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Oil and Gas, Natural Resources, and Energy Journal

VOLUME 9 NUMBER 2

COLORADO

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I. Introduction

During this reporting period, the 2023 Colorado General Assembly passed three bills which amended existing statutes and/or added new statutes addressing issues materially affecting oil, gas, and other energy operations in Colorado. Additional bills were passed which tangentially affected oil and gas operations in the state, but such legislation is not discussed herein.[1] The Colorado Oil and Gas Conservation Commission ("COGCC"), now known as the Energy and Carbon Management Commission ("ECMC"; both the COGCC and ECMC may sometimes be referred to herein as the "Commission"), began one rulemaking pertaining to high priority wildlife habitat during the reporting period, but this rulemaking was not completed. Finally, three published state court opinions during this reporting period addressed issues that materially impacted oil and gas law in Colorado.

1. For example: Senate Bill 23-186 required the Commission to study methane seepage in the Raton basin of Colorado, House Bill 23-1069 created a biochar in oil and gas well plugging working advisory group in the Commission and required various studies of the use of biochar in plugging wells, House Bill 23-1294 passed certain measures to protect communities from pollution, and House Bill 23-1216 addressed natural gas pipeline safety. *See* Colorado General Assembly, 2023 Regular Session, all bills available at https://leg.colorado.gov/bills.

II. Legislative and Regulatory Developments

A. State Legislative Developments

1. Senate Bill 23-016 – Greenhouse Gas Emission Reduction Measures

Senate Bill 23-016 was signed by the Governor on May 11, 2023, and became effective on August 7, 2023.[2] This bill promotes reductions in greenhouse gas ("GHG") emissions through various methods and ultimately provides that the Colorado energy office "shall . . . make progress toward eliminating [GHG] pollution from electricity generation, gas utilities, and transportation."[3] Specifically, Section 2 of the bill contained amendments to Colorado Revised Statutes ("CRS") § 24.38.5-102(1) which require that, among other things, the Colorado energy office: (i) support the deployment of renewable energy (*e.g.*, wind, solar, hydroelectricity), energy storage systems, and energy load management technologies and strategies; (ii) evaluate and, when appropriate, support the deployment of cleaner energy sources (*e.g.*, geothermal, clean hydrogen, recovered methane) and innovative energy technologies; and (iii) support widespread transportation electrification, sustainable land-use patterns that reduce energy consumption and GHG pollution, and utilize forms of carbon management like carbon capture and sequestration to reduce pollution.[4] Section 8 of the bill also updated the State's emission reduction goals to minimums of 65% of 2005 statewide GHG levels by the year 2035, 75% by 2040, 90% by 2045, and 100% by 2050.[5]

Another important aspect of Senate Bill 23-016 is that it authorized the Commission to regulate Class VI injection wells, which are used for the geologic sequestration and long-term storage of carbon dioxide. Prior to the passage of Senate Bill 23-016, such wells were governed and regulated by the United States Environmental Protection Agency ("EPA").[6] Section 9 of the bill provided that, if the Governor and the Commission determine that the State has sufficient resources to safely and effectively regulate the sequestration of GHG, then the Commission may, after a public hearing, "seek Class VI injection well primacy under the federal 'Safe Drinking

2. Colorado General Assembly, 2023 Regular Session, Senate Bill 23-016, available at https://leg.colorado.gov/bills/sb23-016.

3. Colo. Rev. Stat. § 24-38.5-102(1)(a)(II).

4. *See* Colo. Rev. Stat. § 24-38.5-102(1).

5. Colo. Rev. Stat. § 25-7-102(2)(g)(I).

6. *See* Fiscal Note at Background, available at https://leg.colorado.gov/sites/default/files/documents/2023A/bills/fn/2023a_sb016_r4.pdf.

