Oil and Gas, Natural Resources, and Energy Journal

Volume 7 | Number 2
The 2021 Survey on Oil & Gas

December 2021

Colorado

Diana S. Prulhiere

David R. Little

Recommended Citation
Diana S. Prulhiere & David R. Little, *Colorado*, 7 OIL & GAS, NAT. RESOURCES & ENERGY J. 297 (2021), https://digitalcommons.law.ou.edu/onej/vol7/iss2/4

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 7 NUMBER 2

COLORADO

Diana S. Prulhiere and David R. Little[*]

Table of Contents

* Diana S. Prulhiere is a member attorney with Steptoe & Johnson PLLC in the Denver, Colorado office. She is licensed in Colorado, Oklahoma, Pennsylvania, and West Virginia and concentrates her practice in the areas of energy and natural resources title and transactions. David R. Little is a member attorney with Steptoe & Johnson PLLC in the Denver, Colorado office. He is licensed in Colorado and concentrates his practice in the areas of commercial and oil and gas litigation and contracts.

I. Introduction

There were no major legislative developments affecting the oil and gas industry in Colorado during the examination of this year's article; however, the Colorado Oil and Gas Conservation Commission (COGCC) continued the process of amending its existing rules and promulgating new rules to implement the legislative directives of Senate Bill 19-181 (passed in 2019), which fundamentally altered oil and gas law and regulation in Colorado.[1] Relatedly, local jurisdictions have begun entering into agreements and amending their oil and gas codes under the revised authority granted to them by said bill to address more surface impacts associated with the siting of oil and gas locations in their jurisdictions. Additionally, three published cases affecting oil and gas leaseholds were decided by appellate courts in Colorado, and an unpublished opinion was also issued in an appeal of a federal district court decision addressing statutory pooling.

II. Legislative and Regulatory Developments

A. State Legislative Developments

There were no major legislative enactments affecting the oil and gas industry during the examination period of this article. One bill of note – Senate Bill 21-108 – was proposed in the 2021 Regular Session of the Colorado General Assembly which pertained to gas pipeline safety.[2] Specifically, this bill clarified the Public Utility Commission's authority to "collaborate with the United States department of transportation (DOT) on

---

1. Colorado General Assembly, 2019 Regular Session, Senate Bill 19-181, available at https://leg.colorado.gov/sites/default/files/2019a_181_signed.pdf. *See also*, Diana S. Prulhiere & David R. Little, *Colorado*, 6 OIL & GAS, NAT. RESOURCES & ENERGY J. 109 (2020).

2. Colorado General Assembly, 2021 Regular Session, Senate Bill 21-108, available at https://leg.colorado.gov/bills/sb21-108.

pipeline safety issues" and increased penalties for safety violations.[3] The Governor signed Senate Bill 21-108 into law on July 6, 2021.[4] An additional bill – House Bill 21-1238 – was signed into law on June 24, 2021 which "update[d] the methods used to determine the cost-effectiveness of demand-side management (DSM) programs of public utilities selling natural gas at retail."[5]

B. State Regulatory Developments

As noted above, in 2019, the Colorado General Assembly passed Senate Bill 19-181.[6] This legislation directed the Colorado Oil and Gas Conservation Commission to undertake a series of rulemakings addressing, among other things, its new statutory mission to protect public health, safety, welfare, the environment and wildlife resources, more comprehensively assess the cumulative impacts of oil and gas development and adopt more specific criteria and processes for determining where oil and gas wells and facilities should be located and operated.[7] The COGCC began this rulemaking process in 2019, continued it during the first half of 2020 and concluded it during the time frame addressed in this article.[8]

Rules amended or enacted anew as a result of rulemaking by the COGCC during the latter part of 2020 included COGCC rules addressing the processes for siting and permitting new wells, operating oil and gas wells and granting variances from COGCC rules, implementing new requirements for applications requesting orders from the COGCC and new rules relating to enforcement of COGCC rules, amending existing rules pertaining to well safety, underground injection and enhanced recovery operations, and updating existing rules regarding environmental standards and the protection of wildlife.[9] Key changes, per a COGCC press release dated November 23, 2020,[10] also included the following:

---

3. *Id.*

4. *Id.*

5. Colorado General Assembly, 2021 Regular Session, House Bill 21-1238, available at https://leg.colorado.gov/bills/hb21-1238.

6. See footnote 2.

7. §§ 34-60-102.5(a), 34-60-104(1)(b), 34-60-104.3(5), 34-60-106(1)(f), Colo. Rev. Stat.

8. A list of the various rulemakings and links to the new rules, redlines showing the text added or amended and Statements of Basis and Purpose related to each rulemaking are available at https://cogcc.state.co.us/hearings.html#/rulemaking.

