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I. Introduction

During this reporting period, the 2022 Colorado General Assembly enacted four statutes addressing issues materially affecting oil and gas operations in Colorado. Two rulemakings by the Colorado Oil and Gas Conservation Commission (“COGCC”) also resulted in new rules impacting oil and gas operators. Only two significant published opinions during this reporting period – one state and one federal – addressed material issues of oil and gas law in Colorado. But other pending cases and several orders and unpublished decisions – three cases in which the Colorado Supreme Court granted petitions for writ of certiorari and three unpublished federal district court decisions addressing issues of federal law – may come to materially affect oil and gas operations in Colorado as well.

II. Legislative and Regulatory Developments

A. State Legislative Developments

1. House Bill 22-1348 – Additional Oversight of Chemicals Used in Oil and Gas

The COGCC has enacted rules in recent years that require companies operating oil and gas wells or providing hydraulic fracturing services in Colorado to maintain a chemical inventory of the chemical products they use or store at oil and gas locations,¹ to post information about the chemicals used in hydraulic fracturing fluids on the Chemical Disclosure Registry,² and to refrain from using certain chemicals as additives in hydraulic fracturing fluid.³ In 2022, the legislature concluded that these COGCC Rules are insufficient.

Governor Polis signed House Bill 22-1348 which became effective on June 8, 2022.⁴ The Bill amends the Colorado Oil and Gas Conservation Act to add new requirements that further disclosure, collection, and distribution of additional information about chemicals used in oil and gas operations.⁵ The General Assembly made the following findings and determinations during its passage of HB 22-1348:

[w]hile Colorado requires the reporting of certain chemical information for products that are used in hydraulic fracturing (fracking) operations for input into a third-party database, there are broad exemptions allowed for chemical information that is deemed proprietary or confidential by the operator or supplier of a product. . . . As a result of the amount of trade secrecy claims and the operators' and suppliers' lack of knowledge of specific chemical information, information about chemical additives that are used in fracking operations in the state is vastly underreported. . . . Greater transparency regarding chemical use in oil and gas production is urgently needed⁶

1. 2 Colo. Code Reg. 404-1:206, 404-1:208, available at <https://cogcc.state.co.us/reg.html#/rules>.

2. *Id.* at 404-1:208.

3. *Id.* at 404-1:437.

4. H.B. 22-1348, 73rd Gen. Assemb., 2d Reg. Sess. (Colo. 2022) (available at <https://leg.colorado.gov/bills/hb22-1348>).

5. Colo. Rev. Stat. § 34-60-132 (2022).

6. These and other findings and declarations made by the General Assembly when it passed Senate Bill 22-026 are set forth in the Legislative Declaration included in Section 1

House Bill 22-1348 requires that, on and after July 31, 2023, manufacturers and distributors of chemicals used in underground oil and gas operations in Colorado must disclose the trade names of their products, provide certain information about their products' chemical compositions, and explain the intended use for each product.⁷ Companies operating oil and gas wells in Colorado on and after July 31, 2023 will be required to disclose trade names and quantities of the chemical products used downhole in each well.⁸ In addition, as of this same date, manufacturers, distributors, and operators will be required to make written declarations that the chemicals used in downhole operations do not include polyfluoroalkyl (PFAS) chemicals.⁹

Finally, on or before July 31, 2023, the COGCC must begin collecting certain data about chemical use from manufacturers, distributors and oil and gas operators and posting the collected data on a public website in a searchable and downloadable format.¹⁰ In addition, by this same date, the COGCC must promulgate and begin implementing new rules and standards for disclosing this data to government officials, health care professionals, scientists, and researchers at institutions of higher education.¹¹

2. House Bill 22-1361 – Oil and Gas Reporting – State Audit of Oil and Gas Revenues and Emissions

On June 8, 2022, Governor Polis signed House Bill 22-1361.¹² The Bill became effective on July 1, 2022.¹³

In its Legislative Declaration, the General Assembly explained that State audits in 2020 and 2021 “found instances of noncompliance and areas for improvement in oil and gas reporting.”¹⁴ The purpose of House Bill 22-1361 “is to ensure proper reporting related to oil and gas extraction through a performance audit conducted by the state auditor.”¹⁵

of the Signed Act, which may be accessed at Colorado General Assembly, 2022 Regular Session, Senate Bill 22-026, available at <https://leg.colorado.gov/bills/sb22-026>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Colorado General Assembly, 2022 Regular Session, Senate Bill 22-026, available at <https://leg.colorado.gov/bills/hb22-1361>.