Water Act'."[7] If and when primacy is granted, the Commission must conduct an additional study in consultation with the Colorado Department of Public Health and the Environment ("CDPHE"), and present the results thereof to the General Assembly, before it may issue any Class VI injection well permit.[8] The study, to be completed by February 1, 2024, must consider potential air quality impacts of capture technology, carbon dioxide pipeline safety considerations, safety protocols, ways to determine storage stability, and community protections from carbon dioxide releases[9]; the findings and conclusions from the study must be presented to the General Assembly by March 1, 2024.[10] Section 9 of the bill also identified an initial setback of 2,000 feet for Class VI injection wells from residences, schools and commercial buildings.[11]

There are several additional noteworthy portions of Section 9 of Senate Bill 23-016. First, proposed Class VI wells located within, and found to negatively impact, a disproportionately impacted community must be denied.[12] Second, a public hearing must accompany each Class VI well permit to determine that the well complies with local siting requirements, that the CDPHE has issued an associated air permit for the well, that the operator has obtained the consent of the surface owner where the well would be located, and that conditions protective of public health and environmental impacts have been added to the permit by Commission.[13] Third, the Commission may also consider whether it should seek primacy for all other classes of subsurface injection wells covered under the EPA's underground injection well program by conducting another study and reporting its findings therefrom on or before December 1, 2024.[14] For more information on the legislative amendments resulting from the passage of Senate Bill 23-016, see the full text of the bill.

7. Colo. Rev. Stat. § 34-60-106(9)(c).
8. *Id*. at § 34-60-106(9.5).
9. *Id*. at (a).
10. *Id*. at (b).
11. *Id*. at (c).
12. *Id*. at § 34-60-106(9)(c)(III)(A).
13. *Id*. at § 34-60-106(9)(d).
14. *Id*. at § 34-60-106(9.7).

2. Senate Bill 23-285 – Energy and Carbon Management Regulation in Colorado

In May 2022, Governor Polis signed Senate Bill 23-285, which became effective on July 1, 2023.[15] First and foremost, this bill changed the name of the Colorado Oil and Gas Conservation Commission to the Energy and Carbon Management Commission and expanded the Commission's authority beyond oil and gas to other areas of energy and carbon management including deep geothermal operations and underground natural gas storage.

The Commission's name change is codified in CRS § 34-60-104.3(6). The name of the Commission's cash fund was also similarly changed to the Energy and Carbon Management Cash Fund, and such fund may be used for the Commission's expanded purposes.[16] The bill also required the Commission to "create and maintain a website that serves as the state portal for information and data regarding the Commission's regulatory activities."[17]

Prior to the passage of Senate Bill 23-285, Colorado's Division of Water Resources ("DWR") had the authority to regulate much of the state's geothermal development.[18] Section 8 of the bill provided that the Commission now has authority to regulate deep geothermal operations, with the State Engineer under DWR maintaining authority to regulate shallow geothermal operations.[19] The dividing line between shallow and deep geothermal operations is defined as 2,500 feet below the surface.[20] Deep geothermal operations must also be for the exploration for or production of an "allocated geothermal resource,"[21] which is defined to mean "any geothermal resource that is associated with nontributary

15. Colorado General Assembly, 2023 Regular Session, Senate Bill 23-285, available at https://leg.colorado.gov/bills/sb23-285.

16. Colo. Rev. Stat. § 34-60-122(1).

17. *Id*. at § 34-60-106(22).

18. *See* Final Fiscal Note at Summary of Legislation, available at https://leg.colorado.gov/sites/default/files/documents/2023A/bills/fn/2023a_sb285_f1.pdf.

19. *See* Colo. Rev. Stat. §§ 37-90.5-106(1)(a)(I) and 37-90.5-106(1)(b)(I). Local governments are given concurrent siting authority for deep geothermal operations; *see* Colo. Rev. Stat. § 37-90.5-106(2)(b)(I)(B) (providing that the Commission will not issue an operations permit unless "the local government with jurisdiction to approve the siting of the proposed deep geothermal operations does not regulate the siting of Deep Geothermal Operations").

20. *See* definition of "deep geothermal operation" in Colo. Rev. Stat. § 37-90.5-103(3)(a)(II).

