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I. Introduction

Several court decisions applying Colorado law during the relevant time period of this update materially impact the oil and gas industry.

In *OXY USA Inc. v. Mesa Cty. Bd. of Commissioners*,[1] the Supreme Court of Colorado considered whether an oil and gas company was entitled to tax abatement due to an overvaluation of leasehold interest caused solely by the company itself. Two cases, one a federal district court opinion (*Maralex Res., Inc. v. Jewell*[2]) and the other a decision issued by the Colorado Court of Appeals (*Maralex Res., Inc. v. Colorado Oil & Gas Conservation Comm'n*[3]) addressed the constitutionality of administrative inspections of oil and gas wells by the Bureau of Land Management ("BLM") and the Colorado Commission of Oil and Gas Conservation Commission ("COGCC"). The obligations of parties under an area-of-mutual interest agreement, and what actions constitute a breach of this agreement, were considered by the Tenth Circuit Court of Appeals in *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*.[4] Finally, the Colorado Supreme Court granted a petition for a writ of certiorari in *Colorado Oil and Gas Conservation Comm'n v. Martinez*.[5]

In 2018, 311 Senate bills and 475 House bills were introduced.[6] Highlighted within this article are bills addressing oil and gas issues, two of

1. 2017 CO 104, 405 P.3d 1142 (Colo. 2017).
2. 301 F. Supp. 3d 976 (D. Colo. 2017).
3. 2018 COA 40 (March 22, 2018).
4. 887 F.3d 1003 (10th Cir. 2018), (as revised Apr. 13, 2018).
5. 2018 WL 582105 (Colo. Jan. 29, 2018).
6. *See* All Bills, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018), https://leg.colorado.gov/bill-search?field_subjects[0]=40&field_subjects[1]=38&field_

which passed and eleven other bills that were introduced and debated but postponed indefinitely.[7] This update concludes by summarizing an important 2018 COGCC rulemaking relating to flowlines and two ballot initiatives materially affecting the oil and gas industry that will appear on the 2018 statewide general election ballot.

II. Case Law

A. Overvaluation of Oil and Gas Leasehold Assessments

In *OXY USA Inc. v. Mesa Cty. Bd. of Commissioners*, the court considered whether an oil and gas company was entitled to abatement under Colo. Rev. Stat. §39-10-114(1)(a)(I)(A) due to an overvaluation error caused by the company itself.[8] Oil and gas leaseholds are treated, and taxed, as real property in Colorado.[9] In order to ascertain the taxes due on leasehold interests, operators are required by statute to provide information about the amount of oil and gas sold and produced to the taxation authority by filing annual statements; the assessor then uses those annual statements to ascribe a value to leasehold interests for taxation.[10]

In this case, OXY USA, Inc. ("OXY") filed its annual statement but later "discovered that it had failed to deduct certain allowable costs" therefrom, resulting in the over-reporting of the "selling price of its gas at the wellhead," and consequently, the overvaluation of its leasehold interests and overpayment of taxes thereon.[11] OXY filed an amended annual statement and petitioned for abatement under the above mentioned statute, but the Mesa County Board of Commissioners ("County Board") denied OXY's petition, stating that abatement was not proper when the taxpayer was the source of the error.[12] The Board of Assessment Appeals reversed the County Board, finding that OXY was entitled to abatement.[13] The County Board appealed to the Court of Appeals, which agreed with the

sessions=45771&field_chamber=All&field_bill_type=All&sort_bef_combine=search_api_relevance%20DESC. (last visited July 16, 2018).

7. 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018), https://leg.colorado.gov/bill-search?field_sessions=45771&sort_bef_combine=field_bill_number%20ASC (Search for Subjects: Energy, Natural Resources & Environment).

8. 2017 CO 104, ¶ 1, 405 P.3d 1142, 1143 (Colo. 2017).

9. *Id.* at ¶ 4, 405 P.3d at 1144.

10. *Id.* at ¶ 5, 405 P.3d at 1144.

11. *Id.* at ¶ 6, 405 P.3d at 1144.

12. *Id.* at ¶¶ 7-8 405 P.3d at 1144.

13. *Id.* at ¶ 9, 405 P.3d at 1144.

County Board; OXY then petitioned the Colorado Supreme Court for writ of certiorari, which was granted.[14]

The precise issue upon which writ was granted was as follows: "whether section 39-10-114(1)(a)(I)(A) permits abatement for an error caused solely by the taxpayer," the error being overvaluation.[15] The court first considered the plain language of the aforesaid statute, which "allows the abatement and refund of property taxes erroneously or illegally levied 'due to erroneous valuation for assessment, irregularity in levying, clerical error, or overvaluation.'"[16] It found that the statute was significantly silent on the source of such error, and that "[t]his silence suggests the source of the error does not matter."[17] Next, it held that the court of appeals misplaced reliance on certain precedent in reaching its decision. Specifically, the court noted that *Coquina Oil Corp. v. Larimer County Bd. of Equalization*,[18] which pertained to erroneous overvaluation of leasehold interests due to clerical error, was inapplicable because two years following such decision, the legislature superseded the same by amending the statute to expressly address overvaluation.[19] The legislative history surrounding this amendment also indicates an intent to provide broad relief in circumstances of overvaluation.[20] Additionally, the court found that while *Boulder County Bd. of Commissioners v. HealthSouth Corp.*[21] stated that "assessor error may be the most likely cause of overvaluation," it does prevent the issuance of abatement in other circumstances, *i.e.*, when someone other than the assessor, such as the taxpayer, is the cause of the overvaluation.[22] Therefore, the court held that Colo. Rev. Stat. §39-10-114(1)(a)(I)(A) "gives taxpayers the right to seek abatement and refund for erroneously or illegally levied taxes resulting from overvaluation caused

14. *Id.* at ¶¶ 10-11, 405 P.3d at 1144.