13. *Id.*

14. The Legislative Declaration may be found in Section 1 of the Signed Act which may be accessed at Colorado General Assembly, 2022 Regular Session, Senate Bill 22-026, available at <https://leg.colorado.gov/bills/hb22-1361>.

15. *Id.*

House Bill 22-1361 requires the Office of the State Auditor to conduct an audit of certain records filed with the State by a random sample of oil and gas operators and issue a written report to the General Assembly by May 1, 2026.¹⁶ The Office of the State Auditor is to examine and compare COGCC oil and gas production records with Colorado Department of Revenue severance tax withholding and payment records, identify gaps or inconsistencies in reporting, and perform a similar random sample audit and comparison analysis of emissions data reported to the COGCC and collected by the Colorado Department of Public Health and Environment.¹⁷

3. Senate Bill 22-026 – Oil and Gas Operator Property Tax Procedures

On March 30, 2022, Governor Polis signed Senate Bill 22-026.¹⁸ This bill, which became effective upon execution by the Governor,¹⁹ addressed an issue discussed in *CO2 Committee, Inc. v. Montezuma County*, a 2021 decision of the Colorado Court of Appeals.²⁰ The *CO2 Committee, Inc.* opinion was summarized in last year's update.²¹ In 2022, as discussed below, the Colorado Supreme Court granted certiorari to review whether nonoperating fractional owners of oil and gas interests have standing to challenge local tax assessments.²²

In *CO2 Committee, Inc.*, the Colorado Court of Appeals stated that “[a]bsent clear [statutory] language authorizing the unit operator to represent all tax-paying nonoperating fractional interest owners in the review, audit, protest, and abatement procedures, each such taxpayer has standing to assert that its rights in such procedures have been violated.”²³

Senate Bill 22-026 addresses this issue by adding a new statutory subsection²⁴ guiding that “[n]otwithstanding any other provision of law, the partial interests of oil and gas fractional interest owners are not subject to separate valuation by the assessor and shall be represented by the well or unit operator of each wellsite. The well or unit operator is the sole point of contact for all notification, review, audit, protest, abatement, and appeal

16. *Id.*

17. *Id.*

18. Colorado General Assembly, 2022 Regular Session, Senate Bill 22-026, available at <https://leg.colorado.gov/bills/sb22-026>.

19. *Id.*

20. 2021 COA 36M, 491 P.3d 516.

21. Diana S. Prulhiere and David R. Little, COLORADO, 7 Oil & Gas Nat. Resources & Energy 297, 305 (2021).

22. 2022 WL 904627 (Colo. Mar. 21, 2022) (Colo. Sup. Ct. Case No. 2021SC3930).

23. 2021 COA 36M, ¶ 21, 491 P.3d at 529.

24. C.R.S. § 39-7-110(2) (2022).

procedures.”²⁵ This new provision effectively removes any obligation for local governments to conduct detailed title examination aimed at identifying fractional nonoperating oil and gas interest owners.

As of the date of this writing, *CO2 Committee, Inc.* has been briefed by the parties and remains pending in the Colorado Supreme Court, notwithstanding the passage of Senate Bill 22-026.²⁶

4. Senate Bill 22-198 – Establishment of Orphaned Wells Mitigation Enterprise in the Colorado Department of Natural Resources

On June 2, 2022, Governor Polis signed Senate Bill 22-198.²⁷ The Bill became effective on July 1, 2022.²⁸

This legislation establishes a five-member board called the Orphaned Well Mitigation Enterprise (“Enterprise”) within the Department of Natural Resources to administer a fund to be used in consultation with the COGCC to finance the plugging, reclamation, and remediation of orphaned oil and gas wells.²⁹ It will be funded by mitigation fees charged to oil and gas operators and other sources of revenues or funds appropriated or transferred to the Enterprise by the General Assembly.³⁰ The Enterprise is administering the fund in compliance with state tax and revenue limitations embodied in the Colorado Constitution and state statutes.³¹

25. Colorado General Assembly, 2022 Regular Session, Senate Bill 22-026, available at <https://leg.colorado.gov/bills/sb22-026>.