21. Colo. Rev. Stat. § 37-90.5-103(3)(a)(II).

groundwater."[22] Section 7 of the bill further provides that, as to property rights acquired on or after July 1, 2023, a property right to a geothermal resource associated with nontributary groundwater is tied to the ownership of the overlying surface, unless expressly severed.[23]

Additionally, Section 13 of the bill provided that "the Commission has the exclusive authority to regulate all intrastate underground natural gas storage facilities" (*i.e.* all pipelines that are not subject to regulation by the Public Utilities Commission ("PUC")).[24] In regulating such facilities, the Commission shall consider and protect public health, safety, welfare, the environment, and wildlife resources.[25] Any rules adopted by the Commission "must be at least as stringent as the applicable federal requirements."[26]

Moreover, various portions of Senate Bill 23-285 required the Commission to conduct four studies, summarized as follows:

- a technical study of the state's geothermal resources;
- a study, in collaboration with the state engineer, that evaluates the state's regulatory structure for geothermal resources and whether any changes to law or rules are necessary;
- a study concerning the regulation and permitting of hydrogen; and
- a study, in coordination with the PUC examining the siting and regulation of intrastate pipelines.[27]

The bill also set out various timelines by which the results of these studies must be reported on the Commission's website and to the General Assembly. Further clarifications to the Commission's jurisdiction and authority, permitting logistics and requirements, and other related topics were also addressed by the bill but are not discussed in detail in this article; see the full text of the bill for additional information.

3. House Bill 23-1242 – Water Conservation in Oil and Gas Operations

House Bill 23-1242 was approved by the Governor and became effective on June 7, 2023.[28] This bill requires oil and gas operators to report certain

22. *Id*. at (1)(a).
23. Colo. Rev. Stat. § 37-90.5-104(2), (4)(b).
24. Colo. Rev. Stat. § 34-64-108(1)(a).
25. *Id*. at (2)(a).
26. *Id*. at (1)(c).
27. *See* Final Fiscal Note at Summary of Legislation, *supra* Footnote 19.

information pertaining to water use in their operations to the Commission. Specifically, operators must disclose the volume and source for all water purchased or otherwise acquired for use in their operations, including recycled or reused water and produced water, as well as the disposal method and location for such water.[29] Monthly reporting requirements for operators commenced on September 1, 2023, and quarterly reporting will begin on January 1, 2024.[30] These reports must capture and describe all water produced or used throughout the operational lifetime of a well.[31]

House Bill 23-1242 further required the Commission to adopt rules that increase the recycling and reuse of produced water and reduce the use of fresh water by no later than December 31, 2024.[32] Section 2 of the bill set forth specific items which must be addressed by these new rules, including: (1) requiring new oil and gas development or substantial modifications to existing oil and gas development to specify methods and locations for treatment of produced water and plans for the use of recycled or reused produced water as opposed to fresh water; (2) reporting of daily vehicle miles traveled for trucks hauling water to or from oil and gas operations sites; and (3) establishing targets and dates for using recycled or reused produced water in hydraulic fracturing.[33]

Finally, House Bill 23-1242 created a Colorado Produced Water Consortium ("Consortium") in the Executive Director's Office of the Division of Natural Resources to analyze and report on the recycling and reuse of produced water.[34] Statutes define the Consortium's primary goal as "to help reduce the consumption of fresh water within oil and gas operations."[35] The Consortium is comprised of 29 members from state and local governmental groups, research institutions, industry representatives, subject matter experts, and other stakeholders, and is governed by representatives from the Commission, DWR and CDPHE.[36] The first members of the Consortium were required to be appointed by July 1,

28. Colorado General Assembly, 2023 Regular Session, House Bill 23-1242, available at https://leg.colorado.gov/bills/hb23-1242.

29. Colo. Rev. Stat. § 34-60-134(2), (3).

30. *Id*.

31. Colo. Rev. Stat. § 34-60-134(4).

32. Colo. Rev. Stat. § 34-60-134(5)(c)(1).

33. *Id*. at (5)(c)(II).

34. Colo. Rev. Stat. § 34-60-135.

35. *Id*. at (1)(c).

