commission acted appropriately in denying the proposed rulemaking because the proposed rule itself “would have required the Commission to view public health and environmental considerations as being determinative,” where the Commission’s duty by statute is “to regulate oil and gas operations by balancing the relevant considerations.”<sup>66</sup> For these reasons, Judge Booras concluded that the district court’s decision should have been affirmed.<sup>67</sup>

## 2. Current Case Status

On May 18, 2017, two separate Petitions for Writ of Certiorari were filed with the Colorado Supreme Court, one by the attorneys for the American Petroleum Institute and Colorado Petroleum Association (Intervenors) and one for the Commission (Petitioner), seeking review of the court of appeals decision in *Martinez*. Each petition outlined several reasons why the appellate court erred and the supreme court should grant review. The petition submitted by the Commission phrased the key issue as follows: “When the Commission engages in rulemaking, is it permitted to disregard the Act’s policy of fostering oil and gas development in Colorado?”<sup>68</sup>

Both petitions identify the appellate court’s ruling as not only a novel interpretation of the Act, but a rejection of the Commission’s longstanding approach to regulating oil and gas activities.<sup>69</sup> Specifically, the court’s

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64. *Id.* ¶ 40.

65. *Id.* ¶ 41, 2017 WL 1089556, at \*9 (citation omitted).

66. *Id.* ¶ 44.

67. *Id.* ¶ 47, 2017 WL 1089556, at \*9.

68. Petition for Writ of Certiorari at 1, *Colorado Oil & Gas Conserv. Comm’n v. Martinez*, (No. 2017SC297) (Commission Petition) (petition for cert. filed May 18, 2017).

69. *See* Petition for Writ of Certiorari, *supra* note 75, at 9. For example, the Commission’s petition states that “[s]ince at least 1994, [it] has interpreted the Act to require a *balancing* of each of the potentially competing public policies that the Act codifies.” *Id.* at 6; *see also* Petition for Writ of Certiorari at 5, *Colorado Oil & Gas Conserv. Comm’n v. Martinez* (No. 17 SC 297) (Intervener Petition) (petition for cert. filed May 18, 2017) (“The Court of Appeals Ruling, if not corrected, will radically change the COGCC’s implementation of oil and gas law, and will have a drastic impact on the Colorado economy.”).

interpretation of the act is categorized as “elevating the importance of some of the Act’s policies at the expense of others and making ‘the development of oil and gas in Colorado . . . *subject to* the Act’s other objectives.”<sup>70</sup> The petitions further assert that such interpretation is in conflict with other Colorado precedent, both at the supreme court level and also other divisions of the court of appeals.<sup>71</sup> Based on this, the petitions argue that the state of oil and gas law in Colorado has been rendered uncertain, and the supreme court’s review is “necessary to ensure that the Commission, as well as the public and regulated parties, understands what the Act means and how it should be interpreted.”<sup>72</sup> The Commission’s petition also notes that the implications of the court’s decision reach much farther than the oil and gas industry, as “the Commission is not the only agency required to balance potentially conflicting policies.”<sup>73</sup>

Several briefs have been submitted in response to the aforementioned petitions and a decision from the court as to whether it will grant the writs is forthcoming.

### *C. Remedies Available for Accounting to Non-Consenting Mineral Owners*

In *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*,<sup>74</sup> the Colorado Court of Appeals considered whether non-consenting, pooled mineral owners must exhaust available administrative remedies provided for under the Act before seeking, by court intervention, an accounting of proceeds derived from the production of oil and gas. Grant Brothers owned property within a drilling and spacing unit established by the Commission which included wells operated by Antero in Garfield County.<sup>75</sup> The Commission issued an order pooling all of the non-consenting interests in the unit pursuant to C.R.S. § 34-60-116(7) and Commission Rule 530 because Grant Brothers had refused Antero’s reasonable efforts to lease the minerals or ask Grant Brothers to participate in their production.<sup>76</sup> Antero later decided to produce oil and gas from a deeper formation in these lands, so it obtained additional spacing and pooling orders after Grant Brothers once again refused its reasonable efforts to lease the minerals or invite

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70. Petition for Writ of Certiorari, *supra* note 75, at 13 (internal quotations and citation omitted).

71. *See id.* at 12.

72. *Id.* at 13.

73. Petition for Writ of Certiorari, *supra* note 75, at 16-17 n.2.

74. 2016 COA 178, 2016 WL 7009138 (Colo. App. Dec. 1, 2016).

75. *Id.* ¶ 2, 2016 WL 7009138, at \*1.

76. *Id.* ¶ 5.