9. *Id.*

10. "Colorado Oil & Gas Conservation Commission Unanimously Adopts SB 19-181 new Mission Change Rules, Alternative location Analysis and Cumulative Impacts,"

Public Participation:

- Create broader access to the COGCC.
- Expand standing to allow citizens the ability to participate in hearings, permits applications, and requests from operators for a variance or waiver from a rule.

Increased Protections for Public Health, Safety, Welfare, Wildlife and Environmental Resources:

- Incentivize comprehensive landscape-level planning through the permitting process.
- Create a solidified one permit process rather than the current multi-step process.
- Transfer the permitting authority from administrative approvals by the Commission's Staff to the Commissioners through a public hearing, which increases transparency and public participation.
- Establish new regulatory relationships with local governments, which includes COGCC involvement early on in local permitting and siting processes and includes recognition that operators must comply with the most protective regulations.
- Ensure environmental justice for disproportionately impacted communities and allow them to be involved in the permit process. These are Colorado's first ever rules to be adopted that incorporate environmental justice as a consideration in facility siting.
- Create a first-of-kind Cumulative Impacts data gathering system with an annual reporting requirement to the public for transparency.
- Establish protective setbacks for oil and gas development from residential building units, schools, and high priority habitat, including riparian areas.

---

available at http://cogcc.state.co.us/documents/media/Press_Release_Mission_Change_Vote_20201123.pdf.

- End routine flaring and venting.
- Increase protections for wildlife management.
- Increased protections for water resources.[11]

C. Noteworthy Local Rules

Senate Bill 19-181 also expressly authorized local governments in Colorado, within their respective jurisdictions, to regulate "the surface impacts of oil and gas operations in a reasonable manner . . . to protect and minimize adverse impacts to public health, safety, and welfare and the environment" insofar as those oil and gas operations impact, among other things, land use, the siting of oil and gas facilities and locations, water quality, noise, vibration, odor, light, dust, air emissions, air quality, reclamation, emergency preparedness, security, traffic and "all other nuisance-type effects of oil and gas development."[12]

Local governments have begun to act on this new authority. As one example, on April 28, 2021, the COGCC and Weld County entered into an Amended Memorandum of Understanding.[13] Shortly after Senate Bill 19-181 was passed in 2019, "Weld County's 1041 Oil and Gas Location Assessment ('1041 WOGLA') permitting process regulations became effective August 5, 2019. That same day, Weld County created and staffed the Weld County Oil and Gas Energy Department . . . to oversee the 1041 WOGLA permitting process."[14] The new Amended Memorandum details how the COGCC and Weld County will work together to facilitate more efficient state and local permitting.[15]

---

11. *Id*. Present and past COGCC rules are available at https://cogcc.state.co.us/reg.html#/rules.

12. § 29-20-104(1)(h), Colo. Rev. Stat.; see also footnote 1 for a citation to Senate Bill 19-181.

13. Amended Memorandum of Understanding for Coordination of Certain Procedures Between Weld County's 1041 WOGLA Permitting and the Colorado Oil and Gas Conservation Commission's Oil and Gas Development Plan and Comprehensive Area Plan Permitting Processes, available at https://cogcc.state.co.us/documents/gov/local/Weld_County_MOU_2021-428.pdf.

14. *Id*. at 1.

15. *Id*. at 1-6.

III. Judicial Developments

A. Royalties Due to Life Tenant – Hess v. Hobart

In Hess v. Hobart,[16] the Colorado court of appeals considered the allocation of royalty payments due under an oil and gas lease between the life tenant and the remainderman. Hobart conveyed a certain tract of land to the Hesses by warranty deed, containing the following reservation: "'except grantor [Hobart] reserves a life estate in all mineral rights on the property including but not limited to all oil, gas, hydrocarbons and any other minerals.'"[17] After the deed, Hobart entered into a number of oil and gas leases, some of which the Hesses ultimately ratified, but others which the Hesses did not; a particular lease known as the Bur Oak lease, which the Hesses did not ratify, was the lease at issue in this case.[18] Specifically, the Hesses brought multiple claims against Hobart with respect to the Bur Oak lease, including breach of fiduciary duty and contract, and sought a declaratory judgment to, among other things, clarify their rights in said lease.[19]

The district court dismissed the Hesses' claims, finding that the deed unambiguously reserved a life estate in all mineral rights to Hobart and that "'[t]here is no question of whether … oil and gas are minerals, whether development is a mineral right, or whether 'all' means less than all.'"[20] Accordingly, the district court held that Hobart could do whatever she chose with the minerals, including lease them, and she "was not required to seek the Hesses' [prior] consent."[21]

On appeal, the Hesses alleged that the district court's dismissal was improper because the court disregarded their rights under the open mines doctrine and the uniform principle and income act ("UPIA").[22] Hobart contended that the dismissal was proper and that neither the open mines doctrine nor the UPIA applied.[23]

