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ONE J

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I. Introduction

During the relevant update period, the Colorado General Assembly passed legislation that fundamentally altered oil and gas law and regulation in Colorado. Two rulemakings and four court decisions also addressed important issues affecting oil and gas operations and regulation in Colorado.

II. Legislative and Regulatory Developments

A. State Legislative Developments – Amendment of the Colorado Oil and Gas Conservation Act

In 2019, the Colorado General Assembly passed Senate Bill 19-181.¹ This bill substantially amended the Colorado Oil and Gas Conservation Act (“Act”)² and promises to impact the regulation of oil and gas operations in Colorado in many ways. As explained below, government regulators are just beginning the process of adopting rules to implement Senate Bill 19-181. The COGCC has described its objectives for such rulemakings as follows: “creating a neutral regulatory framework, establishing a holistic and

1. S.B. 19-181, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).
 2. COLO. REV. STAT. §§ 34-60-101 to 131, amended by S.B. 19-181, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

contextual decision making process, continuing to develop trust in the COGCC, and restructuring the state-local government relationship.”³ Most provisions in the legislation help effect four fundamental changes in Colorado oil and gas law.

1. Mission Change for the COGCC

Senate Bill 19-181 changed the regulatory mission of the Colorado Oil and Gas Conservation Commission (“COGCC”) from fostering the development of oil and gas to regulating oil and gas production in order to protect public health, safety, welfare, the environment and wildlife resources.

Before 2019, the Act directed the COGCC to foster the development of oil and gas resources in a manner consistent with other public health and policy objectives.⁴ The Act declared that it was in Colorado’s 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 public health, safety, and welfare, including the protection of the environment and wildlife resources.*”⁵ The meaning of this language in the original Act is what the court construed in the *Martinez* case, discussed in Section III of this article.

Senate Bill 19-181 amended this provision to read as follows: it is now in Colorado’s public interest to “*[r]egulate the development and production of the natural resources of oil and gas . . . in a manner that protects public health, safety and welfare, including the protection of the environment and wildlife resources.*”⁶

Another new passage added to the Act by Senate Bill 19-181 explains the new mission of the COGCC in simpler terms:

In exercising the authority granted by this article 60, the commission shall *regulate* oil and gas operations *in a reasonable manner to protect against and minimize* adverse impacts to public health, safety, and welfare, the environment, and wildlife resources *and shall protect against* adverse environmental

3. Jeff Robbins, Director, Colo. Oil & Gas Conservation Comm’n, Presentation at Glenwood Springs: INSIGHTS INTO COGCC RULEMAKING FROM 30,000’ - (intended to be a conversation): An update on the COGCC rulemaking process (August 21, 2019), https://cogcc.state.co.us/documents/sb19181/Overview/SB_19_181_Rulemaking_Update_20190821_rev.pdf.

4. Colorado Oil & Gas Conservation Comm’n v. Martinez, 2019 CO 3, ¶¶ 31-37, 433 P.3d 22, 30 (Colo. 2019) (discussing the history of the Act).

5. COLO. REV. STAT. § 34-60-102(1)(a)(I) (prior to April 16, 2019) (emphasis added).

6. COLO. REV. STAT. § 34-60-102(1)(a)(I) (effective April 16, 2019) (emphasis added).

impacts on any air, water, soil, or biological resource resulting from oil and gas operations.⁷

The COGCC will assess future rulemaking, permitting, enforcement and other regulatory decisions through the lens of this changed mission statement.

2. Local Governments Have Greater Authority to Regulate Surface Uses Associated with Oil and Gas Development

Since at least 1992, Colorado courts have held that local governments may enact ordinances and otherwise regulate the surface impacts of oil and gas production in their respective jurisdictions so long as these regulatory efforts do not impermissibly conflict with state policy and regulatory efforts. A 2016 decision defines an impermissible operational conflict of this type as a regulatory action by local government that “would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes . . .” creates an impermissible operational conflict.⁸

Senate Bill 19-181 vests local governments with more authority to regulate surface uses associated with oil and gas development. According to Weld County Attorney Bruce Barker, “[t]hat line, through [Senate Bill 19-]181, was moved in a different direction. It’s basically moved so there’s more land use authority, regulatory authority, for a local government than had been there previously.”⁹ But how much more authority local governments have is yet to be determined.