Grant Brothers to participate in their production.<sup>77</sup> As a non-consenting owner of both units, Grant Brothers was subjected to penalties defined in the Act such that it was not entitled to receive its proportionate share of all proceeds until Antero had been compensated for Grant Brothers' share of certain costs defined in the Act and a statutory penalty.<sup>78</sup> As required by the Act, the pooling orders also required Antero to furnish Grant Brothers with monthly statements containing information about its costs and proceeds with respect to both units.<sup>79</sup>

Three years after the Commission's last pooling order was issued, Grant Brothers requested permission from Antero to audit its books and records regarding the certain wells at issue.<sup>80</sup> Antero refused, explaining that it had satisfied any outstanding obligations by providing Grant Brothers with the required monthly statements.<sup>81</sup> Grant Brothers sued Antero and another operator within the unit, Ursa Operating Company ("Ursa") (collectively, "Operators"), in district court requesting an equitable accounting and alleging the wells had already reached "payout," entitling Grant Brothers to payment from Operators.<sup>82</sup> Operators moved for summary judgment, asserting that Grant Brothers failed to exhaust its administrative remedies available under the Act, and thus, the district court lacked subject matter jurisdiction over the action.<sup>83</sup> The district court agreed and granted summary judgment, dismissing the action with prejudice.<sup>84</sup>

Grant Brothers appealed, contending that it was not required to exhaust its administrative remedies.<sup>85</sup> Further, Grant Brothers asserted the dismissal without prejudice by the district court was inappropriate on the basis the district court lacked subject matter jurisdiction.<sup>86</sup> Grant Brothers argued that the Act does not contain a clear manifestation of legislative intent requiring an involuntary pooled mineral rights owner to exhaust its administrative remedies prior to seeking an equitable accounting in district court.<sup>87</sup> Grant Brothers finally argued these were all issues of law because

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77. *Id.* ¶ 4.

78. *Id.* ¶ 5.

79. *Id.*

80. *Id.* ¶ 6.

81. *Id.*

82. *Id.* ¶ 7, 2016 WL 7009138, at \*2.

83. *Id.* ¶ 8.

84. *Id.*

85. *Id.* ¶ 9.

86. *Id.*

87. *Id.* Grant Brothers argued that the Act's language and legislative history, which included the 1998 amendments to the Act and related testimony from Senator Tilman

the Operators' motion for summary judgment at the district court level was effectively a motion to dismiss for lack of subject matter jurisdiction more properly brought under C.R.C.P. 12(b)(1).<sup>88</sup> This required the court to apply a mix standard of review for motions to dismiss for lack of subject matter jurisdiction,<sup>89</sup> among other juridical principles shaped by Colorado case law.<sup>90</sup>

The appellate court unanimously affirmed the district court's decision, concluding that the Act grants the Commission primary jurisdiction to address payment disputes with non-consenting owners.<sup>91</sup> "[A]bsent a bona fide dispute over the interpretation of a contract for payment," the Commission has jurisdiction to determine the date on which payment of proceeds is due together with the amount of proceeds and any interest due thereon.<sup>92</sup> The court cited C.R.S. § 34-60-118.5(5), which states:

Before hearing the merits of any proceeding regarding payment of proceeds pursuant to this section, the [Commission] shall determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and the payee. If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the

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Bishop, supported this position. *Id.* Operators argued Grant Brothers had failed to preserve the right to use Senator Bishop's testimony to support its contention. *See id.* ¶ 10.

88. *Id.* ¶¶ 13-14, 2016 WL 7009138, at \*3.

89. *Id.* ¶ 15 (citing *Hanson v. Colo. Dep't of Revenue*, 140 P.3d 256, 257-58 (Colo. App. 2006)).

90. *Grant Brothers*, 2016 COA 178, ¶ 15 ("We review factual findings for clear error, and such findings will be upheld unless they have no support in the record. [*Hanson v. Colo. Dep't of Revenue*, 140 P.3d at 257-58]. However, we review legal conclusions de novo. *Id.* We also review a district court's interpretation of a statute de novo. *Anderson v. Vail Corp.*, 251 P.3d 1125, 1127-28 (Colo. App. 2010). In construing legislation, we look first to the plain language of the statute, reading it as a whole. *Young v. Brighton Sch. Dist.* 27J, 2014 CO 32, ¶ 11, 325 P.3d 571. Then, if the language is ambiguous, we 'construe the statute in light of the General Assembly's objective,' presuming 'that the legislature intended a consistent, harmonious, and sensible effect.'" *Anderson*, 251 P.3d at 1127-28.").

91. *See Grant Brothers*, 2016 COA 178, ¶¶ 22-30, 2016 WL 7009138, \*4-\*6; *see also* COLO. REV. STAT. § 34-60-106(2)(a) (2016) (stating that the Commission has "the authority to regulate: . . . the drilling, producing, and plugging of wells and all other operations for the production of oil or gas . . .").