36. *Id*. *See also* Final Fiscal Note available at https://leg.colorado.gov/sites/default/files/documents/2023A/bills/fn/2023a_hb1242_f1.pdf

2023.[37] Consortium meetings take place monthly for its first year, and at least quarterly thereafter.[38] There are a number of items which the Consortium is required to accomplish in specified timelines, including, but not limited to, (i) develop guidance documents and case studies to promote best practices for reuse and recycling of produced water by March 1, 2024, (ii) analyze and report on current produced water infrastructure, storage and treatment facilities by July 1, 2024, (iii) analyze and report on the infrastructure, storage and technology necessary to achieve different levels of recycling and reuse of produced water by September 1, 2024, and (iv) update the relevant committees of the House of Representatives and the Senate on the Consortium's work by April 1, 2024. Section 3 of the bill schedules the Consortium for repeal on September 1, 2030.[39]

B. State Regulatory Developments

1. Continuance of the Commission's High Priority Habitat Rulemaking

The Commission commenced only one rulemaking during the reporting period, but this rulemaking was not completed during the reporting period.

A "high priority habitat" is a wildlife habitat area identified by the Colorado Department of Parks and Wildlife ("CPW") within which CPW recommends the Commission should consider whether to require those conducting oil and gas operations to undertake measures to avoid, minimize, and mitigate adverse impacts to breeding, nesting, foraging, migrating, or other wildlife uses.[40] Commission rules require the Commission to periodically update its posted maps of high priority habitats, providing that "[n]otice of such rulemaking will be provided by February 28 of each year."[41]

On February 28, 2023, the Commission submitted a notice to the Colorado Secretary of State for a rulemaking to amend its high priority wildlife habitat maps.[42] This rulemaking was continued at the request of

37. Colo. Rev. Stat. § 34-60-135(5)(a).

38. *Id*. at (5)(b).

39. Colo. Rev. Stat. § 34-60-135.

40. 100 Series (Definitions) of the Commission Rules, High Priority Habitat, 2 C.C.R. § 404-1, available at https://ecmc.state.co.us/reg.html#/rules.

41. *Id*.

42. Notice of Rulemaking Hearing, 2 C.C.R. § 404-1, Cause No. 1R, Docket No. 230200062, High Priority Map Rulemaking, available at https://ecmc.state.co.us/hearings.html#/rulemaking.

parties thereto and is now scheduled for a rulemaking hearing commencing on October 4, 2023.[43]

III. Judicial Developments

A. Commission's Statutory Jurisdiction in Payment of Proceeds Disputes – Antero Res. Corp. v. Airport Land Partners, Ltd.[44]

Addressing an issue of first impression,[45] the Colorado Supreme Court issued an opinion on March 27, 2023, determining that the Commission lacks jurisdiction to determine a payment of proceeds dispute between a payer[46] and a payee[47] pursuant to CRS § 34-60-118.5 if the dispute involves a bona fide dispute of contract interpretation.[48] The Court held that a bona fide dispute of contract interpretation exists "where the parties disagree in good faith about the meaning or application of a relevant contract term."[49]

The case arose out of a disagreement between an oil and gas operator and its payee mineral owners concerning the deduction of certain post-production costs from royalties payments.[50] A state district court determined that the mineral owners were required to bring their claims before the Commission, but the Commission disagreed.[51] The Commission's determination declining to exercise its statutory jurisdiction was appealed to the district court and the court of appeals before the Colorado Supreme Court granted a petition for a writ of certiorari.[52]

The Court began by explaining that CRS § 34-60-118.5 sets statutory standards for the payments of proceeds and vests the Commission with

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43. Second Amendment to Notice of Rulemaking Hearing, 2 C.C.R. § 404-1, Cause No. 1R, Docket No. 230200062, High Priority Map Rulemaking, available at https://ecmc.state.co.us/hearings.html#/rulemaking.

44. Antero Res. Corp. v. Airport Land Partners, Ltd. 2023 CO 13.

45. *Id*. at ¶ 2.

46. Colo. Rev. Stat. § 34-60-118.5(1)(b) defines a payer as "the first purchaser of oil, gas, or associated products from a well in Colorado unless the first purchaser has entered into an agreement under which the operator of a well has accepted responsibility for making payments to payees, in which case the operator shall be the payee."

47. Colo. Rev. Stat. § 34-60-118.5(1)(b) defines a payee as "any person or persons legally entitled to payment for proceeds determined from the sale of oil, gas, or associated products from a well in Colorado, but shall not include those interests owned by the state of Colorado."

