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# Articles

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## **Not Under My Backyard: The Battle Between Colorado and Local Governments Over Hydraulic Fracturing**

**Katherine Toan\***

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In measure, however, history has repeated itself . . . . To all these places the oil derrick has come like a conquering army driving all before it. Farms, fields, orchards, gardens, dooryards, and even homesteads have been given over to the mad search for oil. In nearly all appear the same steps of progress; a lucky strike, the rush for leases, sudden wealth to the fortunate ones, boom towns, stock companies, and sooner or later the inevitable decline.<sup>1</sup>

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\* J.D. 2008, Vermont Law School; L.L.M., Natural Resources Law 2013, University of Colorado Law School. Ms. Toan practices environmental and natural resources litigation and administrative law in Colorado.

1. WALTER SHELDON TOWER, THE STORY OF OIL 60 (1909).

## I. INTRODUCTION

The State of Colorado owes a great deal to geology. Mining built the state out of its Rocky Mountains both literally and figuratively. Colorado would not be what she is today without her history of mineral extraction: from the gold and silver that drew prospectors to build the city of Denver and settle the most isolated reaches of the San Juans, to the coal that heated and powered a rapidly growing population.<sup>2</sup> The culture and economy of Colorado's "Old West" were inextricably linked by the extraction of natural resources.<sup>3</sup> Over time, and with increased general prosperity, much of the Old West has faded as "New Western" economic industries and environmental values have blossomed.<sup>4</sup> Today a new resource boom is occurring in Colorado—the shale gas "revolution"<sup>5</sup>—and it has ignited new battles over the land and its mineral resources.<sup>6</sup>

Within just over a decade, developments in technology—particularly multi-stage slick-water hydraulic fracturing ("fracking")<sup>7</sup>

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2. DUANE A. SMITH, *THE TRAIL OF GOLD AND SILVER: MINING IN COLORADO 1859–2009* 19–24 (2009).

3. DONALD WORSTER, *UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST* 19–33 (1992).

4. See RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A NEW HISTORY OF THE AMERICAN WEST (1991) (exploring the history of Anglo-American conquest of the west, and subsequent economic and political development). See also Steve Lipsher, *Nature Fuels Economy of West, Analysis Finds*, DENVER POST, Sept. 27, 2007, at B4 (showing that natural-resource development (including agriculture) accounted for less than 5 percent of Colorado personal income in 2005, down from nearly 10% in the 1970s); Richelle Winkler et al., *Social Landscapes of the Intermountain West: A Comparison of "Old West" and "New West" Communities*, 72 RURAL SOCIOLOGY 478 (2007) (illustrating that while shifts are occurring throughout the mountain west, Colorado exhibits a higher level than neighboring mountain states, on both the eastern and western slopes).

5. David Brooks, Op-Ed., *Shale Gas Revolution*, N.Y. TIMES, Nov. 4, 2011, at A31.

6. See, e.g., Joe Eaton, *Battles Escalate over Community Efforts to Ban Fracking*, NAT'L. GEOGRAPHIC (Aug. 22, 2013), <http://news.nationalgeographic.com/news/energy/2013/08/130823-battles-escalate-over-towns-banning-fracking/>; Food & Water Watch, *Anti-Fracking Movement Map*, <http://www.foodandwaterwatch.org/california/stopthecorporatewatergrab/map/> (last visited 8/16/2014); MOVEON.ORG, *Fracking Fighters*, <http://www.moveon.org/frackingfighters/> (last visited 8/16/2014).

7. Marie Cusick, *No matter how you spell it, fracking stirs controversy*, NPR STATEIMPACT (May 29, 2014), <http://stateimpact.npr.org/pennsylvania/2014/05/29/no-matter-how-you-spell-it-fracking-stirs-controversy/> (discussing how industry often prefers the term 'fracing,' noting that there is no 'K' in 'fracturing,' and insisting that the addition of a 'K' creates more negative connotations). The Merriam-Webster dictionary has adopted the 'k' spelling. Peter Sokolowski, Editor-at-Large for the dictionary, noted:

and horizontal or directional drilling—made previously unrecoverable hydrocarbon deposits profitable and vastly increased Colorado’s fuel mineral production.<sup>8</sup> This production surge has resulted in over 50,000 active wells in Colorado, sparking concern throughout the state about the impacts of oil and gas development.<sup>9</sup>

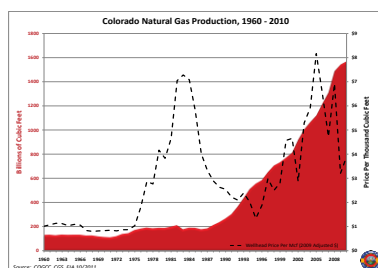


Fig. 1. Colorado Natural Gas Production, 1960–2010.<sup>10</sup>



Fig. 2. Colorado’s Oil and Gas Basins.<sup>11</sup>

Outside of federal lands, the federal government has generally left regulation of onshore petroleum development to the states.<sup>12</sup> In Colorado, the regulation of oil and gas production falls largely to one agency: the Colorado Oil and Gas Conservation Commission (“COGCC”).<sup>13</sup> The COGCC’s primary mission is to “[f]oster the

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‘Without the K it would very often be read, perhaps, with a soft ‘C.’ So I’m going to guess this is more phonetic than ideological.’”

8. See COLO. GEOLOGICAL SURVEY, COLORADO NATURAL GAS PRODUCTION (Apr. 12, 2011), available at [http://coloradogeologicalsurvey.org/wp-content/uploads/2013/08/Colorado\\_NG\\_Production\\_1960\\_2010.pdf](http://coloradogeologicalsurvey.org/wp-content/uploads/2013/08/Colorado_NG_Production_1960_2010.pdf) (showing production of gas in Colorado has grown nearly exponentially, from less than 200 million cubic feet per year from the 1960s through 1986 to roughly 1,600 m.c.f. in 2010). Advances in hydraulic fracturing have made possible the current boom in petroleum production. See, e.g., Jeff Brady, *Focus on Fracking Diverts Attention from Horizontal Drilling*, NPR (Jan. 27, 2013), <http://www.npr.org/templates/transcript/transcript.php> (focusing on the legal balance between the state and local governments in Colorado over the recent boom in petroleum development, not on technical distinctions between development and the individual technologies enabling development).

9. See *Colorado Weekly & Monthly Oil & Gas Statistics*, COLO. OIL & GAS CONSERVATION COMM’N (Mar. 7, 2013), <http://cogcc.state.co.us> (by March of 2013, there were 50,375 active oil and gas wells in Colorado).

10. COLORADO NATURAL GAS PRODUCTION, *supra* note 8.

11. *Oil and Gas Basins*, COLORADO GEOLOGICAL SURVEY, <http://coloradogeologicalsurvey.org/energy-resources/oil/map/> (last visited Aug. 16, 2014).

12. See discussion *infra* Part 0.

13. Oil and Gas Conservation Act, COLO. REV. STAT. § 34-60-104(1) (2014).

responsible, balanced development, production, and utilization of the natural resources of oil and gas . . . in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.”<sup>14</sup> The Oil and Gas Conservation Act (“OGCA”) provides that the COGCC “has the jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article, and may do whatever may reasonably be necessary to carry out the provisions of this article.”<sup>15</sup>

Colorado has always valued strongly empowered local governments, adopting municipal home rule into its constitution in 1902, only twenty-six years after achieving statehood.<sup>16</sup> Among their powers, local governments in Colorado have authority to regulate land use within their jurisdictions,<sup>17</sup> and several have recently acted to restrict oil and gas development (hereinafter “OGD”, or simply “development”).<sup>18</sup> Several localities/municipalities have enacted bans, moratoria, and regulations in an attempt to protect citizens and the environment from what many (although by no means all) have viewed as under-regulation by the state.<sup>19</sup> These efforts have been controversial and the focus of intense counter-efforts to override local authority in favor of a “uniform” state system.<sup>20</sup> The dispute over local OGD authority dates back to the late

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14. *Id.* at § 34-60-102(1)(a)(I).

15. *Id.* at § 34-60-105(1).

16. See DALE CRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 72 (2000).

17. See discussion *infra* Part 0.

18. Bruce Finley, *Suit Threat Looms as Fracking Ban OK'd*, DENVER POST Mar. 6, 2013, at 10A; Scott Rochat, *Longmont Voters Pass Ban on Fracking*, DENVER POST, Nov. 8, 2012, [http://www.denverpost.com/ci\\_21952523/longmont-voters-pass-ban-fracking](http://www.denverpost.com/ci_21952523/longmont-voters-pass-ban-fracking); John Fryar, *Boulder County Commissioners Approve New Oil, Gas Regulations*, LONGMONT TIMES-CALL, Dec. 13, 2012, [http://www.timescall.com/ci\\_22189270/boulder-county-commissioners-approve-new-oil-gas-regulations](http://www.timescall.com/ci_22189270/boulder-county-commissioners-approve-new-oil-gas-regulations).

19. See Scott Rochat, *Hickenlooper Letter Says Lawsuit vs. Longmont was Last Resort*, LONGMONT TIMES-CALL, Sept. 28, 2012, [http://www.timescall.com/ci\\_21655439/hickenlooper-letter-says-lawsuit-vs-longmont-was-last](http://www.timescall.com/ci_21655439/hickenlooper-letter-says-lawsuit-vs-longmont-was-last) (quoting Mayor Dennis Coombs of Longmont as saying “Our regulations aren’t that difficult. They’re fairly benign. A lot of our citizens think they’re too weak.”).

20. See Angela Neese, *The Battle Between the Colorado Oil and Gas Conservation Commission and Local Governments: A Call for a New and Comprehensive Approach*, 76 U. COLO. L. REV. 561 (2005) (arguing the need for expanded state preemption); Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L.J. 1, 17 (2004) (describing the complexity for developers trying to comply with multiple layers of regulatory authority); Alison Noon, *Sides Square Off over \$900,000 Spent on Colorado Anti-Fracking Measures*, DENVER POST, Nov. 5, 2013, [http://www.denverpost.com/breakingnews/ci\\_24460947/900-000-spent-four-colorado-anti-fracking-measures](http://www.denverpost.com/breakingnews/ci_24460947/900-000-spent-four-colorado-anti-fracking-measures).

1980s, when many rural, nonindustrialized communities began to see significant development activity for the first time. In 1992 two important cases were decided on the same day. These cases, referred to here as *Voss* and *Bowen/Edwards*,<sup>21</sup> while still good law, provide what is perhaps an outdated framework for balancing the current interests of state and local powers, industry, and twenty-first century New-Western communities.<sup>22</sup> This Article will focus on how the history of oil and gas regulation is being challenged to adapt to a new era where development is suddenly “booming” in large, heavily populated areas of the state.

Hydraulic fracturing and related technologies have unlocked vast reserves of natural gas in the Rocky Mountain region, providing the opportunity for lower energy costs, a transition away from heavily polluting coal, jobs, revenues, and the prospect of being a net energy exporter.<sup>23</sup> However, petroleum development has also heavily impacted local communities with impacts ranging from merely irritating to potentially dangerous, and is not always welcome. Perhaps most importantly, it has undermined the democratic respect for local control enshrined in the Colorado Constitution.

## II. A BRIEF HISTORY OF STATE OIL AND GAS REGULATION

The discovery of petroleum and its rise as a dominant energy source has been fraught with discord and concerns about scarcity nearly since the first commercial oil well was drilled.<sup>24</sup> In 1924, one scholar noted, “fears are increasingly felt. Will it be possible to satisfy the dizzy increase in consumption of oil? And do not certain countries already fear to see the reserves contained in their soil exhausted?”<sup>25</sup> In addition to the

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21. *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992); *Bd. of Cnty. Comm’rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045 (Colo. 1992).

22. See discussion *infra* at Part 0.

23. See David Persons, *Hickenlooper: Natural Gas Development is Key Part of Colorado’s Future*, GREELEY TRIBUNE, July 14, 2014, <http://www.greeleytribune.com/news/7174821-113/gas-natural-hickenlooper-colorado>.

24. See Diana D. Olien and Roger M. Olien, *Running Out of Oil: Discourse and Public Policy 1909–1929*, 22 BUS. & ECON. HIS. 36 (1993) (exploring the role of discourse in calibrating public policy toward oil, and noting that criticisms of the swiftness of extraction in the 1880s as ‘thriftless’ and with a ‘gambling spirit’ likely to ‘bankrupt’ mineral reserves in a generation were couched in moralistic terms opposed to the American virtue of frugality).

25. PIERRE L’ESPAGNOL DE LA TRAMERYE, *THE WORLD-STRUGGLE FOR OIL* 33 (1924).

“dizzy increase in consumption,” fundamental problems with extraction alarmed producers. At the end of the nineteenth century the market was controlled not by regulation but by increasing monopolization; established in 1870 by John D. Rockefeller, Standard Oil had acquired ninety percent of the market by 1904.<sup>26</sup> The federal government responded with antitrust actions that culminated in the breakup of Standard Oil in 1911.<sup>27</sup> This shocking event caused oil producers to harbor a long-lasting distrust for the federal government<sup>28</sup> and unleashed competition into an unregulated industry where a lack of property rights created perverse incentives. In the pre-regulatory era developers operated under the “law of capture,” under which landowners had no legal property right until the oil was extracted.<sup>29</sup> Landowners had to drill wells and race to extract before neighbors could drain their interest: this is known as the ‘Offset Drilling Rule.’<sup>30</sup> Waste—both physical and economic—was rampant as often-inexperienced producers cut corners to obtain their share before it flowed away underground, encouraged by mineral lease contracts construed to promote development and prevent delay.<sup>31</sup>

Between 1916 and 1926, it became clear that the law of capture was inadequate to equitably apportion or administer rights in common pools.<sup>32</sup> A counter-balancing doctrine—the doctrine of ‘correlative

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26. See IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904). Cf. Alex Epstein, *Vindicating Capitalism: The Real History of the Standard Oil Company*, MASTER RESOURCE: A FREE MARKET ENERGY BLOG (Aug. 29, 2011), <https://www.masterresource.org/epstein-alex/vindicating-capitalism-standard-oil-i/> (arguing that the general understanding of the Standard Oil monopoly is “mythology,” noting the benefits that monopoly conferred on the market: removing shoddy operations, streamlining transportation, developing superior refining techniques, and lowering prices for consumers).

27. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

28. Olien, *supra* note 24, at 55–58.

29. Robert E. Sullivan, *The History and Purpose of Conservation Law*, 18A ROCKY MTN. MIN. L. INST. 1-1 (1985).

30. See *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907).

31. Sullivan, *supra* note 29, at 1–3.

32. Along with the rise of the automobile and other domestic uses, World War I convinced the United States that petroleum was an indispensable resource for national security. Ships fueled by oil were faster, stealthier, could be refueled at sea, and required half the manpower of coal-fired ships. Erik Dahl, *Naval Innovation: from Coal to Oil*, JOINT FORCE Q. 50, 51 (Winter 2000–01). The U.S. military demanded a secure and continual access for national defense. In 1920 the federal government excluded petroleum and other strategic resources from the ‘free and open’ minerals under the 1872 Mining Act, with the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* This rise in national

rights,<sup>7</sup> which formed the basis for later conservation efforts—was recognized by the Supreme Court in 1900, but did not greatly influence the legal framework of production at the time.<sup>33</sup> Regulation (also called conservation) would be necessary to control production and end the industry-defeating price depressions and the unfairness of the common-pool depletions.

### A. Regulation of Oil Extraction Before 1935

States came to dominate the regulation of oil and gas production, but this was not an inevitable result. The federal government attempted to impose regulations on oil production in 1924 when President Coolidge created the Federal Oil Conservation Board (“FOCB” or “the Board”).<sup>34</sup> This occurred during the Lochner Era, when the Supreme Court narrowly interpreted the Commerce Clause to limit Congress’s power to regulate industrial production.<sup>35</sup> In its first report, the Board concluded that the lack of a general police power limited federal regulation to oil production on federal lands and for national defense.<sup>36</sup> In its fifth and final report in 1932, the Board declared that states would need to cooperate and coordinate to enact regulation, a solution much favored by industry.<sup>37</sup> While pro-conservation forces worked to move federal regulation

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dependence put pressure on industry to accept that regulation was inevitable and should be politically managed so as to procure favorable terms.

33. Sullivan, *supra* note 29, at 1-3 to 1-4 (citing *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900)).

34. See, e.g., Raymond Clapper, *Coolidge Names Federal Oil Conservation Board*, THE EVENING INDEPENDENT (St. Petersburg, Fla.), Dec. 20, 1924, at 21.

35. See Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011); William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1384–85 (1994) (“The Normalcy Court is [best known] for a series of fiercely contested decisions striking down New Deal statutes as beyond Congress’ Commerce Clause powers.”).

36. The police power is the right of the state to regulate actions and property, to place limitations on individual rights and liberties, to protect the public health and welfare. At the heart of the police power are the dicta *sic uteretur ut alienum non laedas* (use what is yours so that you do not harm another) and *salus populi suprema lex est* (the public welfare is the highest law). See, e.g., MARKUS DUBBER, THE POLICE POWER (2005).

37. Northcutt Ely, *The Conservation of Oil*, 51 HARV. L. REV. 1209, 1216 (1938). See also *The Petroleum Industry: Hearings on S. Res. 40 Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 91st Cong. 578–99 (1969) (memorandum submitted by Walter S. Measday) [hereinafter *Petroleum Indus. Hearings*].



forward, oil interests attempted to avoid federal oversight by discrediting the notion that oil was being ‘wasted’ and by imposing self-regulation measures.<sup>38</sup>

By the early 1930s there was an American oil crisis.<sup>39</sup> Overproduction of newly discovered oil fields caused oil prices to fall from around a dollar per barrel to fifteen cents, and then to ten cents per barrel.<sup>40</sup> The situation was dire enough that oil fields were closed, martial law was imposed, and National Guard troops called to keep the peace in East Texas and Oklahoma oil fields in 1931.<sup>41</sup>

In response, and in an effort to forestall the threat of federal regulation and to keep oil prices high, oil-producing states pushed hard on the federal government to allow the states themselves to regulate the production of oil and adopt various oil conservation measures.<sup>42</sup> In March of 1931, the Oil States Advisory Committee, representing seven oil-producing states, agreed to a framework for interstate cooperation.<sup>43</sup> In a letter to the FOCB, the members asked for each state to retain its own administration, in cooperation with the other oil-producing states through an interstate advisory board.<sup>44</sup> The FOCB, in its fifth and final report, called for the immediate creation of an interstate compact to coordinate the regulation of oil and gas production.<sup>45</sup>

Before the issues of interstate compacts and state commissions were settled, an important case involving one of the first state conservation measures tested the ability of local governments to enact protective

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38. See Olien, *supra* note 24, at 58–61.

39. See, e.g., *Hazardous Business— The Oil Wars*, TEX. STATE LIBRARY & ARCHIVES COMM’N, <https://www.tsl.state.tx.us/exhibits/railroad/oil/page7.html> (last updated Aug. 18, 2011) (explaining the history of oil conservation in Texas, beginning with the rule of capture which led to chaos and overproduction, and ending with control of production by the Texas Railroad Commission). If the crisis in American oil production had occurred a few years later the Board may have reached a completely different conclusion, as the New Deal Court did an about face in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and upheld substantive labor regulation on the grounds that it “affected” interstate commerce.

40. INTERSTATE OIL & GAS COMPACT COMM’N, MAKING A DIFFERENCE: A HISTORICAL LOOK AT THE IOGCC 4 (2006), <http://iogcc.publishpath.com/Websites/iogcc/pdfs/2006-FINAL-History-Publication.pdf> [hereinafter IOGCC REPORT].

41. CARL COKE RISTER, OIL! TITAN OF THE SOUTHWEST 258–64 (1949).

42. See Ely, *supra* note 37 (relating the history of state conservation laws and suggesting the need for federal control rather than allowing the oil-producing states to enact self-interested regulation).

43. IOGCC REPORT, *supra* note 40, at 5.

44. *Id.* at 6.

45. *Petroleum Indus. Hearings*, *supra* note 37, at 582 (citing FED. OIL CONSERVATION BD. REPORT V, at 24 (1932)).

regulations that would prevent the development of oil and gas. Oklahoma City enacted a local ordinance requiring a bond of \$200,000 per well drilled in the city,<sup>46</sup> and sought an injunction against drillers who did not provide the bond. In *Gant v. Oklahoma City*, operators (also known as developers) sought to enjoin the ordinance on the grounds that exclusive control of drilling had been placed in the hands of the Corporation Commission, a state agency charged with regulating the conservation of petroleum, drilling of wells, and the operation of pipelines.<sup>47</sup> The Oklahoma Supreme Court found that nothing in the grant of authority to the Commission deprived the city of its police power and that,

[a]s a property protection, the city was endowed with the power of regulation. But there is something far greater than property involved in this case; it is the safety of human life and health . . . . We have on one side the people that want money, and on the other side the people that want life, and its enjoyment in the home already provided.<sup>48</sup>

The U.S. Supreme Court affirmed the holding in *Gant* as neither violating due process, nor arbitrary or unreasonable, and the city's bond requirement was upheld.<sup>49</sup>

Between 1932 and 1935, chaos ensued as the FOCB dissolved, the Oil States Advisory Committee collapsed, and state conservation commissions, notably the Texas Railroad Commission, failed to impose regulations that were either heeded by producers or upheld by the courts.<sup>50</sup> In 1933, President Roosevelt signed the National Industrial Recovery Act ("NIRA"), as part of his New Deal legislation, which allowed the federal government to create regulated cartels and monopolies.<sup>51</sup> However, after the constitutional invalidation of the NIRA in May of 1935,<sup>52</sup> the door was open for the states to resume control over conservation regulation.<sup>53</sup>

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46. *E.g.*, *Gant v. Okla. City*, 289 U.S. 98, 101 (1933) (this calculates to roughly \$3 million dollars in 2014).

