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I. Introduction

Last year’s article discussed the Colorado General Assembly’s passage of Senate Bill 19-181 which fundamentally altered oil and gas law and regulation in Colorado. While there were no significant legislative enactments during the examination period of this year’s article, rulemakings mandated and contemplated by Senate Bill 19-181 have occurred and remain in progress. Two cases with the potential to materially affect oil and gas ownership and operations were also decided.

II. Legislative and Regulatory Developments

A. State Legislative Developments

Two bills affecting the oil and gas industry were introduced in the House of Representatives during the 2020 Regular Session of the Colorado General Assembly. House Bill 20-1126 proposed to repeal the authority of the Director of the Colorado Oil and Gas Conservation Commission (“COGCC”) to delay final determination of oil and gas permit applications, and replace the same with a mandate that the Director approve such applications that have been approved by a local government with “House Bill 1041 authority.”¹ House Bill 20-1018 would have added Colorado Revised Statutes § 40-2-124.5, requiring the Public Utilities Commission to adopt a rule no later than July 31, 2021 obligating small and large natural gas utilities to implement “renewable natural gas” programs.² Both of

1. 72nd Colorado General Assembly, Second Regular Session, House Bill 20-1126, available at https://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a_1126_01.pdf.

2. *Id.* at House Bill 20-1018, available at https://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a_1018_01.pdf.

these bills remain indefinitely postponed in the House Committee on Energy & Environment.

B. State Regulatory Developments

Three rulemakings have been undertaken during the examination period of this article. The Flowline and Wellbore Integrity Rulemakings were heard and approved by the former nine-member volunteer COGCC. A third ongoing joint rulemaking is being undertaken by the new COGCC staffed by full-time paid commissioners.

This transition has been explained by the COGCC itself as follows: “Another fundamental change enacted by Senate Bill 19-181 is a transition to a Commission staffed by five full-time professionals. Previously, the Commission was a nine-member volunteer body that meets periodically. Senate Bill 19-181 made several structural changes to the Commission. The Professional Commission provisions of Senate Bill 19-181 became effective on July 1, 2020.”³

1. Flowline Rulemaking

As explained in Colorado Revised Statutes § 34-60-106(19), Senate Bill 19-181 required the COGCC to “review and amend its flowline and inactive, temporarily abandoned, and shut-in wells rules” by, among other things, setting new standards for when “a deactivated flowline must be inspected before being reactivated” and when “inactive, temporarily abandoned, and shut in wells must be inspected before being put into production or used for injection.”⁴ Final Flowline Rules were adopted by the COGCC on November 21, 2019.⁵ Amendments were made to the 100 Series Rules and Rules 215, 316C, 326, 333, 610, 711, 712, 713, 906 and the 1100 Series Rules.⁶

The new rules require Geographic Information System data to be obtained and made available for all off-location flowlines and crude oil transfer lines, advance notice from an operator to the COGCC when inactive flowlines or temporarily abandoned or shut-in wells are returned to

3. Draft Proposed Statement of Basis, Specific Statutory Authority, and Purpose, COGCC Cause No. 1R, Docket No. 200300071 at 4-5, https://drive.google.com/drive/folders/1v2LFzNW44nrUUM5G3_f8KwBSn_pCGG5B (Aug. 20, 2020).

4. §§ 34-60-106(19)(a), 34-60-106(19)(b), Colo. Rev. Stat.

5. Statement of Basis, Specific Statutory Authority, and Purpose, COGCC Cause No. 1R, Docket No. 191100692 at 1, <https://drive.google.com/drive/folders/1sQ2eQnzb8fzp5pai6a-npkS7FOVH-cVJ>.