48. 2023 CO 13, ¶ 42.

49. *Id*. at ¶¶ 4, 42.

50. *Id*. at ¶ 6.

51. *Id*. at ¶¶ 6-8.

52. *Id*. at ¶¶ 8-11.

jurisdiction to determine payment due dates, whether circumstances exist that may justify a delay in payment, and the amount of payment due, including interest, if any, but only in the absence of a bona fide dispute over the interpretation of a contract.[53]

The Court next observed that the fact a contract may be unambiguous "does not mean that the adjudicating entity did not need to interpret the contract to arrive at that conclusion."[54] According to the Court, "the line between factual findings and contract interpretation is not so clean as the district court asserted," "questions of fact are often deeply intertwined with contract interpretation," and the "statute does not confer on the [Commission] the authority to interpret any disputed contract."[55]

Applying these principles to the dispute between the operator, *i.e.* the payer, and its payees, the Court determined that, "[f]or each of the lease agreements at issue, the parties sincerely disagree about the meaning and appropriate application of contract terms."[56] For this reason, "the courts are the appropriate forum for resolution of these contract disputes," not the Commission.[57]

B. Nonoperators' Ability to Challenge Retroactive County Assessments – Colorado Prop. Tax Adm'r v. CO_2 Comm., Inc.

On February 21, 2023, the Colorado Supreme Court answered the question of "whether nonoperating fractional interest owners in a unitized oil and gas operation have standing to independently challenge a county's retroactive property tax increase."[58] Referring to Article 7 (Valuation of Oil and Gas Leaseholds and Lands) of Title 39 (Taxation) of the Colorado Revised Statutes, the court explained that unit operations are representative in nature, with the unit operator being the only point of contact for reporting, notice and taxpaying purposes. Because of this unique system, the court found that the unit operator was the sole party with standing to challenge a retroactive increase in oil and gas leasehold taxes, and that "nonoperating fractional interest owners do not have a legally protected interest in the valuation and taxation of their oil and gas leaseholds and

53. *Id*. at ¶¶ 16-18.
54. *Id*. at ¶ 27.
55. *Id*. at ¶ 28-29.
56. *Id*. at ¶ 41.
57. *Id*.
58. Colorado Prop. Tax Adm'r v. CO2 Comm., Inc., 2023 CO 8, ¶ 1.

lands, and therefore, lack standing to challenge a retroactive assessment and property tax increase."[59]

The Colorado Supreme Court agreed to hear this case on March 21, 2022, when it granted writ of 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."[60] In *CO_2 Committee, Inc. v. Montezuma County*,[61] the Plaintiff, CO_2 Committee, Inc. ("CO_2"), was a nonprofit corporation comprised of certain members who owned nonoperating fractional interests in a unit and who paid real property taxes to Montezuma County.[62] As required by statute, the county had communicated a retroactive tax increase with the unit operator, who was obligated to collect and remit tax payments on behalf of the nonoperating owners.[63] 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.[64] 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."[65]

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."[66] The court ultimately held that CO_2 suffered an injury in fact in the form of "denial of due process and an economic loss."[67] As to

59. *See* Advanced Sheet Headnote, available at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2021/21SC393.pdf.

60. 2022 WL 904627 (March 21, 2022) (Court of Appeals Case No. 19CA1798). *See also* Diana S. Prulhiere and David R. Little, COLORADO, 7 Oil & Gas Nat. Resources & Energy 297, 305 (2021).

61. 2021 COA 36M, 491 P.3d 516, *as modified on denial of reh'g* (May 13, 2021), *cert. granted in part*, No. 21SC393, 2022 WL 904627 (Colo. Mar. 21, 2022), and *rev'd sub nom.* Colorado Prop. Tax Adm'r v. CO2 Comm., Inc., 2023 CO 8.

62. *Id*. at ¶ 2.

63. *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.

64. *Id*. at ¶¶ 3, 18.

65. *Id*. at ¶ 19.

66. *Id*. at ¶¶ 24, 30.

67. *Id*. at ¶ 34.