47. *Gant v. Okla. City*, 6 P.2d 1065, 1067 (Okla.1931), *aff'd*, 289 U.S. 98 (1933).

48. *Gant*, 6 P.2d at 1070.

49. *See Gant*, 289 U.S. at 101–03.

50. *See generally Petroleum Indus. Hearings*, *supra* note 37.

51. *See generally* National Industrial Recovery Act, Pub. L. No. 67, 48 Stat. 195 (1933), *invalidated by* *Schechter Poultry v. United States*, 295 U.S. 495 (1935).

52. *See Schechter Poultry*, 295 U.S. 495 (1935) (holding that that the act impermissibly delegated legislative power and that the application of the act to commerce within the state of New York exceeded the powers granted to the federal government by the Commerce Clause).

53. In 1933, President Roosevelt took action and issued two executive orders—prohibiting foreign or interstate commerce in oil produced in violation of state law or

### B. *The Conservation Era in Colorado*

In February 1935 nine oil-producing states met in Dallas, Texas.<sup>54</sup> With the decision looming in *Schechter Poultry Corp.* and potential for chaos with the invalidation of NIRA, these would-be regulators finalized an Interstate Compact to Preserve Oil and Gas and became the Interstate Oil and Gas Compact Commission (“IOGCC”).<sup>55</sup> Colorado ratified and adopted the compact in April the same year,<sup>56</sup> prior to ratification by the U.S. Congress in August 1935.<sup>57</sup> While the Compact did not contain binding orders or regulations, each state agreed to pass laws, enact regulations, and create programs to conserve oil and gas, prevent waste, and maximize recovery.<sup>58</sup>

Colorado’s first conservation agency—the Gas Conservation Commission (“GCC”)—was established in 1927 as part of the division of conservation under the executive department.<sup>59</sup> The GCC was to “adopt reasonable rules and regulations as may be proper for the conservation of the gas resources of the state and the prevention of gas waste,” with penalties of “not less than fifty dollars and not more than one hundred dollars [for] each day’s violation . . . .”<sup>60</sup> The GCC repealed several oil and gas statutes, including: portions related to record keeping for drilling and well abandonment; a 1915 law prohibiting natural gas venting; and two 1929 laws requiring the plugging of abandoned wells, and established penalties for violating well abandonment laws.<sup>61</sup> Before the 1929 laws were repealed, the penalties for violating well abandonment laws were set at “not more than one thousand dollars, or by

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valid regulation, and instructing the Secretary of the Interior to issue regulations to that effect—however and the executive orders were ceremoniously invalidated by the Supreme Court in 1935. *See* *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Then, Congress declared it to be the policy of the U.S. to protect interstate and foreign commerce from contraband oil, and to encourage conservation. Act of Feb. 22, 1935, ch. 18, Pub. L. No. 14, 49 Stat. 30; *See also* 15 U.S.C. § 715 (2012). This was the Connelly “hot oil” Act, intended to expire in 1937 it became permanent law instead. Act of Feb. 22, 1935, ch. 18, Pub. L. No. 14, 49 Stat. 30.

54. *See* Act of Dec. 24, 1969, Pub. L. No. 91-158, 83 Stat. 436.

55. H.J. Res. 407, Pub. Res. No. 64, 939–41, 74th Cong. (1935) (enacted).

56. Interstate Compact Act, ch. 141, S.B. No. 409, Colo. Sess. Laws 591 (1935) (approving the establishment of interstate compacts).

57. H.J. Res. 407 at 939.

58. Sullivan, *supra* note 29, at 1-10 to 1-18.

59. 1927 Colo. Sess. Laws 525-526.

60. COLO. STAT. ANN. ch. 118, §§ 66–67 (1935).

61. *See* 1951 Colo. Sess. Laws 651, 662 (repealing COLO. STAT. ANN. ch. 118, §§ 39, 40, 41, 42, 43, 44, 49, 50, 52, 64, 65, 66, and 67 (1935)) (codified at COLO. REV. STAT. § 34-60-101) [hereinafter Oil & Gas Conservation Act].

imprisonment of not more than six months in the county jail, [or both]” for “any violation.”<sup>62</sup> In 1951 the Colorado General Assembly adopted the Oil and Gas Conservation Act (“OGCA”).<sup>63</sup> At the time, the major issue facing Colorado oil and gas production was the need to promote industry in the face of relatively scant recoverable petroleum resources. The OGCA created the Colorado Oil and Gas Conservation Commission (“COGCC”), replacing the GCC.<sup>64</sup> The new Commission consisted of five members. Four members with at least five years of industry experience were to be appointed by the governor, the fifth member was the State Oil Inspector.<sup>65</sup> None of the members received compensation for their performance as members of the COGCC.<sup>66</sup> The Commission was charged with preventing waste;<sup>67</sup> was granted authority to promulgate rules and to enjoin violations; and was given jurisdiction over “all persons and property, public and private, necessary to enforce the provisions of this Act.”<sup>68</sup>

By 1970 U.S. production of oil reached its apex.<sup>69</sup> Suddenly, under the combined effects of federal import policies, global upheaval, and an oil embargo from OPEC, a crisis in the U.S. oil supply occurred in the first half of the 1970s.<sup>70</sup> Relaxed controls on production by the compacting states were insufficient to mitigate the sudden reduction in supply to prevent economic shock.<sup>71</sup> The passing of the Clean Air Act

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62. COLO. STAT. ANN. ch. 118, § 44 (1935) (citing that section was codified in 1929).

63. Oil & Gas Conservation Act, *supra* note 61, at §§ 1–17.

64. *Id.* at § 17 (repealing COLO. STAT. ANN. 1935, ch. 118, §§ 39–44, 49, 50, 52, 64–67).

65. Oil and Gas Conservation Act, *supra* note 61, at § 2.

66. *Id.*

67. Waste was defined as “escape, blowing or releasing, directly or indirectly, into the open air of gas from wells productive of gas only, or gas from wells producing oil or both oil and gas; and the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced; excepting gas that is reasonably necessary in the drilling, completing, testing, and producing of wells.” *Id.* at § 5. It wasn’t until 1955 that the definition was expanded to include “locating, spacing, drilling, equipping, operating, or producing . . . which causes or tends to cause a reduction in quantity of oil or gas ultimately recoverable . . .” Oil & Gas Conservation Act of 1955, ch. 208, § 2 (amending COLO. REV. STAT. 100-6-3 (1953)).

68. Oil & Gas Conservation Act, *supra* note 61, at § 7 (codified at COLO. REV. STAT. §§ 34-60-105(1)).

69. IOGCC REPORT, *supra* note 40, at 16.

70. RAYMOND VERNON, THE OIL CRISIS 2 (1976).

71. Office of the Historian, *Oil Embargo, 1973-1974*, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1969-1976/oil-embargo> (last updated Oct. 31, 2013).

(1963, strengthened in 1970), the National Environmental Policy Act (1970), and the Clean Water Act (1972) altered the relationship between the IOGCC, member states, and production. The new goal of state ‘conservation’ was an all-ahead maximization of production, which included political efforts to push against the application of federal environmental regulation and to obtain federal support for production and research. The IOGCC’s lobbying efforts successfully obtained exemptions from federal price controls and environmental regulations,<sup>72</sup> and obtained billions of dollars for research into hydraulic fracturing and related technologies.<sup>73</sup> IOGCC’s efforts continue to this day. Most recently, then IOGCC chair Alaska Governor Frank Murkowski championed the passage of the 2005 Energy Policy Act, a federal action that unleashed new growth potential for the use of hydraulic fracturing through exemption from certain environmental protections.<sup>74</sup>

Today, federal environmental laws contain many exemptions for OGD,<sup>75</sup> and have been far less controlling of OGD than other heavily

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*See also* IOGCC REPORT, *supra* note 40, at 16 (noting that in 1971, the Texas state Commission allowed “all out” production but even that was unable to rise to the level of demand).

72. IOGCC REPORT, *supra* note 40, at 17:

The [IOGCC] convinced the federal government to exempt enhanced production and heavy gravity oil from freemarket prices and was successful in gaining flexibility in underground injection control regulations that would affect thousands of older wells. . . . Actions [also] targeted simplifying application processes and royalty collection verifications, carving out incentives for enhanced recovery and tertiary oil, and incentives for marginal gas wells.

73. Today’s fracking technology required billions of dollars from the federal government in tax assistance and direct research. *E.g.*, Kevin Begos, *Decades of Federal Dollars Helped Fuel Gas Boom*, AP (Sept. 23, 2012, 4:13 P.M.), <http://bigstory.ap.org/article/decades-federal-dollars-helped-fuel-gas-boom>; MICHAEL SHELLENBERGER ET AL., BREAKTHROUGH INSTITUTE, WHERE THE SHALE GAS REVOLUTION CAME FROM 2, (2012), *available at* [http://thebreakthrough.org/blog/Where\\_the\\_Shale\\_Gas\\_Revolution\\_Came\\_From.pdf](http://thebreakthrough.org/blog/Where_the_Shale_Gas_Revolution_Came_From.pdf).

74. IOGCC REPORT, *supra* note 40, at 24.

75. Industry dismisses these exemptions as “myths.” COLO. OIL & GAS ASS’N, MYTHBUSTERS: FEDERAL EXEMPTIONS (2013), *available at* [http://www.coga.org/pdf\\_mythbusters/MythBusters\\_FederalExemptions.pdf](http://www.coga.org/pdf_mythbusters/MythBusters_FederalExemptions.pdf). However, the federal government itself describes its own regulatory gaps as “exemptions.” *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-874, UNCONVENTIONAL OIL AND GAS DEVELOPMENT: KEY ENVIRONMENTAL AND PUBLIC HEALTH REQUIREMENTS (2012) (“As with conventional oil and gas development, requirements from eight federal environmental and public health laws apply to unconventional oil and gas development. . . However, key exemptions or limitations in regulatory coverage affect the applicability of six of these environmental and public health laws.”).

polluting industries.<sup>76</sup> Many OGD chemicals, processes, or wastes have been given special treatment under federal legislation, including the Clean Water Act (“CWA”),<sup>77</sup> the Safe Drinking Water Act (“SDWA”),<sup>78</sup> the Resource Conservation and Recovery Act (the federal hazardous-waste disposal law),<sup>79</sup> and the Comprehensive Environmental Response,

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76. See Barclay R. Nicholson, *Fracing: Are the Regulators Coming or Not? A Review of the State of the Industry*, 57 ROCKY MTN. MIN. L. INST. 13-1 (2011) (analyzing current federal regulatory efforts to study and redress potentially inadequate hydraulic fracturing regulations); David L. Callies, *Federal Laws, Regulations, and Programs Affecting Local Land Use Decisionmaking: Hydraulic Fracturing*, SU010 ALI-ABA 343 (2012); see, e.g., William J. Brady & James P. Crannell, *Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulation*, 14 VT. J. ENVTL. L. 39 (2012) (discussing the ways in which hydraulic fracturing is exempt from most major federal environmental regulation).

77. 33 U.S.C. §§ 1251–1388 (2012). 33 U.S.C. § 1362(6) (2012) (“The term “pollutant” . . . does not mean . . . water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes.”). In 1987, Congress amended the CWA, requiring the EPA to develop a permitting program for storm water runoff, but the exploration, production, and processing of oil and gas exploration was exempt (as long as the water was not contaminated). Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, § 401 (codified at 33 U.S.C. § 1342). Then, in the Energy Policy Act of 2005 the exemptions were once again expanded to include exemptions for wastewater from gas and oil construction activities.

78. 42 U.S.C. §§ 300f–300j (26) (2012). The Energy Policy Act of 2005 (“Halliburton loophole”) specifically excludes the underground injection of hydraulic fracturing fluids from regulation under SDWA section 1421(d). Pub. L. No. 109-58, § 322, 119 Stat. 594, 694 (2005) (codified at 42 U.S.C. § 300h). See also, MARY TIEMANN & ADAM VANN, CONG. RESEARCH SERV., R41760, HYDRAULIC FRACTURING AND SAFE DRINKING WATER ACT REGULATORY ISSUES 7 (2013) (reviewing the role of SDWA in regulating hydraulic fracturing). However, oil and gas production is still subject to regulations under other portions of the Clean Water Act, which can impose liability on landowners for oil pollution, regardless of their “fault.” See Polly Jessen & Carlton Ekberg, *Mixing Surface Development with Oil and Gas Operations - Part I*, 34 COLO. LAW. 11, 17 (2005) (citing *Quaker State Corp. v. U.S. Coast Guard*, 681 F.Supp. 280, 285 (W.D. Pa. 1988) (holding a surface owner liable for discharge of oil from his property into navigable waters)).

79. 42 U.S.C. § 6901–6992 (2012). See Brady & Crannell, *supra* note 76 (discussing the complicated procedural history of the exemption of oil and gas wastes from being designated as “hazardous” waste by the EPA, and therefore from more stringent regulation under RCRA). Fracturing fluid and all flowback materials are exempt from RCRA regulation under Subtitle C (hazardous waste) and instead are merely “solid waste” regulated under Subtitle D. Regulatory Determination for Oil and Gas Production Wastes, 53 Fed. Reg. 25,447 (Jul. 6, 1988) (amended by 58 Fed. Reg. 15,284 (Mar. 22, 1993)) (“Subtitle C regulations for all oil and gas wastes could subject billions of barrels of waste to regulation . . . and would cause a severe economic impact on the industry and on oil and gas production in the U.S.”).

Compensation, and Liability Act (“CERCLA,” or “Superfund”) which imposes liability on polluters.<sup>80</sup> Some sources of OGD air pollution are exempt from regulations under the Clean Air Act,<sup>81</sup> and the Environmental Protection Agency (“EPA”) does not require the oil and gas industry to report the release of its toxic effluents or emissions to the Toxic Release Inventory under the Emergency Planning and Community Right to Know Act (“EPCRA”).<sup>82</sup>

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80. 42 U.S.C. §§ 9601–9675 (2012). CERCLA was enacted to force financial liability on current or past owners of sites contaminated with “hazardous substances.” Petroleum, natural gas, natural gas liquids, and liquefied natural gas are all exempt from the definition of hazardous substances under RCRA, which lends its definition to CERCLA by reference. 42 U.S.C. § 9601(14). The EPA interprets the “petroleum exclusion” as applying to “crude oil, petroleum feedstocks, and refined petroleum products, even if a specifically listed or designated hazardous substance is present in such products[,]” but not waste oil or waste from the extraction process. Jessen & Ekberg, *supra* note 78, at 16. In addition, CERCLA removes potential liability from “federally permitted releases,” where the polluter has received any of a number of permits, some of which may be issued by a state (under the cooperative federalism environmental statutes). 42 U.S.C. §§ 9601(10), 9607(j). Federally permitted releases include injection (fracking and storage) and flowback materials. 42 U.S.C. § 9601(10)(G).

81. Hazardous air pollutants (“HAPs”) are regulated by § 112 of the Clean Air Act, which regulates major sources that “emit or have the potential to emit . . . in the aggregate, 10 tons per year or more of any [HAP] or 25 tons per year or more of any combination of [HAPs].” 42 U.S.C. § 7412(a)(1) (2012). Major sources are regulated more stringently than other sources of HAPs, and oil and gas sources that are major sources must obtain permits and utilize control technology that are otherwise not required. *Compare* 40 C.F.R. § 63.764(c) (2014), *with* 40 C.F.R. § 63.764(d). Unlike other emitters of HAPs, whose emissions from small facilities may be aggregated if they are located within a contiguous area and under common control, 42 U.S.C. § 7412(a)(1), oil and gas developers are specially exempt from aggregation, meaning that any individual well producing less than the statutory amount will be exempt from the CAA HAP regulations, even if it is located in a field of other wells operated by the same company. 40 C.F.R. § 63.761.

82. 42 U.S.C. § 11023 (2012). Section 313 of the act requires certain facilities that use dangerous chemicals to report annually on their releases, transfers, and other waste management practices for more than 600 listed toxic chemicals and chemical categories. Information on the release, disposal, transfer, and other waste management activities of these chemicals is then made publicly available. In 1996, while expanding EPCRA to apply outside of manufacturing facilities, the EPA declined to include oil and gas extraction and exploration to the list of reporting facilities. Addition of Facilities in Certain Industry Sectors, 61 Fed. Reg. 33,588, 33,592 (June 27, 1996) (“One industry group, oil and gas extraction . . . is believed to conduct significant management activities that involve EPCRA section 313 chemicals. EPA is deferring action to add this industry group at this time because of questions regarding how particular facilities should be identified. . . . EPA will be addressing these issues in the future.”). Twenty years later, the EPA has not addressed the issue.

Even the Oil Pollution Prevention Act contains exclusions for hydraulic fracturing, and applies only where “oil is discharged, or . . . poses the substantial threat of a discharge . . . .”<sup>83</sup> That act excludes federally permitted releases, and covers only the release of oil (excluding gasses, fracking fluids, flowback, or other wastes) into “navigable” waters—it does not apply to releases onshore or from onshore facilities.<sup>84</sup> Finally, certain natural gas facilities are the subject of targeted “categorical exclusions” under the National Environmental Policy Act (“NEPA”), which imposes a ‘rebuttable presumption’ against environmental review.<sup>85</sup>

Although the federal government directly controls petroleum pipelines, offshore production,<sup>86</sup> and development on public lands,<sup>87</sup> recent catastrophic events have cast doubt upon its willingness and ability to regulate producers.<sup>88</sup> The EPA has expressed a renewed (if belated) interest in increasing federal regulation of OGD, and has enacted new regulations requiring certain air pollution-control measures

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83. 33 U.S.C. § 2702(a) (2012).

84. *Id.* § 2701(23).

85. Pub. L. No. 109-58, § 390, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 15942). *See also* Lawrence Hurley, *N.Y. Natural Gas Fracking Lawsuit Raises NEPA Questions*, N.Y. TIMES, June 1, 2011, <http://www.nytimes.com/gwire/2011/06/01/01greenwire-ny-natural-gas-fracking-lawsuit-raises-nepa-qu-12192.html> (discussing NEPA’s application only to “major federal actions,” and the conclusion that where fracturing is not conducted on federal land or by a federal entity, NEPA likely will not apply). Although the issuance of federal permits can rise to a “major federal action,” under many environmental statutes federal environmental permits will be issued by the state, depriving the action of a federal component and alleviating the requirements of NEPA. The Clean Air and Clean Water Acts are both such cooperative federalism statutes.

86. *See* H. LEE SCAMEHORN, *HIGH ALTITUDE ENERGY: A HISTORY OF FOSSIL FUELS IN COLORADO* 43–70 (2002) (recounting the history of federal pipeline control).

87. *New Energy for America*, BUREAU OF LAND MGMT., <http://www.blm.gov/wo/st/en/prog/energy.html> (last updated Oct. 5, 2014).

88. Prior to the British Petroleum blowout of the Macondo well after the explosion and sinking of the Deepwater Horizon there were repeated warnings that such an event was likely, including evidence of a ‘near-miss’ with the B.P. Thunderhorse, and a whistleblower’s warning that the B.P. rig Atlantis violated numerous safety rules in its construction and operation. Sarah Lyell, *In BP’s Record, a History of Boldness and Costly Blunders*, N.Y. TIMES, July 12, 2010, at A1 (exploring the chronic culture of environmental and safety risk-taking at B.P., facilitated by the neglectful attitude of its federal overseers, which led to repeated disasters including dozens of deaths and the release of billions of gallons of oil). In 2010 the explosion of a natural gas pipeline in a residential Californian community, which killed eight people, was blamed in large part on poor regulatory oversight including federal exemptions for existing pipelines. NAT’L TRANSP. SAFETY BD., *PIPELINE ACCIDENT REPORT: PACIFIC GAS AND ELECTRIC COMPANY NATURAL GAS TRANSMISSION PIPELINE RUPTURE AND FIRE*, PAR-11/01 (2011).



to prevent venting of untreated gasses to the atmosphere by 2015,<sup>89</sup> and to improve performance standards for storage tanks regarding emissions of volatile organic compounds.<sup>90</sup> The EPA is also considering requiring the disclosure of the chemicals used during fracking.<sup>91</sup>

### III. LOCAL REGULATION OF OIL AND GAS IN COLORADO

Local governments have been in a regulatory fight to enact restrictions on development in Colorado since the 1980s, when conventional development began to encroach on both populated and undeveloped areas.<sup>92</sup> Until 2007, a majority of the COGCC Commissioners were also members of industry (by statute), and the state seemed happy to pocket the economic benefits of the pro-industry regulation that resulted. Cities and counties, having extremely limited or no procedural rights at the Commission, have attempted numerous regulations or bans some of which have been upheld by courts.<sup>93</sup> However, while the legislature rewrote much of the OGCA to increase the Commission's authority and duty to protect public health and the environment, and reduce the mandate to foster development and prevent waste as well as industry influence within the COGCC, the COGCC, the Governor, and the State Attorney General have used these developments to attempt further expansion of state control by interpreting state powers broadly and state responsibilities narrowly.<sup>94</sup>

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89. Oil and Natural Gas Sector: New Source Performance Standards, 77 Fed. Reg. 49,490 (Aug. 16, 2012) (to be codified at 40 C.F.R. pts. 60 and 63). *See, e.g.*, Andrew Restuccia, *EPA Issues First-Ever Air-Pollution Limits on Hydraulic Fracturing*, THE HILL, Apr. 19, 2012, at 8 (describing the regulation and some of the political debates over its proposal).

90. Amendments to the New Source Performance Standards for the Oil and Natural Gas Sector, 78 Fed. Reg. 58,416 (Sept. 23, 2013) (to be codified at 40 C.F.R. pt. 60). Volatile organic compounds include a wide range of chemicals, many of which have either short or long-term health impacts.

91. Hydraulic Fracturing Chemicals and Mixtures, 79 Fed. Reg. 28,664 (May 19, 2014).

92. Kathryn M. Mutz, Note, *Home Rule City Regulation of Oil and Gas Development*, 23 COLO. LAW. 2771, 2771 (1994); *see* Ray Ring, *Backlash: Local Governments Tackle an In-Your-Face Rush on Coalbed Methane*, HIGH COUNTRY NEWS, Sept. 2, 2002, available at <http://www.hcn.org/issues/233/11371>.