New subsection 29-20-104(1)(h) now expressly empowers local governments in Colorado to regulate “the surface impacts of oil and gas operations in a reasonable manner” so long as the local regulation is aimed at “protect[ing] and minimiz[ing] adverse impacts to public health, safety, and welfare and the environment.”¹⁰ Senate Bill 19-181 also requires the COGCC to acknowledge the authority of, and work with, local governments. For example, new subsection 34-60-106(1)(f) requires that, when applying for a well permit, an oil and gas operator must submit proof that it has either

7. COLO. REV. STAT. § 34-60-106(2.5)(a) (emphasis added).

8. *City of Longmont v. Colo. Oil & Gas Assoc.*, 2016 CO 29, ¶ 42, 369 P.3d 573, 583 (preempting local fracking ordinance).

9. Cuyler Meade, *SB 181 tussle between Weld, Denver seems far from over*, GREELEY TRIB. (Aug. 31, 2019), <https://www.greeleytribune.com/news/sb-181-tussle-between-weld-denver-seems-far-from-over/>.

10. COLO. REV. STAT. § 29-20-104(1)(h).

filed a siting application with the responsible local government or that the local government has waived its right to regulate oil and gas siting.¹¹

The net effect of these changes is to give local governments a much more important seat at the table when decisions are made as to where oil and gas facilities will be located and how they will be constructed and operated.

3. Broader State Regulatory Focus and Greater Authority to Deny Permits

Senate Bill 19-181 also directs and empowers the COGCC to more thoroughly assess the cumulative impacts of nearby oil and gas development when permitting specific projects.

New subsection 34-60-106(11)(c)(II) now commands the COGCC to work more closely with the Colorado Department of Public Health and Environment to “evaluate and address the potential cumulative impacts of oil and gas development.”¹² The COGCC is no longer expressly directed to consider “cost-effectiveness and technical feasibility,”¹³ factors the Colorado Supreme Court recently held should be considered by the COGCC.¹⁴ However, Senate Bill 19-181 still limits COGCC authority by requiring that its regulatory efforts and decisions be reasonable.¹⁵

As discussed above, the COGCC is now required by Senate Bill 19-181 to assess the impact of all oil and gas operations, existing and proposed, in light of its new mission to protect public health, safety, welfare, the environment and wildlife resources.¹⁶ If the COGCC determines that specific proposed projects do not meet these standards, it need not approve the project. New subsections 34-60-103(5.5)(b) and 34-60-106(1)(f)(B)(2.5)(b) clarify that the statutory prohibition against waste does not include the nonproduction of oil or gas.¹⁷

11. COLO. REV. STAT. § 34-60-106(1)(f).

12. COLO. REV. STAT. § 34-60-106(11)(c)(II).

13. COLO. REV. STAT. § 34-60-103(15.5)(d) (before April 16, 2019).

14. *Colo. Oil & Gas Conservation Comm’n*, 2019 CO ¶ 41, 433 P.3d at 31 (Colo. 2019) (discussing the COGCC’s obligation to consider cost-effectiveness and technical feasibility under prior version of the Act).

15. *See* COLO. REV. STAT. § 34-60-103(5.5) and § 34-60-106(2.5)(a).

16. *Id.*

17. COLO. REV. STAT. §§ 34-60-103(5.5)(b) and 34-60-106(1)(f)(B)(2.5)(b).

4. Changes in Commissioner Status and Qualifications

The last fundamental change brought about by Senate Bill 19-181 is a restructuring of the COGCC itself. Effective April 16, 2019, the membership matrix for commissioners was restructured to include more members with public health expertise and fewer members with oil and gas industry experience.¹⁸ Under this revised model, the COGCC is comprised of a total of nine commissioners, seven of whom are appointed by the Governor and serve on a voluntary basis; the executive directors of the Department of Natural Resources and the Department of Public Health and Environment round out the COGCC and serve as ex-officio voting members.¹⁹