92. *Grant Brothers*, 2016 COA 178, ¶ 17, 2016 WL 7009138, at \*3 (quoting COLO. REV. STAT. § 34-60-118.5(5)(a), (c) (2016)) (internal quotations omitted).

dispute and the parties may seek resolution of the matter in the district court.<sup>93</sup>

Furthermore, with respect to Operator's recovery of costs prior to payments becoming due to non-consenting owners, the panel examined the Act's direction to the Commission to "determine the proper costs in the event of any dispute,"<sup>94</sup> once again noting that the Commission's jurisdiction does not extend to contract disputes over the interpretation of a payment contract, as the parties in such instance can seek direct relief in district court.<sup>95</sup> Generally, in Colorado, if "complete, adequate, and speedy" administrative exhaustive remedies are available, a party . . . must exhaust its remedies before filing suit in district court.<sup>96</sup>

As a result, the court held the district court correctly dismissed the action for lack of subject matter jurisdiction.<sup>97</sup> The Act's comprehensive scheme vested the Commission with primary jurisdiction to resolve disputes of this type with non-consenting parties<sup>98</sup> so long as the parties have no contract addressing the issue.<sup>99</sup> Non-consenting owners must therefore adhere to the requirements of the Act by first submitting a written request to the payor and then, if the dispute remains unsolved, submitting a Form 38 to the Commission to request a hearing.<sup>100</sup> Any final order resulting from the hearing is subject to judicial review pursuant to Colorado's Administrative

93. COLO. REV. STAT. § 34-60-118.5(5) (2016).

94. *Id.* The Commission also retains jurisdiction to determine the reasonableness of such costs. *Id.*

95. *See Grant Brothers*, 2016 COA 178, ¶¶ 18-19, 2016 WL 7009138, at \*4. The Commission also retains jurisdiction to determine "the reasonableness" of such costs. *See* COLO. REV. STAT. § 34-60-116(7)(d) (2017).

96. *Grant Brothers*, 2016 COA 178, ¶ 20, 2016 WL 7009138, at \*4 (citing *City & Cty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000)).

97. *Grant Brothers*, 2016 COA 178, ¶ 22.

98. *Id.* ¶ 23. The court stated that "[W]e understand Grant Brothers' claim as one for payment of proceeds arising under sections 34-60-116 and -118.5 of the Act. At issue is: (1) whether payout has been reached; (2) if so, the date on which payment proceeds became due; and (3) the amount owed (plus interest) to [Grant Brothers] . . . It is undisputed that [Grant Brothers] is a nonconsenting owner seeking payment of funds acquired by Operators by extracting and selling natural gas from the wells at issue. Consequently, [Grant Brothers] qualifies as a 'payee' entitled to payment of proceeds from Operators, the 'payers.' . . . *Id.* The court continued, "[Grant Brothers] entitlement, however, is subject to a condition precedent. Where, as here, an operator and a nonconsenting owner have no contract addressing the issue, '[t]he date on which payment of proceeds is due' is the date the wells reach payout." *Id.* ¶ 5, 2016 WL 7009138, at \*5.

99. *See id.* ¶ 28.

100. *Id.* (citing COLO. REV. STAT. § 34-60-118.5(2.5) (2016)).

Procedure Act, C.R.S. §§ 24-4-101 to -108.<sup>101</sup> The court also rejected Grant Brothers' argument that 1998 amendments to the Act evidenced a change in the legislature's intent regarding the primacy of the Commission's jurisdiction over disputes like this one.<sup>102</sup> It concluded that allowing parallel jurisdiction on these same issues, rather than giving the Commission the first opportunity to resolve them, would go against the legislative intent revealed by the Act's declaration.<sup>103</sup> Based on these determinations, the court of appeals held the district court correctly dismissed the action for lack of subject matter jurisdiction.<sup>104</sup>

Nonetheless, Grant Brothers did prevail on one point of civil procedure. The court held that the district court erred in dismissing Grant Brothers' claim with prejudice. As the "issue of subject matter jurisdiction raised by Operators' motion should have been addressed pursuant to Rule 12(b)(1)," dismissal should have been made without prejudice.<sup>105</sup> As a result, any effort by the Grant Brothers to seek further relief after administrative proceedings before the Commission is not barred.<sup>106</sup>

*D. Colorado Attorney General Challenges Boulder County Moratorium – The People of the State of Colorado, et al. v. The County of Boulder, et al.*

In 2012, Boulder County's Board of County Commissioners imposed a moratorium on all new applications for oil and gas development in the county (the "Moratorium").<sup>107</sup> The Moratorium had been extended or re-imposed eight (8) times, allowing these "short-term" moratoriums to effectively act as one, five-year continuous Moratorium.<sup>108</sup> On January 26, 2017, the Colorado Attorney General, Cynthia Coffman, sent a letter to three Boulder County Commissioners, demanding Boulder rescind the ban

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101. *Grant Brothers*, 2016 COA 178, ¶ 30, 2016 WL 7009138, at \*6.

102. *Id.* ("The 1998 amendments did not change the Commission's primary jurisdiction such as the one before us. Rather, they clarified that disputes involving a 'bona fide dispute over the interpretation of a contract for payment' should be brought in the district court."). See also COLO. REV. STAT. §§34-60-118.5(5) and -118.5(5.5) (2016).

103. *Grant Brothers*, 2016 COA 178, ¶ 32, 2016 WL 7009138, at \*7.

104. *Id.* ¶ 33.

105. *Id.* ¶ 35.