93. *See* discussion *infra* Part 0.

94. *See* discussion *infra* Part 0.

### A. *Local Governmental Powers & Limits of Authority*

At the end of the nineteenth century, municipalities were widely viewed as mere agents for state government, and were dependent on state legislation to control or delegate control of local activities. Under the common law doctrine of “Dillon’s Rule,” municipalities had no inherent sovereignty or police powers outside of those delegated by the state.<sup>95</sup> Local authority was limited to powers explicitly or impliedly conferred by the legislature.<sup>96</sup> During this era reformers felt that,

[I]t was a period of disintegration, waste, and inefficiency. Political machines and bosses plundered many communities. Lax moral standards of the times in business life, the apathy of the public, and general neglect of the whole municipal problem by leading citizens, by the press, and by the universities, all contributed to the low state of city affairs.<sup>97</sup>

The “home rule” movement found root in Colorado at the turn of the century, in part because the citizens of Denver chafed under state control of their municipality—particularly state appointed boards in charge of public works, fire, and police.<sup>98</sup> This tension nearly led to armed conflict between the city and the state in 1894.<sup>99</sup>

As noted by the Colorado Supreme Court, in one of the earliest cases on the point, “[t]he right of self-government in cities and towns is coeval with the history of the Anglo-Saxon race. It was confirmed by Magna Charta to cities and boroughs.”<sup>100</sup> Quoting language from two other state courts, the Colorado Supreme Court directed that:

Written constitutions should be construed with reference to and in the light of well-recognized and fundamental principles lying back of all constitutions, and constituting the very warp and woof of these fabrics. A law may be within the inhibition of the constitution as well by implication as by expression.

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95. *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868) (stating that “[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control”).

96. Patricia Tisdale & Erin Smith, *Municipal and County Regulation of Natural Resources Development: How Far Can Local Regulation Go?*, 40A ROCKY MTN. MIN. L. INST. 7-1, 7-2 (1995).

97. FRANK MANN STEWART, *A HALF CENTURY OF MUNICIPAL REFORM* 10 (1950).

98. *Id.* at 4–5.

99. *Id.*

100. *Town of Holyoke v. Smith*, 226 P. 158, 159 (Colo. 1924).

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‘Courts, at least, are bound to respect what the people have seen fit to preserve by constitutional enactment, until the people are unwise enough to undo their own work. The loss of interest in the preservation of ancient rights is not a very encouraging sign of public spirit or good sense.’ Such a statement is very pertinent at this time, when both federal and state government[s] are constantly encroaching upon the right of local self-government.<sup>101</sup>

Importantly, the court in *Town of Holyoke v. Smith* found that while the state may exercise its police power within a city, it may not delegate those police powers.<sup>102</sup> Article V § 35 of the Colorado Constitution prohibits the delegation of municipal functions to state commissions, corporations, or associations.<sup>103</sup> Counties may also qualify as “municipal” for the purposes of this nondelegation doctrine.<sup>104</sup> The purpose of this amendment was specifically to “prevent intrusion upon a municipality’s domain of local self-government.”<sup>105</sup> Regarding the importance of upholding the constitutional spirit, the court quoted:

Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government. The Constitution is to be construed as a frame of government or fundamental law, and not as a mere statute.<sup>106</sup>

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101. *Id.* at 159–60 (quoting *State v. Barker*, 89 N.W. 204, 207 (Iowa 1902), and *Allor v. Bd. of Auditors*, 4 N.W. 492, 499 (Mich. 1880)).

102. *Holyoke*, 226 P. at 161. (“[W]e should, in applying [Art. 5 § 35], give it a broad and reasonable, rather than a technical meaning, so as to accomplish its evident purpose. That the purpose was to prevent . . . any organization being authorized by law to control or interfere with municipal matters, whether it be the making of local improvements, *the management of property*, or the levying taxes, is clear.”) (emphasis added).

103. Colo. Const. art. V, § 35.

104. *See Reg’l Transp. Dist. v. Colo. Dep’t of Labor & Emp’t*, 830 P.2d 942, 946 (Colo. 1992) (“The term “municipal” as used in article V, section 35 of the Colorado Constitution is not limited to cities and towns.”). This case also represents the “functional” approach to nondelegation, whereby the court will examine whether the function in question is truly local such that, “principally if not exclusively, it affects only those persons residing within boundaries of the governmental unit in question and whether the political processes make those who perform the function responsive to the electorate within the affected area.” *Id.*

105. *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374 (Colo. 1980) (citing *Holyoke*, 226 P. 158).

106. *Holyoke v. Smith*, 226 P. at 158 (quoting *City & Cnty. of Denver v. Mountain States Tel. & Tel. Co.*, 184 P. 604, 606 (Colo. 1919)).

### 1. Constitutional Home Rule in Colorado

The Colorado Constitution empowers municipalities to become “home rule” jurisdictions.<sup>107</sup> Home rule municipalities have jurisdictional sovereignty equal to but separate from the state,<sup>108</sup> with the “police power” to regulate local issues without specific statutory authorization from the state.<sup>109</sup> This constitutionally empowered form of governance contrasts with “statutory” municipalities, whose powers are limited to express or implied delegation of legislative authority from the state. Home rule, with its expansive regard for the power of local governments, has always appealed to the citizens of Colorado and much less so to the state government.<sup>110</sup>

By constitutional amendment, Colorado’s citizens adopted municipal home rule in 1902 “for the purpose of creating the consolidated city of Denver and establishing that city’s independence from state legislative control of its affairs.”<sup>111</sup> In 1912, the voters strengthened the new independence of municipalities by amending the home rule provision to “grant and confirm to the people of all municipalities . . . the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such

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107. COLO. CONST. art. XX, § 6 (“The people of each city or town of this state . . . are hereby vested with . . . power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters. Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith . . . .”). See also Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321 (1964).

108. RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 281–85 (6th ed. 2004). In 1971, the state legislature adopted the Municipal Home Rule Act, establishing rules and guidelines by which municipalities could implement Art. XX. COLO. REV. STAT. §§ 31-2-101 to 31-2-407.

109. Klemme, *supra* note 107, at 321 (citing *People ex rel. Elder v. Sours*, 74 P. 167, 172 (Colo. 1903)). See also Michael J. Wozniak, *Home Court Advantage? Local Government Jurisdiction Over Oil and Gas Operations*, 48 ROCKY MTN. MIN. L. INST. 12-1, 12-16 (2002) (“In contrast [to statutory municipalities], home rule municipalities possess every power possessed by the state legislature, limited however to local and municipal matters.”).

110. KENNETH G. BUECHE, *COLO. MUN. LEAGUE, A HISTORY OF HOME RULE* 4 (2009).

111. 1901 Colo. Sess. Laws 97 (codified at COLO. CONST. art. XX). The amendment was approved by Colorado voters with 60,000 in favor and 26,000 against. Bueche, *supra* note 110, at 5.

right.”<sup>112</sup> Municipal home rule was expanded in 1970 to allow municipalities to adopt home rule regardless of their size.<sup>113</sup> The Colorado Supreme Court has interpreted these constitutional powers broadly, holding that “the power of a municipal corporation should be as broad as possible within the scope of a Republican form of government of the State.”<sup>114</sup> Obviously, home rule does not assist in the uniform administration or operational efficiency of the state, nor was it ever intended to. Home rule is intended to uphold the most ancient foundation of our political beliefs: that sovereignty lies with the people, it is not delegated to people by the state.<sup>115</sup>

The power of home rule municipalities is exclusive over local concerns—the state may not impose its will.<sup>116</sup> Under Colorado law, however, the state may preempt home rule regulations where there is a significant “state interest” involved. Where a matter encompasses both local and statewide interests, home rule municipalities may enact a regulation that does not “operationally conflict” to the extent that it “materially impedes or destroys a state interest,”<sup>117</sup> although both may be valid if they can be harmonized.<sup>118</sup> Contrary provisions do not necessarily create such a conflict, and they should be reconciled and each

112. 1913 Colo. Sess. Laws 669 (codified as amended at COLO. CONST. art. XX, § 6).

113. Senate Concurrent Resolution No. 6, 1969 Colo. Sess. Laws 1247 (codified as amended at COLO. CONST. art. XX, § 9).

114. *City of Fort Collins v. Pub. Utils. Comm’n*, 195 P. 1099, 1099 (Colo. 1921).

115. *See* discussion *supra* Part 0.

116. *Vela v. People*, 484 P.2d 1204, 1205 (Colo. 1971) (“In purely local and municipal matters, home rule cities may exercise exclusive jurisdiction by passing ordinances which supersede state statutes.”). *See also* *Roosevelt v. City of Englewood*, 492 P.2d 65 (Colo. 1971); *Nat’l Adver. Co. v. Dep’t of Highways*, 751 P.2d 632, 635 (Colo. 1988); *Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs*, 575 P.2d 835 (Colo. 1978); *City of Greeley v. Eells*, 527 P.2d 538, 541 (Colo. 1974) (proposing that zoning is a matter of local concern).

117. *See* *Nat’l Adver. Co.*, 751 P.2d at 635; *Bennion v. City & Cnty. of Denver*, 504 P.2d 350 (Colo. 1972); *Nat’l Adver. Co.*, 751 P.2d at 635; *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 761 (Colo. App. 2002). *See also* *Tisdale & Smith*, *supra* note 96, at 7-1, 7-8 (citing *Bd. of Cnty. Comm’rs v. Bowen/Edwards Ass’n, Inc.*, 830 P.2d 1045, 1056 (Colo. 1992)).

118. *Colo. Mining Ass’n v. Bd. of Cnty. Comm’rs*, 199 P.3d 718, 725 (2009) (citing *Ray v. City and Cnty. of Denver*, 21 P.2d 886, 888 (Colo. 1942)):

Mere overlap in subject matter is not sufficient to void a local ordinance. However, a local regulation and a state regulatory statute impermissibly conflict if they ‘contain either express or implied conditions which are inconsistent and irreconcilable with each other.’ In particular, local land-use ordinances banning an activity that a statute authorizes an agency to permit are subject to heightened scrutiny in preemption analysis.

given effect if possible.<sup>119</sup> Where the state interest is dominant, even home rule municipalities may not regulate in the absence of specific state constitutional or statutory authorization.<sup>120</sup>

The Colorado Supreme Court has articulated four factors to determine what constitutes a local versus a statewide concern: (1) whether there is a need for statewide uniformity of regulation; (2) whether the local regulation could create “extraterritorial” effects beyond the borders of the local jurisdiction; (3) whether there is a traditional or historic exercise of control; and (4) whether the state constitution explicitly vests authority over an issue at the state or local level.<sup>121</sup> This is not meant to be exhaustive, but to act as guidance for “a process that lends itself to flexibility and consideration of numerous criteria.”<sup>122</sup> Colorado courts have upheld local regulations with extraterritorial impacts,<sup>123</sup> have noted “uniformity in and of itself is not a virtue,”<sup>124</sup> and have weighed the relative local and state-asserted interests in order to find that some local interests trump other state interests.<sup>125</sup> The courts have wide leeway to determine whether there is a state or local interest “depend[ing] on the time, circumstances, technology, and economics.”<sup>126</sup>

It was not until 1972 that the legislature granted Colorado counties home rule authority over their unincorporated (nonmunicipal) territory.<sup>127</sup> The state legislature enacted the Colorado County Home Rule Powers Act in 1981,<sup>128</sup> to expand the powers of home rule

119. *See Minch v. Town of Mead*, 957 P.2d 1054, 1056 (Colo. App. 1998) (citing *Lewis v. Nederland*, 934 P.2d 848 (Colo. App. 1996) (“While generally a local ordinance which is in conflict with a state is void, contrary provisions in an ordinance and a state statute do not necessarily indicate a conflict”). Note that at the time of *Minch*, and today, Mead is a statutory town.

120. *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002) (citing *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001)).

121. *City & Cnty. of Denver v. State*, 788 P.2d 764, 768-69 (Colo. 1990).

122. *City of Northglenn v. Ibarra*, 62 P.3d 151, 156 (Colo. 2003).

123. *See Colorado Open Space Council, Inc. v. City & Cnty. of Denver*, 543 P. 2d 1258 (Colo. 1975); *Fishel v. City & Cnty. of Denver*, 106 P. 2d 236 (Colo. 1940); *Town of Glendale v. City & Cnty. of Denver*, 322 P.2d 1053 (Colo. 1958).

124. *Commerce City*, 40 P.3d at 1280 (Colo. 2002).

125. *Winslow Constr. Co. v. City & Cnty. of Denver*, 960 P.2d 685, 694 (Colo. 1998).

126. *Commerce City*, 40 P.3d at 1282 (citing *People v. Graham*, 110 P.2d 256, 257 (Colo. 1941)).

127. COLO. CONST. art. XIV, § 16 (“[T]he registered electors of each county of the state are hereby vested with the power to adopt a home rule charter establishing the organization and structure of county government consistent with this article and statutes enacted pursuant hereto.”).

128. COLO. REV. STAT. § 30-35-101 (2014).

counties.<sup>129</sup> Still, the powers of home rule counties are far less encompassing than that of home rule municipalities, as counties are given only a “structural” home rule—the power to change the structure of their self-governance—and do not have the additional “functional” home rule granted to municipalities.<sup>130</sup> Therefore, home rule counties have fewer inherent powers than home-rule municipalities, and require enabling legislation from the state similar to that required by statutory municipalities.<sup>131</sup>

## 2. Enabling Legislation for Local Government Regulation

For statutory municipalities and all counties, enabling legislation is required to enact regulations to control land use and other incidents related to oil and gas. Colorado has enacted a number of statutes empowering local governments to create comprehensive plans, zoning and land-use regulations.<sup>132</sup> Unlike some other states, Colorado does not have a statewide land-use plan, but leaves the majority of land-use planning to local governments.<sup>133</sup> County land-use regulatory authority in Colorado derives from three statutes: the County Planning Act, the Local Government Land Use Control Enabling Act (“Land Use Enabling Act”), and the Areas and Activities of State Interest Act (“AASIA”).<sup>134</sup> Statutory cities are empowered under Colo. Rev. Stat. § 31-15-101 (2012).

The County Planning Act was first enacted in 1939, to broadly empower boards of county commissioners to “provide for the physical

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129. “[H]ome rule powers for the counties of this state . . . shall be liberally construed.” *Id.* § 102.

130. DALE CRANE, ET AL., HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK 72 (2001).

131. See discussion *infra* Part 0.

132. Zoning ordinances to protect the public health and welfare have been held to be a proper use of police power since the early 20th century. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Exercise of the police power through zoning regulation will not be considered a taking of property without due process of law or without just compensation, nor does it violate the equal protection clause of the 14th Amendment. *Id.*, see also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition of on-site brickmaking not a taking); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (set-back regulations not a taking); *Welch v. Swasey*, 214 U.S. 91 (1909) (height restrictions not a taking). Many cases have upheld the zoning authority in spite of the effect on the value of a property or the ability to extract mineral resources from it. See Patrick H. Martin, *Jurisdiction of State Oil and Gas Commissions*, ROCKY MTN. MIN. L. INST. 3-1, 3-26 (1985) (citing, *e.g.*, *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir. 1929)).

133. COLO. DEP’T OF LOCAL AFFAIRS, LAND USE PLANNING IN COLORADO 1 (2001).

134. *Osborne v. Bd. of Cnty. Comm’rs*, 764 P.2d 397, 399–400 (Colo. App. 1988).

development of the unincorporated territory within the county and for the zoning of any part of such unincorporated territory.”<sup>135</sup> Under the County Planning Act, a county may adopt zoning resolutions to regulate land uses to promote the “health, safety, morals, convenience, order, propriety, or welfare of the present and future inhabitants of the state,”<sup>136</sup> and may adopt a land-use master plan for its unincorporated territory.<sup>137</sup>

After a population boom in the 1960s, during which Colorado grew by over twenty-five percent,<sup>138</sup> local governments complained to the legislature that their existing powers were inadequate to deal with land-use conflicts.<sup>139</sup> The Land Use Enabling Act was enacted with the recognition that “rapid growth and uncontrolled [human] development may destroy Colorado’s great resource of natural, scenic, and recreational wealth.”<sup>140</sup> Finding that local authority needed to be expanded, the legislature provided that “the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions.”<sup>141</sup> The Land Use Enabling Act allowed local governments to control and plan for growth related land uses, including “protecting lands from activities that could pose an immediate or foreseeable material danger to significant wildlife habitat,”<sup>142</sup> regulating land uses that might “impact . . . the community or surrounding areas,”<sup>143</sup> and “[o]therwise planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights.”<sup>144</sup> Under the Land Use Enabling Act, Counties are “provide[d with] broad authority” to “plan for and regulate the use of land within their respective jurisdictions.”<sup>145</sup> However, local governments may not “diminish the planning functions of the state,”<sup>146</sup> and if the state has enacted “other procedural or

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135. 1939 Colo. Sess. Laws 294.

136. COLO. REV. STAT. § 30-28-115 (2013).

137. *Id.* § 30-28-106.

138. Christopher Warner, *Of Growth Controls, Wilderness and the Urban Strip*, 6 COLO. LAW. 1730, 1734 (1977).

139. Michael D. White and Raymond L. Petros, *Land Use Legislation: H.B. 1034 and H.B. 1041*, 6 COLO. LAW. 1686, 1687 (1977).

140. *Theobald v. Bd. of County Comm’rs*, 644 P.2d 942, 947 (Colo. 1982).

141. COLO. REV. STAT. § 29-20-102 (1974) [hereinafter Land Use Enabling Act].

142. *Id.* § 104(b).

143. *Id.* § 104(g).

144. *Id.* § 104(h).

145. *Id.* § 102.

146. Land Use Enabling Act, § 102.



substantive requirements for the planning or the regulation of the use of land, such requirements shall control.”<sup>147</sup>

The AASIA was created the same year to clarify the boundary of state and local jurisdiction over matters of statewide interest, and improve the quality of local development (including non-oil and gas related development) through increased state oversight.<sup>148</sup> It gave local government so called “1041 Powers,” named for H.B. 1041 that created the AASIA.<sup>149</sup> The AASIA ensured that local authorities could consider and mitigate the impacts of new developments, even those that affect areas or activities of state interest.<sup>150</sup> Local governments can designate an activity or area to be one of state interest, in which case they may halt the project until reviews are conducted, and although they would then be forced to use minimum state regulations, they may also choose more stringent regulations.<sup>151</sup> Some examples of activities that a local government might want to designate would be the site selection for airports, highways, or sewage treatment plants.<sup>152</sup> Mineral resource areas may be designated, and, if a local government finds that mineral “extraction and exploration would cause significant danger to public health and safety,” it need not devote the area to mineral development, and if “the economic value of the minerals present therein is less than the value of another existing or requested use, such other use should be given preference . . . .”<sup>153</sup> In 2004 the Department of Local Affairs reviewed local 1041 regulations and found that approximately half of Colorado’s counties were regulating ‘mineral resource areas.’<sup>154</sup> However, 1041 powers are limited in their authorization for local control over oil and gas development: the COGCC must agree to new

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147. *Id.* §107.

148. CO H.B. 74-1041 (codified at COLO. REV. STAT. § 24-65.1-101) (amended by CO H.B. 05-1063). *See also* Nicholas Panos, *H.B. 1041 as a Tool for Municipal Attorneys*, 23 COLO. LAW. 1309 (1994).

149. CO H.B. 74-1041 (codified at COLO. REV. STAT. § 24-65.1-101) (amended by CO H.B. 05-1063).

150. *Id.*

151. Panos, *supra* note 148, at 1309. The AASIA provides that “[n]o provision in this article shall be construed as prohibiting a local government from adopting guidelines or regulations containing requirements which are more stringent.” COLO. REV. STAT. § 24-65.1-402.

152. COLO. REV. STAT. § 24-65.1-101 (2012). *See Colo. Dep’t of Local Affairs—1041 Regulations*, COLORADO.GOV, <http://www.colorado.gov/cs/Satellite/DOLA-Main/CBON/1251595404521> (last visited Oct. 6, 2014).

153. COLO. REV. STAT. § 24-65.1-202(1)(a).

154. *Id.* § 24-65.1-101; *2004 Colorado County Land Use Survey*, COLO. DEP’T OF LOCAL AFFAIRS, <http://www.colorado.gov/> (last visited Oct. 6, 2014).

designations of oil and gas areas of state interest, unless it includes all or part of another area of state interest.<sup>155</sup>

The legislature delegated police power to statutory municipalities to enact “ordinances not inconsistent with the laws of [the] state,” where “necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such municipality and the inhabitants thereof.”<sup>156</sup> The statute was amended in 1975 to clarify and guide the use of municipal powers.<sup>157</sup> Statutory municipalities also have zoning authority;<sup>158</sup> however, this is narrower than the zoning authority granted to counties.<sup>159</sup> Several Colorado statutes give local governments regulatory authority to protect the environment and public health, including the power to enact air pollution regulations,<sup>160</sup> and to declare what is a nuisance.<sup>161</sup>

Although home rule municipalities possess more regulatory power than other forms of local government, the preemption test for home rule and statutory municipalities and counties is currently the same: whether there is “operational conflict” to the extent that it “materially impedes or destroys a state interest.”<sup>162</sup> The regulation of oil and gas has been found

155. COLO. REV. STAT. § 24-65.1-202(1)(d) (2012).

156. *Id.* § 31-15-103 (2013).

157. 1975 Colo. Sess. Laws 1105.

158. COLO. REV. STAT. § 31-23-301 (2011); *see* *Glennon Heights, Inc. v. Central Bank & Trust*, 658 P.2d 872, 876 (Colo. 1983) (internal citations omitted) (“We have previously held that the general assembly has power to legislate zoning regulations applicable to statutory cities . . . . The power to promulgate zoning regulations in furtherance of the general health, safety and welfare is reposed in the legislative branch of the state government, and any such legislative powers of statutory cities are derived through a delegation of state power.”).