After certain enumerated rulemakings are completed in 2020, the membership matrix will change again. Effective July 1, 2020, a new commission will be reseeded with a total of seven, but only five voting, members.²⁰ The five voting commissioners will each be appointed by the Governor, will be full time employees of the state, and will serve four year terms.²¹ The new legislation also specifies other requirements for membership of the new COGCC. For example, the voting commissioners should be selected, if possible, from different geographic areas of the state impacted by oil and gas operations.²² Also, at least one member of the restructured COGCC must have substantial experience or formal training in the following areas: the oil and gas industry; planning and land use; environmental and wildlife protection or reclamation; and public health.²³ The fifth commissioner should “aid the commission in making sound, balanced decisions.”²⁴ No more than three commissioners may be from any particular political party, and no commissioner may have a conflict of interest with the oil and gas industry.²⁵ The executive directors of the Department of Natural Resources and the Department of Public Health and Environment will continue to sit with the other commissioners, but will be ex-officio non-voting members.²⁶

18. COLO. REV. STAT. § 34-60-104(1)(b).

19. COLO. REV. STAT. § 34-60-104(2)(a)(I).

20. COLO. REV. STAT. § 34-60-104.3(2)(a).

21. COLO. REV. STAT. § 34-60-104.3. Two of the initial commissioners will serve two-year terms.

22. COLO. REV. STAT. § 34-60-104.3(2)(b).

23. COLO. REV. STAT. § 34-60-104.3(2)(c).

24. *Id.*

25. COLO. REV. STAT. § 34-60-104.3(2)(b), (2)(d).

26. COLO. REV. STAT. § 34-60-104.3(2)(a).

B. State Regulatory Developments

Between August 1, 2018 and July 31, 2019, the COGCC completed two rulemakings. The first rulemaking was in response to Senate Bill 18-230,²⁷ legislation enacted in 2018 to amend Colo. Rev. Stat. Section 34-60-116(7)(d) by slowing down the statutory pooling process and providing more information to parties being pooled. In October 2018, the COGCC amended COGCC Rule 530²⁸ to implement these objectives. The COGCC also changed many of its other rules to accommodate its transition to electronic filing.²⁹

In December 2018, the COGCC's second rulemaking amended COGCC Rule 604³⁰ to require the surface location for new wells to be at least 1,000 feet from certain defined school facilities and child-care centers.³¹

The COGCC is now working on a series of rulemakings to implement the requirements of Senate Bill 19-181.³² During the next year it is expected that the COGCC may engage in rulemakings addressing more than a dozen issues.³³

III. Judicial Developments

A. COGCC Rulemaking Discretion—Colo. Oil & Gas Conserv. Comm'n v. Martinez

As reported last year, the Colorado Court of Appeals in 2017 issued an important opinion construing the scope of the COGCC's regulatory authority under the Act as then enacted.³⁴ The majority concluded that the Act, as then written, required the COGCC to ensure all oil and gas development in Colorado was conducted in a manner consistent with public health, safety,

27. S.B. 18-230, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018).

28. 2 COLO. CODE REGS. 404-1:530 (Lexis Advance through all regulations in effect as of August 25, 2019).

29. Statement of Basis, Specific Statutory Authority, and Purpose Amendments to Current Rules of the Colorado Oil and Gas Conservation Commission, 2 C.C.R. 404-1, Cause No. IR Docket No. 180900646 (Oct. 3, 2018).

30. 2 COLO. CODE REGS. § 404-1:604 (Lexis Advance through all regulations in effect as of August 25, 2019).

31. 2 COLO. CODE REGS. § 404-1:604(a)(6) (Lexis Advance through all regulations in effect as of August 25, 2019).

32. COLO. REV. STAT. §§ 34-60-106(7)(b), 34-60-106(ii)(c), 34-60-106(18) (listing more than a dozen issues the COGCC is to address through rulemaking).