106. *Id.*

107. See Complaint for Declaratory and Injunctive Relief at 2, *People of the State of Colorado ex rel. Cynthia H. Coffman & the State of Colorado v. County of Boulder, Colorado & the Board of County Commissioners of Boulder County*, No. 2017CV30151 (filed Feb. 14, 2017), available at <https://assets.bouldercounty.org/wp-content/uploads/2017/04/complaint-for-declaratory-injunctive-relief-20170214.pdf>.

108. *Id.*



on oil and gas development by February 10, 2017.<sup>109</sup> For support that the Moratorium was contrary to Colorado state law, Coffman directed the Commissioners' attention to two Colorado Supreme Court decisions issued a year prior, *City of Fort Collins v. Colo. Oil & Gas Ass'n*<sup>110</sup> and *City of Longmont v. Colo. Oil & Gas Ass'n*.<sup>111</sup> These two supreme court cases made it clear that the state has a superior interest in regulating oil and gas development and the local regulations at issue in those cases were impeding the state's effectuation of such interest; therefore, the local governments' attempts at regulation in that area were unlawful.<sup>112</sup> As the Moratorium had extended longer than the five-year moratorium the Colorado Supreme Court struck down in *City of Fort Collins*, Attorney General Coffman firmly asserted the Moratorium was unlawful.<sup>113</sup>

In response to Attorney General Coffman's letter, the Board of County Commissioners sent a response letter indicating their position that the Moratorium was not unlawful.<sup>114</sup> According to Boulder County Attorney's response letter, the moratorium in place at the time of the two supreme court decisions had been rescinded on May 12, 2016 to align with state law.<sup>115</sup> However, an additional, six-month moratorium was required because the Boulder County oil and gas regulations at that time were outdated and required updating so that they "do not conflict with new state laws, to better reflect more recent industry practices, and to best protect public health, safety, welfare and the environment in Boulder County."<sup>116</sup> Because Boulder's Moratorium was of a "materially shorter duration" than that at issue in *City of Fort Collins*, Boulder County viewed that case as

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109. Letter from Cynthia Coffman, Colo. Att'y Gen., to Cindy Domenico, Deb Gardner, and Elise Jones, Boulder Cty. Comm'rs (Jan. 26, 2017), available at <https://coag.gov/sites/default/files/contentuploads/ago/press-releases/2017/01/01-26-17/1-26-17bouldercounty.pdf>.

110. 2016 CO 28, 369 P.3d 586 (Colo. 2016).

111. 2016 CO 29, 369 P.3d 573 (Colo. 2016).

112. See Letter from Cynthia Coffman, *supra* note 115, at 1.

113. *Id.*

114. Letter from Ben Pearlman, Boulder Cty. Att'y, to Cynthia H. Coffman, Colo. Att'y Gen. (Jan. 27, 2017), available at <https://assets.bouldercounty.org/wp-content/uploads/2017/04/coag-bocc-response-oilgas-20170127.pdf>.

115. *Id.*

116. Press Release, Boulder County Commissioners, Boulder County Responds to Colorado Attorney General on Oil & Gas Moratorium (Jan. 27, 2017), available at <https://content.govdelivery.com/accounts/COBOULDER/bulletins/1836a25> (last visited Sept. 25, 2017).

inapplicable.<sup>117</sup> As such, Boulder County announced its intent to keep the Moratorium in place.<sup>118</sup>

As promised, on February 14, 2017, Coffman sued on behalf of the People and the State of Colorado (“State”) against Boulder County and the Board of County Commissions of Boulder County (collectively, “Defendants”).<sup>119</sup> The State’s complaint requested both declaratory and injunctive relief, asking the court to declare the Moratorium preempted by the Act and to enjoin the enforcement or re-creation of the Moratorium in any form.<sup>120</sup> The Colorado Oil and Gas Association and American Petroleum Institute (“Plaintiffs”) successfully moved to intervene as Plaintiff-Intervenors in the case.<sup>121</sup> Despite the ongoing litigation, Boulder County announced on February 27, 2017 that it planned to move forward with public hearing on new draft oil and gas regulations as originally planned. The Moratorium was set to expire on May 1, 2017.<sup>122</sup>

Boulder moved to dismiss the complaint on two grounds. First, Defendants argued the Moratorium was set to expire on May 2, 2017, at which point the State’s challenge to the Moratorium to be moot.<sup>123</sup> Further,

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117. *Id.*

118. *See* Complaint, *People of State of Colorado*, *supra* note 114, at 2-3.

119. *See id.*

120. *Id.* at 12 (“[T]he State respectfully requests that the Court[:] 1. Declare that the County’s Moratorium on oil and gas development is preempted by the [Act] and its implementing regulations; (2) Permanently enjoin the enforcement of the Moratorium or the creation of any similar moratorium or restriction on new oil or gas development in Boulder County; [and] (3) Enter judgment in favor of Plaintiffs and against Defendants on all claims[.]”).