6. *Id* at 2.

service and third party verification for lines abandoned in place.⁷ Many new technical standards and reporting requirements also were adopted.⁸ The amendments are intended to provide the COGCC with better location data and more information about each line's integrity throughout its lifetime and after abandonment.⁹ The adopted Flowline Rules became effective 20 days after publication in the Colorado Register.¹⁰

2. Wellbore Integrity Rulemaking

Senate Bill 19-181 also required the COGCC to review all aspects of oil and gas well permitting, construction, operation and abandonment for the purpose of promulgating new rules to “ensure proper wellbore integrity of all oil and gas production wells.”¹¹ The COGCC adopted final Wellbore Integrity Rules on June 10, 2020.¹² Amendments or additions were made to the 100 Series Rules and Rules 201, 207, 209, 301, 303, 308A, 308B, 311, 314, 316C, 317, 319, 321, 341, 603 and 608.¹³

The amendments and additions changed the COGCC's Rules in five primary ways: (1) by updating the requirements for Bradenhead monitoring and testing; (2) by improving casing and other requirements for isolating groundwater from oil, gas and produced water; (3) by establishing new rules for isolating and protecting offset oil and gas wells from subsurface forces associated with hydraulic fracturing and well stimulation; (4) by adopting new best practices for blowout preventer systems; and (5) by mandating updated and new standards for well plugging and abandonment.¹⁴ The adopted Wellbore Integrity Rules will become effective on November 2, 2020.¹⁵

3. Mission Change, Cumulative Impacts and Alternative Location Analysis Rulemakings

Finally, Senate Bill 19-181 also directed the COGCC to conduct rulemakings to address three other issues: (1) the mission change; (2) the

7. *Id.*

8. *Id.* at 2-17.

9. *Id.* at 3.

10. *Id.* at 25.

11. § 34-60-106(18), Colo. Rev. Stat.

12. Statement of Basis, Specific Statutory Authority, and Purpose, COGCC Cause No. 1R, Docket No. 191200754 at 3, https://drive.google.com/drive/folders/1SDSdBd92ADHz80XuAefEZrM2XUs_e18m.

13. *Id.* at 4.

14. *Id.* at 5-6.

15. *Id.* at 25.

potential cumulative impacts of oil and gas development; and (3) the adoption of more specific criteria and processes for determining where oil and gas wells and facilities should be located and operated.¹⁶ This joint rulemaking is ongoing and at the time of writing this article was scheduled to be completed during the late summer and fall of 2020, with the new rules to become effective on December 1, 2020.¹⁷ As presently proposed, the rulemakings promise to amend, restructure, replace or renumber many, if not most, of the present COGCC rules as well as add new rules and processes.¹⁸

As explained in the most recent draft Statement of Basis and Purpose issued by the COGCC, this comprehensive rulemaking aims to implement two fundamental changes adopted by the Colorado General Assembly in Senate Bill 19-181. First, as amended, the Oil and Gas Conservation Act has enhanced the COGCC's regulatory mission and now directs the COGCC to "[r]egulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, and welfare, including the protection of the environment and wildlife resources."¹⁹ Second, "Senate Bill 19-181 substantially revised the rule local governments play in regulating the siting and surface impacts of oil and gas facilities."²⁰ Through this rulemaking, the COGCC seeks to implement "Senate Bill 19-181's framework of co-equal, independent siting authority for both the [COGCC] and a local government."²¹

C. Ballot Initiative Developments

Past articles have addressed a variety of ballot initiatives affecting the oil and gas industry in Colorado. Several ballot initiatives were proposed for inclusion on the 2020 ballot, nine of which were officially titled; however, all oil and gas related initiatives have expired and will not appear on the ballot due to a pledge by Governor Jared Polis, joined by the Colorado General Assembly, to "actively oppose ballot initiatives related to oil and

16. §§ 34-60-102.5(a), 34-60-104(1)(b), 34-60-104.3(5), 34-60-106(1)(a)(I), 34-60-106(1)(f), Colo. Rev. Stat.

17. Draft Proposed Statement of Basis, Specific Statutory Authority, and Purpose, COGCC Cause No. 1R, Docket No. 200300071 at 1, 12, https://drive.google.com/drive/folders/1v2LFzNW44nrUUM5G3_f8KwBSn_pCGG5B (Aug. 20, 2020).

18. *Id.* at 11-186.

19. *Id.* at 2 (quoting § 34-60-106(1)(a)(I), Colo. Rev. Stat.)

20. *Id.* at 3.