159. Even under statutory municipal authority, ordinances that require structures to be set back from the property line—even for aesthetic purposes—are a valid exercise of zoning power. *City of Leadville v. Rood*, 600 P.2d 62 (1979) (upholding the power of a city to enact building setbacks and variance requirements to promote aesthetic uniformity).

160. COLO. REV. STAT. § 25-7-128.

161. *Id.* § 31-15-401(1)(c) (2012).

162. *See Bennion v. City & Cnty. of Denver*, 504 P.2d 350, 352 (Colo. 1972) (where there are both state and local interests, a home rule city may not forbid what the state expressly permits in criminal statutes); *Nat’l Adver. Co. v. Dep’t of Highways*, 751 P.2d 632, 636 (Colo. 1988) (“Vesting a home-rule municipality with exclusive control over outdoor advertising devices located within the municipality along roads of the state highway system would materially impede, if not destroy, any prospect of achieving [state regulatory] goals”). *See Tisdale & Smith, supra* note 96, at 7-1, 7-5 (citing *Bowen/Edwards*, 830 P.2d at 1056–57).

to be of mixed state and local interests, and neither expressly nor impliedly preempted by statute.<sup>163</sup>

### *B. Development of The Ad Hoc Conflict Preemption Test*

In the 1980s, when the fight between the state and local governments over regulation of oil and gas began, the statutory mandate of the COGCC was:

[T]o promote the development, production, and utilization of the natural resources of oil and gas in the state; to protect public and private interests against the evils of waste; to safeguard and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas so that each may obtain a just and reasonable share of production therefrom; and to permit each oil and gas pool to produce up to its maximum efficient rate of production subject to the prohibition of waste and subject further to the enforcement of the coequal and correlative rights of commons-source owners and producers to a just and equitable share of the profits.<sup>164</sup>

It was not until 1985, after Douglas County attempted to restrict development, that the General Assembly amended the OGCA to explicitly require the COGCC to “promulgate rules and regulations to protect the health, safety, and welfare of the general public in the drilling, completion, and operation of oil and gas wells and production facilities.”<sup>165</sup>

#### *1. Osborne v. Board of County Commissioners of Summit County*

In the mid-1980s, Douglas County enacted regulations requiring oil and gas developers to obtain special use zoning permits, which would be determined by the Board of County Commissioners after a public hearing.<sup>166</sup> In addition to specific permitting criteria, the measure allowed the Board to impose additional conditions not required by the zoning resolution.<sup>167</sup> The Board denied Harry Osborne and Anthony Allegreti’s permit for three wells because they refused some conditions

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163. See *Bowen/Edwards*, 830 P.2d at 1057–58 (no clear and unequivocal statement of legislative intent to prohibit a county from exercising its traditional land-use authority over OGD, and no state interest so patently dominant or inherent irreconcilable conflict so as to eliminate local control by necessary implication).

164. COLO. REV. STAT. § 34-60-102(a) (1984).

165. *Id.* § 34-60-106(11) (1991 Supp.).

166. *Osborne v. Bd. of County Comm’rs*, 764 P.2d 397, 398 (Colo. App. 1988).

167. *Id.* at 397.

required by the Board, including immediate reclamation, a bond to cover potential costs to the County, assurances that spills would not impact downstream water users, a fire protection plan, and cement casing of the well to the base of the water supply.<sup>168</sup> Osborne and Allegreti sued the County, claiming that COGCC's authority to regulate OGD preempted Douglas County's zoning ordinance.<sup>169</sup> The district court concluded that none of the conditions and requirements imposed by the Board were "proper land use considerations," but pertained to "conduct of the drilling operations" regulated exclusively by the COGCC, reversed the denial of the permit and remanded to the Board.<sup>170</sup> The County appealed the district court's decision.<sup>171</sup>

*Osborne* entered the courts before the 1985 amendments, when the stated purpose of the COGCC was to "encourage the development, production, and utilization of the natural resources of oil and gas . . . to prevent waste, and to allow each owner of an interest in an oil or gas pool to obtain an equitable share of the pool's production."<sup>172</sup> The court of appeals found that the COGCC had adopted expansive regulation under its authority, and decided that by enacting the OGCA, the legislature intended "to vest in the Commission the sole authority to regulate those subjects addressed by the Act and bar any local regulation concerning those subjects."<sup>173</sup> It contrasted the OCGA with the Mined Land Reclamation Act, which required permittees to show they had complied with all local laws, instructing the state to deny permits if the operation would be in conflict with county zoning or subdivision regulations—provisions not contained within the OGCA.<sup>174</sup>

In 1985, while *Osborne* was still being decided, the state General Assembly adopted an amendment to the OGCA requiring the COGCC to promulgate regulations "to protect the health, safety, and welfare of the general public in the drilling, completion, and operation of oil and gas wells and production facilities."<sup>175</sup> The *Osborne* court asked the County to "provide . . . their views as to whether this provision left any room for local legislation, or for the requirement of a local permit."<sup>176</sup> The County conceded that "it no longer [had] any basis to continue to deny . . . their

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168. *Id.* at 399.

169. *Id.*

170. *Id.* at 399.

171. *Osborne*, 764 P.2d at 398.

172. *Id.* at 400 (citing COLO. REV. STAT. § 34-60-102 (1984)).

173. *Osborne*, 764 P.2d at 402.

174. *Id.*

175. COLO. REV. STAT. § 34-60-106(11) (1987 Cum. Supp.).

176. *Osborne*, 764 P.2d at 402.

right to make use of their leasehold interest . . . .”<sup>177</sup> Whether or not the legislature intended the result, the amendment had the effect of expanding the issues subject to state preemption by the state.

The court of appeals remanded the case and directed the district court to remand it to the County with instructions to issue the well permits.<sup>178</sup> *Oborne* represents the high water mark for state preemption of local oil and gas regulations because it found that the COGCC had field preemption to promulgate OGD rules, including health and safety rules.<sup>179</sup> However, while *Oborne* was never explicitly overruled, in *Bowen/Edwards* the Colorado Supreme Court narrowly construed the 1985 OGCA provisions to apply only to the technical aspects of drilling, and failed to grant broad authority to regulate for health, safety and welfare.<sup>180</sup> No later case has supported the field preemption theory advanced in *Oborne*.

2. *Voss v. Lundvall Brothers and Board of County Commissioners v. Bowen/Edwards*

Two cases, *Voss v. Lundvall Brothers* (“Voss”),<sup>181</sup> and *County Commissioners v. Bowen/Edwards and Associates* (“Bowen/Edwards”),<sup>182</sup> articulate the current scope of state preemption in OGD regulation. Together, these two cases hold that while state delegation of certain regulatory powers preempted local regulations that “operationally conflict” with state regulations, there is no “overriding state interest” or field preemption. Instead, operational conflict must be decided in each case on a developed evidentiary record, or “ad hoc” basis.<sup>183</sup> Thus, these cases implicitly overrule *Oborne*’s field preemption

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177. *Id.*

178. *Id.*

179. *Id.* at 401–02 (“[T]he comprehensiveness of the provisions of the Act, and the Commission’s regulations issued pursuant thereto, and the purposes sought to be accomplished by them, as well as the absence from the Act’s terms of any reference to local zoning or other regulations, convince us that it was the intent of the General Assembly to vest in the Commission the sole authority to regulate those subjects addressed by the Act and to bar any local regulation addressing those subjects.”).

180. *Bowen/Edwards*, 830 P.2d at 1058.

181. *Voss*, 830 P.2d 1061.

182. *Bowen/Edwards*, 830 P.2d 1045.

183. *See Voss*, 830 P.2d 1061 (Colo. 1992) (invalidating the total ban of petroleum development by a home rule municipality); *Bowen/Edwards*, 830 P.2d 1045 (Colo. 1992) (upholding some and invalidating other regulations of oil and gas development by a county).

finding, and make room for both counties and home-rule municipalities to exercise their regulatory powers in the oil and gas context.<sup>184</sup>

*Bowen/Edwards* came to the court of appeals after an oil developer brought a facial challenge to La Plata County oil and gas permit regulations.<sup>185</sup> Finding it could resolve the legal issue of preemption without first remanding the case for development of a factual record, the court held that “[t]he [Colorado Oil and Gas Conservation] Act is a legislative intent to occupy the field of oil and gas regulation. Sole authority to regulate that area is vested in the [COGCC], and any local regulation addressing the subject is barred.”<sup>186</sup> In addition, the court did not make any distinction between technical aspects of drilling, operation, and production on the one hand, and land use on the other. It found that the Colorado legislature had created field preemption by giving the COGCC “broad authority to regulate all phases of oil and gas development, including regulation of the impact of such development on the surrounding community.”<sup>187</sup>

In a momentous turn, the Colorado Supreme Court took up *Bowen/Edwards* to overturn the holding of the court of appeals.<sup>188</sup> Disagreeing with the lower court’s holding on preemption, the court found that local jurisdictions were not preempted with regard to their traditional powers over local land-use issues: “The state’s interest in oil and gas activities,” the court stated, “is not so patently dominant over a county’s interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.”<sup>189</sup> Because the Colorado Supreme Court found that conflict preemption, rather than field preemption, would decide the validity of local regulation, *Bowen/Edwards* primarily stands

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184. See *Voss*, 830 P.2d at 1068 (citing *Bowen/Edwards*, 830 P.2d at 1058):

“What we said in *Bowen/Edwards* concerning the land-use authority of a county applies to a home-rule city . . . The state’s interest in oil and gas activities is not so patently dominant over a county’s interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.”

185. *Bowen/Edwards Assocs., v. Board of Cnty. Comm’rs*, 812 P.2d 656 (Colo. App. 1990).

186. *Id.* at 658 (citing *Osborne*, 764 P.2d 397).

187. *Bowen/Edwards* 812 P.2d at 659.

188. *Bd. of Cnty. Comm’rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045 (Colo. 1992).

189. *Id.* at 1058.

for the proposition that operational conflict questions must be resolved on an ad hoc basis using a fully developed evidentiary record.<sup>190</sup>

The Colorado Supreme Court in *Bowen/Edwards* held that the effect of the 1985 amendments to the OGCA was simply to regulate the technical aspects of OGD to minimize the risk to the public.<sup>191</sup> As discussed at length by the Colorado Supreme Court in *Bowen/Edwards*, that provision was enacted to give the Commission the rulemaking authority to protect the public from such hazards as leaks, blowouts, or explosions, and “nothing in the statutory text . . . or[,] for that matter, in the legislative history . . . evinces a legislative intent to preempt all aspects of a county’s land-use authority over land that might be subject to oil and gas development or operations.”<sup>192</sup> As noted by the court, “[a] legislative intent to preempt local control over certain activities cannot be inferred merely from the enactment of a state statute addressing certain aspects of those activities.”<sup>193</sup> Indeed “[t]he state’s interest in uniform regulation . . . does not militate in favor of an implied legislative intent to preempt all aspects of a county’s statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations.”<sup>194</sup>

The same day it decided *Bowen/Edwards*, the Colorado Supreme Court issued the companion case of *Voss v. Lundvall Bros.*<sup>195</sup> There, the home-rule City of Greeley enacted two nearly identical ordinances banning oil and gas well drilling within the city.<sup>196</sup> Lundvall Brothers, a Colorado oil company, obtained drilling permits from the city and the COGCC shortly before (and subsequently invalidated by) the passage of these ordinances.<sup>197</sup> Both the trial court and the court of appeals sided with the developer, holding that the OGCA reflects an overriding state concern with uniformity in regulation of OGD that left no room even for

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190. *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 761 (Colo. App. 2002) (discussing the meaning of *Bowen/Edwards*).

191. *Bowen/Edwards*, 830 P.2d at 1059 (“The predominant legislative concern [in granting] the Oil and Gas Conservation Commission adequate rulemaking authority [was] to protect the general public from accidents caused by gas leaks and ‘blowouts’ or explosions . . . . The effect . . . therefore, is to vest the commission with the authority and responsibility for developing adequate technical safeguards calculated to minimize the risk of injury to the public from oil and gas drilling and production operations.”) (internal citations omitted).

192. *Id.* at 1058–59.

193. *Id.* at 1058 (citing *City of Aurora v. Martin*, 507 P.2d 868, 869 (Colo. 1973)).

194. *Bowen/Edwards*, 830 P.2d at 1058.

195. *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992).

196. *Id.* at 1063.

197. *Id.*

home rule cities to exercise traditional land-use authority.<sup>198</sup> The Colorado Supreme Court affirmed the court of appeals decision, but not its field-preemption reasoning.<sup>199</sup> Instead, it held that the powers of a home-rule city to control OGD encompassed matters of both local and statewide concern, and that since conflict preemption applied to matters of ‘mixed’ concern, a total ban on drilling would be invalidated by its inherent conflict with state regulations.<sup>200</sup> Using the four-part test, the court examined the local ban.<sup>201</sup> First, the court found that “primarily” due to the “pooling nature” of oil, the technological limitations on well placement, and consequent potential for extraterritorial effects, “the need for statewide uniformity of regulation of oil and gas development and production . . . weighs heavily in favor of state preemption of Greeley’s total ban . . . .”<sup>202</sup> Furthermore, the court found that the state traditionally had been the regulator of OGD (although it did not, traditionally, override local land-use authority).<sup>203</sup> The court noted that the state constitution neither committed OGD regulation solely to the state, nor land-use control to local governments.<sup>204</sup> Therefore, according to *Voss*, local governments retain their land-use authority in the OGD context “only to the extent that the local ordinance does not materially impede . . . significant state goals . . . .”<sup>205</sup>

At the time of *Voss*, drilling locations were restricted to directly above very specific portions of the target formation, and the target formations were those of pooling oil. “Oil and gas are found in subterranean pools, the boundaries of which do not conform to any jurisdictional pattern. As a result, certain drilling methods are necessary for the productive recovery of these resources.”<sup>206</sup> “The extraterritorial effect of the Greeley ordinances,” the court noted, “also weighs in favor of the state’s interest in effective and fair development and production,

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198. *Id.* at 1063–64.

199. *Id.* at 1069.

200. *Voss*, 830 P.2d at 1066.

201. The four factors articulated by the court are: whether there is a need for statewide uniformity of regulation; whether the local regulation could create “extra-territorial” effects beyond the borders of the local jurisdiction; considerations as to the traditional or historic exercise of control; and whether the state constitution explicitly vests authority over an issue at the state or local level. *Id.* at 1067. *See also* *City & Cnty. of Denver v. State*, 788 P.2d 764, 767–68 (Colo. 1990) (citing *Nat’l Adver.*, 751 P.2d 632).

202. *Voss*, 830 P.2d at 1067.

203. *Id.* at 1068.

204. *Id.*

205. *Id.*

206. *Id.* at 1067.



again based primarily on the pooling nature of oil and gas.”<sup>207</sup> Today, advances in drilling technology allow for directional and horizontal drilling of up to two miles underground, allowing recovery from wells that are sited more optimally for surface features.<sup>208</sup> Furthermore, today’s target formations to be fracked are largely impermeable (thus necessitating the fracturing of the rock), and therefore do not “flow.”<sup>209</sup>

As noted by the Colorado Supreme Court in *Town of Frederick v. NARCO*, the Colorado constitution forbids the General Assembly from delegating any municipal authority to a state commission such as the COGCC.<sup>210</sup> Land use, zoning, and regulation related to industrial are quintessentially local and municipal matters.<sup>211</sup> In *Voss*, the Colorado Supreme Court dismissed the notion that the OGCA intruded on municipal functions in violation of the Colorado Constitution’s Article 5 Section 35 because the court found that OCGA was not “directed to municipal land use but rather to the effectuation of the state’s legitimate concern for the efficient and fair development and production of oil and gas resources within the state.”<sup>212</sup>

### C. Legislative and Judicial Developments Subsequent to *Voss* and *Bowen/Edwards*

In 1994, two years after the decisions in *Voss* and *Bowen/Edwards*, the legislature amended the OGCA to include “protection of public health, safety, and welfare” as a consideration of the Commission while

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207. *Voss*, 830 P.2d at 1067.

208. *See, e.g.*, Cathedral Drilling Services Ltd., *Directional Drilling*, CATHEDRAL ENERGY SERVICES, <https://www.cathedralenergyservices.com/services/drilling.php> (last visited Oct. 10, 2014) (“[H]orizontal and directional drilling is used when the specific subsurface target is not accessible using conventional vertical drilling practices; for example, when the desired target zone is located directly beneath . . . [a] town or environmentally sensitive area.”).

209. *See, e.g.*, Kathleen White, *The Fracas about Fracking*, NAT’L REV. (June 2011), <http://energyindepth.org/wp-content/uploads/2011/06/The-Fracas-about-Fracking.pdf> (“Fracking is . . . used in vertical and horizontal drilling in oil reservoirs with low permeability. Conventional oil reservoirs with permeable geologic formations allow oil to flow to the wellbore as a result of natural pressure.”).

210. Brief of the Colorado Municipal League as Amicus Curiae at 21, *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758 (Colo. App. 2002) (citing COLO. CONST. art. V, § 35).

211. *See* discussion *supra* Part 0; Nat’l Adver., 751 P.2d 632 (home-rule municipality’s control of land use within its borders through zoning legislation is a matter of local concern).

212. *Voss*, 830 P.2d at 1069.

it promotes, fosters, and encourages development and production.<sup>213</sup> These amendments added a seventh member to the COGCC, and increased the required number of members who are not employed by the oil and gas industry from one to two, while still requiring that the remaining five “shall be individuals with substantial experience in the oil and gas industry.”<sup>214</sup> The amendments required the Commission to regulate oil and gas operations “so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource . . . to the extent necessary to protect health, safety, and welfare, taking into consideration cost-effectiveness and feasibility.”<sup>215</sup> Also, the amendments required the COGCC to “promulgate rules to ensure proper reclamation of the land and soil affected by oil and gas operations.”<sup>216</sup>

In *Bowen/Edwards*, the Colorado Supreme Court found that the language in the 1985 amendment gave the COGCC authority only to develop the technical safeguards necessary to minimize the risk from production operations.<sup>217</sup> The 1994 amendment gave COGCC authority to promulgate rules and regulations to protect the public “*in the conduct of oil and gas operations*.”<sup>218</sup> Just as in 1985, the state used this new language to claim that COGCC’s authority preempted local rules, despite the legislature’s normative instruction that “nothing in this act shall be construed to affect the existing land use authority of local governmental entities.”<sup>219</sup> This time, however, the courts disagreed. The Colorado Court of Appeals, in the cases of *Town of Frederick v. NARCO*, *Gunnison County v. BDS International*, and *La Plata County v. COGCC*, affirmed that local governments retained their authority to regulate OGD, as long as such regulations could be reconciled with state law.

### *1. Town of Frederick v. North American Resources Company*

In 2002, the Colorado Court of Appeals decided a case in which the North American Resources Company (“NARCO”) challenged the Town

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213. S.B. 94-177, 59th Gen. Assemb., 2d Reg. Sess. (Colo. 1994) (codified as amended at COLO. REV. STAT. § 34-60-102 (2014)).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Bowen/Edwards Assocs., v. Bd. of Cnty. Comm’rs*, 830 P.2d 1045, 1059 (Colo. 1992) (citing Transcript of Preliminary Discussion of S. Comm. on Agric., Natural Res. & Energy, at 14, 21 (Colo. 1985)).

218. S.B. 94-177, 59th Gen. Assemb., 2nd Reg. Sess. (Colo. 1994) (codified as amended at COLO. REV. STAT. § 34-60-102 (2014)) (emphasis added).

219. *Id.*

of Frederick's oil and gas regulations.<sup>220</sup> The Town of Frederick is a small statutory municipality.<sup>221</sup> The disputed local ordinance prohibited the drilling of oil or gas wells without a special use permit.<sup>222</sup> The permit required a \$1,000 application fee; contained specific requirements for well location, setbacks, and nuisance impact mitigation; and authorized the town attorney to bring an action to enjoin, remove, or impose penalties for noncompliance.<sup>223</sup> NARCO obtained the required state COGCC permits, but the town brought suit after NARCO began operations without applying for the town special use permit.<sup>224</sup> The trial court struck down several provisions in the Town of Frederick's ordinance, upheld others, issued an injunction, and awarded attorney's fees to the town.<sup>225</sup> At the Colorado Court of Appeals, the central question was whether a statutory municipality had the power to enact regulations aimed at oil and gas production within its jurisdiction.<sup>226</sup>

NARCO argued that the 1994 OGCA amendments expanded state preemption to preclude any local regulation of oil and gas.<sup>227</sup> The trial court found that the amendments did not "compel such a conclusion," and noted that the amendment contained a statement that "nothing in this act shall be construed to affect the existing land use authority of local governmental entities."<sup>228</sup> Additionally, the court noted that in 1996 the legislature one again amended the OGCA to authorize local governments to charge a "reasonable and nondiscriminatory fee for inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes."<sup>229</sup> According to the court, "the General Assembly anticipated that local governments could issue land use permits that included conditions affecting oil and gas operations [and] . . . did not intend to preempt all local regulation . . ."<sup>230</sup> New COGCC regulations, the court said, could *potentially* create operational conflicts that would invalidate

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220. *Town of Frederick v. N. Am. Res. Co.* ("NARCO"), 60 P.3d 758 (Colo. App. 2002).

221. *NARCO*, 60 P.3d at 761.

222. *Id.* at 760.

223. *Id.*

224. *Id.*

225. *See id.* at 760.

226. *See NARCO*, 60 P.3d at 760–61.

227. *Id.* at 762.

228. *Id.* at 763 (1994 Colo. Sess. Laws 1978).

229. *NARCO*, 60 P.3d at 763 (citing 1996 Colo. Sess. Laws 346) (emphasis removed).