121. *See* Colorado Oil and Gas Association’s and American Petroleum Institute’s Joint Unopposed Motion to Intervene, *People of the State of Colorado ex rel. Cynthia H. Coffman & the State of Colorado & Colorado Oil and Gas Association & American Petroleum Institute v. County of Boulder, Colorado & the Board of County Commissioners of Boulder County*, No. 2017CV30151 (filed Feb. 24, 2017), *available at* <https://assets.bouldercounty.org/wp-content/uploads/2017/04/coga-api-joint-motion-and-complaint-20170224.pdf>.

122. Press Release, Boulder County Commissioner’s Office, Boulder County Responds to Oil & Gas Industry’s Intervention on Lawsuit Filed by the Colorado Attorney General (Feb. 27, 2017), *available at* <https://content.govdelivery.com/bulletins/gd/COBOULDER-18a0f08> (last visited Sept. 25, 2017).

123. *See* Motion to Dismiss State of Colorado’s Complaint for Declaratory and Injunctive Relief at 11, *Motion to Dismiss, People of the State of Colorado ex rel. Cynthia H. Coffman & the State of Colorado & Colorado Oil and Gas Association & American Petroleum Institute v. County of Boulder, Colorado & the Board of County Commissioners of Boulder County*, No. 2017CV30151 (filed Mar. 7, 2017), *available at* <https://assets.bouldercounty.org/wp-content/uploads/2017/04/motion-to-dismiss-state-of-colorado-complaint-20170307.pdf>.

challenges to previous moratoriums, which the State, in Boulder's argument, improperly viewed as one continuous moratorium, were already moot as these moratoriums had already expired.<sup>124</sup> Second, the State's challenge to the Moratorium was barred by the doctrine of laches and the statute of limitations, as it came five (5) years after the original moratorium was enacted.<sup>125</sup>

Plaintiffs both disputed the Motion to Dismiss and filed their Motion for Summary Judgment on March 20, 2017, claiming they were entitled to judgment as a matter of law against Defendants on two grounds.<sup>126</sup> "First, oil and gas development, including the application and approval process, is an issue of mixed state and local concern such that state law preempts any conflicting local regulations. Second, the Moratorium operationally conflicts with state law because, on its face, it forbids what state law authorizes, thereby materially impeding or destroying state interests."<sup>127</sup>

On April 26, 2017, the district court issued a ruling denying Defendants' motion to dismiss.<sup>128</sup> The district court first opined the State had presented a live controversy, as the May 1, 2017 Moratorium expiration had yet to occur, thus making it unlawful for the district court to dismiss the action on grounds of mootness.<sup>129</sup> The district court also held the doctrine of laches and the statute of limitations did not bar the State's claims.<sup>130</sup> Most importantly, however, was the district court's discussion on Boulder's characterization of the Moratorium as "*of a shorter duration*" than that struck in the *City of Fort Collins*.<sup>131</sup> The district court found the

124. *Id.* 11-12.

125. *Id.* at 16-21.

126. *See* Colorado Oil and Gas Association's and American Petroleum Institute's Joint Motion for Summary Judgment, People of the State of Colorado ex rel. Cynthia H. Coffman & the State of Colorado & Colorado Oil and Gas Association & American Petroleum Institute v. County of Boulder, Colorado & the Board of County Commissioners of Boulder County, No. 2017CV30151 (filed Mar. 20, 2017), available at <https://assets.bouldercounty.org/wp-content/uploads/2017/04/coga-api-joint-motion-for-summary-judgment-with-exhibits-20170320.pdf>.

127. *Id.*

128. *See* Order Denying Defendants' Motion to Dismiss, People of the State of Colorado ex rel. Cynthia H. Coffman & the State of Colorado & Colorado Oil and Gas Association & American Petroleum Institute v. County of Boulder, Colorado & the Board of County Commissioners of Boulder County, No. 2017CV30151 (filed Apr. 26, 2017), available at <https://assets.bouldercounty.org/wp-content/uploads/2017/05/2017cv301510-order-denying-defendants-motion-to-dismiss-20170426.pdf>.

129. *Id.* at 4.

130. *Id.* at 3-5.

131. *Id.* at 5.

Moratorium did not comply with *City of Fort Collins*, as “the reality is that Boulder County has barred [oil and gas development] applications since 2012” with its continuous moratoriums.<sup>132</sup> Despite Boulder’s position to the contrary, “[a] moratorium of six months, followed by an identical moratorium of six months, results in a moratorium of twelve months[.]”<sup>133</sup> As the district court was unable to draw any legal distinction between “one continuous ban” or “two separate bans”, the action was not moot and Defendants’ motion to dismiss was denied.<sup>134</sup>

Boulder County thereafter allowed the Moratorium to expire on May 1, declaring it had no intent to enact a new Moratorium. Defendants once again moved to dismiss on May 2, 2017, contending the case was moot and the district court lacked subject matter jurisdiction.<sup>135</sup> The motion was unopposed by Plaintiffs and granted the same day it was filed.<sup>136</sup> While this case did not reach a decision on the merits, it nonetheless reaffirmed and applied Colorado’s firm stance against local government moratoria banning oil and gas development at the local level, as had already been established by the Supreme Court in *Fort Collins* and *Longmont*.