21. *Id.* at 4.

gas extraction in 2020 and 2022 from both sides.”²² Specifically, Governor Polis announced that he had conversations with representatives from the oil and gas industry and environmental groups, and both have agreed to allow Senate Bill 19-181, and the regulations contemplated therein, “to be fully and effectively implemented as envisioned by the sponsors and the administration before pursuing additional significant regulatory legislative actions.”²³

III. Judicial Developments

A. Interpretation of Mineral Reservation – *Moeller v. Ferrari Energy, LLC*

In *Moeller v. Ferrari Energy, LLC*,²⁴ the Colorado court of appeals considered the effect of a mineral reservation in a deed. The relevant facts are as follows: Russell and Velma Burns conveyed certain real property to Ruth Todd in 1954, reserving “one-half of all oil, gas and minerals on and under said land”²⁵ (the “Burns Reservation”). Todd subsequently conveyed the property to Glenn and Sally Wilson in 1960, subject only to the Burns Reservation.²⁶ The Wilsons then sold the property to Pete and Mary Katzdorn in 1964, “excepting and reserving to the Grantors herein an undivided 1/2 interest in and to all the oil, gas and minerals in, upon and under said land”²⁷ (the “Wilson Reservation”). Eventually, the Moellers acquired title from the Katzdorns without any new reservations;²⁸ Ferrari Energy, LLC (“Ferrari”) acquired the interest reserved to the Wilsons in the Wilson Reservation.²⁹

The court considered the scope and effect of the Wilson Reservation – whether it reserved a total one-half mineral interest (*i.e.* the interest previously reserved in the Burns Reservation) and therefore conveyed one-half mineral interest to the grantee (leaving the Wilsons with no mineral interest), or whether it reserved a one-half mineral interest to the Wilsons together with the Burns Reservation and therefore did not convey any

22. Colorado Politics, “Give pivotal new oil & gas law a chance to work,” available at https://www.coloradopolitics.com/opinion/give-pivotal-new-oil-gas-law-a-chance-to-work/article_8eb26b64-cd67-11ea-9565-d790872378e8.html (July 24, 2020)

23. *Id.*

24. 2020 COA 113, ___ P.3d ___, 2020 WL 4211739 (Colo. Ct. App. 2020).

25. *Id.* at ¶ 6.

26. *Id.* at ¶ 7.

27. *Id.*

28. *Id.* at ¶ 8.

29. *Id.* at ¶ 8, ¶ 9.

mineral interest to the grantee.³⁰ The district court found that the Wilson Reservation unambiguously reserved a one-half mineral interest to the Wilsons (predecessors to Ferrari), and therefore, the Moellers acquired no mineral interest.³¹

The court of appeals reversed and quieted title in the Moellers.³² In reaching this result, the court found that the deed containing the Wilson Reservation was ambiguous due to the aforesaid two possible interpretations, and thus, considered extrinsic evidence in an effort to ascertain the parties' intent,³³ however, the extrinsic evidence presented (subsequent leasing behavior by both sides) was not dispositive of intent.³⁴ In the absence of intent, the court relied on the general rules of construction of written instruments and construed the deed against the grantor (Ferrari's predecessor).³⁵ This outcome was consistent with Colorado precedent under *Brown v. Kirk*³⁶ and *O'Brien v. Village Land Co.*³⁷

B. Statutory Pooling in Colorado – Wildgrass Oil and Gas Comm. v. Colorado

In *Wildgrass Oil and Gas Comm. v. Colorado*,³⁸ the United States District Court for the District of Colorado rejected challenges to the constitutionality of statutory pooling in Colorado. The district court opinion addressed consequential arguments often raised by persons challenging efforts to invoke Colorado's statutory pooling process. The case is now on appeal³⁹ and, if the appeal proceeds to decision, the United States Court of Appeals for the Tenth Circuit may soon have an opportunity to address these controversial issues.

The case arose when an association of neighbors filed a complaint asserting constitutional challenges to an administrative order of the COGCC⁴⁰ pooling the interests of all mineral owners and their lessees within a defined drilling and spacing unit in Broomfield, Colorado. The

30. *Id.* at ¶ 17.

31. *Id.* at ¶ 2.

32. *Id.* at ¶ 29.

33. *Id.* at ¶ 26.

34. *Id.* at ¶ 28.

35. *Id.*

36. 127 Colo. 453, 257 P.2d 1045 (1953).

37. 794 P.2d 246 (Colo. 1990).