230. *NARCO*, 60 P.3d at 763.

irreconcilable local regulation, but that the statutory changes did not preclude local regulation per se.<sup>231</sup>

NARCO also claimed that language in *Bowen/Edwards* declared that technical aspects of siting, drilling, and operation of production facilities were activities that required uniform state regulation, and that therefore the Town ordinance was wholly preempted.<sup>232</sup> The court dismissed the claim, noting that “[t]he *Bowen/Edwards* court did not say that the state’s interest ‘requires uniform regulation of drilling’ and similar activities,” rather, only the “technical aspects” of drilling and similar activities.<sup>233</sup> The court then held that the town’s regulations, “such as those governing access roads and fire protection plans,” did not “regulate technical aspects of oil and gas operations.”<sup>234</sup> The court noted that the Town’s regulations might be preempted if an actual conflict with COGCC regulations persisted.<sup>235</sup>

After dismissing NARCO’s arguments, the court found that, under the operational conflict test established by *Bowen/Edwards* and *Voss*, local regulations relating to any technical aspect of drilling, setback, noise abatement, or visual impacts were preempted, including the town’s fine for violations.<sup>236</sup> After *NARCO*, what remained of the town ordinance were building permit requirements for aboveground structures, access road maintenance requirements, fire and emergency planning requirements, the ability to require new buildings to be set back from existing wells, and the ability to enjoin violations.<sup>237</sup>

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231. *Id.* at 764. It is important to note that the Colorado Municipal League, as amicus curiae, argued that the operational conflict rules articulated by the court “impermissibly imputed to the General Assembly a delegation of authority to the COGCC, in violation of Colo. Const. Art. V, § 35.” *Id.* at 766. The court declined to hear this argument as it was raised for the first time on appeal. *Id.* This argument therefore remains untested since *Voss*, although the 1994 amendments significantly expanded the ability of the COGCC to regulate not just the technical aspects of OGD, but everything that occurs “in the conduct” of OGD. *See Voss*, 830 P.2d 1061.

232. *NARCO*, 60 P.3d at 762 (citing *Bowen/Edwards*, 830 P.2d at 1058).

233. *NARCO*, 60 P.3d at 763. “The phrase ‘technical aspects[,]’” the court argued, “suggests that there are ‘nontechnical aspects’ that may yet be subject to local regulation.” *Id.*

234. *Id.* at 763–64.

235. *Id.* at 763.

236. *Id.* at 765–66.

237. *See id.* at 765.



Fig. 3. Pump jack next to homes in Frederick, CO.<sup>238</sup>



Fig. 4. Drilling rig set up near subdivision in Frederick, CO.<sup>239</sup>

## 2. *Board of County Commissioners of Gunnison County v. BDS International, LLC*

At roughly the same time as *NARCO* was moving through the courts, Gunnison County brought a case against BDS International for violating local oil and gas regulations.<sup>240</sup> The COGCC intervened to defend the oil company, and moved for summary judgment on the basis that the county regulations were preempted.<sup>241</sup> The trial court agreed, holding that numerous county ordinance provisions facially conflicted with state law.<sup>242</sup> The Colorado Court of Appeals found that the trial court erred, in part, by failing to develop the evidentiary record required by the ad hoc rule in *Bowen/Edwards*.<sup>243</sup> The court rejected the notion that “same subject” regulation by local governments was necessarily preempted, under both *Bowen/Edwards* and *NARCO*.<sup>244</sup> The court

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238. Photograph of pump jack next to homes in Frederick, Colo., in Scott Rochat, *10 Years Since Frederick Fought to a Draw on Oil/Gas Rules*, LONGMONT TIMES-CALL, June 2, 2012, [http://www.timescall.com/ci\\_20769188/10-years-since-frederick-fought-draw-oil-gas](http://www.timescall.com/ci_20769188/10-years-since-frederick-fought-draw-oil-gas). Today, the Town of Frederick is a hotspot for OGD activity, with nearly 500 wells inside municipal limits. *See id.*

239. Photograph of Drilling rig set up near subdivision in Frederick, Colo. in Joshua Zaffos, *Front Range Drilldown*, HIGH COUNTRY NEWS, Sept. 5, 2013, available at <http://www.hcn.org/issues/45.15/front-range-drilldown>.

240. Bd. of Cnty. Comm’rs v. BDS Int’l, 159 P.3d 773, 777 (Colo. App. 2006).

241. *Id.*

242. *Id.*

243. *Id.* at 778.

244. *Id.* at 779 (“[W]e reject [the] contention that a same-subject analysis applies to determine whether there is an operational conflict. [Intervenor] maintains that if a state statute or regulation concerns a particular aspect of oil and gas operations, any county regulations in that area are automatically preempted under operational conflicts preemption . . . *Bowen/Edwards* and *Town of Frederick v. North American Resources Co.* do not support this conclusion.”).

upheld the trial court's facial determination that fines, mitigation costs, and bonds were solely regulated by the COGCC, and that access to operator records could be limited to the COGCC and its agents.<sup>245</sup> However, the court determined that an evidentiary record was necessary to support the claim of preemption against county regulations relating to water quality, soil erosion, wildlife, vegetation, livestock, cultural and historic resources, geologic hazards, wildfire protection, recreation impacts, and permit duration.<sup>246</sup>

### 3. *Board of County Commissioners of La Plata County v. COGCC*

In a minor case decided between *NARCO* and *BDS, International—La Plata County v. COGCC*—La Plata County Commissioners brought action against the COGCC challenging the language of Rule 303(a), which stated that “[t]he permit-to-drill shall be binding with respect to any conflicting local governmental permit or land use approval process.”<sup>247</sup> The County argued that the rule “improperly expanded the operational conflict standard articulated in *Bowen/Edwards* by providing that [the Commission rule] prevailed whenever there is any conflicting local government permit or land use approval process.”<sup>248</sup> The court, applying *Bowen/Edwards*, *Voss*, and *NARCO*, determined that the COGCC had overstepped its authority.<sup>249</sup> “According to [the COGCC],” the court stated, “this rule is merely a statement of its understanding of relevant case law, in particular, *Bowen/Edwards*, and is not meant to contravene that law. COGCC’s understanding of relevant case law, however, is not binding upon us.”<sup>250</sup>

### 4. *2007 Amendments to the OGCA and 2008 COGCC Rule Making*

The most recent major amendments to the OGCA were in 2007. House Bill 07-1341 increased the members of the COGCC from seven to nine, by including the directors of the Colorado Departments of Natural Resources and Public Health and the Environment as ex officio members. The bill reduced the number members who must have “substantial oil and gas experience” from five to three, and required that at least one member of the COGCC be a local government official, one

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245. *BDS Int’l*, 159 P.3d at 779–80.

246. *Id.* at 780.

247. *Bd. of Cnty. Comm’rs v. Colo. Oil & Gas Conservation Comm’n*, 81 P.3d 1119, 1122 (Colo. App. 2003).

248. *Id.* at 1123.

249. *Id.* at 1125.

250. *Id.*

have training in environmental or wildlife issues, one be experienced in soil conservation, and one be a royalty owner engaged in agriculture.<sup>251</sup> *Inter alia*, the amendments require the COGCC to consult with the Colorado Department of Public Health and Environment (“CDPHE”) to promulgate regulations to protect the health, safety, and welfare of the public, and ensure that the Department “has an opportunity to provide comments” during the decision-making process.<sup>252</sup> In addition, the Commission must “minimize adverse impacts to wildlife resources affected by oil and gas operations,”<sup>253</sup> consult with the Division of Wildlife when making decisions impacting wildlife, and implement best management practices and standards to conserve and minimize impacts on wildlife.<sup>254</sup>

The COGCC began implementing rule making on Dec. 11, 2008 “to protect public health, safety, and welfare, including the environment and wildlife resources, from the impacts resulting from the dramatic increase in oil and gas development in Colorado.”<sup>255</sup> The new regulations were developed with input from both the CDPHE and Colorado Parks and Wildlife. The regulations contained additional operating requirements in sensitive wildlife habitat and restricted surface occupancy areas.<sup>256</sup> However, many of the Rules’ substantive—but more importantly, procedural—requirements were left in place, including simple processes for industry to obtain rule variances and waivers, the limitations on procedural rights for neighbors and local governments, and extremely small penalties for violations.<sup>257</sup>

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251. H.B. 07-1341, 66th Gen. Assemb., 1st Reg. Sess. (Colo. 2007) (codified at COLO. REV. STAT. § 34-60-106 (2014)).

252. COLO. REV. STAT. § 34-60-106(11)(a)(II) (2014).

253. *Id.* § 34-60-128(2).

254. *Id.* § 34-60-128(3).

255. Statement of Basis, Specific Statutory Authority, and Purpose: New Rules and Amendments to Current Rules of the Colorado Oil and Gas Conservation Commission, 2 COLO. CODE REGS. 404-1, COGCC, (2008), *available at* [https://cogcc.state.co.us/RuleMaking/FinalRules/COGCCFinalSPB\\_121708.pdf](https://cogcc.state.co.us/RuleMaking/FinalRules/COGCCFinalSPB_121708.pdf).

256. *See* COGCC Protection of Wildlife Resources Rules, 2 COLO. CODE REGS. 404-1 §§ 1203–1205 (2014). *See also* COGCC Reclamation Regulations, 2 COLO. CODE REGS. 404-1 §§ 1001–1104 (2014).

257. *See* Draft Rules for Oil and Gas Development in Colo. (H.B. 1298 & H.B. 1341), COGCC (2008), *available at* [https://cogcc.state.co.us/RuleMaking/FinalRules/COGCCFinalRuleAmendments\\_121708.pdf](https://cogcc.state.co.us/RuleMaking/FinalRules/COGCCFinalRuleAmendments_121708.pdf) (for example, Rule 502 was substantively unchanged in the process, and allows “[v]ariations to any Commission rules, regulations, or orders may be granted in writing by the Director without a hearing upon written request by the operator to the Director,” if the operator can “make a showing it has made a good faith effort to comply, or is unable to comply” and “that the requested variance will not violate the basic intent of the [OGCA]”).

During the rule-making process, several counties and the Northwest Council of Colorado Council of Governments filed a motion with the COGCC to address their concerns that the Commission was acting beyond its powers and expanding the preemptive effect of its regulations.<sup>258</sup> They asked for clarification from the COGCC that the rules were to constitute a “floor” and not a “ceiling” in oil and gas regulation, and also asked that the COGCC acknowledge in its regulations that local governments have express authority to enact land-use, environmental, and surface impact aspects of oil and gas regulation more stringent than are imposed by the state.<sup>259</sup> This, they noted, is authorized by the Land Use Enabling Act, Colo. Rev. Stat. § 30-28-123 (2014), which provides that “[w]henver the regulations made under authority of this part . . . impose other higher standards than are required in or under any other statute, the provisions of the regulations made under authority of this part shall govern.”<sup>260</sup> They noted that the legislature had articulated, with express statements in each of the 1994 and 2007 amendments, its intent for local authorities to retain their land-use control while instructing the COGCC to be a better steward of both the environment and public health.<sup>261</sup>

The proposed solution of treating COGCC regulations as a “floor” rather than as an alternative to local rules seems particularly warranted in light two facts: first, the incredibly varied physical, economic, and political make-up of Colorado’s local communities; and second, the lack of institutional capacity by many local governments to defend lawsuits aimed at eliminating local rules. When the Bureau of Land Management

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258. Motion Addressing Ultra Vires and Possible Preemption Concerns with the Proposed Draft Rulemaking, COGCC Cause No. 1R, Docket No. 0803-RM-02, (May 8, 2008) [hereinafter Ultra Vires Motion].

259. *See id.*:

Draft Rule 521 should be modified to expressly establish that the State’s land use rules serve as minimum standards addressing land use issues associated with oil and gas development and it should expressly state that the State Rules do not preempt, expressly or implicitly, local land use regulations over oil and gas operations. [It] should also expressly state that a local government may impose higher standards in its land use regulations than as set forth within the State rules and that such regulations are not preempted . . . .

260. COLO. REV. STAT. § 30-28-123 (2014). The statute continues to say that if the state statute imposes higher standards, the state statute will control. This implies that both local regulations and state regulations are to remain in effect, rather than “same subject” conflict preemption being imposed.

261. *See* Ultra Vires Motion, *supra* note 258 (citing language in the 1994 amendments, 1994 Colo. Sess. Law, Ch. 317, § 1, and in both of the major 2007 amendments, H.B. 07-1341 and H.B. 07-1298).



decided to withdraw the parcels from the auction,<sup>262</sup> the Town of Paonia won a second reprieve that would have otherwise resulted in OGD within their small statutory municipality.<sup>263</sup> Had those leases gone through, Mayor Neal Schweiterman explained, the town staff of thirteen—including the sanitation department and police force—would not be easily capable of independently evaluating, implanting, and defending local regulations.<sup>264</sup> Defending regulations from industry lawsuits, in particular, threatens to be a costly burden for local communities.

#### *D. Continuing Local Efforts to Regulate Oil and Gas Development*

Since 1951, the oil and gas development industry has undergone profound changes. Easily accessed petroleum deposits have long since been drained. Now, unconventional sources—sources that are difficult to access or process into a commercial form—dominate the industry. Techniques such as horizontal or directional drilling,<sup>265</sup> slick-water, and multi-stage fracturing<sup>266</sup> have revolutionized the process and made it possible to recover hydrocarbons that until recently were uneconomical to produce. The number of active oil and gas wells in Colorado is currently over 50,000, more than double the number of wells that existed ten years ago. Although the rate of growth has slowed,<sup>267</sup> it could

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262. Mark Jaffe, *North Fork Parcels No Longer on Plate*, DENVER POST, Feb. 7, 2013, at 9A.

263. The federal government owns a substantial number of mineral acres in Colorado, including acreage that underlies private land. The Bureau of Land Management within the Department of the Interior is required to conduct auctions for parcels of these mineral acres periodically. *See, Lease Sales*, BUREAU OF LAND MGMT., [http://www.blm.gov/co/st/en/BLM\\_Programs/oilandgas/oil\\_and\\_gas\\_lease.html](http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/oil_and_gas_lease.html) (last visited Oct. 8, 2014).

264. Personal communication with Neal Schweiterman, Mayor of Paonia (Jan. 30, 2013).

265. *See* U.S. DEP'T OF ENERGY, DRILLING SIDEWAYS – A REVIEW OF HORIZONTAL WELL TECHNOLOGY AND ITS DOMESTIC APPLICATION 7–10 (1993), *available at* [http://www.eia.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/drilling\\_sideways\\_well\\_technology/pdf/tr0565.pdf](http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/drilling_sideways_well_technology/pdf/tr0565.pdf).

266. *See, e.g.,* Keith Schaeffer, *What's a Frac – Or WAF?*, OIL & GAS INVESTMENTS BULLETIN (May 15, 2009), *available at* <http://oilandgas-investments.com/2009/natural-gas/whats-a-frac-or-waf/> (“[M]ulti-stage fracturing . . . opened up huge new reservoirs across North America, and is the leading reason on the supply side as to why the price of natural gas has plummeted . . . . [T]he industry is continually getting more production, more fracs, or stages, per well.”).

267. COGCC, COLORADO WEEKLY & MONTHLY OIL & GAS STATISTICS 6, 11 (2013), *available at* <http://cogcc.state.co.us/Library/Statistics/CoWkly&MnthlyO&GStats.pdf>.

increase with new discoveries in the Denver-Julesburg Basin in the north Front Range.<sup>268</sup> This area is the most densely populated, fastest growing, and economically developed area of the state – it is also completely surrounded by a vast oil field that already contains half the wells in the state.<sup>269</sup> Suburban communities, outlying subdivisions, and even many municipalities now contain significant levels of OGD. The City of Greeley (pop. 96,000), whose ban was at issue in *Voss*, now has over 430 active OGD wells within city limits and over 1,220 including the immediate area projected for future city growth.<sup>270</sup>

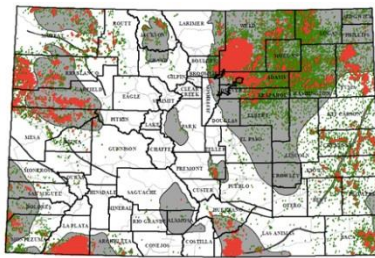


Fig. 5, Colorado Oil and Gas Wells.<sup>271</sup>

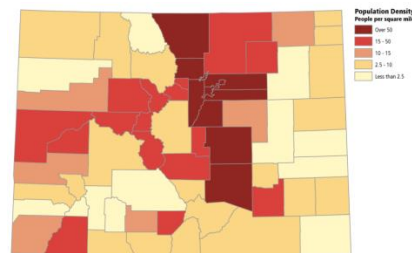


Fig. 6, Colorado population density.<sup>272</sup>

For many citizens, the industry has become controversial as the number of wells continues to grow in and around their communities.<sup>273</sup>

268. Mark Jaffe, *New Oil Boom Lurks in Denver-Julesburg Basin*, DENVER POST, Dec. 15, 2013, at 1K (“Since 2010, the drilling push has led to record-setting oil production in Colorado, reaching an estimated 48 million barrels in 2012. Before the fall’s massive floods closed down some wells, 2013 production was running 44 percent ahead of 2012’s record, according to the state oil and gas commission.”).

269. See Kirk Johnson, *Drilling in Fast Growing Areas Ushers in a New Era of Tension*, N.Y. TIMES, Oct. 24, 2011, at A16 (“‘It’s completely surrounding the metro area,’ [according to] Thom Kerr, the permit and technical services manager at the [COGCC].”).

270. CITY OF GREELEY PLANNING COMM’N, OIL AND GAS DEVELOPMENT: LAND USE CONSIDERATIONS 2 (2014), available at <http://weldairandwater.files.wordpress.com/2014/03/greeley-oil-gas-overview-pc-1-14-2014.pdf>.

271. INTERMOUNTAIN OIL & GAS BMP PROJECT, COLORADO COUNTY AND MUNICIPAL LAW, [http://www.oilandgasbmps.org/laws/colorado\\_localgovt\\_law.php](http://www.oilandgasbmps.org/laws/colorado_localgovt_law.php) (last visited Mar. 11, 2013) (figure courtesy of the COGCC).

272. *Colorado Population Density Map*, RAND-MCNALLY, <http://education.randmcnally.com/> (last visited April 3, 2013).

273. See, e.g., Statement of Basis, *supra* note 255, at 1 (2008) (“In 1996, the COGCC . . . approved 1,002 applications for permits to drill (‘APD’). In 2004, that number increased to 2,915 approved APDs. In 2007, the COGCC approved 6,368 APDs. The COGCC anticipates that it will approve approximately 7,500 APDs in 2008.”).

Citizens are worried about the potential impacts, such as air, surface, and groundwater pollution,<sup>274</sup> surface disposal and evaporation of toxic drilling residues,<sup>275</sup> light and noise disturbances, and traffic.<sup>276</sup> The U.S. Geological Survey has identified waste disposal from fracking as the culprit in a large numbers of small earthquakes around the U.S.<sup>277</sup> There have been a number of fatal explosions, injuries, and evacuations, from both well sites and pipelines.<sup>278</sup> Surface owners have incurred economic losses from OGD, such as decreased property values, the cost of replacing well water with trucked-in water, and “reasonable” amounts of property damage.<sup>279</sup> A lack of transparency and the repeated denials of

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274. See Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. TIMES, Aug. 4, 2011, at A13; Stephen Osborn, et al., *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing*, 108 PROC. NAT’L ACAD. SCI. 8172 (May 2011) (showing methane in drinking water was caused by fracking); Encana Oil & Gas (USA) Inc., COGCC Order No. 1V-276, Cause No. 1V (2004) (finding EnCana at fault for the West Divide Creek contamination caused by casing failure); INT’L ENERGY AGENCY, GOLDEN RULES FOR A GOLDEN AGE OF GAS 9 (2012) (noting that unconventional gas generally imposes a larger environmental footprint than conventional gas development, which can have major implications for local communities and their air, land, and water resources).

275. See, e.g., COGCC, PIT DISCUSSION: SETBACK STAKEHOLDERS MEETING 7 (2012), available at <http://cogcc.state.co.us/library/setbackstakeholdergroup/Presentations/Pits.pdf>. Production pits include pits designed to allow “produced water” to evaporate or percolate into the surrounding soil.

276. See COLO. DEP’T OF LOCAL AFFAIRS, OIL AND GAS REGULATION: A GUIDE FOR LOCAL GOVERNMENTS 3–10 (2010), available at <http://www.springsgov.com/units/boardscomm/OilGas/DOLA%20O&G%20Guide%20for%20Local%20Governments.pdf> (describing numerous potential local impacts of oil and gas development).

277. See Man-Made Earthquakes Update, U.S. GEOLOGICAL SURVEY, Jan. 17, 2014, [http://www.usgs.gov/blogs/features/usgs\\_top\\_story/man-made-earthquakes/](http://www.usgs.gov/blogs/features/usgs_top_story/man-made-earthquakes/) (“[U]nderground disposal of wastewater co-produced with oil and gas, enabled by hydraulic fracturing operations, has been linked to induced earthquakes. \* \* \* For example, wastewater disposal appears to be related to the magnitude-5.6 earthquake that struck rural central Oklahoma in 2011 leading to a few injuries and damage to more than a dozen homes. Damage from an earthquake of this magnitude would be much worse if it were to happen in a more densely populated area.”).

278. See, e.g., F.J. Gallagher, *This Week in Natural Gas Leaks and Explosions*, NATURAL GAS WATCH (Dec. 3, 2012), <http://www.naturalgaswatch.org/> (describing one week’s worth of accidents in Indiana, Massachusetts, Idaho, California, Utah, New Jersey, Ohio, Virginia, and Kansas); Yesenia Robles, *1 Dead, 3 Hurt in Natural Gas Well Explosion Near Fort Lupton*, DENVER POST, Aug. 16, 2012, [http://www.denverpost.com/ci\\_21323110/1-dead-3-hurt-natural-gas-well-explosion](http://www.denverpost.com/ci_21323110/1-dead-3-hurt-natural-gas-well-explosion).

