

DISTRICT COURT, CITY AND COUNTY OF BROOMFIELD, COLORADO 17 DesCombes Dr. Broomfield, CO 80020 720-887-2100	▲ COURT USE ONLY ▲
Plaintiff: COLORADO OIL & GAS ASSOCIATION, v. Defendant: CITY AND COUNTY OF BROOMFIELD, COLORADO	
Attorneys for Plaintiff Colorado Oil & Gas Association: Name(s): Mark J. Mathews, # 23749 Wayne F. Forman, # 14082 Michael D. Hoke, #41034 Address: BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4437 Phone: 303.223.1100 FAX : 303.223.1111 E-mail: mmathews@bhfs.com; wforman@bhfs.com; mhoke@bhfs.com	Case Number: Div.:
COMPLAINT FOR DECLARATORY JUDGMENT	

Plaintiff, the Colorado Oil and Gas Association (“COGA”), for its Complaint against the City and County of Broomfield (“Broomfield”), alleges as follows:

I. INTRODUCTION

1. Broomfield’s citizen-initiated Charter Amendment, which passed by a twenty-vote majority of Broomfield voters on November 5, 2013, bans for five years the use of hydraulic fracturing to extract oil and gas and the storage in open pits or disposal of hydraulic fracturing waste within Broomfield. In light of the state’s dominant interest in efficient and equitable oil and gas production, the fact that the Charter Amendment bans oil and gas operations that the Colorado Oil and Gas Conservation Commission (“Commission”) extensively regulates and permits, the state’s exclusive authority to regulate technical areas of oil and gas production, and the state law requiring Commission approval for a local government to ban oil and gas operations, COGA is entitled to a declaratory judgment invalidating the Charter Amendment.

II. PARTIES

2. COGA is a Colorado nonprofit corporation and trade association whose purpose is to foster and promote the beneficial, efficient, responsible, and environmentally sound development, production, and use of Colorado's oil and natural gas.

3. COGA promotes the expansion of Rocky Mountain oil and natural gas supplies, markets, and transportation infrastructure, and represents its members in a variety of government forums.

4. COGA brings this action on behalf of itself and its members who have mineral interests within the physical boundaries and jurisdiction of Broomfield.

5. COGA's members include: (a) companies that are engaged in the exploration, production, and development of oil and natural gas in the State of Colorado; (b) companies that hold mineral leases and interests within Broomfield; and (c) companies that operate oil and gas wells within Broomfield.

6. Broomfield is a home-rule city and county under the Colorado Constitution.

III. JURISDICTION AND VENUE

7. The Court has subject matter jurisdiction over this action pursuant to Colo. Const. art. VI, § 9(1), COLO. REV. STAT. §§ 13-51-105 & 13-51-106, and C.R.C.P. 57.

8. The Court has personal jurisdiction over Broomfield pursuant to COLO. REV. STAT. § 13-1-124(1).

9. Venue in this district is proper pursuant to C.R.C.P. 98(c).

IV. FACTUAL ALLEGATIONS

A. THE OIL AND GAS CONSERVATION ACT AND ITS IMPLEMENTING REGULATIONS

10. Pursuant to the Colorado Oil and Gas Conservation Act (the "Act"), §§ 34-60-101 to 34-60-129, the state of Colorado extensively regulates oil and gas operations within the state.

11. By virtue of COLO. REV. STAT. §34-60-102(1)(a), the General Assembly has declared it to be in the public interest to:

- a. foster the responsible and balanced development, production, and utilization of the natural resources of oil and gas in Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources;

- b. protect the public and private interests against waste in the production and utilization of oil and gas;
- c. safeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production therefrom; and
- d. plan and manage oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting, fishing, and recreation traditions they support, which are an important part of Colorado's economy and culture.

12. The General Assembly also has declared it to be in the public interest to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste and consistent with the protection of public health, safety, and welfare.

13. The efficient and equitable development of oil and gas within Colorado requires uniform regulation of the technical aspects of drilling and production.

14. The Act established the Commission and vested it with the authority to enforce the Act's provisions, make and enforce rules and orders pursuant to the Act, and to do whatever may reasonably be necessary to carry out the provisions of the Act.

15. The Act mandates that the Commission shall:

- a. establish a timely and efficient permitting procedure and prices for reviewing applications to establish or amend a drilling and spacing unit;
- e. regulate to protect the health, safety, and welfare of the general public in the conduct of oil and gas operations;
- f. regulate to ensure the proper reclamation of the land and soil affected by oil and gas operations and the protection of the topsoil during operations;
- g. require operators to provide financial assurances to protect surface owners against unreasonable crop loss and land damage, and to guarantee compliance with health, safety, welfare, and reclamation requirements; and
- h. order a responsible party to perform mitigation of significant adverse environmental impacts on air, water, soil, or biological resources resulting

from oil and gas operations and, if necessary, pay for such mitigation out of the oil and gas conservation and environmental response fund and sue the responsible party for recovery.