15. *Id.* at ¶ 15, 405 P.3d at 1145.

16. *Id.* at ¶ 7, 405 P.3d at 1144.

17. *Id.* at ¶ 17, 405 P.3d at 1145.

18. 770 P.2d 1196 (Colo. 1989).

19. *OXY USA Inc.*,at ¶¶ 18-21, 405 P.3d at 1145-46.

20. *Id*. at ¶¶ 25-32, 405 P.3d at 1146-47. (According to the court, "[t]he legislative declaration accompanying the 1991 amendment is particularly telling: The General Assembly explained that it was enacting the bill 'with the intent of clarifying' that the court of appeals' statutory interpretation . . . was incorrect and that any taxpayer has 'the right to petition for an abatement or refund of property taxes levied erroneously or illegally due to an overvaluation of such taxpayer's property.'") *Id*. at ¶ 30 (quoting Ch. 309, sec. 1, 1991 Colo. Sess. Laws 1962, 1962)).

21. 246 P.3d 948 (Colo. 2011).

22. *OXY USA Inc*., at ¶ 35, 405 P.3d at 1147.

solely by taxpayer mistake," and reversed the court of appeals' decision, finding that OXY was entitled to the abatement sought.[23]

B. Search and Seizure Challenges to Administrative Well Inspections

1. BLM Authority – Federal and Indian Lands

The court considered the scope of the BLM's authority to inspect wells on fee property when subject to a communitization agreement in *Maralex Res., Inc. v. Jewell*.[24] In that case, minerals owned by Mr. O'Hare ("O'Hare") were leased to Maralex Resources, Inc. ("Maralex"); Maralex then contributed the O'Hare lease to a Communization Agreement ("CA") with minerals owned by the Southern Ute Indian Tribe ("Tribe").[25] The BLM contacted Maralex to provide notice of their intention to inspect certain wells within the CA, including a well located on the O'Hare property.[26] O'Hare refused to let the BLM inspector on his property, and consequently, Maralex was issued four Notices of Incidents of Noncompliance ("NICs"); the BLM also mandated as corrective action that Maralex provide the BLM with keys to the property gates or alternatively allow the BLM to place its own locks on the property gates to facilitate access.[27] Eventually O'Hare allowed the BLM to inspect the well and Maralex appealed the NICs to the Interior Board of Land Appeals ("IBLAs"), which upheld them.[28]

The court here considered whether the IBLA's decision to uphold the NICs was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[29] The IBLA's authority in the instant case comes from the Federal Oil and Gas Royalty Management Act ("FOGRMA"), which governs royalty payments from oil and gas leases on Federal and Indian lands.[30] FOGRMA also authorizes the Secretary of the Interior "to conduct 'any investigation or other inquiry necessary and appropriate' to carry out his or her duties under FOGRMA."[31] With respect to inspections, FOGRMA provides, in relevant part, as follows:

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23. *Id*. at ¶ 36, 405 P.3d at 1148.
24. 301 F. Supp. 3d 976 (D. Colo. 2017).
25. *Id*. at 979.
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*. at 981.
30. *See id*. at 980.
31. *Id*.

> Authorized and properly identified representatives of the Secretary may without advance notice, enter upon, travel across and inspect lease sites on Federal or Indian lands and may obtain from the operator immediate access to secured facilities on such lease sites, for the purpose of making any inspection or investigation for determining whether there is compliance with the requirements of the mineral leasing laws and this chapter. . . .
>
> For the purpose of making any inspection or investigation under this chapter, the Secretary shall have the same right to enter upon or travel across any lease site as the lessee or operator has acquired by purchase, condemnation, or otherwise."[32]

On appeal, Maralex argued that the BLM had no right "to conduct warrantless, unannounced inspections of oil and gas facilities located on fee lands," and even if they were so authorized, FOGRMA does not support the directive for landowners "to provide the BLM with keys to the landowner's locked gates or allow the BLM to place its own locks on the landowner's locked gates."[33] Additionally, Maralex contended that such BLM searches violate Fourth Amendment rights to be free from unreasonable search and seizure.[34] The IBLA determined, and the court affirmed, that although FOGRMA "refers only to 'lease sites on Federal or Indian lands,' production from any lease site subject to a communitization agreement (whether on fee or Indian land) is deemed to occur on each lease site within the communitization agreement".[35] Therefore, because a portion of the revenue generated from production of the well on the O'Hare property was allocated to the Tribe, the BLM had the authority to inspect wells on fee lands subject to a CA.[36]