33. *Id.*

34. *Martinez v. Colo. Oil & Gas Conservation Comm'n*, 2017 COA 37, ¶ 30, 434 P.3d 689, 695 (Colo. App. 2017), *rev'd*, 433 P.3d 22.

and welfare, including the protection of the environment and wildlife resources.³⁵

In January 2019, the Colorado Supreme Court reversed and held that the Colorado Court of Appeals, as well as the COGCC, had misread the Act.³⁶ It concluded the Act, as then enacted, did “not allow the [COGCC] to condition all new oil and gas development on a finding of no cumulative adverse impacts to public health and environment.”³⁷ Instead, the Act required the COGCC “(1) to foster the development of oil and gas resources, protecting and enforcing the rights of owners and producers, and (2) in doing so, to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety and welfare, but only after taking into consideration cost-effectiveness and technical feasibility.”³⁸

As discussed above, Senate Bill 19-181 rewrote much of the text construed by the Colorado Supreme Court in *Martinez*. As a result, the Colorado Supreme Court’s interpretation of this historic text is no longer controlling because the text has changed. But this does not mean the decision is without significance and precedential value. In *Martinez*, the Colorado Supreme Court reiterated its principles of statutory construction by which legislation should be interpreted.³⁹ Presumably Senate Bill 19-181 will be construed and applied using these same principles.

The decision also reaffirms the “broad discretion” of the COGCC to engage in rulemaking and decide what rules to enact or not enact.⁴⁰ As noted above, the General Assembly has identified more than a dozen subjects which the COGCC is to address in rulemakings during the next year.⁴¹ It will be difficult to challenge the rules adopted by the COGCC given the holding in *Martinez* that the rulemaking agency is entitled to great deference.

35. *See id.*

36. Colo. Oil & Gas Conservation Comm’n v. Martinez, 2019 CO 3, ¶ 41, 433 P.3d 22, 31 (Colo. 2019).

37. *Id.* at 25.

38. *Id.*

39. *See id.* at 28 (requiring courts to assess the entire statutory scheme so as to “give consistent, harmonious and sensible effect to all of its parts.”).

40. *Id.* at 27.

41. COLO. REV. STAT. §§ 34-60-106(7)(b), 34-60-106(ii)(c), 34-60-106(18) (listing more than a dozen issues the COGCC is to address through rulemaking).

B. Challenges to COGCC Permitting Decisions—Weld Air & Water v. Colo. Oil & Gas Conserv. Comm’n

The decision of the Colorado Court of Appeals in *Weld Air & Water v. Colo. Oil & Gas Conserv. Comm’n*⁴² reaffirmed important standards Colorado courts use to review administrative permitting decisions by the COGCC and other agencies. The record is to be reviewed in the light most favorable to the agency, and the court is to defer to the COGCC’s findings of fact unless they are unsupported by the evidence or contrary to controlling statutes.⁴³

In this case, the court affirmed a decision by the COGCC to issue permits authorizing a controversial oil and gas project near a school in an urban area in Greeley.⁴⁴ Note, however, that the decision may not be final. Despite judgment in its favor, in August 2019, the COGCC voted five to four to appeal this decision and direct the Colorado Attorney General to file a petition for writ of certiorari urging the Colorado Supreme Court to review the case and decide whether the Colorado Court of Appeals wrongfully concluded the plaintiff public interest groups had standing to challenge its decisions.⁴⁵ It is not yet known whether the plaintiff public interest groups will file their own petition or whether the Colorado Supreme Court will agree to grant a petition for a writ of certiorari and review the decision.

C. Warrantless Administrative Searches by BLM—Maralex Res., Inc. v. Barnhardt

As reported last year, in *Maralex Res., Inc. v. Jewell*,⁴⁶ the District Court for the District of Colorado concluded that federal law authorized warrantless administrative searches on private fee lands on which oil and gas wells were located if, and only if, those wells produced federal minerals from other lands subject to a communization agreement approved and administered by the United States Bureau of Land Management (“BLM”). The district court also concluded such warrantless administrative searches did not violate the Fourth Amendment prohibition against unreasonable searches and seizures, even

42. *Weld Air & Water v. Colo. Oil & Gas Conservation Comm’n*, No. 18CA1147, 2019 COA 86, 2019 WL 2375889 (Colo. App. June 6, 2019) (unpublished decision).