26. Colo. Sup. Ct. Case No. 2021SC3930.

27. Colorado General Assembly, 2022 Regular Session, Senate Bill 22-026, available at <https://leg.colorado.gov/bills/sb22-198>.

28. *Id.*

29. *Id.*

30. *Id.*

31. As explained in Senate Bill 22-198’s legislative declaration, “[s]o long as the enterprise qualifies as an enterprise for purposes of section 20 of article X of the state constitution, the revenue from the mitigation fees collected by the enterprise is not state fiscal year spending, as defined in section 24-77-102(1), Colorado Revised Statutes, or state revenues, as defined in section 24-77-103.6(6)(c), Colorado Revised Statutes, and does not count against either the state fiscal spending limit imposed by section 20 of article X of the state constitution or the excess state revenues cap, as defined in section 24-77-103.6(6)(b)(I)(G), Colorado Revised Statutes.” The Legislative Declaration may be found in Section 1 of the Signed Act which may be accessed at Colorado General Assembly, 2022 Regular Session, Senate Bill 22-026, available at <https://leg.colorado.gov/bills/sb22-198>.

B. State Regulatory Developments

1. COGCC Rule 205.c. – Orphaned Wells Mitigation Enterprise Rulemaking

On June 30, 2022, the COGCC adopted amendments to COGCC Rule 205³² “to make Rule 205.c consistent with [Senate Bill] 22-198,”³³ discussed above. In Rule 205.c, the COGCC “created a new pooled fund to address orphaned wells . . . intended to raise \$10,000,000 in each of the first two years.”³⁴ Among other changes, the rule added two new definitions to the 100 Series of the COGCC Rules³⁵ and amended Rule 205.c.(2) to require payment of mitigation fees to the Orphaned Well Mitigation Enterprise instead of to the COGCC.³⁶

2. COGCC 700 Series Rules – Financial Assurance Rulemaking

In 2019, the General Assembly adopted Senate Bill 19-181.³⁷ One of the new statutory subsections added to the Colorado Oil and Gas Conservation Act in Senate Bill 19-181 was C.R.S. § 34-60-106(13). This subsection provides:

The commission shall require every operator to provide assurance that it is financially capable of fulfilling every obligation imposed by this article 60 as specified in rules adopted on or after April 16, 2019. The rule-making must consider: increasing financial assurance for inactive wells and for wells transferred to a new owner; requiring a financial assurance account, which must remain tied to the well in the event of a transfer of ownership, to be fully funded in the initial years of operation of reach new well to cover future costs to

32. 2 Colo. Code Reg. 404-1:205.

33. 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. 1R, Docket No. 220500106, Orphan Well Mitigation Fee Rulemaking, at 2, available at <https://cogcc.state.co.us/hearings.html#/rulemaking>.

34. *Id.*

35. The newly defined terms which were added are “Orphaned Wells Mitigation Enterprise” and “Enterprise Board.” *Id.*

36. *Id.*

37. Statement of Basis, Specific Statutory Authority, and Purpose, New Rules and Amendments to Current Rules of the Colorado Oil and Gas Conservation Commission, 2 C.C.R. § 404-1, Cause No. 1R, Docket No. 210600097, Financial Assurance Rulemaking, at 2, available at <https://cogcc.state.co.us/hearings.html#/rulemaking>.

plug, reclaim, and remediate the well; and creating a pooled fund to address orphaned wells for which no owner, operator, or responsible party is capable of covering the costs of plugging, reclamation, and remediation.³⁸

In its 2021 and 2022 Financial Assurance Rulemakings, the COGCC addressed this mandate by amending various rules in the 100, 200, 300, 400, 500, 700, 800, and 900 Series of the COGCC Rules.³⁹ Discussion of these changes are beyond the scope of this article. These new rules and amendments were adopted on March 1, 2022 and became effective on April 30, 2022.⁴⁰