The court also found that such BLM searches did not violate the Fourth Amendment right to be free from unreasonable search and seizure.[37] O'Hare leased his minerals to Maralex, and thus, consented to allowing Maralex to enter the property.[38] Maralex then contributed the O'Hare lease

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32. *Id.* at 980, (citing 30 U.S.C. §1718(b), (c)).
33. *Id*. at 981.
34. *Id*.
35. *Id*. at 982-83.
36. *Id* at 983 ("FOGRMA requires the development of procedures to ensure proper collection and disbursement of oil and gas revenues owed to Indian lessors from oil and gas both originating from, and allocated to, Indian Lands.") (citations omitted).
37. *Id*. at 984-85
38. *Id*. at 984.

to a CA and "agreed to the BLM's supervision over all operations subject to the agreement"; consequently, the BLM acquired the same right to enter O'Hare's lands as Maralex.[39] Further, so long as the inspections performed by the BLM do not exceed the scope of the CA or the applicable statutes and regulations, "providing the BLM with keys to the O'Hares' locked gates, or placing the BLM's own locks on O'Hares' gates, does not violate Plaintiffs' Fourth Amendment rights."[40]

2. COGCC Authority – Fee Lands

A similar search and seizure argument, also including O'Hare, was decided in *Maralex Res., Inc. v. Colorado Oil & Gas Conservation Comm'n*.[41] Maralex operated three wells on O'Hare's surface.[42] A field inspector for the COGCC contacted Maralex requesting access to the wells to perform an inspection.[43] O'Hare was out of town so the inspector agreed to delay inspection until the following day provided that Maralex contact him "oil-field early," an oil field custom and practice reference to 6:00 a.m.[44] When the inspector had not heard from Maralex by 9:30 a.m., he issued a notice of alleged violation for failure to provide access to the wells.[45] Later that day, O'Hare spoke with the inspector and sent a follow-up email in which he agreed to provide access to the wells for inspection the following week; however, the correspondence also threatened the inspector should he attempt to otherwise enter his property.[46] The COGCC obtained an administrative search warrant to inspect the wells and executed the same, during which the inspector noted several violations.[47] A follow-up inspection was conducted and the violations were found to be ongoing, so the COGCC issued Maralex multiple notices of alleged violation.[48] Maralex requested an administrative hearing to challenge these notices, at which the notices were upheld and the COGCC issued an order finding violation ("OFV").[49] O'Hare and Maralex appealed the COGCC's OFV to

39. *Id*.
40. *Id*.
41. 2018 COA 40, 2018 WL 1417462 (Colo. App. March 22, 2018).
42. *Id*. at ¶ 4, 2018 WL 1417462 at *1.
43. *Id*. at ¶ 7, 2018 WL 1417462 at *2.
44. *Id*.
45. *Id*. at ¶ 8, 2018 WL 1417462 at *2.
46. *Id*. at ¶ 9, 2018 WL 1417462 at *2.
47. *Id*. at ¶¶ 10-11, 2018 WL 1417462 at *2.
48. *Id*. at ¶ 12-13, 2018 WL 1417462 at *3.
49. *Id*. at ¶ 13, 2018 WL 1417462 at *3.

the district court, which affirmed the COGCC's order; Maralex and O'Hare appealed again.[50]

The main contention on appeal, which was a matter of first impression for the court, was whether the "COGCC rule permitting random, warrantless searches of oil and gas properties violates the United States and Colorado Constitutions."[51] The court characterized this claim as "a facial challenge to the constitutionality of Rule 204, which permits authorized COGCC staff 'the right at all reasonable times to go upon and inspect any oil or gas properties.'"[52] The court disagreed with the petitioner's arguments and concluded that Rule 204 falls under the administrative search exception, known as the *Colonnade-Biswell* exception, to the warrant requirement.[53] Said exception provides that:

> "[A] warrantless inspection made pursuant to a regulatory scheme of a closely regulated industry is reasonable if three requirements are met." First, the regulatory scheme must "be informed by a substantial government interest." Second, warrantless searches must be necessary to further that government interest. Third, the regulatory scheme must "provide a 'constitutionally adequate substitute' for a warrant in terms of the certainty and regularity of the program's application."[54]

The rationale behind this exception is that an owner of premises subject to a pervasively regulated industry has a reduced expectation of privacy, and therefore, "the traditional warrant and probable cause requirements have lessened application."[55]

In reaching its conclusion, the court considered each of the above requirements in turn. First, the court found that the oil and gas industry is closely regulated because the "COGCC is empowered to 'do whatever may reasonably be necessary to carry out the provisions of'" the Oil and Gas Conservation Act ("Act") and "has promulgated comprehensive rules regulating multitudinous aspects of the oil and gas industry."[56] The court

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50. *Id*. at ¶ 1, 2018 WL 1417462 at *1.
51. *Id*.
52. *Id*. at ¶ 16, 2018 WL 1417462 at *3.
53. *See id*. at ¶ 24, 2018 WL 1417462 at *4.
54. *Id*. at ¶ 20, 2018 WL 1417462 at *4 (quoting New York v. Burger, 682 U.S. 691, 700 (1987)).
55. *Id*. at ¶ 21, 2018 WL 1417462 at *4 (citing Marshall v. Barlow's Inc., 436 U.S. 307 (1978)).
56. *Id*. at ¶ 26, 2018 WL 1417462 at *5.