279. See *Typical Questions from the Public About Oil and Gas Development in Colorado*, COGCC, <http://cogcc.state.co.us/General/typquest.html> (last visited Nov. 5, 2014) (“The law that created the COGCC and empowers their regulation of the oil and gas industry provides for the COGCC to promulgate rules to protect the health, safety and welfare of the general public in the conduct of oil and gas operations. The law is intended

extensively documented harms have affected the social license to operate—the public support necessary for an activity or operator to proceed without social unrest—for OGD.<sup>280</sup> Citizens are skeptical about the willingness or ability of the state to protect their health and their air and water resources.<sup>281</sup> Industry has also undermined its social license with actions that seem to have little regard for the perception of local communities. For instance, the oil and gas industry has applied for permits to drill in playgrounds<sup>282</sup> and cemeteries,<sup>283</sup> and has brought aggressive and punitive litigation against homeowners and activists.<sup>284</sup>

The current dynamic is highly polarized; one side calls fracking “safe” and repeatedly asserts that groundwater contamination does not, has not, and cannot occur,<sup>285</sup> while the other side insists that the opposite

to keep the general public safe when drilling and development occurs, and is not directed at protecting individual property values or a preferred quality of life.”).

280. See, e.g., Ian Thomson et al., *Corporate Social Responsibility – The Social License to Operate a Mine*, INT’L RES. J. (2012) (“In practice, the [social license] arises from the community’s perception of a mining project or company. It is granted by the local community; is intangible, informal, non-permanent, and dynamic. It has to be earned and then maintained. It is an expression of the quality of a ‘relationship.’”); Loren Steffy, *Why No One Trusts Oil Companies on Fracking*, FORBES, Aug. 5, 2013, <http://www.forbes.com/sites/lorensteffy/2013/08/05/why-no-one-trusts-oil-companies-on-fracking/> (noting that years of denial and opacity have created public doubts regarding fracking and the industry’s trustworthiness).

281. See, e.g., EARTHWORKS, *BREAKING ALL THE RULES: THE CRISIS IN OIL & GAS REGULATORY ENFORCEMENT* app. 2 (2012), available at <http://www.earthworksaction.org/files/publications/FINAL-US-enforcement-sm.pdf>

(noting that in Colorado, of five spills that led to penalties in 2011, one company failed to appear at their hearings, and the other four all agreed to pay fines while still denying responsibility); Jad Mouawad & Clifford Krauss, *Dark Side of a Natural Gas Boom*, N.Y. TIMES, Dec. 8, 2009, at B1 (discussing several domestic wells contaminated by hydraulic fracturing operations).

282. See, e.g., Jack Healy, *With Ban on Drilling Practice, Town Lands in Thick of Dispute*, N.Y. TIMES, Nov. 25, 2012, at A14 (“When people learned of plans to sink wells in Longmont near the Union Reservoir and a playground and recreational area on the east end of town, a response began to coalesce: not here.”).

283. Manny Fernandez, *Drilling for Natural Gas Under Cemeteries Raises Concerns*, N.Y. TIMES, July 9, 2012, at A10.

284. See, e.g., Suzanne Goldenberg, *The Anti-Fracking Activist Barred from 312.5 Sq. Miles of Pennsylvania*, THE GUARDIAN, Jan. 29, 2014, <http://www.theguardian.com/environment/2014/jan/29/vera-scroggins-fracking-activist-pennsylvania>; Mark Drajem and Mike Lee, *Fracker Range Resources Sues Over YouTube of Burning Well*, BLOOMBERG NEWS (May 18, 2012), <http://www.businessweek.com/news/2012-05-18/fracker-range-resources-sues-over-youtube-of-burning-well>.

285. See, e.g., Dominic Dezutti, *Hickenlooper’s Fracking Balancing Act*, CBS DENVER (Aug. 4, 2011), <http://denver.cbslocal.com/2011/08/04/hickenlooper%E2%80%99s-fracking-balancing-act/> (quoting Governor Hickenlooper as

is true. The current intensity of OGD activity, coupled with its proximity to large population centers, the public perception of under-regulation (warranted or not),<sup>286</sup> and a lack of trust in industry,<sup>287</sup> all combine to create a recipe for political activism. In 2012, local governments took up the fight again for the ability to protect their citizens and their communities.<sup>288</sup> In several cases, citizens used the ballot initiative process to overrule their local governments and demand an end, or at least a temporary reprieve, to drilling in their communities.<sup>289</sup> The movement started in Longmont before spreading to Boulder County, Fort Collins, and several smaller Front Range municipalities.

### 1. Longmont

The home rule City of Longmont straddles Boulder and Weld County. Weld and Boulder County have drastically divergent views on OGD. Weld County has the highest number of oil and gas wells of any county in the nation with over 18,000,<sup>290</sup> while Boulder County has implemented a moratorium on new OGD through 2018.<sup>291</sup> In December

saying “hydraulic fracturing doesn’t connect to groundwater . . . it’s almost inconceivable that groundwater will be contaminated”); Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. TIMES, AUG. 4, 2011, at A13 (“For decades, oil and gas industry executives as well as regulators have maintained that a drilling technique known as hydraulic fracturing, or fracking, that is used for most natural gas wells has never contaminated underground drinking water.”).

286. See Ben Geman, *News Bites: Poll Shows Public Wants More Regulation of ‘Fracking’*, THE HILL (Dec. 14, 2012, 10:39 A.M.), <http://thehill.com/policy/energy-environment/272953-news-bites-poll-shows-growing-support-for-fracking-regs> (reporting that a Bloomberg poll showed public support of 66% in favor of tighter regulation of hydraulic fracturing, up from 56% in September of 2012).

287. *Shale Gas Industry Insider: We Are Losing the Messaging War on Fracking*, NATURALGASWATCH.ORG (Sep. 13, 2011), <http://www.naturalgaswatch.org/> (“The favorable perception of the oil and gas industry polls at seven percent — that’s lower than Congress. The public does not believe us. We need someone else delivering our message for us.”).

288. See discussion, *infra* Part 0.1–3.

289. See, e.g., Story Archive: Oil & Gas in Northern Colorado, THE COLORADOAN, <http://archive.coloradoan.com/> (last visited Oct. 10, 2014) (archives of news articles from the past year documenting local regulation efforts).

290. Nathan Heffel, *Noble Energy to Invest Billions in Weld County Oil and Gas Boom*, CMTY. RADIO FOR N. COLO. (May 22, 2012), <http://www.kunc.org/post/noble-energy-invest-billions-weld-county-oil-and-gas-boom> (quoting Weld Cnty. Comm’r Sean Conway).

291. See discussion *infra* Part 0; Press Release, Boulder County, *Boulder County Commissioners Extend Moratorium on New Oil and Gas Drilling Permits to July 1, 2018* (Nov. 13, 2014) available at <http://www.bouldercounty.org/apps/newsroom/templates/bc12.aspx?articleid=4279>.

2011, Longmont imposed a moratorium on applications for oil and gas well permits while it considered enacting regulations to control the explosive growth of OGD in and around the city.<sup>292</sup> In February 2012, Longmont released a first draft of its new regulations.<sup>293</sup> The COGCC sent a letter stating that it believed some of the provisions were preempted.<sup>294</sup> The Commission believed that state law preempted portions of the ordinance, including the per se ban on surface oil and gas facilities within residential zoning districts and the claimed right to assess the “appropriateness” of certain practices and impose additional conditions on drilling and production.<sup>295</sup> In July 2012, after several months of discussions between the City, its local COGCC liaison, and the COGCC, the City Council approved the ordinance over the Commission’s objections. Longmont’s Ordinance O-2012-25 prohibits the city from issuing permits for oil and gas surface operations in residential zoning districts, requires public review for certain permit applications, bans open-pit disposal of mining waste, and limits waste disposal to industrial zoning districts. Additionally, it imposes other requirements on operators for siting and setbacks, operating, mitigating impacts, and the provision of financial sureties.<sup>296</sup>

Within a month, the COGCC filed a lawsuit against Longmont in Boulder County District Court, claiming that the 2008 COGCC rules expanded the preemptive effect of the Commission’s regulatory structure.<sup>297</sup> In its complaint for declaratory relief, the COGCC laid out eight claims against the city: (1) that state law preempted the City’s right to regulate the use of multi-well sites and directional drilling; (2) the proposed setback rules; (3) the wildlife habitat and species protection

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292. Scott Rochat, *Council Approves Oil and Gas Moratorium*, LONGMONT TIMES-CALL, Dec. 20, 2011, [http://www.timescall.com/news/longmont-local-news/ci\\_19590626](http://www.timescall.com/news/longmont-local-news/ci_19590626).

293. *See generally Oil and Gas Regulations in Longmont*, CITY OF LONGMONT, COLO., <http://longmontcolorado.gov/departments/departments-n-z/public-information/oil-and-gas-information/oil-and-gas-regulations-in-longmont> (last visited Nov. 6, 2014).

294. Tony Kindelspire, *State Suit against Longmont Would Be Uncharted Territory*, LONGMONT TIMES-CALL, July 28, 2012, [http://www.timescall.com/ci\\_21182917/state-suit-against-longmont-would-be-uncharted-territory](http://www.timescall.com/ci_21182917/state-suit-against-longmont-would-be-uncharted-territory).

295. *Id.*; *see also* Tyler Sandberg, *State, Local Officials Clash over Energy Development*, COLO. OBSERVER (May 21, 2012) (quoting Governor Hickenlooper as saying “We intend to work with counties and municipalities to make sure we have appropriate regulation on oil and gas development.”).

296. Longmont, Colorado Ordinance O-2012-25 (July 17, 2012).

297. Plaintiff’s Complaint for Declaratory Relief at 7, *Colo. Oil & Gas Conservation Comm’n v. City of Longmont*, No. 12CV702 (Colo. Dist. Ct. Boulder Cnty. July 30, 2012).

rules; (4) the ban on surface facilities and operations; (5) the chemical reporting rule; (6) the visual mitigation methods; (7) the water quality monitoring rule; and (8) the claim of authority to adjudicate operational conflicts.<sup>298</sup> In the fall of 2012, over eighty local government officials submitted a letter to the Governor of Colorado, asking the state to withdraw its lawsuit against the city of Longmont.<sup>299</sup>

While the state clearly viewed Longmont's ordinance as a step too far, many residents felt the measure did not go far enough, given the plans of TOP Operating Company to drill near a city reservoir and popular recreation area, and in a local historic landmark ranch and community park.<sup>300</sup> In November 2013, the city's voters approved Ballot Question 300 to completely ban hydraulic fracturing within the city.<sup>301</sup> In a grassroots campaign facilitated by Our Health, Our Future, Our Longmont, a local group, and Food & Water Watch, a national organization, proponents obtained 8,000 signatures in six weeks to put the measure on the November ballot.<sup>302</sup> Proponents had a budget of less than \$24,000 in cash and in-kind donations, compared to the oil and gas industry's \$500,000. The ballot question still managed to win sixty percent of the vote.<sup>303</sup> Some observers believe that the "David and Goliath" image created by the massive financial imbalance in the campaign worked against the oil and gas industry.<sup>304</sup>

The Colorado Oil and Gas Association ("COGA") filed a lawsuit against the city in Weld County District Court in December 2012,

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298. *Id.* at 10–19.

299. Cathy Proctor, *Statewide Municipal Officials Ask Hickenlooper to Withdraw Longmont Suit*, DENVER BUS. J. (Sept. 19, 2012), <http://www.bizjournals.com/denver/news/2012/09/19/statewide-municipal-officials-ask.html>.

300. Scott Rochat, *Ballot Question 300: Longmont Fracking Ban Storms to Victory*, LONGMONT TIMES-CALL, Nov. 6, 2012, [http://www.timescall.com/news/election2012/ci\\_21943036/longmont-fracking-ban-holds-early-lead](http://www.timescall.com/news/election2012/ci_21943036/longmont-fracking-ban-holds-early-lead).

301. *Id.*

302. John Tomasic, *Longmont Ballot Initiative Fuels Debate over Fracking*, COLO. INDEPENDENT, Aug. 17, 2012, [www.coloradoindependent.com/124360/longmont-ballot-initiative-fuels-debate-over-fracking](http://www.coloradoindependent.com/124360/longmont-ballot-initiative-fuels-debate-over-fracking).

303. Mark Jaffe, *Colorado Joins Suit to Knock Down Longmont Fracking Ban*, DENVER POST, July 11, 2013, [http://www.denverpost.com/ci\\_23643679/state-joins-suit-knock-down-longmont-fracking-ban](http://www.denverpost.com/ci_23643679/state-joins-suit-knock-down-longmont-fracking-ban).

304. See Cathy Proctor, *Big Oil Weighs in Big in Longmont Fracking Vote*, DENVER BUSINESS J. (Oct. 24, 2012), <http://www.bizjournals.com/denver/news/2012/10/24/big-oil-weighs-in-big-in-longmont.html>; Jefferson Dodge, *People of the Year: Longmont Anti-Fracking Citizens' Group Our Longmont*, BOULDER WEEKLY, Dec. 27, 2012, at 11.

seeking to overturn the voter's ban.<sup>305</sup> The suit alleged that state law preempted the ban, and that minerals worth \$500 million would be taken if the ban were allowed to stand.<sup>306</sup> The state originally declined to sue Longmont over the ban, believing that Longmont lacked standing because it could not allege a particularized injury. However, the state filed an amicus brief in support of COGA,<sup>307</sup> and eventually joined the COGCC as a necessary party to the lawsuit.<sup>308</sup> Longmont successfully petitioned to change venue to Boulder County District Court since most of Longmont lies within Boulder County and Boulder County was the site of both the city charter and the disputed acts.<sup>309</sup> The court also granted TOP Operating's motion to intervene, since it was operating in Longmont and would be directly affected by the outcome of the case.<sup>310</sup> The state's lawsuit over the City Council's regulations was stayed pending the outcome of the industry lawsuit over the voter ban.<sup>311</sup>

On July 24, 2014, the Boulder County District Court struck down the voter ban.<sup>312</sup> The judge stated:

The Court recognizes that some of the case law described above [primarily *Voss* and *Bowen/Edwards*] may have been developed at a time when public policy strongly favored the development of mineral resources. Longmont and the environmental groups, the Defendant-

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305. Complaint, Colo. Oil & Gas Ass'n v. City of Longmont, No. 2012CV960 (Colo. Dist. Ct. Weld Cnty. Dec. 17, 2012).

306. The takings claim was later voluntarily dismissed. Stipulated Motion to Dismiss COGA's Third Claim for Relief, Colo. Oil & Gas Ass'n v. City of Longmont, No. 2013CV63 (Colo. Dist. Ct. Boulder Cnty. Mar. 21, 2013).

307. Scott Roachat, *Longmont Wants Fracking Ban Moved to Boulder County*, LONGMONT TIMES-CALL, Dec. 18, 2012, [http://www.timescall.com/ci\\_22215695/longmont-wants-fracking-fight-moved-boulder-county](http://www.timescall.com/ci_22215695/longmont-wants-fracking-fight-moved-boulder-county).

308. Motion to Join Necessary Party for Adjudication of Claims, Colo. Oil & Gas Ass'n v. City of Longmont, No. 2013CV63 (Colo. Dist. Ct. Boulder Cnty. Mar. 27, 2013); John Tomasic, *State of Colorado Joins Oil and Gas Companies' Lawsuit against Longmont Fracking Ban*, COLO. INDEPENDENT, July 11, 2013, <http://www.coloradoindependent.com/128472/state-joins-suit-against-longmont-fracking-ban>.

309. Order Granting City of Longmont's Motion to Change Venue, Colo. Oil & Gas Ass'n v. City of Longmont, No. 2012CV960 (Colo. Dist. Ct. Weld Cnty. Mar. 8, 2013).

310. Scott Roachat, *TOP Joins Fracking Lawsuit against Longmont*, LONGMONT TIMES-CALL, Mar. 6, 2013, [http://www.timescall.com/ci\\_22733378/top-joins-fracking-lawsuit-against-longmont](http://www.timescall.com/ci_22733378/top-joins-fracking-lawsuit-against-longmont).

311. Scott Roachat, *Fracking: Industry Lawsuit against Longmont will be Decided First*, LONGMONT TIMES-CALL, Mar. 14, 2013, [http://www.timescall.com/longmont-local-news/ci\\_25347802/fracking-industry-lawsuit-against-longmont-will-be-decided](http://www.timescall.com/longmont-local-news/ci_25347802/fracking-industry-lawsuit-against-longmont-will-be-decided).

312. Order Granting Motions for Summary Judgment, Colo. Oil & Gas Ass'n v. City of Longmont, No. 2013CV63 (Colo. Dist. Ct. Boulder Cnty. July 24, 2014).



Intervenors, are essentially asking this Court to establish a public policy that favors protection from health, safety, and environmental risks over the development of mineral resources. Whether public policy should be changed in that manner is a question for the legislature or a different court. . . . The conflict in this case is an irreconcilable conflict.<sup>313</sup>

The ruling was stayed, pending appeal.<sup>314</sup> Meanwhile, the case against the Longmont City Council's regulations was dropped as part of a political compromise in which a statewide vote on local control was withheld from the November 2014 ballot.<sup>315</sup>

## 2. Boulder County

Despite its residents' reputation for environmental activism and pro-regulatory zeal, Boulder County avoided the controversy of the early years of local OGD regulation by adopting carefully tailored regulations that did not impose a ban.<sup>316</sup> In 1993, Boulder County revised its Land Use Code to create a "Development Plan Review" process, requiring, among other things, financial sureties, emergency response plans, reclamation plans, a nuisance abatement plan, and mitigation for aesthetic, environmental, or wildlife impacts.<sup>317</sup> The Land Use Code also imposed criteria for evaluating Development Plans and conditions for approval.<sup>318</sup> Violators are subject to enforcement actions, including the loss of financial guarantees and the right of the Land Use Director to take corrective actions by entering the site.<sup>319</sup> Unlike other land uses, however, the Director can only approve or conditionally approve a Development Plan for oil and gas, with no authority to categorically deny

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313. *Id.* Note that the Colorado Supreme Court in both *Voss* and *Bowen/Edwards* explicitly stated that there was no irreconcilable conflict between local land-use control and state oil and gas regulation. "The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes." *Voss*, 830 P.2d at 1068; *Bowen/Edwards*, 830 P.2d at 1059 (citing *Bd. of Land Comm'rs v. Mined Land Reclamation Bd.*, 809 P.2d 974, 982–85 (Colo.1991)).

314. Order Granting Motions for Summary Judgment, *supra* note 312.

315. Discussed *infra* Part 0.

316. See FELSBERG, HOLT & ULLEVIG, BOULDER COUNTY OIL AND GAS ROADWAY IMPACT STUDY 1, available at <http://www.bouldercounty.org/doc/landuse/dc120003oilgasroadwaystudy20130114.pdf>.

317. BOULDER CNTY., COLORADO CODE § 4-904 (2012).

318. *Id.* § 4-906, 4-907.

319. *Id.* § 4-912.

a plan.<sup>320</sup> Boulder's authority to enact these amendments was never challenged.

On February 2, 2012, the Boulder County Board of County Commissioners instituted a temporary moratorium on new OGD while the County evaluated its Comprehensive Plan and Land Use Code.<sup>321</sup> During the next eleven months, the Board held public meetings, solicited written comments and public testimony, and developed draft regulations for managing impacts from OGD.<sup>322</sup> The board adopted a resolution on December 20, 2012, approving various amendments to the County's Land Use Code.<sup>323</sup> These amendments set up two processes by which oil and gas developers can pass through the Development Plan Review: a standard process which takes longer, or an expedited review process by which developers agree to a Memorandum of Understanding with more stringent requirements, including increased setbacks, air quality standards, water quality monitoring, and transportation standards and fees.<sup>324</sup> Boulder will require public engagement at every stage.<sup>325</sup> On January 24, 2013, the Board voted to extend the moratorium by an additional four months, in part to give it time to update the Land Use Code and integrate new COGCC setback and groundwater monitoring regulations.<sup>326</sup>

### 3. *Fort Collins*

Fort Collins is a home-rule city located north of Denver, near the Wyoming border.<sup>327</sup> It has been ranked among the best places to live in the U.S. due to its "great schools, low crime, good jobs in a high-tech

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320. See Amendments to Oil and Gas Dev. Regulations, Boulder Cnty. Planning Comm'n Docket DC-12-0003, at 4-5 (Sept. 24, 2012) available at <http://www.bouldercounty.org/doc/landuse/dc120003stafrecregs20120924.pdf> (discussing the history of oil and gas regulations in Boulder County).

321. Boulder Cnty., Colo., Res. 2012-16 (Feb. 2, 2012).

322. See *Oil & Gas Development*, BOULDER COUNTY, <http://www.bouldercounty.org/dept/landuse/pages/oilgas.aspx> (last visited Oct. 10, 2014) (providing a timeline and links to documents for the county's deliberations on OGD regulations).

323. Boulder Cnty., Colo., Res. 2012-142 (Dec. 20, 2012).

324. *Id.* 2012-142(12-400(A)-(C); 12-602).

325. *Id.* 2012-142(12-400(A)(2)).