III. Judicial Developments

A. Gathering Systems as Public Utilities – Danks v. Colorado Public Utilities Commission

In *Danks v. Colorado Public Utilities Commission*,⁴¹ the Supreme Court of Colorado considered an appeal of a district court decision that reviewed a Colorado Public Utilities Commission (“PUC”) determination that a gas-gathering system was not a public utility subject to either the PUC’s regulations or the statutory requirement to obtain a certificate of public convenience and necessity (“CPCN”). William C. Danks (“Danks”) was a property owner who received notice of DCP Operation Company, L.P.’s (“DCP”) plans to construct two pipelines – the Red Cloud and the Lindsey pipelines – that would connect to its existing gathering system – the Grand Parkway.⁴² DCP did not market or sell gas from the Grand Parkway to consumers; rather, the system was used to collect unprocessed gas from private wells and deliver the same to DCP-owned or operated processing facilities.⁴³ Danks filed a complaint with the PUC, alleging that DCP failed to secure a CPCN prior to constructing the Grand Parkway system and its two new pipelines.⁴⁴ DCP moved to dismiss, alleging that Danks suffered

38. *Id.* at 3.

39. *Id.* at 1-3.

40. *Id.*; see also the 700 Series Rules available at [https://cogcc.state.co.us/reg.html/](https://cogcc.state.co.us/reg.html#/) rules.

41. 2022 CO 26, 512 P.3d 692.

42. *Id.* ¶¶ 1, 4-6.

43. *Id.* ¶ 4.

44. *Id.* ¶ 6.

no injury and therefore lacked standing to bring his claim, and further argued that it was not a public utility, and therefore, did not need a CPCN.⁴⁵

Danks attempted a series of amended complaints and various other procedures. Afterward, the Administrative Law Judge (“ALJ”) determined that Danks lacked standing and dismissed his complaint without ruling on the question of the PUC’s authority (i.e., whether DCP was a public utility).⁴⁶ Danks then filed a motion for reconsideration.⁴⁷ While the PUC agreed with the ALJ’s rationale, it found that “the interests of justice compelled it to review the record to determine whether DCP was unlawfully engaged in public utility operations.”⁴⁸ In order for an entity to be a public utility, and thus be subject to the PUC’s regulations and jurisdiction, such entity must operate to supply the public for domestic, mechanical or public uses.⁴⁹ If an entity is a public utility, then it must obtain a CPCN prior to constructing any new facility, plant, system, or extensions of the same.⁵⁰ The PUC highlighted that even Danks agreed in his complaint that DCP did not market raw gas from its gathering system to the public, and additionally reasoned that the mere connection to a processing plant did not mean that Grand Parkway (and thus the Red Stone and Lindsey pipelines) were serving the public.⁵¹ Accordingly, the PUC determined that “up to the processing plant, DCP was not a public utility,” and consequently, did not require a CPCN.⁵²

Danks was denied a rehearing with the PUC, and then filed for review in the district court, which affirmed both the dismissal of Danks’ amended complaint for lack of standing and the determination that DCP was not a public utility.⁵³ Ultimately, Danks appealed to the Supreme Court of Colorado, which affirmed the district court’s ruling.⁵⁴ In its decision, the court considered three questions: “whether the PUC (1) regularly pursued its authority, (2) reached a just and reasonable decision, and (3) acted in accordance with the evidence when it granted DCP’s motion to dismiss.”⁵⁵

45. *Id.* ¶ 7.

46. *Id.* ¶¶ 8-14.

47. *Id.* ¶ 15.

48. *Id.* ¶¶ 16-17.

49. *Id.* ¶ 18, citing C.R.S. § 40-1-103(1)(a)(I) (2021).

50. *Id.* ¶ 40, citing C.R.S. § 40-5-101(1)(a) (2021).

51. *Id.* ¶¶ 17-19.

52. *Id.* ¶ 17.

53. *Id.* ¶¶ 22-24.

54. *Id.* ¶¶ 25, 59, 60.

55. *Id.* ¶ 41.

First, the court explained that the PUC appropriately applied the statutory requirements of what it means to be a public utility,⁵⁶ as well as appropriately accepted the facts alleged in Danks' complaint as true,⁵⁷ and thus, had regularly pursued its authority.⁵⁸ Second, the court found that the PUC's decision had "a rational foundation in the facts," which is the foundation for a "just and reasonable decision."⁵⁹ It also opined that the PUC properly considered DCP's upstream operations separate and apart from its downstream operations as Danks' complaint "almost exclusively" focused on upstream operations.⁶⁰ Third, the court found that Danks' complaint alleged on its face that "DCP does not market the raw gas it owns and gathers in its Colorado gas gathering system," and therefore, the PUC's decision that DCP was not a public utility was in accordance with the evidence before it.⁶¹ Based upon its three-part analysis, the court agreed that DCP's gas-gathering system was not a public utility and did not require a CPCN.⁶²