determined that, based upon the Act's directive that "it is 'in the public interest' to '[f]oster 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,'"[57] together with the COGCC's robust regulatory scheme, the state has a substantial interest in regulating the oil and gas industry.[58] Next, the court explained that warrantless searches are necessary to effectuate the state's interest because "[r]equiring that inspectors apply to a court for a warrant before each inspection would dramatically reduce COGCC's enforcement power, and might allow operators to conceal violations."[59] Finally, the court found that the COGCC's inspections were frequent enough that landowners had an expectation that their property would be periodically inspected and that the COGCC was subject to a reasonableness requirement that restricts their authority to conduct random inspections; thus, a "constitutionally adequate substitute for a warrant" is provided for in the COGCC's regulatory regime.[60] Note that while the above analysis was performed with respect to the Fourth Amendment under the United States Constitution, the court stated that the result was the same under the Colorado Constitution.[61]

Several other issues were raised on appeal. O'Hare argued that Rule 204 was "unconstitutional as applied to surface owners" who did not own the minerals.[62] The court disagreed in this case as O'Hare had signed a surface use agreement with Maralex granting "an extraordinarily broad set of rights";[63] the court also opined that "in other cases where a surface owner has granted a mineral lessee a broad surface easement, warrantless entry of the surface estate would not necessarily violate the surface owner's rights."[64] Maralex also challenged the COGCC's order as violating several COGCC rules. Of import, the court agreed that the COGCC was arbitrary and capricious in its determination that Maralex had failed to provide access to wells on the O'Hare's property "at 'all reasonable times'."[65] Specifically, the court noted that the inspector had agreed to delay the

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57. *Id. at* ¶ 25-30, 2018 WL 1417462 at *5.
58. *Id*.
59. *Id*. at ¶ 30, 2018 WL 1417462 at *5.
60. *Id*. at ¶¶ 32-33, 2018 WL 1417462 at *6.
61. *Id*. at ¶ 35, 2018 WL 1417462 at *6.
62. *Id*. at ¶ 38, 2018 WL 1417462 at *6.
63. *Id*.
64. *Id*. at ¶ 39, 2018 WL 1417462 at *7.
65. *Id*. at ¶ 45, 2018 WL 1417462 at *7.

inspection to the following day until O'Hare was back in town, and the mere fact that the inspector did not hear back until the afternoon of the following day, as opposed to "oil-field early," was not substantial evidence to support COGCC's determination.[66] The court rejected all other arguments by Maralex.

C. Breach of Contract Under Area of Mutual Interest Agreement

In *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC,*[67] the court considered several questions on appeal[68] pertaining to various contracts entered among oil and gas companies, including an area of mutual interest agreement ("AMI Agreement"). The AMI Agreement, by and among Spring Creek Exploration & Production Company, LLC ("Spring Creek"), Gold Coast Energy, LLC ("Gold Coast") and Hess Bakken Investments II, LLC ("Hess'), was valid for a term of three years, and provided, in relevant part:

> During the term of the AMI, only [Hess] may proceed to lease or otherwise acquire interests within the AMI. If, during the term of the AMI, [Hess] should acquire any oil and gas lease, leasehold interest or mineral interest, [Hess] should . . . offer such interest to Coachman[69] in the following proportions, [Hess] (90%), Coachman (10%), pursuant to that certain Participation Agreement dated October 8, 2009, by and between [Hess] and Coachman.[70]

The AMI Agreement further provided that Spring Creek and Gold Coast would receive an overriding royalty interest ("ORRI") on new leases acquired by Hess during the AMI term.[71]

The AMI Agreement was executed in conjunction with the "Tomahawk Agreement," covering a small portion of lands within a larger area known to Hess as the Rough Rider Prospect, subject to a separate agreement ("Rough Rider Agreement") one of its affiliates had entered in to with Statoil Oil & Gas LP ("Statoil"). The Rough Rider Agreement prohibited

66. *See id*.
67. 887 F.3d 1003 (10th Cir. 2018).
68. The only issues discussed herein are those decided by applying Colorado law; the Tenth Circuit also applied North Dakota law to other issues and claims on appeals.
69. *Id*. at 1010. (Coachman Energy was a predecessor of Spring Creek and Gold Coast.).
70. *Id*.
71. *Id*.