43. *Id.* at *1, *6-7.

44. *Id.* at *7-10.

45. *Id.* at *2-5.

46. 301 F. Supp. 3d 976 (D. Colo. 2017), *rev’d*, 913 F.3d 1189 (10th Cir. 2019).

when the BLM required the fee owner to provide it with keys to locked gates.⁴⁷

In January 2019, the Tenth Circuit Court of Appeals reversed.⁴⁸ At issue was the BLM's enforcement authority pursuant to the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA")⁴⁹ and its implementing regulations.⁵⁰ The Tenth Circuit concluded that section 1718(b) of FOGRMA⁵¹ "does not afford the BLM with authority to inspect lease sites on privately-owned lands."⁵² But the implementing regulations do, in fact, permit the BLM to conduct such inspections so long as they contact the surface owner:

"[F]or lease sites on privately owned lands, BLM representatives may not independently enter the sites, but must instead seek entry (but do not need to give advance notice) from the operating rights owner or operator and the operating rights owner or operator, as noted, is obligated to allow such entry."⁵³

Here, the BLM did not contemporaneously contact the surface owner, but, instead, overstepped its authority by requiring the fee surface owner to provide it with keys to locked gates in advance of any search.⁵⁴

This decision reaffirms that the BLM does have authority to conduct administrative searches on fee lands when communitized minerals are at issue. However, the BLM must contact the fee owner before entering upon the fee lands and may not demand preapproval by, for instance, asking in advance for duplicate keys to locked gates or asking to install its own locks.

D. Impact of Deed Language on Surface Trespass Claim Against Oil and Gas Operator —Bay v. Anadarko E&P Onshore, LLC

In *Bay v. Anadarko E&P Onshore LLC*,⁵⁵ the United States Court of Appeals for the Tenth Circuit assessed whether text in a deed reserving mineral rights in land affected the standard a trial court should apply when

47. 301 F. Supp. 3d at 980-984.

48. *Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189 (10th Cir. 2019).

49. 30 U.S.C. §§ 1701, 1711–1726 (2012).

50. 43 C.F.R. §§ 3161, 3162, 3163 (2018).

51. 30 U.S.C. § 1718(b) (2012).

52. 913 F.3d at 1201.

53. *Id.* at 1203.

54. *Id.* at 1204.

55. 912 F.3d 1249 (10th Cir. 2019).

assessing Colorado common law⁵⁶ claims for trespass based on excessive surface use by an oil and gas operator.⁵⁷ The reservation in the deed at issue reserved all minerals within and underlying said land, together with the right to prospect for the same, the right of ingress and egress, and “the right to use so much of said land as may be convenient or necessary for the right-of-way to and from such prospect places or mines, and for the convenient and proper operation of such prospect places.”⁵⁸

For many reasons, the Tenth Circuit concluded that the district court below “erred when it interpreted the deed’s language to expand the mineral owner’s rights beyond the common law.”⁵⁹ Colorado common law on trespass through excessive surface use by an oil and gas operator was established in *Gerrity Oil & Gas Corp. v. Magness*.⁶⁰ Gerrity essentially adopted the accommodation doctrine in Colorado by which surface and mineral owners must reasonably accommodate each other’s rights to exercise their rights of use.⁶¹ The Court concluded the “convenient and necessary” text in the deed was not specific enough to demonstrate an intent and agreement to overturn these common law standards and provide the mineral owner with more expansive rights.⁶² Accordingly, the mineral owner’s rights to use the surface were limited to those afforded by common law.⁶³

56. *Id.*; See also COLO. REV. STAT. § 34-60-127 (providing surface owners with a statutory remedy for excessive surface use).

57. *Maralex Res., Inc.*, 912 F.3d at 1252.

58. *Id.*

59. *Id.* at 1258.

60. 946 P.2d 913, 927 (Colo. 1997).

61. *Id.*

62. *Bay*, 912 F.3d at 1257-61.

63. *Id.*