326. Boulder Cnty., Colo., Res. 2013-18 (Jan. 24, 2013).

327. *Fort Collins Facts*, CITY OF FORT COLLINS, <http://www.fcgov.com/visitor/fcfacts.php> (last visited Oct. 10, 2014).

economy and a fantastic outdoor life.”<sup>328</sup> Currently OGD is limited to the Fort Collins field, in the northeast portion of the city, which has been in production since 1925.<sup>329</sup> On December 4, 2012, the Fort Collins city council approved a six-month moratorium (later extended to seven months) on new oil and gas permits, in order to review the city authority to regulate OGD, particularly groundwater monitoring and setbacks.<sup>330</sup> The council wanted particularly to investigate its authority to impose setbacks, prevent drilling in community parks and natural areas, and regulate the health and nuisance impacts from drilling.<sup>331</sup>

The Fort Collins City Council considered banning all oil and gas operations from the city, including hydraulic fracturing, which drew a sharp rebuke from the Governor, who threatened to sue the city.<sup>332</sup> Fort Collins estimates that approximately \$200,000 dollars of annual revenue could be lost, although that number is uncertain since many revenue-producing wells would be allowed to remain under the new regulations.<sup>333</sup> On March 5, 2013, the city council of Fort Collins voted to ban hydraulic fracturing, amending its code to prohibit hydraulic fracturing for hydrocarbons, and to prevent the storage of drilling wastes and flowback in open pits.<sup>334</sup> The city agreed to exempt existing wells and pad sites, provided there was an agreement in place between the existing sites and the city to prevent methane release and to protect the public health, safety, and welfare.<sup>335</sup>

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328. See *Best Places to Live 2006*, CNN MONEY (July 2006), [http://money.cnn.com/popups/2006/moneymag/bplive\\_2006/frameset.1.1.exclude.html](http://money.cnn.com/popups/2006/moneymag/bplive_2006/frameset.1.1.exclude.html) (ranking Fort Collins number one).

329. Fort Collins History Connection, Fort Collins Time Line 1920, available at <http://history.fcgov.com/archive/timeline/1920.php> (last accessed Nov. 16, 2014).

330. Fort Collins, Colo., Ordinance 145 (Dec. 18, 2012), available at <http://citydocs.fcgov.com/>.

331. Fort Collins, Colo., Agenda Item Summary 24 at 1-2 (Dec. 18, 2012), available at [http://www.fcgov.com/oilandgas/pdf/agenda-item\\_dec-18-2012\\_item\\_24.pdf](http://www.fcgov.com/oilandgas/pdf/agenda-item_dec-18-2012_item_24.pdf).

332. Kevin Duggan, *Fort Collins Council to Revisit Proposed Fracking Ban*, THE COLORADOAN, Mar. 4, 2013, <http://www.coloradoan.com/article/20130304/NEWS01/303040036/Fort-Collins-council-revisit-proposed-fracking-ban>.

333. Fort Collins, Colo., Agenda Item Summary 26 at 6 (Feb. 19, 2013), available at <http://citydocs.fcgov.com/>.

334. Fort Collins, Colo., Agenda Item Summary 29 at 1 (Mar. 5, 2013), available at [http://www.fcgov.com/oilandgas/pdf/agenda-item\\_mar-05-2013\\_item\\_29.pdf](http://www.fcgov.com/oilandgas/pdf/agenda-item_mar-05-2013_item_29.pdf).

335. Fort Collins, Colo., Ordinance 032, 2013 (Mar. 5, 2013), available at <http://citydocs.fcgov.com/>.

#### 4. 2013 and 2014 Elections

In November of 2013, local control measures were put up for a vote in four local jurisdictions: City of Boulder, Fort Collins, and Lafayette (all home rule cities), and the City and County of Broomfield. A measure in the City of Loveland was challenged in court before making it onto the ballot in the same election.<sup>336</sup> In Boulder, voters approved a five-year moratorium on oil and gas exploration, including in city-owned county open space.<sup>337</sup> Fort Collins voters approved a five-year moratorium on hydraulic fracturing and storage of oil and gas production waste, despite a resolution passed by the local city council opposing the measure. Lafayette voters decided that there would be no new oil and gas wells within the city. COGA filed suits against the resolutions in Fort Collins and Lafayette.<sup>338</sup> The trial court in both cases struck down the local provisions on state preemption grounds as set forth by *Voss and Bowen/Edwards*.<sup>339</sup> On June 10, 2014, the citizens of Lafayette filed a class action lawsuit against the State of Colorado, the Governor, and COGA.<sup>340</sup> The City of Lafayette argued that the Colorado Oil and Gas Act, as well as the industry's enforcement of the act, violated the constitutional right of residents of the community to local self-government.<sup>341</sup>

In Broomfield, voters considered whether to impose a five-year prohibition on hydraulic fracturing.<sup>342</sup> On December 5, 2013, after a

336. It appeared in the primary election, along with a mostly Republican race, in June of 2014, 52-47%. The date was agreed to as part of a settlement with an opponent of the measure. *City of Loveland Two Year Fracking Suspension Initiative, Question 1*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Loveland\\_Two\\_Year\\_Fracking\\_Suspension\\_Initiative\\_\(June\\_2014\)](http://ballotpedia.org/City_of_Loveland_Two_Year_Fracking_Suspension_Initiative_(June_2014)) (last visited Aug. 18, 2014).

337. *City of Boulder Five Year Fracking Suspension, Question 2H*, BALLOTPEDIA, [http://ballotpedia.org/City\\_of\\_Boulder\\_Five\\_Year\\_Fracking\\_Suspension,\\_Question\\_2H\\_\(November\\_2013\)](http://ballotpedia.org/City_of_Boulder_Five_Year_Fracking_Suspension,_Question_2H_(November_2013)) (last visited Aug. 18, 2014) (passing with nearly 80% of the vote).

338. Grace Hood, *COGA Files Suit against Lafayette, Fort Collins on Voter Approved Fracking Measures*, CMTY. RADIO FOR N. COLO. (Dec. 3, 2013), <http://www.kunc.org/post/coga-files-suit-against-lafayette-fort-collins-voter-approved-fracking-measures>.

339. Lori Dawkins & Devin Daines, *Colorado Oil and Gas Association (COGA) Sues Broomfield Seeking to Invalidate its Hydraulic Fracturing Ban*, NAT'L L. REV. (Dec. 3, 2014), <http://www.natlawreview.com/article/colorado-oil-and-gas-association-coga-sues-broomfield-seeking-to-invalidate-its-hydr>.

340. Complaint at 5-7, *Willmeng & Griffin v. Colorado*, No. 2014CV30718 (Colo. Dist. Ct. Boulder Cnty. June 10, 2014).

341. *Id.*

342. *Broomfield Five Year Fracking Suspension, Question 300*, BALLOTPEDIA, [http://ballotpedia.org/Broomfield\\_Five\\_Year\\_Fracking\\_Suspension,\\_Question\\_300\\_\(November\\_2013\)](http://ballotpedia.org/Broomfield_Five_Year_Fracking_Suspension,_Question_300_(November_2013)) (last visited Oct. 8, 2014).

contentious and litigated election, the measure passed by a mere twenty votes.<sup>343</sup> A developer is currently challenging the moratorium, claiming that its preexisting Memorandum of Understanding with the municipal government should exempt its planned OGD activities from the time-out.<sup>344</sup> COGA has also filed a lawsuit challenging the prohibition.<sup>345</sup>

November 2014 was poised to be the setting of a historic election regarding the power of local governments. In early May it looked as if there could be as many as eleven measures addressing local control, setbacks, the “rights of nature,” regulatory takings, monetary disbursements to local governments, and other OGD related issues on the ballot.<sup>346</sup> Throughout the summer these were whittled down to four measures. Jared Polis, a Democratic Congressman from Colorado’s second congressional district (covering all of the areas that had voted to impose local controls on OGD except Longmont) backed two of these measures.<sup>347</sup> The other two measures were industry-funded.<sup>348</sup> Although early polling seemed to indicate a likely victory for the pro-local control measures,<sup>349</sup> political pressure from within the Democratic Party forced

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343. Megan Quinn, *Pro-fracking Group Files Suit against Broomfield Elections Division*, DENVER POST, Dec. 3, 2013, [http://www.denverpost.com/news/ci\\_24646742/](http://www.denverpost.com/news/ci_24646742/).

344. Megan Quinn, *Trial Date to be Set in Sovereign’s Fracking Lawsuit against Broomfield*, BROOMFIELD ENTERPRISE, June 14, 2013, [http://www.broomfieldenterprise.com/broomfield-news/ci\\_25957221/sovereign-oil-gas-trial-date-fracking-lawsuit-against-broomfield](http://www.broomfieldenterprise.com/broomfield-news/ci_25957221/sovereign-oil-gas-trial-date-fracking-lawsuit-against-broomfield).

345. Dawkins, COGA Sues Broomfield, *supra* note 339.

346. Anne Landman, *Untangling Colorado’s Flood of Anti-Fracking Ballot Initiatives*, DESMOGBLOG.ORG (Apr. 27, 2014, 10:00 A.M.), <http://www.desmogblog.com/2014/04/27/untangling-colorado-s-flood-anti-fracking-ballot-initiatives>.

347. See Valerie Richardson, *Anti-Fracking Crusade in Colorado is Backfiring on Democrats*, WASH. TIMES, July 21, 2014, <http://www.washingtontimes.com/news/2014/jul/21/rep-jared-polis-anti-fracking-crusade-riles-colora/> (“Initiative 88 would increase setbacks from drilling operations from 500 to 2,000 feet, while Initiative 89 would create an environmental bill of rights that would allow localities to enact fracking rules stricter than those of the state.”).

348. See Jody Strogoff, *Compromise Struck on Ballot Initiatives*, COLO. STATESMAN, Aug. 8, 2014, <http://www.coloradostatesman.com/content/995056-compromise-struck-ballot-initiatives> (“Initiative 121 . . . mandated the withholding of state oil and gas revenue from counties banning drilling, and Initiative 137 [required] a fiscal impact note for all initiatives.”).

349. See Lynn Bartels, *Poll: Two Jared Polis-backed Energy Measures would Pass*, DENVER POST (July 12, 2014, 9:46 P.M.), <http://blogs.denverpost.com/thespot/2014/07/12/jared-polis-energy-ballot-fracking/110798/> (“Support for this idea was strong across all major subgroups and even led (initially) among registered Republicans by a 62 percent to 26 percent margin,’ according to the poll.”).

the sitting Congressman to withdraw them.<sup>350</sup> In a political compromise, both sides agreed to drop the remaining ballot measures, the state agreed to drop the first of the two legal challenges against Longmont, and the Governor agreed to initiate an eighteen-member “task force” to review Colorado’s oil and gas legislation and make suggestions to the legislature.<sup>351</sup> Some viewed the task force, however, as being heavily weighted with organizations and citizens friendly to development and to state control, and it did not include any of the organizations that have been involved with the local control issue.<sup>352</sup> Furthermore, a similar task force appointed by Governor Hickenlooper in 2012 to review state oil and gas regulations’ balance with local governments was widely considered a failure, with no perceptible impact on state regulatory or legislative enactments.<sup>353</sup>

In February 2012, Governor Hickenlooper established a task force to develop cooperative strategies for dealing with state and local conflicts over oil and gas issues.<sup>354</sup> The Governor charged the task force to develop mechanisms that avoid conflicting with local regulations while simultaneously “foster[ing] a climate that encourages responsible development.”<sup>355</sup> Two months later, the task force announced its recommendations. They focused on increasing communication between

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350. See, e.g., Dan Boyce, *Fracking Compromise and Party Politics*, INSIDEENERGY (Aug. 8, 2014), <http://insideenergy.org/2014/08/08/fracking-compromise-and-party-politics/>.

351. See, e.g., Mark Jaffe, *Striking a Compromise*, DENVER POST, Aug. 5, 2014, at 1A.

352. See Elizabeth Miller, *Out of Balance*, BOULDER WEEKLY, Sept. 18, 2014, at 19 (quoting Sam Schabacker, Western Region director for Food & Water Watch: “[I]f your position isn’t represented at the table, you can be certain that it’s not going to be a possibility in one of the outcomes.”); Earnest Luning, *Oil & Gas Taskforce Fueled by Good Intentions*, COLO. STATESMAN, Oct. 3, 2014, <http://www.coloradostatesman.com/content/995122-oil-%3Fgas-task-force-fueled-good-intentions> (describing the first meeting of the task force, and emphasizing the difficulty of reconciling ‘competing but legitimate’ interests).

353. See, e.g., *Statewide Oil and Gas Legislation on Hold*, RADIO COLO. COLLEGE (Apr. 19, 2012), <http://radiocoloradocollege.org/2012/04/statewide-oil-and-gas-legislation-on-hold/> (quoting State Representative Frank McNulty as criticizing the task force for failing to address important issues and not clarifying the issues it did address).

354. OFFICE OF THE GOVERNOR, STATE OF COLO., EXEC. ORDER B-2012-002 (Feb. 29, 2012), available at <http://dnr.state.co.us/taskforce/Documents/task%20force%20executive%20order.pdf>.

355. Press Release, Office of Gov. John Hickenlooper, *Executive Order Creates Task Force to Examine Oil and Gas Regulatory Jurisdiction between the State and Local Governments* (Feb. 29, 2012), available at <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251617174040>.

operators, local governments, and the public; increasing the delegation of the COGCC's authority to inspect wells to local governments; and enhancing transparency within the COGCC with regard to Notices of Alleged Violations, self-reported incidents, and emergencies.<sup>356</sup> The task force was also charged with addressing issues such as setbacks, noise, operational methods, air quality, traffic, financial assurance and more; developing cooperative mechanisms; and suggesting potential legislative changes. The final recommendations, however, explicitly declined to suggest such changes and suggested only that impacts be addressed through COGCC rulemaking with a "robust stakeholder process."<sup>357</sup> Although the task force was intended to be a collaborative effort to diffuse local concerns, it was widely criticized as over-representing state and industry interests, and in the end offered no real solutions.<sup>358</sup>

#### IV. THE BALANCING ACT: STATE RESPONSES TO PUBLIC CONCERN

The issue of which matters constitute 'local concern' versus matters of 'statewide concern' is one of tremendous importance to the question of state preemption.<sup>359</sup> The state interest in regulating development has typically been framed as both an interest in maximizing the production of natural resources within the state, and an interest in 'uniformity' of regulation at the state level so as to avoid a 'patchwork' of local regulations that might discourage industry.<sup>360</sup> However, it is inherently problematic in a democracy when the interests of the many impose on the rights of a few. Many voters expressing support for OGD activities and opposing local regulation are geographically removed from the negative impacts of those activities, although they may indirectly benefit

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356. TASK FORCE ON COOPERATIVE STRATEGIES REGARDING STATE AND LOCAL REGULATION OF OIL AND GAS DEVELOPMENT, PROTOCOLS RECOMMENDATIONS (April 18, 2012), *available at* <http://dnr.state.co.us/taskforce/Documents/Task%20Force%20LGD%20Matrix%20-%20Final.pdf>.

357. *Id.*

358. Kirk Siegler, *Colorado Oil and Gas Task Force Mission Questioned*, CMTY. RADIO FOR N. COLO. (Mar. 15, 2012), <http://www.kunc.org/post/colorado-oil-and-gas-task-force-mission-questioned>.

359. *See discussion supra* Part 0.

360. *See, e.g.,* Voss, 830 P.2d at 1068 ("There is no question that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration.").

economically.<sup>361</sup> The availability of public hearings and the rights of citizens to be involved in decisions regarding the issuance of drilling permits support the relevance of local regulations.<sup>362</sup>

Every major amendment to the OGCA since 1994 has included a legislative declaration that the rights of local governments are not to be abridged.<sup>363</sup> Where then does the battle arise? Why do local governments find themselves the victims of state intimidation, such that some believe they are powerless to do more to protect citizens than to conduct weed inspections at well pads?<sup>364</sup> Ironically, the COGCC and the state Attorney General have used the environmental mandates imposed by the recent OGCA amendments as a lever to broaden the conflicts that create state preemption.<sup>365</sup> Since the 1994 and the 2007 amendments to the OGCA, the COGCC seems to have considered itself essentially free to adopt any regulations, including those that create operational conflict preemption over local regulations, even if the state imposes a far lower

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361. In 2012, Exxon C.E.O. Rex Tillerson filed a lawsuit to block the construction, across the street from his home, of a water tower that would supply fracking operations because the tower is a “monstrosity mock[ing] the purpose of the [local] zoning ordinance,” “causing unreasonable discomfort and annoyance to persons of ordinary sensibilities,” and would create “noise nuisance and traffic hazards.” *Arney v. Bartonville Water Supply Co.*, District Court of Denton County Texas, 393rd Judicial District, No. 2012-30982-211. Mr. Tillerson, however, is generally a fan of hydraulic fracturing: “We’ve been hydraulically fracturing wells in large numbers since the 1960s; first developed in 1940. So this is an old technology just being applied, integrated with some new technologies. So the risks are very manageable.” Christopher Helman, *Inside the Mind of Rex Tillerson*, FORBES, July 3, 2012, <http://www.forbes.com/sites/christopherhelman/2012/07/03/exxons-tillerson-speaks-some-convenient-truths/2/>.

362. The COGCC rules have some notice requirements, and hearings on APDs may be requested by local governments, operators, and surface owners. However the Director may issue a permit at any time, overriding the operator obligations to surface owners, local governmental designees, the CDPHE, and the Department of Wildlife if the operator swears that exigent circumstances or financial hardship would result from a drilling delay. 2 COLO. CODE REGS. 404-1:303(i) (2014).

363. See discussion *supra* Part II.B.

364. Personal communication with Ursula Morgan, Trustee of the City of Mead (Jan. 2013).

365. The Attorney General warned several local governments, including El Paso, Elbert, and Arapahoe Counties, Longmont, Fort Collins, and Commerce City that “[t]he 1994 amendments to the [OGCA] broadened the state’s interest and authority beyond what they were when *Bowen/Edwards* and *Voss* were decided” and that the 2007 amendments and 2008 rulemaking likewise “give rise to additional areas of operational conflict . . . .” Letter from Jake Matter, Assistant Attorney General, the Colorado Office of the Attorney General to Robert Miller, Director of Cnty and Dev. Servs., Elbert County (Jan. 24, 2012).



standard for protecting local interests than a local government would otherwise allow.

### A. *Legislative and Executive Solutions*

The current Governor of Colorado, John Hickenlooper, is a former petroleum geologist who strongly supports the oil and gas industry.<sup>366</sup> Hickenlooper appeared as a spokesperson for the Colorado Oil and Gas Association while in office,<sup>367</sup> and famously drank diluted fracking fluid to demonstrate its safety.<sup>368</sup> He has also appeared before the U.S. Senate Committee on Energy and Natural Resources to argue against the disclosure of the chemicals used in fracking fluids.<sup>369</sup>

Although Governor Hickenlooper has stated many times that he would bring lawsuits against local governments who ban fracking,<sup>370</sup> he has also suggested that rather than bring these suits, the state might set up a fund to assist with potential takings claims arising from the regulations.<sup>371</sup> Under general property law principles, regulation will not amount to a regulatory taking unless it deprives the property owner of all reasonable use and value, or if it does not advance legitimate government interests.<sup>372</sup> Landowners, however, have not historically been entitled to

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366. Ellynne Bannon, *Gov. Hickenlooper is a Bad Example on Oil-and-Gas Issues*, THE HILL (May 21, 2013, 4:30 P.M.), <http://thehill.com/blogs/congress-blog/energy-environment/300923-gov-hickenlooper-a-bad-example-on-oil-and-gas-issues>.

367. Audio recording by the Colo. Oil & Gas Conservation Ass'n, *available at* [http://www.coga.org/audio/Gov\\_Hickenlooper\\_HF\\_Rule\\_30sec.mp3](http://www.coga.org/audio/Gov_Hickenlooper_HF_Rule_30sec.mp3).

368. *See, e.g.*, David Sirota, *Drinking the Fracking Kool-Aid*, SALON (Feb. 13, 2013), [http://www.salon.com/2013/02/13/drinking\\_the\\_fracking\\_kool\\_aid/](http://www.salon.com/2013/02/13/drinking_the_fracking_kool_aid/) (noting that the Halliburton brand Clean-Stim formula is only one of many different types of fracking fluid, that there is no requirement that industry use this particular formula or type of formula, and the fluid was 'clean' as opposed to the fluids after they have been injected and contain hydrocarbons, radionuclides, heavy metals, and other hazardous substances).

369. *Hearing to Explore Opportunities and Challenges Associated with America's Natural Gas Resources Before the S. Comm. on Energy & Natural Resources*, 113th Cong. 7–12 (2013) (statement of John Hickenlooper, Gov. of Colorado).

370. *See, e.g.*, Bobby Magill, *Hickenlooper: Colorado Obligated to Sue Fort Collins if Fracking Ban Passes*, THE COLORADOAN, Feb. 27, 2013, <http://www.coloradoan.com/article/20130227/NEWS01/%20302270029/Hickenlooper-Colorado-obligated-sue-Fort-Collins-fracking-ban-passes>.

371. Bobby Magill, *Hickenlooper: State May Be Willing to Help Anti-Fracking Cities Compensate Mineral Owners*, THE COLORADOAN, Mar. 6, 2013, <http://archive.coloradoan.com/article/20130306/NEWS01/303060024/Hickenlooper-State-may-willing-help-anti-fracking-cities-compensate-mineral-owners>.

372. *See Penn Central Transp. v. City of New York*, 438 U.S. 104 (1978) (establishing a three prong, ad hoc test to determine if a regulatory taking has occurred,

compensation for the loss of “noxious” economic uses of their property that “inflict injury on the community.”<sup>373</sup> A complete takings analysis is beyond the scope of this article. While the state may well wish to assist local communities with any potential takings liability they may incur in the course of regulating to protect public health, the state should not simply hand money to oil and gas developers.

The state General Assembly has managed to wrest some power from industry as sole administrators of the COGCC, in 1994, and again in 2007.<sup>374</sup> The General Assembly has imposed environmental mandates that the agency has used to intimidate or defeat local governments, despite the repeated admonitions of the legislature that “nothing in this act shall be construed to affect the existing land use authority of local governmental entities.”<sup>375</sup> In the past several years dozens of bills have been introduced to the legislature, including measures to increase penalties for violators,<sup>376</sup> require realtors to disclose the ownership of mineral rights to residential buyers,<sup>377</sup> or to clarify the powers of local governments.<sup>378</sup> Both Colorado’s Governor and its legislature are deeply intertwined with the interests of the oil and gas industry.<sup>379</sup> Combined with the state’s partisan gridlock over urban versus rural issues

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including economic impact, interference with investment backed expectation, and the character of the government action); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (a regulation that deprives a property owner of all beneficial use of the property can be a taking, but background principles of nuisance and property law may be identified that justify the regulatory diminution of property’s value).