Hess from acquiring new leases in the Rough Rider Prospect for a period of one year.[72] Hess entered into the Tomahawk Agreement with Spring Creek, Gold Coast and Coachman Energy during the one year non-compete period.[73] Statoil brought suit against Hess, and Statoil and Hess ultimately reached a settlement agreement ("Settlement") wherein Hess sold most of its Tomahawk leases to Statoil at a discount and Hess agreed that any additional leases acquired would be offered to Statoil at cost.[74] The AMI Agreement was not assigned from Hess to Statoil.[75]

Neither Spring Creek nor Gold Coast were privy to the settlement negotiations or the Settlement itself. Hess did not acquire any new leases during the remainder of the AMI term but resumed lease acquisitions at its expiration.[76] Statoil, on the other hand, acquired numerous leasehold interests during the term of the AMI.[77]

Applying Colorado law, the Tenth Circuit court considered whether Hess breached the AMI Agreement by failing to acquire any new leases during its term. The court found that "[t]he AMI Agreement plainly does not require Hess to acquire new leases," but rather provides that *if* Hess should acquire new leases, *then* Spring Creek and Gold Hill would be entitled to an ORRI thereon.[78] The court also found that there was no breach of an implied covenant to acquire new leases given that Hess had no duty to obtain new leases at all.[79]

Additionally, when considering whether Hess' actions constituted fraudulent concealment, the court agreed this tort claim was barred by the economic loss rule.[80] Spring Creek relied on a 1990 decision of the Colorado Court of Appeals that had affirmed an award of money damages for fraudulent concealment, *H&H Distribs., Inc. v. BBC Int'l, Inc.*,[81] but this opinion, which had been issued before the Colorado Supreme Court

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72. *Id*. at 1009.
73. *Id*. at 1009-10.
74. *Id*. at 1010-11.
75. *Id*.
76. *Id*. at 1011. (New leasing actually resumed three months after the Settlement was reached, referred to therein as the "three-month tail" period). *Id*. at 1010-11.
77. *See Id*.
78. *See Id*. at 1018.
79. *Id*. at 1019-20.
80. *Id*. at 1021-23.
81. *Id*. at 1021 (H&H Distribs., Inc. v. BBC Int'l, Inc., 812 P.2d 659 (Colo. App. 1990); internal citations omitted).

adopted the economic loss rule, was deemed by the court to likely no longer be good precedent. [82]

D. Law Firm's Responsibility in Negotiation for Undisclosed Principal

In *Rocky Mountain Expl., Inc. v. Davis Graham & Stubbs LLP*,[83] Rocky Mountain Exploration, Inc. ("RMEI") brought suit against the law firm of Davis Graham & Stubbs LLC ("DGS"), for, among other things, breach of fiduciary duty, fraud, and civil conspiracy. The claims arose from DGS's representation of Tracker Resource Exploration NC, LLC ("Tracker"), as principal of Lario Oil and Gas Company ("Lario"), agent and purchaser of certain assets from RMEI. RMEI and Tracker entered into agreements with one another covering certain oil and gas leaseholds in North Dakota, wherein RMEI agreed to sell eighty percent of its interest to Tracker.[84] In connection therewith, RMEI and Tracker entered into an area-of-mutual interest agreement, an operating agreement, and a participation agreement.[85] The operating agreement expressly disclaimed any joint venture or fiduciary relationship between RMEI and Tracker and stated that it, together with the participation agreement, constituted the entire agreement between the parties, superseding all prior agreements.[86]

The relationship between Tracker and RMEI eventually deteriorated and Tracker unsuccessfully attempted to purchase RMEI's 20% interest.[87] Lario then offered to purchase RMEI's interest, striking a separate agreement with Tracker that it would assign 75% of its acquired interest to Tracker; the parties further agreed that they would not disclose Tracker's involvement in the transaction to RMEI.[88] RMEI accepted Lario's offer and the parties entered into an agreement ("Letter Agreement").[89] DGS had previously represented Tracker, and Lario sought to have DGS represent them in the transaction; however, DGS determined there was a conflict of interest.[90] As such, DGS continued to represent only Tracker, preparing many of the deal documents, though certain email correspondence referenced DGS as Lario's counsel.[91] The transaction between RMEI and

82. *Id*. at 1022.
83. 2018 CO 54, 420 P.3d 223 (Colo. 2018).
84. *Id*. at ¶ 11, 420 P.3d. at 227.
85. *Id*. at ¶¶ 11-12, 420 P.3d. at 227.
86. *Id*. at ¶ 12, 420 P.3d. at 227.
87. *Id*. at ¶ 13, 420 P.3d. at 227.
88. *Id*. at ¶ 15-17, 420 P.3d. at 227-28.
89. *Id*. at ¶ 17, 420 P.3d. at 228.
90. *Id*. at ¶ 16, 420 P.3d. at 228.
91. *Id*. at ¶¶ 16-19, 420 P.3d. at 228.

Lario closed, and on the same date Lario transferred the contemplated interest to Tracker, at which point RMEI learned of Tracker's involvement and filed suit against Tracker, Lario, certain of their officers, and DGS.[92]

Lario and Tracker eventually settled their claims, but RMEI brought claims against DGS, alleging it "(1) engaged in a civil conspiracy to misappropriate RMEI's interests in the leaseholds at issue by setting up Lario as a strawman purchaser; (2) aided and abetted Tracker's breach of its fiduciary duty to RMEI; (3) committed fraud; (4) engaged in a civil conspiracy to commit fraud; and (5) aided and abetted fraud."[93] The District Court granted DGS's motion for summary judgment and the Court of Appeals affirmed.[94] RMEI appealed and the Colorado Supreme Court granted certiorari.[95]