The court of appeals ultimately agreed with Hobart and found that the district court's dismissal was proper.[24] The court identified that "the open

16. 477 P.3d 771, 2020 COA 139M2 (Colo. App. 2020).
17. *Id*. at ¶ 3 (emphasis added).
18. *Id*. at ¶¶ 4, 6.
19. *Id*. at ¶ 6.
20. *Id*. at 7.
21. *Id*.
22. *Id*. at ¶ 8.
23. *Id*. at ¶ 9.
24. *Id*. at ¶¶ 2, 32, 39.

mines doctrine applies only when a lease is created before the creating of the life estate," and since that was not the factual scenario at issue, the open mines doctrine did not apply.[25] Similarly, the court said that the UPIA was not applicable because the same "applies only in the context of wills, trusts, and estates."[26] Additionally, the court held that the common practice of dividing royalties among life tenants and remainderman was irrelevant because, while the parties here did not enter into a separate agreement regarding the division of royalties, the plain language of their contract would control.[27] And while it is true that "the life tenant must not waste" the corpus of the mineral estate for the remainderman, the parties can alter that rule and it appears that is what occurred here since "there was no agreement that 'all mineral rights' would mean something less than all."[28] Consequently, the court concluded that Hobart had "unambiguously reserved a life estate in 'all mineral rights,'" and those rights include "the right to produce minerals without the consent of the Hesses and to retain all income from them."[29] As such, the district court's dismissal was proper.[30]

B. Production and Lease Termination – Board of County Commissioners of Boulder County v. Crestone Peak Resources Operating LLC

In Board of County Commissioners of Boulder County v. Crestone Peak Resources Operating LLC,[31] the court of appeals considered what the term "production" requires in the context of an oil and gas lease habendum clause. This case concerned two oil and gas leases under which Boulder County was the current lessor, and defendant, Crestone Peak, was the current lessee. The leases each contained three common provisions relevant to the court's decision. First, the habendum clauses provided that the leases would be extended beyond their primary terms as long as oil and/or gas were "produced from" the land or the premises were being operated by the lessee.[32] Second, the cessation (or continuous drilling operations) clauses provided that the leases would remain in effect despite temporary pauses in

25. *Id*. at ¶ 15.
26. *Id*. at ¶ 16.
27. *Id*. at ¶¶ 22, 27.
28. *Id*. at ¶ 31.
29. *Id*. at ¶ 18. *See also, id.* at ¶ 10 ("the broad language ['a life estate in all mineral rights'] does not contemplate any surrender of those rights to the Hesses, or any sharing of income with the Hesses that Hobart receives from minerals during her life").
30. *Id*. at ¶¶ 2, 32, 39.
31. 2021 WL 1916380, 2021 COA 67 (Colo. Ct. 2021).
32. *Id*. at ¶¶ 3-4.

operations so long as operations resumed within either 60 days in the case of one lease or 90 days in the case of the other lease.[33] Third, both leases contained provisions providing for the payment of shut-in royalties.[34]

The leases were extended beyond their primary terms and held by steady production from multiple wells until early 2014.[35] At that time, the lessee paused production from the leases for 122 days to allow its downstream purchaser to conduct pipeline maintenance.[36] The lessee regularly worked on the leases during this time, and soon resumed paying production from the wells, which then continued for years including during the pendency of the lawsuit.[37] Boulder County continued to accept royalty payments under the leases,[38] but in 2019 it filed a claim seeking termination of the leases on the grounds that both had expired due to the lapse in production back in 2014.[39]

The question that came before the district court, and subsequently the court of appeals, was essentially what does "production" mean?[40] The district court granted summary judgment motions on each lease in favor of the operator, agreeing with its position that the 2014 "temporary extraction pause did not constitute a cessation of production under either lease."[41] Boulder County appealed and the court of appeals also found in favor of the operator.[42]

Specifically, the court adopted and applied previous appellate court precedent and held that "production mean[s] capable of production"[43] and that the leases' habendum clauses therefore required only "discovery in commercial quantities."[44] The court explained that not only did equitable policies justify the 'commercial discovery rule,' but the rule's principles were supported by the relevant lease terms here because if the court were to adopt the interpretation proffered by Boulder County – that production under the habendum clause required the continuous extraction of minerals – then the leases' cessation and shut-in clauses would be rendered

33. *Id*. at ¶ 5.
34. *Id*. at ¶ 6.
35. *Id*. at ¶¶ 7, 10.
36. *Id*. at ¶ 10.
37. *Id*. at ¶ 11.
38. *Id*.
39. *Id*. at ¶ 12.
40. *Id*. at ¶ 20.
41. *Id*. at ¶ 13.
42. *Id*. at ¶¶ 38-41.
43. *Id*. at ¶¶ 22, 25 (emphasis added).
44. *Id*. at ¶ 38.