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 pay its proportionate share of the taxes" if the unit operator failed to pay.[68] 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.[69] 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."[70] The Colorado Property Tax Administrator ("Administrator") then filed a motion to intervene and petitioned for certiorari.

In reversing the court of appeals' decision, the Colorado Supreme Court relied upon the statutory scheme and administrative guidance pertaining to oil and gas leasehold taxation. Specifically, CRS. § 39-7-101(1) requires that, once a year, unit operators prepare and file an "Annual Statement with the county assessor for each unit the operator manages," which Annual Statement is used by the assessor to value the lands and leaseholds for assessment.[71] Notice of the valuation is sent "only to the operator, who shall accept it."[72] Though each fractional interest owner is liable for its proportionate share of taxes due on the unit, the unit operator collects payments from all nonoperators and remits the total payment to the treasurer.[73]

The valuation of property may be revisited in two ways: by the taxpayer and by the county. Protest procedures are discussed in the code generally as to all property taxation, providing that if "any person" objects to the valuation of his or her property, he or she may "complete the form mailed with his or her notice of valuation . . . , or file a written letter of project and protest."[74] On the other hand, county treasurers have the ability to audit

68. *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."

69. *Id*.

70. *Id*.

71. Colo. Rev. Stat. § 39-7-101(1). *See also* 2023 CO 8, ¶¶ 7-9, 26-27, Colo. Rev. Stat. § 39-7-102(1).

72. Colo. Rev. Stat. § 39-5-121(1.5)(b)(l). *See also* 2023 CO 8, ¶ 27.

73. Colo. Rev. Stat. § 39-7-106(2). *See also* 2023 CO 8, ¶ 30.

74. Colo. Rev. Stat. § 39-5-122(2). *See also* 2023 CO 8, ¶ 28.

taxpayers and impose retroactive assessments if it is discovered that taxable property has been omitted from the valuation process.[75] According to the Assessor's Reference Library: Administrative Assessments Procedures Manual, if an audit is conducted, the county must provide notice to the taxpayer at the address provided on the annual declaration."[76]

With this background in mind, assessing the question of standing, the court considered whether CO_2, or more broadly, nonoperating fractional interest owners, have "a legally protected interest in the valuation and taxation of their oil and gas leaseholds and lands."[77] The Administrator argued that nonoperating fractional interest owners are not taxpayers, and thus, are not entitled to the rights provided to taxpayers (*e.g.* audit, protest, etc.). More precisely, the Administrator proffered that the General Assembly intentionally created a "representative system" in these situations where the "unit operator is the sole point of contact" on these types of interests, and to find that nonoperators had the same rights would essentially disregard that system.[78]

The court acknowledged this intentional, representative system where "the unit operator serves as the sole taxpayer," citing to the statutes previously mentioned herein,[79] and found that, when read in concert with such statutes, the protest procedures support the conclusion that only the operator may file such protests (*e.g.*, an option for protesting is to "complete the form mailed with [] notice of valuation" and such notice is mailed only to the operator, thus, only the operator may protest).[80]

C. Clarification of State's Centerline Presumption – Great N. Properties, LLLP v. Extraction Oil & Gas, Inc.[81]

On September 15, 2022, the Colorado Court of Appeals published an opinion that answered a question of first impression: "Does the common law centerline presumption apply to convey the mineral interests beneath a

75. Colo. Rev. Stat. § 39-10-101(2)(a)(l), § 39-5-125(1). *See also* 2023 CO 8, ¶ 32.

76. 3 ARL 6.56, 6.57. *See also* 2023 CO 8, ¶ 33.

77. 2023 CO 8, ¶ 34.

78. *Id*. at ¶ 35.

79. *Id*. (e.*g.,* the operator files the Annual Statement, notice of valuation is sent only to the operator, etc.)

80. *Id*. at ¶¶ 35-38.