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132. *Id.*

133. *Id.*

134. *Id.* (“The Oil and Gas Act does not create exceptions to its application on the basis of a county’s efforts to ensure that any development occurs safely and in consideration of the safety of citizens. In evaluating the preemption by state law of county ordinances, the law does not permit the Court to give weight to the County Commissioners’ efforts. The recourse of those citizens who have participated in Boulder County’s public process may not best be considered the County Commissioners; as the Oil and Gas Act is a state law, state representatives may be better positioned to address the concerns of county residents. Neither is there an exception in the Oil and Gas Act for a temporary moratorium, regardless of its duration.”).

135. *See* Unopposed Motion to Dismiss State of Colorado’s Complaint for Declaratory and Injunctive Relief and COGA/API’s Joint Complaint, People of the State of Colorado ex rel. Cynthia H. Coffman & the State of Colorado & Colorado Oil and Gas Association & American Petroleum Institute v. County of Boulder, Colorado & the Board of County Commissioners of Boulder County, No. 2017CV30151 (filed May 2, 2017), *available at* <https://assets.bouldercounty.org/wp-content/uploads/2017/05/2017cv30151-unopposed-motion-to-dismiss-20170502.pdf>.

136. *See* Order Granting Defendants’ Unopposed Motion to Dismiss State of Colorado’s Complaint for Declaratory and Injunctive Relief and COGA/API’s Joint Complaint, No. 2017CV30151 (filed May 2, 2017), *available at* <https://assets.bouldercounty.org/wp-content/uploads/2017/05/2017cv30151-order-granting-defendants-unopposed-motion-to-dismiss-20170502.pdf>.

*E. Noteworthy District Court Cases*

Two additional cases which also affect the oil and gas industry are discussed briefly herein. First, in *Wage Gagnon, et al. v. Merit Energy Company, LLC*,<sup>137</sup> Plaintiffs asked the district court to reconsider two determinations from the district court's previous Order Denying Plaintiffs' Motion for Class Certification.<sup>138</sup> The Plaintiffs asked the district court to reconsider, among other issues, its determination that "if a royalty clause provides for payment of 'net proceeds' it is no longer subject to the Implied Covenant of Marketability ("ICM") under Colorado Law."<sup>139</sup> While the court ultimately held no basis had been provided to vacate its previous denial for class certification,<sup>140</sup> the district court did offer commentary on the second issue mentioned above. As stated above, the district court, in its original order, predicted that the Colorado Supreme Court would rule a royalty clause providing for payments on a "net proceeds" basis would negate application of the ICM.<sup>141</sup> The district court based this prediction on *Rogers v. Westerman Farm Co.*, in which the Colorado Supreme Court held that the ICM applies when leases are silent with respect to the allocation of production costs.<sup>142</sup> Because the Supreme Court, in *Rogers*, discusses how the "net-back" method of cost allocation allowed for production cost deductions, the district court predicted the Colorado Supreme Court would find the term "net proceeds" is not silent as to the allocation of costs.<sup>143</sup>

Second, in *A-W Land Co., LLC, et al. v. Anadarko E&P Company, LP*,<sup>144</sup> the district court reanalyzed a previous district court order as it pertained to the plaintiffs, representing a class of owners of surface lands that traced their ownership of surface lands to deeds issued by Union Pacific Railroad Company. These deeds reserved the mineral estates beneath those lands to

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137. 2016 WL 7868816, No. 14-cv-0832-WJM-KLM (D. Colo. Aug. 8, 2016).

138. *Id.* at \*1. The district court pointed out that Plaintiffs were not seeking reconsideration on the merits of the district court's denial of Plaintiffs' motion for class certification. *Id.*

139. *Id.*

140. *Id.* at \*2 ("[T]he [Plaintiffs] have presented no basis for the [district court] to vacate its prior denial of Plaintiffs' Motion for Class Certification, and that Order remains in full force and effect.").

141. *Id.* (quoting *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1093 (10th Cir. 2010) (stating that when no case law is on point, "[the district court's] task in diversity cases is to predict how the state supreme court would rule.")).

142. 29 P.3d 887 (Colo. 2001).

143. *See id.*

144. No. 09-cv-02209-MSK-MJW, 2017 WL 1023375 (D. Colo. Mar. 3, 2017).

Union Pacific, later acquired by Anadarko.<sup>145</sup> The district court affirmed its previous orders holding the terms “convenient or necessary” and “convenient and proper” should be construed from the perspective of the owner of the mineral estate only and, accordingly, both refer to the convenience of the mineral owner.<sup>146</sup> The district court already reaffirmed its previous determination that Anadarko could be held liable for trespasses where it accepts the fruits of the trespass after obtaining full knowledge of the lessee’s tortious action; thus, the matter was a factually intensive one that required individual proof in each case.<sup>147</sup> Because factual disputes regarding what particular items of information of which the Defendants had actual, or constructive, knowledge, the district court denied both motions for summary judgment.<sup>148</sup>

### III. Legislation

During the 2017 legislative session, at least four bills were introduced which might have materially affected the oil and gas industry. All four of these bills were introduced in the House of Representatives. One of these bills had only House sponsors, while the remaining three bills had sponsors from both the House and the Senate. Although all four of these bills did not pass, a brief summary of each is provided below for informational purposes.