B. Acceptable Scope of Surface Use for Drilling – Bay v. Anadarko E&P Co. LP

In *Bay v. Anadarko E&P Company LP*,⁶³ the United States District Court for the District of Colorado considered on remand whether oil and gas interest owners' surface activities materially interfered with the surface owners' use of the surface. As noted by the court, this case is one step in the lengthy process of a class action of surface owners. Surface owners allege trespass against various mineral owners (collectively, "Anadarko"), claiming that the mineral owners' oil and gas activities exceed the scope of their rights to use the surface.⁶⁴ Once the court construed the severance deeds at issue, the court de-certified the class to allow each plaintiff to separately pursue its own highly-fact-dependent trespass claims.⁶⁵ The Bays

56. *Id.* ¶ 43, citing C.R.S. § 40-1-103(1)(a)(I) (2021) ("(a) the entity is a pipeline corporation or gas corporation; (b) operating for the purpose of supplying the public; and (c) for domestic, mechanical or public uses").

57. *Id.* ¶ 44.

58. *Id.* ¶ 45.

59. *Id.* ¶¶ 48-50.

60. *Id.* ¶¶ 51-52.

61. *Id.* ¶ 57.

62. *Id.* ¶ 59.

63. 563 F.Supp.3d 1156 (D. Colo. Sept. 28, 2021), *appeal filed* Bay v. Anadarko E&P Onshore, No. 21-1361 (10th Cir. Oct. 18, 2021).

64. *Id.* at 1157.

65. *Id.*

were selected as the “bellwether plaintiff to proceed to trial” on these grounds.⁶⁶

At trial, the district court found that “the Bays’ evidence failed, as a matter of law, to demonstrate that Anadarko’s activities amounted to a trespass” and entered judgment in favor of Anadarko.⁶⁷ The Bays appealed to the 10th Circuit, which reversed the district court’s decision.⁶⁸ The court in the present case provided a discussion of the 10th Circuit’s reasoning for reversal, which is not discussed in detail in this article; however, what is discussed herein are the applicable standards the appeal court applied for proving a trespass claim. Of note, the court adopted a “three-step burden-shifting approach” based upon Colorado and Texas precedent.⁶⁹

First, ‘the surface owner must make a *prima facie* case by introducing evidence that ‘the operator’s conduct materially interfered with surface uses,’ and ... ‘[t]he interference must be more than ‘inconvenient to the surface owner,’ and ‘must be unreasonable from the perspective of the surface owner, considering only the effects on surface use.’ Second, the mineral owner [is] required to show ‘why its surface conduct was reasonable and necessary from its perspective by showing, for instance, that its operations conformed to standard customs and practices in the industry.’ Finally, the surface owner could prove ‘that reasonable alternatives were available to the operator at the time of the alleged trespass.’⁷⁰

The court extrapolated that, in order for a mineral owner’s surface use to constitute “material interference,” the 10th Circuit’s opinion “suggests that [other] surface use must be infeasible or nearly impossible under the circumstances.”⁷¹ The 10th Circuit also looked to other Texas cases to state that “the surface owner has the burden to prove that the lessee’s use completely precludes or substantially impairs the existing use.”⁷² In other words, “the surface owner must show that it ‘has no reasonable alternative

66. *Id.*

67. *Id.*

68. *Id.* at 1157-58.

69. *Id.* at 1158, citing *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997) and *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).

70. *Id.*, citing 912 F.3d. at 1257.

71. *Id.* at 1159, citing 912 F.3d. at 1261.

72. *Id.*, citing 912 F.3d. at 1262 (quoting *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013)).

method to maintain the existing use' in light of the mineral owner's activities."⁷³

The 10th Circuit found that Anadarko had met its burden of proving that its surface use was reasonable and necessary, and that the Bays had met their burden of proving that Anadarko had available alternatives, and remanded the case to the district court on the issue of material interference.⁷⁴ In response to the 10th Circuit's doubt that the current record would support a finding of material interference, the district court directed the Bays to file a brief addressing that element.⁷⁵ The Bays argued that the standards set out above had no application and that, even if such standards applied, they were different from the standards previously employed and thus additional discovery is appropriate. What's more, the Bays asserted that the court should stay this case and "certify the question of the appropriate interpretation of the 'material interference' standard to the Colorado Supreme Court . . . or [] await further development of the law by state courts hearing some sixty similar cases."⁷⁶