81. The discussion of this case – with the exception of the last paragraph which has been added as an update for this publication – is reprinted as appeared in the Institute for Energy Law's *Oil and Gas E-Report*, Issue 4, December 2022, "Colorado Clarifies Application of Centerline Presumption to Minerals," by Prulhiere, Diana S.

dedicated right-of-way to the owners of abutting parcels?"[82] In short, the court held that, where all criteria for the application of the centerline presumption have been met, "it applies to all interests a grantor possesses in the property underlying a right-of-way, including mineral interests."[83]

The case of *Great Northern Properties, LLLP v. Extraction Oil & Gas, Inc.*[84] was an appeal of the district court's decision in a quiet title action that arose from the dedication of a right-of-way for a street in a subdivision by a developer to the City of Greeley, located in Weld County, Colorado. The developer first dedicated the street to the city, then conveyed two parcels of land abutting the street, whereafter the city accepted the dedication, and then the third and final parcel abutting the street was conveyed away. The deeds for the first two parcels contained metes and bounds descriptions which did not reference the street; the deed for the third parcel did reference the street in its metes and bounds description. None of the three deeds contained an exception or reservation of minerals underlying the street to the developer.

On January 2, 2019, more than forty years later, "the developer conveyed whatever interest it had in the minerals beneath [the] Street to [Great Northern]."[85] Great Northern then brought suit to quiet title to the minerals underlying the street. Extraction was the lessee under oil and gas leases from Great Northern and all abutting landowners; thus, Extraction had secured leases from all possible mineral owners and the outcome of the quiet title action only affected which parties were entitled to receive royalties under those leases. The district court held that the developer had conveyed the minerals to the centerline of the street when it conveyed the abutting parcels of land and therefore quieted title in the abutting landowners; Great Northern appealed.

The court explained that common law centerline presumption is a rule which states that "'a conveyance of land abutting a road or highway is presumed to carry title to the center of that roadway to the extent the grantor has an interest therein, unless a contrary intent appears on the face of the conveyance.'"[86] The question of whether the centerline presumption applies to minerals had not been expressly addressed by Colorado courts

82. Great Northern Properties, LLLP v. Extraction Oil & Gas, Inc., 2022 COA 110 at ¶ 1. Great Northern Properties, LLLP is hereinafter referred to as "Great Northern" and Extraction Oil & Gas, Inc. is hereinafter referred to as "Extraction."

83. *Id*. at ¶ 2.

84. 2022 COA 110.

85. *Id*. at ¶ 8.

86. *Id*. at ¶ 14 (internal citations omitted).

prior to the *Great Northern* case. The court relied upon well-settled property law principles in reaching its conclusion: "when the centerline presumption applies (that is, when all preconditions to its application are met…), it applies to *all interests* the grantor possesses in the property underlying the right-of-way, including mineral interests."[87]

Among the fundamental rules of property law relied upon by the court, in addition to the precedent establishing the above-quoted centerline presumption itself, were the following: (i) the presumption that a grantor intends to convey their entire interest unless they expressly except and reserve an interest, or specifically describe something less than the whole, in the conveyancing instrument; and the rules that (ii) a conveyance of land, without mineral reservation and absent a prior severance, conveys both the land itself and the minerals underlying it, and (iii) any severance of minerals from the surface must be accomplished by clear and distinct language. It further acknowledged that the application of the centerline presumption was in accord with public policy.

The court also outlined several preconditions which must be satisfied in order for the centerline presumption to apply. In summary, the court held that "the centerline presumption applies only when (1) the grantor conveys ownership of a parcel of land abutting a right-of-way; (2) at the time of the conveyance, the grantor owned the fee underlying the right-of-way; (3) the grantor conveys away all the property they own abutting the right-of-way; and (4) no contrary intent appears on the face of the conveyance."[88]

A fifth point that was distinguished by the court is that, for the centerline presumption to apply, the right-of-way must exist at the time of the conveyance.[89] Importantly, this does not mean that a dedicated right-of-way must be accepted by the governmental authority at the time of the conveyance of abutting lands; rather, as between the parties, the right-of-way would exist as of the moment it was intended to be created, *i.e.* as of the dedication from the dedicator to the governmental authority irrespective of when it was ultimately accepted. However, if, *e.g.*, a roadway was vacated prior to adjoining lands being conveyed away, such lands would not be considered to abut a road (as the road no longer existed), and therefore, the centerline presumption would not apply. The court additionally provided that, as is true for any quiet title action, "the person claiming title to property under the centerline presumption bears the burden