In considering the above questions, the court reiterated the distinction between an undisclosed and an unidentified principal as set forth in the Section 1.04(2) of the Restatement (Third) of Agency: "A principal is undisclosed if the third party has no notice that the agent is acting for a principal," whereas "[a] principal is unidentified if the third party has notice that the agent is acting for a principal but does not have notice of the principal's identity."[96] It is well known that "when an agent for an undisclosed principal enters into a contract, the other party to that contract may avoid the contract if (1) the agent falsely represents to the third party that the agent does not act on behalf of a principal and (2) the principal or agent had notice that the third party would not have dealt with the principal";[97] however, "this rule does not apply to agents who act on behalf of *unidentified*, as opposed to *undisclosed*, principals."[98]

The court found that Tracker was an unidentified principal of Lario due to disclosures contained in the agreements between Lario and RMEI. Specifically, the Letter Agreement stated that Lario had venture partners in the transaction,[99] and further provided that "Lario *has other investors or*

92. *Id*. at ¶¶ 19-21, 420 P.3d. at 228.
93. *Id*. at ¶ 21, 420 P.3d. at 228.
94. *Id*. at ¶ 7, 420 P.3d. at 226.
95. *Id*.
96. *Id*. at ¶ 30, 420 P.3d. at 230 (citing Restatement (Third) of Agency § 1.04(2)).
97. *Id*. at ¶ 33, 420 P.3d. at 230.
98. *Id*. (citing Restatement (Third) of Agency § 6.11(4)) (emphasis added).
99. *Id*. at ¶ 38, 420 P.3d. at 231-32 ("The Parties shall not disclose the existence of this Letter Agreement and its contents to any third party, except . . . to each Party's . . . investors (*including Buyer's venture partners in this transaction*) . . . directly and solely for the purpose of evaluating the proposed transaction.").

partners who may elect to join in the acquisition of the Properties under the terms of this Letter Agreement."[100] Moreover, the Letter Agreement stated that "Lario shall have the right to assign a portion but not all of its interest in this Letter Agreement to such investors or partners."[101] Because Tracker was an unidentified, and not an undisclosed, principal, the court rejected RMEI's civil conspiracy claim and found that RMEI could not avoid the sale to Lario.[102] Likewise, as previously stated above, the agreement between Tracker and RMEI expressly disclaimed any fiduciary duty between the parties, and additionally stated that it constituted the entire agreement between the parties and superseded all prior agreements; therefore, RMEI's breach of fiduciary duty claim also failed.[103]

As for the fraud claims against DGS, RMEI argued that DGS pretended to represent Lario and that Lario acted alone in its transaction with RMEI.[104] Although certain emails referenced DGS as Lario's counsel, and DGS did not correct such misstatements, the court found nothing of "definite and specific character" to indicate that DGS was not representing Tracker.[105] Thus, at best, the court said DGS's actions could amount to fraudulent concealment; however, it also found that DGS did not owe RMEI a duty to disclose Tracker's involvement, and such a duty, if imposed, would essentially eliminate the ability to conduct transactions with undisclosed principals.[106] Moreover, it would interfere with an attorney's duties of loyalty and confidentiality to his or her clients.[107] Thus, the court found that DGS did not commit fraud.[108]

E. Update on Martinez Case

In January 2018, the Colorado Supreme Court granted a petition for writ of certiorari to review the decision of the Colorado Court of Appeals in Case No. 2016CA564, *Colorado Oil and Gas Conservation Comm'n v. Martinez*.[109] As noted in last year's Colorado article,[110] the Court of

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100. *Id*. at ¶ 39, 420 P.3d. at 232.
101. *Id*.
102. *Id*. at ¶¶ 42, 46, 420 P.3d. at 232-33.
103. *Id*. at ¶¶ 63-64, 420 P.3d. at 235.
104. *Id*. at ¶ 52, 420 P.3d. at 233.
105. *Id*. at ¶ 55, 420 P.3d. at 234.
106. *Id*. at ¶¶ 56-57, 420 P.3d. at 234.
107. *Id*. at ¶ 57, 420 P.3d. at 234.
108. *See id*.
109. *Colorado Oil and Gas Conservation Comm'n v. Martinez*, No. 17SC297, 2018 WL 582105, *1 (Colo. Jan. 29, 2018).

Appeals' decision in *Martinez* focused on the intended meaning of the following statutory provision:

> (1)(a) It is declared to be in the public interest to: . . . (I) 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; . . .[111]

The Petitioners' argued that 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.[112] The court of appeals ultimately agreed with the Petitioners.

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 COGCC (Petitioner), seeking review of the court of appeals decision in *Martinez*. The Colorado Supreme Court granted these petitions, phrasing the precise issue for consideration as follows: "Whether the court of appeals erred in determining that the Colorado Oil and Gas Commission misinterpreted section 34-60-102(1)(a)(l), C. R. S., as requiring a balance between oil and gas development and public health, safety, and welfare."[113]

As of this date, the Colorado Supreme Court has not issued an opinion. Oral argument is presently scheduled for October 16, 2018.

III. Legislation

During the 2018 legislative session, more than forty bills were introduced which could have had a material impact on the oil and gas industry.[114] These bills dealt with issues related to oil and gas, the Colorado Energy Office, renewable energy, and 8-1-1 (Call Before You Dig).[115]

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110. Casey C. Breese, David R. Little, & Diana S. Prulhiere, *Colorado*, 3 OIL & GAS, NAT. RESOURCES & ENERGY J. 663, 668 *et seq* (2017).