Considering these arguments, the court first found that it had no ability to determine whether the standard articulated by the 10th Circuit was correct as it "is bound by the 10th Circuit's interpretation of Colorado law."⁷⁷ Second, it inferred from the Bays' arguments and assertions that, as the record stands, they had not proven the element material interference by the applicable standard, and further, they have not "articulated the ability to put on evidence that, if presented in a new trial, would suffice."⁷⁸ Based on these two items, the court found that Anadarko was "entitled to judgment as a matter of law on the trespass claim" and entered judgment accordingly.⁷⁹ The court finally dismissed the Bays' request to stay the case, stating that such action would be inappropriate given the "indefinite duration" of waiting on other cases to be decided, coupled with "the advanced age of this case."⁸⁰ As to the notion that the court should certify a question to the Colorado Supreme Court, the district court reiterated that it was bound by the 10th Circuit's precedent and would not "second guess those instructions

73. *Id.*

74. *Id.* at 1159.

75. *Id.* at 1159-60.

76. *Id.* at 1160.

77. *Id.* at 1161.

78. *Id.* at 1161-63.

79. *Id.* at 1163-64.

80. *Id.* at 1163.

by asking a different court to intercede,” though it noted that the Bays may ask the 10th Circuit to grant such relief on appeal.⁸¹

As the court evidently predicted in its opinion, the Bays have appealed the district court’s decision.⁸² As of the writing of this article, the most recent development in the appeal process was the issuance of an Order on April 14, 2022, finding that “there is no just reason for delaying the Bays’ ability to appeal the Court’s September 2021 Judgment and the Court therefore certifies that judgment as final as to the Bays pursuant to Fed. R. Civ. P. 54(b).”⁸³

C. Petitions for Writs of Certiorari Granted – Antero Resources Corp. v. Airport Land Partners, Ltd.; Board of County Comm. of Boulder County v. Crestone Peak Resources Operating LLC; Montezuma County v. CO2 Committee, Inc.

During the update period of this article, the Colorado Supreme Court granted certiorari in three cases in order to address the following issues: payments due under royalty agreements, application of the commercial discovery rule to oil and gas leases, and ability of nonoperating fractional interest owners in oil and gas units to challenge leasehold taxation. No decision has been issued in any of these cases as of the writing of this article.

First, in *Antero Resources Corp. v. Airport Land Partners, Ltd.*, the court granted certiorari to address the following issues: “[w]hether the court of appeals erred in finding that neither: (1) the mere existence of a disagreement over the extent of Royalty Owners’ legal entitlements to further payments under the royalty agreements; or (2) the existence of terms that are ‘subject to legal debate,’ constitutes a bona fide dispute over the interpretation of a contract for payment under [C.R.S. §] 34-60-118.5(5).”⁸⁴

Second, in *Board of County Commissioners of Boulder County v. Crestone Peak Resources Operating LLC*, the court granted certiorari to decide “[w]hether the court of appeals erred in adopting and applying the ‘commercial discovery rule’ in interpreting oil and gas [leases].”⁸⁵ A

81. *Id.*

82. *See id.* (“this Court presumes that the Bays will want to appeal this matter again in the hopes of convincing the 10th Circuit to reconsider and adopt a more favorable standard”). The appeal was filed on October 18, 2020, under Civil Action Case No. 1:09-cv-02293-MSK-MJW.

83. Civil Docket for Case No. 1:09-cv-02293-MSK-MJW.

84. 2022 WL 103334 (Jan. 10, 2022) (Court of Appeals Case No. 19CA1799).

85. 2022 WL 103333 (Jan. 10, 2022) (Court of Appeals Case No. 19CA2040).

discussion of the court of appeals' decision is contained in the prior year's update for Colorado.⁸⁶

Third, as discussed above, in *Montezuma County v. CO2 Committee, Inc.*, the court granted certiorari to assess “[w]hether the court of appeals erred in holding that nonoperating fractional interest owners in an oil and gas unit have standing to separately challenge a retroactive assessment of tax on the unit, apart from the designated operator.”⁸⁷ Again, a discussion of the court of appeals' decision is contained in the prior year's update for Colorado.⁸⁸

D. NEPA Review Challenges – Board of County Comm. of the County of San Miguel v. U.S. BLM; Citizens for a Healthy Community v. U.S. Dept. of Interior; Rocky Mountain Wild v. Haaland

Colorado saw its fair share of challenges to the United States Bureau of Land Management's (“BLM”) issuance of federal oil and gas leases during the time frame of this article. Though not discussed in detail herein, three challenges to the BLM's decisions affecting federal minerals located in Colorado are briefly summarized below. Note that all of these decisions are currently unpublished.