meaningless (e.g. the leases would have terminated upon any brief delay in operations, regardless of if/when the lessee resumed operations, and regardless of whether the lessee timely made shut-in payments).[45]

C. Oil and Gas Leasehold Taxation – CO_2 Committee, Inc. v. Montezuma County

The court of appeals considered whether nonoperating, fractional interest owners had standing to challenge a retroactive increase in oil and gas leasehold taxes in CO_2 Committee, Inc. v. Montezuma County.[46] CO_2 Committee, Inc. (CO_2), the Plaintiff in this case, was a nonprofit corporation comprised of certain members who owned nonoperating fractional interests in a unit and who paid real estate taxes to Montezuma County.[47] In short, as required by statute, the county had communicated the tax increase with the unit operator, who was obligated to collect and remit tax payments on behalf of the nonoperating owners.[48]

CO_2 filed a complaint on behalf of its members alleging that the county "violated its members' due process rights by failing to provide each member with individual notice of and an opportunity to challenge" the retroactive increase in taxes or seek an abatement therefrom.[49] The district court dismissed CO_2's complaint, finding that they did not have standing "because the statutory scheme governing oil and gas taxation . . . require[s] Montezuma County to interact only with the unit operator."[50]

On review, the court of appeals confirmed that to have standing in Colorado a "plaintiff must have (1) suffered injury in fact (2) to a legally protected interest."[51] They ultimately held that CO_2 suffered an injury in fact in the form of "denial of due process and an economic loss."[52] As to their legally protected interest, the court identified that, despite the statutory requirements for the unit operator to collect and pay taxes for other owners, each "nonoperating fractional interest owner remains liable for and must

45. *Id*. at ¶¶ 25-30.
46. 2021 WL 103879, 2021 COA 36M (Colo. Ct.. 2021).
47. *Id*. at ¶ 2.
48. *See id*. at ¶¶ 28-30. *See also*, C.R.S. § 39-7-101(1) which requires the assessor to send notice of valuation of oil and gas property "only to the operator, who shall accept it"; *see also*, C.R.S. § 39-10-106(2) which states that the unit operator is obligated to collect and remit taxes on behalf of each fractional interest owner.
49. *Id*. at ¶¶ 3, 18.
50. *Id*. at ¶ 19.
51. *Id*. at ¶¶ 24, 30.
52. *Id*. at ¶ 34.

pay its proportionate share of the taxes" if the unit operator failed to pay.[53] Moreover, other statutes vest the rights to "audit, protest, abatement and appeal" in the "'taxpayer,' 'property owner' and 'person'," terms which would include the owners of fractional nonoperating interests.[54] Consequently, the court said that if the statutes do not clearly vest audit, protest, abatement and appeal rights exclusively in the unit operator, "we must conclude that nonoperating fractional interest owners who pay taxes maintain such rights and have standing to sue to enforce them."[55]

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

As previously reported, on March 18, 2020, the United States District Court for the District of Colorado rejected a series of challenges to Colorado's statutory pooling process[56] based on, among other things, substantive due process and the First Amendment, Takings Clause and Contracts Clause of the United States Constitution.[57] The district court also abstained from deciding Wildgrass' procedural due process claims.[58]

In a decision not selected for publication that was filed on February 1, 2021, the Tenth Circuit affirmed the district court's decision to abstain from addressing Wildgrass' procedural due process claims,[59] concluding that Wildgrass had "not exhausted state court remedies for its procedural due process claim" and its other contentions concerning whether the COGCC had properly applied its governing statute.[60] The Tenth Circuit panel agreed with the district court that addressing these issues on this record in federal court would risk "creating 'needless friction with state policies' and disrupting the [COGCC's] longstanding methods of applying its own statute."[61] As a result, the district court's opinion issued in 2020 remains an important precedent upholding Colorado's statutory pooling process.

---

53. *Id*. at ¶ 53. *See also*, § 39-10-106(4)(a), Colo. Rev. Stat., which provides that if the unit operator fails to collect and pay taxes, the treasurer may use "lawful collection and enforcement remedies and procedures against the owner of any fractional interest."

54. *Id*.

55. *Id*.

56. § 34-60-116, Colo. Rev. Stat.

57. *Wildgrass Oil and Gas Comm. v. Colorado*, 447 F. Supp.3d 1051, 1059-71 (D. Colo. 2020).

58. *Id*. at 1065-66.

59. *Wildgrass Oil and Gas Comm. v. Colorado*, 843 Fed. Appx. 120 (10th Cir. Feb. 1, 2021).

60. *Id*. at 123.

61. *Id*. (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943)).