111. COLO. REV. STAT. § 34-60-102, effective July 1, 2007.

112. *Martinez v. Colorado Oil & Gas Conserv. Comm.*, 2017 COA 37, ¶ 18, 2017 WL 1089556 at *4 (Colo. App. Mar. 23, 2017).

113. Colorado Oil and Gas Conservation Commission v. Martinez, No. 17SC297, 2018 WL 582105 at *1 (Colorado Jan. 29, 2018).

114. *See* All Bills, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018), https://leg.colorado.gov/bill-

A. Select New Legislation

Two bills were passed by the Colorado General Assembly during 2018 that materially affected the oil and gas industry. The most important of these bills was Senate Bill ("SB") 18-230.

SB 18-230 amended and updated the statutory spacing and pooling provisions set out in Colo. Rev. Stat. § 34-60-116 in five significant ways.[116] First, the bill amended Colo. Rev. Stat. § 34-60-116(1) to clarify that a spacing or pooling order issued by the COGCC may only cover a portion of an oil and gas pool instead of the entire pool.[117] Second, the bill amended several provisions in the statute, including Colo. Rev. Stat. § 34-60-116(3), to confirm that a spacing or pooling order issued by the COGCC may authorize one or more wells per drilling unit.[118] These changes were intended to update the statute to mirror current COGCC practice.

The third material change amended Colo. Rev. Stat. §§ 34-60-116(7)(a)(I) and 34-60-116(7)(a)(II) to require pooling orders issued by the COGCC to more clearly specify the interests being pooled. These changes also clarified that the creation of royalty or overriding royalty interests intended to avoid statutory pooling penalties need not be recognized by the COGCC. Specifically, royalty interest are to be excluded from the obligation to pay costs only "if and to the extent that the royalty is consistent with the lease terms prevailing in the area and is not designed to avoid the recovery of costs provided for in subsection 7(b) of this section."[119]

Next, a new provision, Colo. Rev. Stat. § 34-60-116(7)(a)(III) was added. It provides that pooling orders issued by the COGCC shall "[s]pecify that a nonconsenting owner is immune from liability for costs arising from spills, releases, damage, or injury resulting from oil and gas operations on the drilling unit."[120]

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search?field_subjects[0]=40&field_subjects[1]=38&field_sessions=45771&field_chamber=All&field_bill_type=All&sort_bef_combine=search_api_relevance%20DESC. (last visited July 16, 2018).

115. 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018), https://leg.colorado.gov/bill-search?field_sessions=45771&sort_bef_combine=field_bill_number%20ASC (Search for Subjects: Energy, Natural Resources & Environment)(last visited July 16, 2018).

116. The COGCC is presently considering a proposed rulemaking to implement these legislative changes.

117. 2018 Colo. Legis. Serv. Ch. 361 (West).

118. *Id*.

119. Colo. Rev. Stat. §§ 34-60-116(7)(a)(I) (as amended in 2018).

120. Colo. Rev. Stat. §§ 34-60-116(7)(a)(III) (as amended in 2018).

Finally, SB 18-230 amended Colo. Rev. Stat. §§ 34-60-116(7)(d)(I) to slow down the statutory pooling process and provide more information for parties who might be pooled. The amendments clarify that the COGCC may not issue a pooling order unless at least sixty days have passed between the date of an offer to each owner to participate in the proposed well or lease its interest and the date of the hearing.[121] The offers to participate or lease must also now "include a copy of or link to a brochure supplied by the commission that clearly and concisely describes the pooling procedures specified in this section and the mineral owner's options pursuant to those procedures."[122]

The other material legislation which passed was House Bill ("HB") 18-1098. HB 18-1098 amended Colo. Rev. Stat. §§ 34-60-122(b) by adding a new sentence permitting the COGCC to retain funds it collects from oil and gas companies for purposes of the environmental response fund instead of having these funds transferred at the end of each fiscal year to the general fund.[123] As amended, Colo. Rev. Stat. §§ 34-60-122(b) now states that "[t]he year-end balance of the account remains in the account."[124] This change will provide greater funding for the COGCC to remediate abandoned oil and gas locations.

B. Indefinitely Postponed Bills

A number of additional bills affecting the oil and gas industry were introduced and debated but failed to pass scrutiny in the House or the Senate during the 2018 legislative session. Below are quick summaries of eleven of these bills.

1. **HB 18-1071**: Intended to codify *Martinez*, this bill would have more expressly and definitively required the regulation of oil and gas operations in a manner consistent with public health, safety, and welfare without also considering the need for the development of oil and gas resources.[125]

121. 2018 Colo. Legis. Serv. Ch. 361 (West).
122. Colo. Rev. Stat. §§ 34-60-116(7)(d)(I) (as amended in 2018).
123. 2018 Colo. Legis. Serv. Ch. 107 (West).
124. *Id*.
125. H.B. 18-1071, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).