First, plaintiffs alleged that the BLM “did not fulfill its public-disclosure and informed-decision-making duties under the National Environmental Policy Act” (“NEPA”) in *Board of County Commissioners of County of San Miguel v. United States Bureau of Land Management*.⁸⁹ There, the BLM had granted oil and gas leases in southwest Colorado covering parcels that were located in Gunnison sage-grouse habitat, as well as in existing and proposed Areas of Critical Environmental Concern.⁹⁰ Specifically, plaintiffs alleged that the BLM “failed to properly consult with the United States Fish and Wildlife Service pursuant to the Endangered Species Act (“ESA”), and that it violated the Federal Land Policy and Management Act (“FLPMA”).”⁹¹ The United States District Court for the District of

86. See Diana S. Prulhiere and David R. Little, *COLORADO*, 7 OIL & GAS NAT. RESOURCES & ENERGY J. 297, 303 (2021).

87. 2022 WL 904627 (Mar. 21, 2022) (Court of Appeals Case No. 19CA1798).

88. See Diana S. Prulhiere and David R. Little, *COLORADO*, 7 OIL & GAS NAT. RESOURCES & ENERGY J. 297, 305 (2021).

89. 2022 WL 472992 at *1 (D. Colo. Feb. 9, 2022).

90. *Id.*

91. *Id.*

Colorado found that the BLM violated its obligations under NEPA and ESA, but that it did not violate FLPMA.⁹²

Second, in *Citizens for a Healthy Community v. United States Department of Interior*, various environmental groups challenged certain decisions of the BLM and the U. S. Forest Service (“FS”) (the BLM and FS together, the “Agencies”) pertaining to a master development plan (the “Plan”) governing oil and gas activities in Colorado’s Western Slope.⁹³ In summary, the environmental groups argued that the Agencies violated NEPA and the Administrative Procedure Act by “failing to adequately consider the effects that approval of the Plan would have on greenhouse gas emissions and climate change because the Agencies failed to consider a range of reasonable alternatives to the Plan.”⁹⁴ The United States District Court for the District of Colorado found that the Plan, as approved on the current record, violated NEPA; accordingly, the court vacated the Agencies’ approval of the Plan and remanded the matter “back to the Agencies for further consideration.”⁹⁵ The Agencies filed an appeal with the 10th Circuit on July 18, 2022.⁹⁶

Third, plaintiffs opposed the BLM’s issuance of oil and gas leases on 58,000 acres of land in Moffat, Routt, Jackson and Rio Blanco Counties, Colorado in *Rocky Mountain Wild v. Haaland*.⁹⁷ Instead of conducting an Environmental Assessment (“EA”) as required by NEPA prior to issuing these leases, the BLM relied upon an EA that was conducted on 100,000 acres in the same region where it had issued oil and gas leases in the previous year.⁹⁸ Plaintiffs alleged that the BLM’s reliance on the prior EA failed to adequately consider the environmental impacts of its decision, including failure “to consider more accurate air monitoring data and modeling that became available after the [prior] EA was issued.”⁹⁹ The court ultimately found that the BLM’s decision to issue the leases violated NEPA and the APA.¹⁰⁰

For additional information regarding the full arguments by plaintiffs and the court’s rationale, please see the full text of the above-mentioned cases.

92. *Id.* at *25.

93. 2022 WL 1597864 at *1 (D. Colo. May 19, 2022).

94. *Id.*

95. *Id.* at *7.

96. Civil Docket for Case No. 1:21-cv-01268-MSK.

97. 2021 WL 4438032 at *1 (D. Colo. Sept. 28, 2021).

98. *Id.*

99. *Id.* at *1-2.

100. *Id.* at *8.

Note that there are also numerous cases alleging similar claims filed in various jurisdictions affecting federally owned oil and gas.