



## COLORADO COURT SHOULD FIND STATE LAW PREEMPTS BOULDER COUNTY'S OIL AND GAS DEVELOPMENT MORATORIUM

by Jason Dunn and Julia Rhine

Under state law, local governments in Colorado cannot prohibit new or existing oil and gas development within their jurisdictions for a period of five years or more. Can this black-letter rule be at least partially evaded by enacting continuous, rolling moratoria of shorter duration on new oil and gas development? According to Boulder County, CO, yes. According to the State of Colorado, the oil and gas industry, and, well, the application of basic arithmetic, no.

Less than one year ago, on May 2, 2016, the Colorado Supreme Court ruled that local governments cannot ban hydraulic fracturing (fracking) of oil and natural gas wells. In a pair of cases, *City of Longmont v. Colo. Oil and Gas Ass'n*, 369 P.3d 573 (Colo. 2016) and *City of Fort Collins v. Colo. Oil and Gas Ass'n*, 369 P.3d 586 (Colo. 2016), the court struck down a permanent ban and a five-year moratorium, respectively, on fracking and the storage of fracking waste. The court ruled that the local governments' regulations were preempted under state law, because they "materially impede[d] the effectuation of the state's interest in the efficient and responsible development of oil and gas resources." *Fort Collins*, 369 P.3d at 593. See also *Longmont*, 369 P.3d at 585.

The court's analysis relied upon Colorado's "strong interest" in the "uniform regulation" of oil and gas development as expressed in Colorado's Oil and Gas Conservation Act (Act), which sets forth as its intent and purpose that oil and gas resources in Colorado be produced to their "maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety and welfare." COLO. REV. STAT. § 34-60-102(1)(b). The court's reasoning also leaned heavily upon the "exhaustive set of rules and regulations 'to prevent waste and to conserve oil and gas in the State of Colorado while protecting public health, safety, and welfare'" that the Colorado Oil and Gas Conservation Commission promulgates pursuant to its authority under the Act. *Fort Collins*, 369 P.3d at 593 (internal citation omitted); *Longmont*, 369 P.3d at 584.

The court explained that local governments that ban or impose "lengthy" moratoria on fracking render the state's statutory and regulatory authority "superfluous" by preventing operators from fracking even if they abide by state law and regulation. *Fort Collins* at 593; *Longmont* at 585. Bans and moratoria also create "patchwork" regulation that frustrates the need for statewide uniformity in oil and gas development. See *Longmont* at 581. While uniformity and consistency are always desirable traits in any regulatory scheme, the qualities take on elevated importance in the oil and gas regulatory context because oil and gas are found in subterranean pools that do not conform to surface jurisdictional patterns. *Longmont* explicitly recognized that 1) certain drilling methods are necessary for the productive recovery of oil and gas; 2) the pressure characteristics of an oil and gas pool often dictate the pattern in which wells must be drilled; and 3) irregular

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drilling patterns result in less-than-optimal resource recovery, leading to waste and the possibility of injuring the correlative rights of owners of oil and gas interests in a common source or pool. *Id.* at 580 (citing *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067 (Colo. 1992) (holding that a municipal ordinance against drilling within city limits had the effect of prohibiting oil and gas development within the city and was therefore preempted by the Act)).

Importantly, the court made clear that its duty was limited to answering the narrow legal question of whether the local government prohibitions were preempted by state law. That is, the court recognized that the “vices and virtues” of fracking were “hotly contested,” but emphasized that it was not required to “weigh in” on the relative merits of the well-stimulation technique because they were “immaterial” to the question of preemption. *Longmont* at 576, 585.

When *Longmont* and *Fort Collins* were handed down, most local governments across Colorado that either had passed similar bans or were considering enacting them, for the most part, promptly abandoned their efforts. Boulder County did not. Without interruption from February 2, 2012 through at least March 21, 2017, Boulder County has had in place some iteration of a moratorium on the acceptance, processing, and approval of any new oil and gas development application for unincorporated\* Boulder County. Of varying lengths but always for the stated purpose of needing to update local oil and gas regulations (among other updates, to address fracking) and always characterized as “temporary,” Boulder County has amended or re-enacted its moratorium no fewer than eight times, with three of those instances post-dating *Longmont* and *Fort Collins*. The latest extension, enacted on December 15, 2016, lengthened the ban on application processing through May 1, 2017, bringing the total duration of Boulder’s moratorium to over five years.

Understandably, the Colorado Attorney General was concerned because the County’s continuous five-year-plus moratorium openly violates established state law. In addition to the fact that Boulder’s prohibition on new oil and gas development has been in effect for longer than was the moratorium invalidated by *Fort Collins*, Boulder’s practice of repeatedly extending its moratorium lends no credibility to the belated claim that its latest expiration date will not be extended further. Accordingly, after Boulder County was given (and refused) the chance to rescind its moratorium before facing legal action, the State of Colorado filed suit on February 14, 2017 against Boulder County and Boulder’s Board of County Commissioners. The action seeks a declaratory judgment invalidating the county’s continuous moratorium and a permanent injunction enjoining the moratorium’s enforcement. On February 24, 2017, the Colorado Oil and Gas Association and the American Petroleum Institute moved to intervene in the litigation as plaintiff-intervenors, which intervention the court granted the following day.

The Colorado Supreme Court decisions discussed herein, particularly *Fort Collins*, should operate to bring the State of Colorado and industry swift and certain victory. Because of Boulder’s moratorium, the Act and the regulations promulgated thereunder have been “superfluous” in Boulder County for over five years and the state’s “strong interest” in the efficient recovery of oil and gas resources in unincorporated Boulder County has been materially impeded for over five years. Indeed, as the assistant county attorney advised Boulder County on May 19, 2016, “were we to be challenged on our current moratorium ... we think it’s likely that a court would find it hard to distinguish our moratorium from Fort Collins’[sic] moratorium, which was just overturned.”

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\* The eastern portion of unincorporated Boulder County is where one of the most actively drilled oil and gas producing formations along Colorado’s Front Range is located.