2. **HB 18-1150**: Would have rendered a local government liable for damages to operators, mineral lessees, and royalty owners for bans on hydraulic fracturing.[126]
3. **HB 18-1157**: Would have increased reporting of oil and gas incidents.[127]
4. **HB 18-1289**: Would have exempted local government and school district lands from statutory pooling.[128]
5. **HB 18-1301**: Would have required most reclamation plans to demonstrate (by substantial evidence) an end date for any water quality treatment necessary to ensure compliance with applicable water quality standards, eliminate the existing self-bonding option, and require that all reclamation bonds include financial assurances of a certain amount.[129]
6. **HB 18-1382**: Would have created an Energy Legislative Review Committee to study energy development, grid security, energy supply and transmission planning, and other issues that affect energy policy in Colorado, beginning in 2019.[130]
7. **HB 18-1352**: Would have required oil and gas facilities and wells to be located at least 1,000 feet from school buildings and other high occupancy buildings, as applied to the school property line; would not apply if a school commences operations near such facilities or wells that are already actively in use.[131]
8. **HB 18-1419**: Would have mandated that the COGCC promulgate rules "as soon as practicable" to ensure proper wellhead integrity of oil and gas production wells. The Bill would have also required an oil and gas operator to give electronic notice of each flow line and gathering pipeline installed, owned, or operated by the operator to each local government within whose jurisdiction the subsurface facility is located.[132]

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126. H.B. 18-1150, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
127. H.B. 18-1157, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
128. H.B. 18-1289, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
129. H.B. 18-1301, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
130. H.B. 18-1382, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
131. H.B. 18-1352, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
132. H.B. 18-1419, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).

9. **SB 18-063**: Would have required operators to post greater financial assurance.[133]
10. **SB 18-064**: Would have updated the renewable energy standard to require that all electric utilities, including cooperative electric associations and municipally owned utilities, to derive their energy from 100% renewable energy by 2035.[134]
11. **SB 18-192**: Would have made local governments that ban hydraulic fracturing of an oil and gas well liable to the mineral interest owners for the value of the mineral interest; would have further required local governments that enact a moratorium on oil and gas activities to compensate oil and gas operators, mineral lessees, and royalty owners for all costs, damages, and losses of fair market value associated with that moratorium.[135]

IV. State Regulation

During the period of this update, the COGCC completed one major rulemaking affecting flowlines. The COGCC approved comprehensive new flowline regulations incorporated into COGCC Rules in a unanimous nine-member vote on February 13, 2018.[136] The goal of this rulemaking was essentially to create a new set of cradle to grave rules specifically for flowlines.[137] The regulations address oversight of flowlines and related infrastructure associated with oil and gas development.[138] They strengthen requirements and establish new standards for the design, installation, maintenance, testing, tracking, and abandoning of flowlines.[139]

V. Ballot Initiatives

Dozens of ballot initiatives aimed at amending the Colorado Constitution or Colorado statutes were proposed during the period of this update and began the long administrative process of seeking to be placed on the 2018

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133. S.B. 18-063, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
134. S.B. 18-064, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
135. S.B. 18-192, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2018).
136. *COGCC Approves Comprehensive New Flowline Regulations* (Feb. 13, 2018), https://www.colorado.gov/governor/news/cogcc-approves-comprehensive-new-flowline-regulations.
137. *See id.*
138. *Id.*
139. *Id.*

statewide general election ballot.[140] Of these proposals, two initiatives that materially impact the oil and gas industry have survived the gauntlet and will appear on the 2018 statewide general election ballot.

The first is Proposition 97, entitled "Setback Requirement for Oil and Gas Development." Proposition 97 would enact a new statute, Colo. Rev. Stat. § 34-60-131, as a part of the Act.[141] Section 34-60-131(3) of this proposed legislation would "establish that all new *oil and gas development* not on federal land must be located at least two thousand five hundred feet from an *occupied structure* or *vulnerable area*," the italicized terms all being defined under the proposed initiative.[142] A recent study by the COGCC determined that, if passed, this initiative would make the majority of lands in Colorado unavailable for oil and gas development, including a very high percentage of those lands near cities or suburban developments.[143]

The other initiative is Proposition 108, entitled "Just Compensation for Reduction in Fair Market Value by Government Law or Regulation."[144] It proposes to amend Section 15 of Article H of the Colorado Constitution by adding the following capitalized text to the existing constitutional provision: "Private property shall not be taken, or damaged, OR REDUCED IN FAIR MARKET VALUE BY GOVERNMENT LAW OR REGULATION for public or private use, without just compensation."[145] One purpose of this initiative would be to require state or local governments to compensate mineral owners and other mineral interest owners for damages accruing from drilling bans or other government regulation.

Colorado's 2018 general election is scheduled for November 6, 2018.

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140. These initiatives are listed, summarized and documented on the Colorado Secretary of State website, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html (last visited on September 3, 2018).

141. The final text of Proposition 97 is available on the Colorado Secretary of State website, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html (last visited on September 11, 2018).

142. *Id*. (emphasis added).

143. This COGCC study may be found at https://cogcc.state.co.us/documents/library/Technical/Miscellaneous/COGCC_2018_Init_97_GIS_Assessment_20180702.pdf.

144. The final text of Proposition 108 is available on the Colorado Secretary of State website, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html (last visited on September 11, 2018).

145. *Id*.