38. ___ F. Supp.3d ___, 2020 WL 1289559 (D. Colo. Mar. 18, 2020) (appeal pending).

39. No. 20-1151.

40. The COGCC is the state agency authorized to regulate downhole oil and gas operations in Colorado. *E.g.*, §§ 34-60-105, 34-60-106, Colo. Rev. Stat.

administrative order of the COGCC, issued pursuant to Colorado Revised Statutes § 34-60-116, provides as follows:

Th[is] statutory provision creates a process through which private entities can apply to pool the interests of a group of mineral owners. This process was intended to allow for more efficient oil and gas drilling by decreasing waste and avoiding drilling of unnecessary wells. . . . Once a drilling unit has been established, operators may extract oil and gas and the proceeds from the venture are divided among the well operator and the pooled mineral owners according to the statutory compensation scheme.⁴¹

The compensation scheme adopted in Colorado's pooling statute encourages mineral owners and their lessees to "pool" their interests and work together to efficiently develop drilling and spacing units established by order of the COGCC.

Owners of the relevant interests may participate in pooling voluntarily, or operators may apply to the COGCC for permission to 'force pool' non-consenting owners. . . . Once the [mineral owner or lessee designated as] the operator is granted authority to force pool, mineral owners who do not lease their rights are considered non-consenting and subject to force pooling.

In addition to permitting operators to extract non-consenting owners' minerals, force pooling also imposes other consequences: Operators may recover one hundred percent of the non-consenting owners' share of [surface] equipment and operation expenses, as well as two hundred percent of some [downhole] preparation and equipment costs. After these costs are recovered, the non-consenting owners become working interest owners.⁴²

The Court began its analysis by rejecting a number of procedural challenges to the neighbors' standing and its own jurisdiction.⁴³ The Court

41. *Id.* at *1 (citation omitted).

42. No. 19-cv-00190, 2020 WL 1289559 (D. Colo. Mar. 18, 2020) (appeal pending) at *2 (citation omitted).

43. The Court determined that the neighbors have standing and their claims are ripe for decision; they do not raise nonjusticiable political questions and are not barred by the Eleventh Amendment. *Id.* at *3-*9.

then addressed the merits of the neighbors' claims by concluding those claims failed to state a cognizable claim under Federal Rule of Civil Procedure 12(b)(6).

The neighbors alleged two First Amendment claims, arguing that "forced pooling requires non-consenting owners to 'associate' with oil and gas companies" and "that forced pooling compels them to 'subsidize private speech' of oil and gas companies."⁴⁴ After reviewing legal authority cited by the neighbors, the Court concluded that "the statute does not compel association nor subsidization of private speech."⁴⁵

The neighbors also claimed Colorado's statutory pooling process denied them due process "because (a) it forces them to associate with oil and gas operators, (b) it is unreasonably vague, and (c) it constitutes a taking for purely private use."⁴⁶ The Court rejected each claim. It began by concluding that, "[l]ike their First Amendment freedom of association claim, Wildgrass fails to show that forced pooling forces them to associate for an impermissible reason, such as for an expressive purpose with which they disagree."⁴⁷ The Court next concluded it would abstain from addressing the neighbors' vagueness and other procedural due process claims for the reasons expressed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), a doctrine applied by federal courts to protect complex state administrative processes from undue federal influence.⁴⁸ The Court completed its due process analysis by determining that, although "Wildgrass has shown the existence of a property interest, it has not shown that the taking of such property does not serve a public purpose."⁴⁹

Finally, the Court rejected the neighbors' contention "that the forced pooling statute violates the Contracts Clause because it does not require mutual consent and creates an involuntary contract."⁵⁰ Relying on Colorado precedent,⁵¹ the Court concluded that no contract exists between operators and non-consenting owners force pooled under § 34-60-116, Colo. Rev. Stat. Thus, Colorado's exercise of its police powers through its

44. *Id.* at *9.

45. *Id.* at *11.

46. *Id.*

47. *Id.*

48. *Id.* at *12.

49. *Id.* at *13.

50. *Id.*

51. *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*, 409 P.3d 637, 643 (Colo. App. 2016).

adoption of the statutory pooling process does not violate the Contracts Clause.⁵²

52. *Id.* at *14.