First, House Bill 17-1372 proposed requirements that an oil and gas operator give electronic notice, in a format and by a deadline established by the Commission, of the location of each flow line, gathering pipeline, and transmission pipeline installed, owned, or operated by the operator to the director of the commission and each local government within whose jurisdiction the subsurface facility is located.<sup>149</sup> This bill also would have

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145. *Id.* at \*1. However, after Anadarko discontinued negotiations for the Surface Use Agreement, including royalty negotiations, with the surface estate owners, they brought this against Anadarko. *Id.*

146. *Id.* at \*2. Plaintiffs argued that the term “convenient” in the phrase “convenient or necessary” in the reservation must be read in harmony with the deeds’ subsequent use of that same word in the separate phrase “convenient or proper.” *Id.* at \*3. Thus, Plaintiffs reasoned “convenient” must, in both contexts, be viewed from the surface owner’s perspective. *Id.* The district court was unpersuaded as “there is no inconsistency in finding that the first term in the phrases ‘convenient or necessary’ and ‘convenient and proper’ both refer to the convenience of the mineral owner.” *Id.*

147. *See id.* at \*6.

148. *Id.*

149. H.B. 17-1372, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

required the Commission to post the information on its website in a searchable database.<sup>150</sup>

Second, House Bill 17-1336 addressed certain requirements associated with pooling.<sup>151</sup> Specifically, this bill provided that the notice for hearing for a pooling application submitted to the Commission must be served and published at least 90 days before the hearing.<sup>152</sup> It also stated that, before entry of a pooling order, the prospective drilling unit operator must give the affected interest owners a clearly stated, concise, neutral explanation of the laws governing pooling.<sup>153</sup> Finally, the bill required operators of drilling units, before commencing drilling operations, to file an electronic report with the Commission detailing the number of nonconsenting owners and the percentage of acres pooled.<sup>154</sup>

Third, House Bill 17-256 proposed a clarification of the minimum distance from which certain oil and gas facilities must be located from any school.<sup>155</sup> This bill proposed that the minimum 1,000-foot distance from which newly permitted production facilities and wells must be located from any school, as required by the Commission, should be measured from the school property line and not from the school building.<sup>156</sup> The bill aimed to further clarify that it does not apply if a school commences operations near production facilities or wells that are already actively in use or permitted. Additionally, with respect to property owned by a school district, the distance requirement applies to the school building, other facilities used for school activities, and real property on which a future permanent or temporary school building is planned within five years after a production facility application is filed.<sup>157</sup>

Last, House Bill 17-1124 related to local government interference with oil and gas operations and damages associated therewith.<sup>158</sup> The bill would have required a local government that banned hydraulic fracturing of an oil and gas well to be liable to the mineral interest owner for the value of the mineral interest.<sup>159</sup> Further, it proposed that a local government that enacts

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150. *Id.*

151. H.B. 17-1336, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

152. *Id.*

153. *Id.*

154. *Id.*

155. H.B. 17-256, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

156. *Id.*

157. *Id.*

158. H.B. 17-1124, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

159. *Id.*

a moratorium on oil and gas activities would have to compensate oil and gas operators, mineral lessees, and royalty owners for all costs, damages, and losses of fair market value associated with the moratorium.<sup>160</sup>

#### IV. State Regulation

##### A. Commission Issues Notice to Operators to Inspect Flowlines

On May 2, 2017, the Commission called for a statewide review of existing oil and gas flowlines following a home explosion in Firestone that killed two and critically injured one other.<sup>161</sup> Specifically, the Notice to Operators (“NTO”) required a two-step review. In Phase I, all operators were required to inspect their existing flowlines within 30 days (*i.e.* by May 30, 2017); Phase I also called for operators to report certain information to the Commission so that they could create a flowline inventory.<sup>162</sup> Phase II required operators, within 60 days (*i.e.* by June 30, 2016), to pressure test active flowlines within 1,000 feet of occupied buildings and ensure their integrity; additionally, in Phase II, operators were to undertake proper abandonment procedures for inactive flowlines, as needed.<sup>163</sup>

##### B. Governor Announces New Policy Initiatives

Following a series of ongoing meetings with the Commission and other stakeholders after the NTO was issued, Governor Hickenlooper announced several new policy initiatives on August 22, 2017.<sup>164</sup> The policy initiatives, to be addressed through legislation or rulemaking over the next 12 months, fall into the following areas:

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160. *Id.*

161. Colorado Oil & Gas Conservation Commission, Notice to Operators Statewide Flowlines or Pipelines – 1100 Series Rules, (May 2, 2017), *available at* [http://cogcc.state.co.us/documents/home/announcements/Flowline\\_Notice\\_to\\_Operators\\_20170502.pdf](http://cogcc.state.co.us/documents/home/announcements/Flowline_Notice_to_Operators_20170502.pdf); *see also*, Press Release, John Hickenlooper, State of Colo. Governor (May 2, 2017), *available at* <https://www.colorado.gov/governor/news/gov-hickenlooper-directs-review-state-wide-oil-and-gas-operations-following-firestone-home> (last visited Sept. 22, 2017). The cause of the home explosion was determined to be a flowline that had been severed near the foundation of the home, but not capped or abandoned. *Id.* When the well to which the flowline was connected was turned back online, natural gas accumulated in the soil and, ultimately, found a source of ignition. *Id.*

162. Notice to Operators, *supra* note 170.

163. *Id.*

164. Press Release, John Hickenlooper, State of Colo. Governor (Aug. 22, 2017), *available at* <https://www.colorado.gov/governor/news/gov-hickenlooper-announces-state%E2%80%99s-response-following-review-oil-and-gas-operations> (last visited Sept. 25, 2017).



- Strengthening COGCC’s flowline regulations
- Enhancing the 8-1-1 “one-call” program
- Creating a nonprofit orphan well fund to plug and abandon orphan wells and provide refunds for in-home methane monitors
- Prohibiting future domestic gas taps
- Creating a technical workgroup to improve safety training
- Requesting peer-review of some COGCC rules
- Exploring an ambient methane leak detection pilot program<sup>165</sup>

In addition to these initiatives, the Governor announced the intention of the Colorado Department of Public Health and Environment to establish an alliance with the Occupational Safety and Health Administration, the National Institute for Occupational Safety and Health and the Colorado Oil and Gas Association.<sup>166</sup> The alliance will aim to “collaboratively address safety within the Oil and Gas Industry by developing best practices to ensure the safety and health of its workforce.”<sup>167</sup> It will be important to monitor the aforementioned policy initiatives, their implementation, and the alliance over the next year.<sup>168</sup>

#### *V. Ballot Initiatives*

In the early 2000s, local governments in Colorado began to take greater interest in developing their own local regulations addressing oil and gas operations. Currently, in 2017, various local governments, including but not limited to Boulder County, Thornton County, Erie County, and Broomfield County, have or are considering enacting or amending regulations of this type. Some of the proposed regulations contradict or exceed regulations imposed by the Commission. The status and legality of these new efforts is uncertain and not worthy of summary. Another manner in which local governments have attempted to assert additional control is through ballot initiatives, which are briefly discussed below.

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

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

general assembly . . . .” During this past year, one ballot initiative affecting the oil and gas industry, discussed below, was eventually denied placement on the ballot by the Colorado Title Board, and later affirmed by the Colorado Supreme Court. Before discussing Ballot Initiative #20, however, it is important to note there could be a decrease in ballot initiatives affecting the industry moving forward, as Amendment 71 substantially increased prerequisites to place an initiative on the ballot.

Approved on November 8, 2016, Amendment 71 made the following changes to previous ballot requirements: (1) initiative petitioners must spread out signature gathering efforts across all of the state’s thirty-five (35) senate districts, making it more difficult to collect enough signatures to qualify a constitutional amendment for the ballot, and (2) a 55 percent supermajority requirement is required for proposed constitutional amendments.<sup>169</sup> The multiple-district approach is an effort to ensure that ballot initiatives are representative of the entire state’s population, rather than only signatures from population-dense areas such as Denver.

During 2017 and after the passage of Amendment 71, voters submitted Ballot Initiative #20, which addressed state severance taxes on oil and natural gas. Initiative #20 sought to increase the existing severance tax rates on oil and gas by 5%, as well as eliminate a credit against the tax based on property taxes paid by producers and interest owners.<sup>170</sup> It also would have lowered the amount of production that exempts a well from the severance tax; it further exempted tax revenue and related investment income from state and local government spending limits.<sup>171</sup> This initiative required the tax revenue to be credited to the State Severance Tax Trust Fund, the Local Government Severance Tax Fund, and a new Severance Tax Stabilization Trust Fund. These funds would have been used in the following manner: (1) 40% to fund public elementary and secondary schools; (2) 30% to fund scholarships for Colorado residents attending state colleges and universities; (3) 20% to fund medical care and treatment for people suffering negative health impacts; and (4) 10% to fund community drinking water and wastewater treatment grants.<sup>172</sup> On April 28, 2017, the Title Board decided to deny the initiative a ballot title on the grounds the Title Board lacked jurisdiction to set titles as changed made after review and

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169. Amendment 71, Colorado Constitution, *available at* <http://leg.colorado.gov/sites/default/files/96Final.pdf>.

170. *See* 2017-2018 Initiative Filings, Agendas & Results, <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html> (last visited Sept. 24, 2017).

171. *Id.*

172. *Id.*

comment were not highlighted or otherwise indicated in the amended draft contrary to C.R.S. § 1-40-105(4).<sup>173</sup> This decision was later confirmed by the Colorado Supreme Court.<sup>174</sup>

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173. *Id.*

174. *Id.*