373. *Mugler v. Kansas*, 123 U.S. 623, 699 (1887):

“The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.”

374. See discussion *supra* Part III.C.

375. S.R. 94-177, 59th Gen. Assemb., 2d Reg. Sess. (Colo. 1994); H.R. 07-1341, 66th Gen. Assemb., 1st Reg. Sess. (Colo. 2007). See also Grant T. Sullivan, *Consistency in Statutory Interpretation*, 38 COLO. LAW. 67, 67 (“Justice Felix Frankfurter urged three keys to interpreting a law: “(1) read the statute; (2) read the statute; (3) read the statute!”). In Colorado, however, intrinsic statutory content includes the *statute’s declaration of purpose or policy*, the placement of sections within the statutory framework, other related statutes, and the statute’s title, all of which also reflect action of the legislature that enacted the statute.”) (emphasis added) (citations omitted).

376. H.R. 13-1267, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

377. H.R. 13-1268, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

378. H.R. 12-1277, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012).

379. In 2014, the oil and gas industry contributed approximately \$950,000 to Colorado campaigns, up from only about \$100,000 in 2004. *Election Overview*, FOLLOWTHEMONEY.ORG (last updated Oct. 23, 2014), [www.followthemoney.org/election-overview](http://www.followthemoney.org/election-overview) (accessed by selecting state and year).

(particularly in the energy context),<sup>380</sup> very little can reasonably be expected to come from the state in the way of a solution.

### B. Judicial Remedies

Lance Astrella, a well-known Denver oil-and-gas attorney, has described the Colorado courts as the citizens' "best hope" against the rich and powerful energy industry.<sup>381</sup> The federal government has largely declined to regulate oil and gas,<sup>382</sup> even though nationally spills, explosions, pipeline accidents, and evidence of other harms mount by the day.<sup>383</sup> The COGCC lacks inspectors to enforce its regulations,<sup>384</sup> and fines remain astonishingly small in the face of mounting harms to citizens.<sup>385</sup> The judiciary has often been the champion of the individual where a legislature was unwilling or unable to repeal unjust laws, or enacted laws that did not respect constitutional mandates.<sup>386</sup>

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380. See, e.g., Valerie Richardson, *Dems Accused of Waging War on Rural Colorado*, COLO. OBSERVER, Jan. 31, 2014, <http://thecoloradoobserver.com/2014/01/democrats-accused-of-war-on-rural-colorado-after-rejecting-compromise-on-green-energy/> (discussing rural concerns over a legislative enactment to require 20% renewable energy statewide by 2020); T.M. Fasano, *Bridging Colorado's Rural/Urban Divide*, GREELEY TRIBUNE, Nov. 19, 2013, <http://www.greeleytribune.com/news/ticker/8896490-113/state-county-rural-think> (discussing the rural/urban divide and a failed 2013 initiative for rural, eastern Colorado counties to secede and form a 51st state).

381. Rebecca Claren, *EPA to Citizens: Frack You*, SALON (May 5, 2006), <http://www.salon.com/2006/05/05/fracking/>.

382. See discussion *supra* Part III.

383. See, e.g. F.J. Gallagher, *This Week in Natural Gas Leaks and Explosions*, NATURAL GAS WATCH (Apr. 8, 2013), <http://www.naturalgaswatch.org/?p=1878>.

384. See Troy Hooper, *Report: Colorado Oil, Gas Regulators 'Inadequate,' Not Enforcing Rules*, THE COLO. INDEPENDENT, Mar. 20, 2012, <http://www.coloradoindependent.com/116024/report-colorado-oil-gas-regulators-inadequate-not-enforcing-rules#comments>.

385. See Associated Press, *Fines Rare for Breaking Colorado Drilling Rules*, DENVER POST, Apr. 8, 2013, [http://www.denverpost.com/business/ci\\_22978340/fines-rare-breaking-colorado-drilling-rules](http://www.denverpost.com/business/ci_22978340/fines-rare-breaking-colorado-drilling-rules)

(stating that of 3,800 violation notices since 1996, the COGCC has imposed fines in only 270 cases, 112 of them for \$2,000 or less, and one company with 49 violation notices since 1999 had their fines reduced from \$170,000 to \$110,000 by the Commission, who then suspended \$70,000 of the fine as long as the company stopped its pattern of violation).

386. See, e.g., ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 107 (1921) ("If a state legislature acts unreasonably and arbitrarily in the enactment of an oppressive statute, the courts conceive that there is a deprivation of liberty or property within the purview of the Fourteenth Amendment, the federal courts, if necessary, will refuse to give effect to the enactment or will even restrain its operation.").

Tort remedies are one way for courts to hold oil and gas developers accountable for the harms they cause, but they are insufficient to achieve the purposes fulfilled by regulation. There are longstanding doctrines in nuisance and trespass that may be available, and the damages awarded in these cases often dwarf the thousand-dollar fines imposed by the COGCC.<sup>387</sup> However, tort remedies present many obstacles for plaintiffs and it can be extremely difficult for the average citizen to bring a case to trial.<sup>388</sup> Strict liability for hydraulic fracturing as an “ultra-hazardous activity” has been rejected by at least one Colorado state district court.<sup>389</sup> Operators can use various aspects of business law to avoid financial responsibility in the absence of strong financial assurance regulations.<sup>390</sup> Tort litigation is often inappropriate when applied to environmental problems, particularly potential or speculative harms and damage to nonhuman species.<sup>391</sup> Finally, tort litigation is inefficient, slow, and remedial.<sup>392</sup> In the face of a fast-moving resource boom, tort remedies are insufficient to protect human health and the environment.

In light of the statutory and technological changes since 1992, the Colorado Supreme Court should reconsider the state and local interests that were pivotal in deciding *Voss* and *Bowen/Edwards*. Considering the

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387. See Mica Rosenberg, *Texas Judge Upholds \$3 Million Fracking Verdict*, REUTERS, July 15, 2014, <http://www.reuters.com/article/2014/07/15/us-usa-fracking-idUSKBN0FK2JE20140715> (discussing this case as having broad potential for those living in and around oil and gas development, as it is one of the first such cases to reach a jury).

388. Medical monitoring, or the ability of plaintiffs to recover for future medical costs incurred where the plaintiff cannot show a present injury, would probably be recognized by the Colorado Supreme Court, according to the court in *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1477 (D. Colo. 1991).

389. *Mobaldi v. CER Corp.*, Case No. 06-cv-6355 (Colo. Dist. Ct. Denver Cnty. May 24, 2007) (unpublished).

390. See James Boyd, *Financial Responsibility for Environmental Obligations: Are Bonding and Assurance Rules Fulfilling Their Promise?*, RESOURCES FOR THE FUTURE (2001), available at <http://www.rff.org/Documents/RFF-DP-01-42.pdf> (examining the causes and amounts of unfunded environmental liability in the United States, and the importance of financial assurance regulation to mitigation).

391. See, e.g., Mark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 *FORDHAM L. REV.* 737, 740–46 (2011) (explaining how the seminal federal environmental regulations such as the CWA, CAA, NEPA, and Endangered Species Act “show that prevention and deterrence are core principles underlying environmental law,” and discussing the limitations of tort law when applied to modern environmental problems).

392. *Id.* at 754–58 (concluding that the intersection of environmental law and the tort system is and should be a narrowly tailored one, given the expansive range and varying objectives of environmental laws, many of which were borne directly out of an inability of the tort system to address particular environmental harms).

importance and storied history of constitutionally based home-rule authority, remarkably little weight is given to the status of home rule municipalities in the preemption analysis. First, the courts should consider requiring the state to particularize and prove a state interest less nebulous than “uniformity,” and less pecuniary than “severance taxes.” Concerns about the state’s interest in protecting correlative rights are misplaced, as regulatory takings challenges are at least as open to mineral rights owners as tort litigation is to their neighbors. Factors that were heavily relied upon by the court in *Voss* to justify the existence of a state interest, particularly the “flowing” nature of the resource and the necessity of vertical drilling in extremely specific locations, have fundamentally changed since 1992. Other factors that exist today were not considered by the *Voss* court, including the scale and scope of production, and how it has marched through “[f]arms, fields, orchards, gardens, dooryards, and even homesteads . . . .”<sup>393</sup>

### C. Lessons from Other States

Colorado is far from the only state that has been facing the question over “how far is too far” when it comes to state agencies unilateral decisions over local land use in oil and gas. While several large producing states have had local control for many years, including Texas and Oklahoma, at least three states that have been faced with OGD have had recent constitutional showdowns in their respective supreme courts.<sup>394</sup>

#### 1. Pennsylvania

Pennsylvania’s Supreme Court struck down as unconstitutional provisions of a legislative enactment<sup>395</sup> that required municipalities to adopt uniform zoning requirements that would allow OGD in all zoning districts.<sup>396</sup> The lower court invalidated the act on due process grounds, holding that “the provision violated the citizens’ due process rights by requiring local governments to amend their existing zoning ordinances without regard for basic zoning principles and, thereby, failing to protect

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393. See Tower, *supra* note 1, at 60.

394. New York and Pennsylvania are described *infra*. Ohio has a case pending in its Supreme Court, State *ex rel.* Jack Morrison et al. v. Beck Energy Corp., No. 2013-0465, 989 N.E.2d 70 (Table) (Ohio 2013). In that case the Town of Munroe Falls appealed from a ruling that many of the Town’s OGD zoning ordinances were preempted by state law.

395. H.B. 1950, Gen. Assemb., Reg. Sess. (Pa. 2012).

396. Robinson Twp., Washington Cnty. v. Pennsylvania, 83 A.3d 901, 985 (Pa. 2013).

interests of property owners from harm and altering the character of neighborhoods.”<sup>397</sup> The state’s Supreme Court primarily upheld the ruling on the grounds that the act violated the Environmental Rights Amendment of the commonwealth’s constitution, which guarantees state citizens the right to a healthy environment.<sup>398</sup> The 158-page ruling deliberates on many issues pertinent to Colorado’s legislative and constitutional treatment of zoning, home rule, and due process concerns.<sup>399</sup> Ultimately, the Pennsylvania courts will not allow the state legislature to impose uniform zoning standards on local governments that require local governments to accept OGD without regard to the impacts on local character, current land uses, health, safety, and welfare, or potential environmental degradation.<sup>400</sup>

## 2. *New York*

In June 2014, the New York State Supreme Court held that local towns were not preempted from using zoning ordinances to exclude OGD.<sup>401</sup> There, the Town Board of Dryden amended the town zoning ordinances and declared that the industrial use of land for natural gas purposes “would endanger the health, safety and general welfare of the community through the deposit of toxins into the air, soil, water, environment, and in the bodies of residents.”<sup>402</sup> The developers who brought the case did not dispute that “absent a state legislative directive to the contrary, municipalities would ordinarily possess the home rule authority to restrict the use of land for oil and gas activities in furtherance of local interests.”<sup>403</sup> Unlike Colorado’s OGCA however, the New York Oil, Gas and Solution Mining Law has a clause which states “[t]he provisions of this article shall supersede *all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries . . .*”<sup>404</sup> Therefore, not only is New York far less empowering in its grant of home rule, New York’s mining law is far *more* powerful in

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397. *Id.* at 931. “The court explained that zoning laws protect landowners’ enjoyment of their property by categorizing uses, designating compatible uses to the same district, and generally excluding incompatible uses from districts . . . . The court stated that the goal of zoning is to preserve the rights of property owners within the constraints of the maxim ‘use your own property as not to injure your neighbors.’”

398. PA. CONST., art 1, § 27.

399. *See generally* Robinson Twp., 83 A.3d 901.

400. *Id.*

401. Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728, 754–55 (2014).

402. *Id.* at 740.

403. *Id.* at 743.

404. *Id.* at 744 (emphasis in original) (citing N.Y. ECL 23-0303(2)).

preempting local control. The *Dryden* court, however, found that this clause was not intended to supersede local zoning ordinances. Quoting the appellate court decision below, it noted,

the well-spacing provisions . . . concern technical, operational aspects of drilling and are separate and distinct from a municipality’s zoning authority, such that the two do not conflict, but rather, may harmoniously coexist; the zoning law will dictate in which, if any, districts drilling may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts in order to prevent waste.<sup>405</sup>

Thus, the New York State Supreme Court deftly upheld the rights of local communities to regulate land use to the exclusion of OGD, while noting that the State Legislature, if it chose, could amend the statutes to foreclose the powers protected by the ruling.<sup>406</sup> Colorado’s home rule provisions are far stronger, and its OGCA contains no provision resembling New York’s express preemption clause.<sup>407</sup> Using *Town of Dryden* as persuasive case law, the Colorado Supreme Court should reconsider its analysis of the relevant constitutional provisions and legislation that informs the current balance between local zoning powers and state preemption.

## V. CONCLUSION

Natural gas is an abundant mineral resource that, when combusted for energy production, releases a fraction of the carbon dioxide emitted by burning coal.<sup>408</sup> The United States possesses vast quantities of natural

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405. *Id.* at 750–51 (citing *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 37 (N.Y. App. Div. 2013)) (emphasis added).

406. *Wallach*, 23 N.Y.3d at 754–55.

407. *See COGCC*, 81 P.3d at 1125. When the COGCC enacted a Rule stating that its rules had a preemptive effect over all local provisions, the Colorado Supreme Court struck down the rule as unconstitutional, noting that “COGCC’s understanding of relevant case law, however, is not binding upon us.” *Id.*

408. The environmental advantage of natural gas to coal is enormously affected by the amount of gas—which is almost entirely methane, a greenhouse gas twenty to eighty times more powerful than carbon dioxide—escapes into the atmosphere as ‘fugitive emissions.’ No one knows how much gas escapes, but an aerial survey of northern Colorado revealed rates three-times higher than previously reported by the state. *See Bruce Finley, Scientists Flying over Colorado Oil Boom Find Worse Air Pollution*, DENVER POST, May 8, 2014, [http://www.denverpost.com/environment/ci\\_25719742/scientists-flying-over-colorado-oil-boom-find-worse](http://www.denverpost.com/environment/ci_25719742/scientists-flying-over-colorado-oil-boom-find-worse) (noting that air pollution has traditionally been measured at ground level, and state agencies did not begin any monitoring for methane until 2012).

gas, the production of which provides high-paying jobs as well as royalties and other revenues for mineral owners and governments.<sup>409</sup> Debates rage among activists and industry about the desirability of exploiting our gas resources. Whatever the “optimal” level or location of development, people possess the understanding and technology to enable developers to extract these resources far more safely and responsibly than is currently being required. Much like the old, “Wild-West” days of unregulated capture, the glut of natural gas has depressed prices.<sup>410</sup> Penalties for pollution remain embarrassingly low—often only hundreds of dollars per day, with no single fine to exceed \$1,000 regardless of aggravating factors—while effective pollution-control and safety technologies remain costly.<sup>411</sup>

Fracking currently operates within a sixty-year old regulatory system that was designed to maximize production with little regard for environmental or health impacts, and without anticipation that this industry would commonly intrude on heavily populated areas. The current regulatory regime does not adequately protect the public health or the environment from either direct harm or from the potential effects of climate change. In Colorado, the first mandate of the COGCC has always been to promote development, with recent amendments requiring the preservation of health and the environment. The progress of the legislature and the COGCC’s rule-making reforms should not be dismissed nor undervalued. However, a large and growing segment of the public is unsatisfied with these efforts as oil wells spring up around them, and the result has been a proliferation of bans, moratoria, and ordinances crafted to regulate “up to the line” of established state preemption. With more drilling in northern Colorado proposed in the near future, and the price of resources expected only to increase, this debate is not going to be quelled by the appointment of task forces.<sup>412</sup>

Most importantly, the current battle between the state and its local governments threatens to upset and undermine Colorado’s home rule

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409. U.S. ENERGY INFO. ADMIN., AEO2014 EARLY RELEASE OVERVIEW 1 (Dec. 16, 2013); IHS GLOBAL INSIGHT (USA) INC., THE ECONOMIC AND EMPLOYMENT CONTRIBUTIONS OF SHALE GAS IN THE UNITED STATES 22–23 (Dec. 2011), *available at* <http://anga.us/media/content/F7D1750E-9C1E-E786-674372E5D5E98A40/files/shale-gas-economic-impact-dec-2011.pdf>.

410. Christopher Joyce, *Is the Booming Natural Gas Industry Overproducing?*, NPR (Jan. 25, 2012, 12:25 P.M.), <http://www.npr.org/2012/01/25/145785839/is-the-booming-natural-gas-industry-overproducing>.

411. Colo. Oil & Gas Conservation Comm’n Rule 523(a)(1), (d).

412. Zoning ordinances, of course, were invented to solve precisely this type of conflict.



democratic principles. Home rule has been a constitutional right for over one hundred years in Colorado. Voters, demanding the right to local control over local affairs, adopted it by easy margins and have strengthened and expanded its powers since then. Colorado has also continuously increased the authority of its counties to regulate land use and development. The constitutional nondelegation provision prohibits the state from delegating municipal and county authority to state commissions. Americans and particularly Coloradoans have always placed a high value on self-determination and local control.

However, due to the finding of a significant ‘state interest’ in oil production, the COGCC has expanded its authority to adopt regulations that may encompass nearly every sphere of traditional local authority. Merely by adopting a regulation, the COGCC may expand state preemption, rendering home rule and local land-use control all but meaningless in the face of a resource boom. Although the COGCC has new mandates to protect public health, safety, welfare, and the environment, and fewer administrators who are members of the oil and gas industry, the *raison d’être* of the COGCC remains the facilitation of petroleum extraction and prevention of ‘waste.’ Under powers claimed by the COGCC, a city could not protect its own cemetery from fracking if it did not own the mineral rights. Inadequate attention has been paid to the traditional authority of local governments to regulate certain areas of local concern, such as a land use, zoning, and the ability to control the character and development of a local jurisdiction.

There are important democratic reasons for local governments to maintain regulatory authority over land use and zoning. These include the availability of public hearings, the relative weight given to citizen concerns, the proximity and accessibility of public hearings to the impacted public, and the availability of remedies.<sup>413</sup> The COGCC does not recognize a private right of action against an oil developer for

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413. COGCC “local public forums” to “consider potential issues related to public health, safety, and welfare” are to be convened “at the discretion of the Director.” 2 COLO. CODE REGS. 404-1:508(b)(2)(B). However, the local public forum “shall be replaced by the presentation of statements” during the hearing on the application, if that hearing is “reasonably proximate” to the lands affected by the application, and an application for increased well density is to be approved or denied “solely on the application’s technical merits,” with conditions to the permit applied only in response to “technical testimony” presented at the hearing. *Id.* 404-1:508(e)(1), 404-1:509(i)(2) . Public issues hearings are only available if the Commission makes findings that “the public issues raised by the application reasonably relate to potential significant adverse impacts to public health, safety and welfare” which were “not adequately addressed” by the permit, proposed plan, or the rules and regulations of the Commission. *Id.* 404-1:508(j).

violation of the OGCA or COGCC regulations,<sup>414</sup> nor can citizens obtain a hearing in order to challenge the issuance of an Application for a Permit to Drill.<sup>415</sup> A local government, through their official designee to the Commission, is specifically excluded from standing to bring an objection to a permit to drill or a location assessment—even where there is “reasonable cause to believe the proposed well or Oil and Gas Location is in material violation of the Commission’s rules, regulations, orders or statutes, or otherwise presents an imminent threat to public health, safety and welfare, including the environment, or a material threat to wildlife resources.”<sup>416</sup> Operators have no obligation to consult with residential tenants, neighbors, agricultural lessees, or any other nonowner who could be affected by the proposed operation.<sup>417</sup> The issuance of permits, but particularly of variances and waivers for rules and procedures, without public hearings or remedies for those who are injured is an insult to the idea of a sovereignty that rises from the people.<sup>418</sup>

There is nothing technical about the decision to allow industrial development in playgrounds, backyards, or next to water supplies. These decisions impact core values that go far beyond economic benefit. The right of local citizens to self-determination as to the character of their communities, the health of their children, and the protection of their drinking water sources should not be impaired. Every gold rush and oil

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414. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 923 (Colo. 1997).

415. *Colo. Oil & Gas Conservation Comm’n v. Grand Valley Citizens’ Alliance*, 279 P.3d 646, 649 (Colo. 2012) (holding that COGCC rules did not allow neighbors to request a hearing to contest drilling proposed at the site of an underground nuclear explosion that contaminated gas in the area).

416. 2 COLO. CODE REGS. 404-1:303(j).

417. 2 COLO. CODE REGS. 404-1:306(g).

418. Rule 303(i) allows the COGCC Director to issue, “without notice or consultation” a permit “at any time in the event that an operator files a sworn statement and demonstrates to the Director’s satisfaction” that economic hardship will result from delay caused by compliance. Under this rule, the operator is automatically exempt from “obligations to Surface Owners, local government designees, the Colorado Department of Public Health and Environment, or Colorado Parks and Wildlife” under Rules 305 (permit applications) and 306 (consultation), with minor exception for notices for ‘subsequent’ well operations and final reclamation. The Director only has to “report such permits granted in such manner to the Commission at regularly scheduled monthly hearings.” 2 COLO. CODE REGS. 404-1:303(i)(2). Additionally, the Director may issue “[v]ariations to any Commission rules, regulations, or orders . . . without a hearing” if the operator “make[s] a showing that it has made a good faith effort to comply, or is unable to comply, with the specific requirements contained in [those] rules, regulations, or orders . . . including, without limitation, securing a waiver or an exception . . . and that the requested variance will not violate the basic intent of the [OGCA].” *Id.* 401-1:502(b).

boom comes to an end—sometimes slowly, and sometimes abruptly. All that is left are the principles that we have defended or the bitter compromises we have made, the legacy of our character as people as expressed through our structure of self-governance, and the ghost towns.