87. *Id*. at ¶ 13.
88. *Id*. at ¶ 24.
89. *See id*. at ¶¶ 26, 31-34.

to prove their ownership and must be able to trace title back to the owner of the fee underlying the right-of-way."[90]

Arguments put forth by Great Northern as to why the centerline presumption should not apply to minerals underlying a right-of-way include (a) it violates the principle that an unambiguous deed conveys only what is described therein and (b) statutory dedications operate to sever the mineral estate from the surface. The court rejected both of these arguments. As to the first, the court recognized that parties' intentions must be determined from the four corners of unambiguous deeds, but clarified that deeds "must be interpreted in the context of existing law."[91] According to existing law, "a silent deed conveying property abutting a right-of-way is not ambiguous" because it "passes the highest estate to the centerline to the right-of-way,"[92] and "the highest estate includes both the surface and the unsevered mineral estate."[93]

As to the second, the court noted that dedications can occur by common law – whereby a property owner dedicates the property and then the governmental authority accepts such dedication – or by statute – whereby all streets designated for public use on a city or town map or plat are deemed public property.[94] Under common law dedication, the government acquires an easement to use the land described in the dedication, whereas under statutory dedication, the city or town acquires "such estate or interest as is reasonably necessary to enable it to utilize the surface and so much of the ground underneath as might be required for" ordinary use as a street.[95] According to Colorado law, the centerline presumption applies the same to common law and statutory dedications and neither scenario results in the creation of a mineral estate separate from the abutting parcels; rather, the minerals underlying dedicated roadways remain vested in the dedicator, with the government acquiring no interest therein.[96]

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90. *Id*. at ¶ 24.
91. *Id*. at ¶ 30.
92. *Id*. (internal citations omitted).
93. *Id*. at ¶ 17.
94. *See id*. at ¶¶ 37-38; *see also* Colo. Rev. Stat. § 31-23-107.
95. *Id*. (internal citations omitted).
96. Note that the court discussed a different result in Wyoming, which has held that a statutory dedication does in fact create a separate mineral estate beneath the street to which the "presumed intent rule" (akin to the centerline presumption in Colorado) does not apply (see Town of Moorcroft v. Lang, 779 P.2d 1180 (Wyo. 1989)); however, the Colorado court found the dissenting opinions in such case to be "persuasive and more consistent with Colorado law than the majority's reasoning." *Id*. at ¶¶ 41-48.

While the court found error in a particular aspect of the district court's ruling,[97] it affirmed the lower court's application of the centerline presumption to the conveyances at issue and held that, if all the preconditions discussed above are satisfied such that the centerline presumption applies, then the same applies to all interests of the grantor, including mineral interests.

On March 20, 2023, the Colorado Supreme Court granted a petition for writ of certiorari on two particular questions, phrased by the court as follows:

> Whether a deed that describes land lying next to a dedicated right-of-way but does not purport to convey any interest in the right-of-way should be presumed to convey the mineral estate underneath the right-of-way.
>
> Whether the court of appeals erred in determining that the centerline presumption does not apply if the grantor retains ownership of any property abutting the right-of-way.[98]

No decision on the above questions was rendered during the reporting period of this article.

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97. There were ultimately nine parcels of land which abutted the street at issue in this case. Great Northern named the owners of all nine parcels as defendants; however, several of those parties had defaulted or disclaimed any interest they may have owned and only two of the parties (each owning one of the abutting parcels) actually participated in the proceeding. The district court quieted title to the entire mineral estate in the two participating owners. The appellate court held that the district court should have quieted title only to the mineral interests owned by the two participating owners and dismissed the balance of the action (noting that "a court cannot quiet title in favor of a defaulting or disclaiming party, even where evidence presented by an appearing party supports the defaulting party's title interests"). The appellate court remanded the case to the district court to correct this issue. *See id*. at ¶¶ 52-56.

98. Great N. Properties, LLLP v. Extraction Oil & Gas, Inc., No. 22SC805, 2023 WL 2588491 (Colo. Mar. 20, 2023).