16. The Commission has promulgated rules and regulations governing oil and gas operations, including hydraulic fracturing and the storage and disposal of exploration and production (“E&P”) wastes.

17. The Act and its implementing regulations contain technical requirements relating to oil and gas operations, including the use of hydraulic fracturing.

B. LOCAL QUESTION 300

18. On November 5, 2013, a twenty-vote majority of the Broomfield voters voted in favor of Local Question 300, a citizen-initiated amendment to Broomfield’s home-rule Charter. Local Question 300 read as follows: “Shall Broomfield’s Home Rule Charter be amended for five years so as to prohibit the use of hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City and County of Broomfield and to prohibit the disposal or open pit storage of solid or liquid wastes created in connection with the hydraulic fracturing process?”

19. As a result of the passage of Local Question 300, the Broomfield home-rule Charter was amended to include the terms of the “Charter Amendment,” which is attached as Exhibit 1.

20. In addition to a Purpose and Findings, the Charter Amendment contains the following policy: “It shall hereby be the policy of the City and County of Broomfield that it is prohibited to use hydraulic fracturing to extract oil, gas or other hydrocarbons within the City and County of Broomfield. In addition, with the City and County of Broomfield, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the hydraulic fracturing process, including but not limited to flowback or produced wastewater and brine.” By its terms, the Charter Amendment expires five years from the date of its implementation, unless extended by a majority vote by the people of Broomfield, and applies retroactively to oil and gas well permits in effect, and well operations being conducted, as of the date Local Question 300 was found to have qualified for the ballot.

C. EFFECTS OF THE CHARTER AMENDMENT

21. Hydraulic fracturing is a well-stimulation technique that is essential to extract oil and gas from the tight sand and shale formations that are the target of exploration and development in Broomfield and surrounding areas.

22. Hydraulic fracturing is a technical aspect of oil and gas operations.

23. The storage and disposal of wastes generated by the hydraulic fracturing process are technical aspects of oil and gas operations.

24. The Charter Amendment's ban on hydraulic fracturing prohibits drilling for oil and gas without waste because the only known, economically viable oil and gas in Broomfield is located in tight sand and shale formations.

25. The Charter Amendment conflicts with the Commission's regulations that govern well stimulation, including hydraulic fracturing.

26. The Charter Amendment bans for five years oil and gas operations within Broomfield that are allowed and regulated by the Commission.

27. The Charter Amendment negates for five years within Broomfield the Commission's regulations governing hydraulic fracturing and the storage and disposal of E&P wastes.

28. With regard to wells that are to be located outside of the boundaries of Broomfield, but that have wellbores that are to extend underground within the jurisdictional boundaries of Broomfield, the Charter Amendment prohibits hydraulic fracturing within those portions of the wellbores underlying the geographic extent of Broomfield.

29. The Charter Amendment impedes the ability of COGA and its members to promote, develop, and produce oil and gas in Broomfield.

30. The Charter Amendment injures COGA's current and future activities by denying it the rights to (a) promote the beneficial, efficient, responsible, and environmentally sound development, production, and use of Colorado's oil and gas in Broomfield, and (b) promote the expansion of oil and gas supplies, markets, and transportation infrastructure in Broomfield.

31. The Charter Amendment adversely impacts the development of oil and gas in Broomfield, thereby hindering COGA's mission and economically affecting some of its members' property rights.

32. The Charter Amendment adversely affects COGA's and its members' plans for oil and gas development within Broomfield.

33. The Charter Amendment adversely affects and injures COGA members' present and/or future oil and gas activities within the City, including the drilling of wells within Broomfield's territorial jurisdiction and the extension of horizontal wellbores under Broomfield.

34. COGA's members have the right to develop and produce oil and gas in Broomfield without interference from a local regulation preempted by the Oil and Gas Conservation Act.

D. COLORADO PREEMPTION DECISIONS

35. Several Colorado courts have already opined on whether a ban or extended moratorium on oil and gas operations in general, and hydraulic fracturing in particular, by local governments is preempted by state law.

36. On July 24, 2014, in Boulder County, Judge Mallard held on summary judgment that the City of Longmont's ban on hydraulic fracturing and the storage and disposal of hydraulic fracturing waste within Longmont was preempted by the Act. See Exhibit 2 (attached), Order Granting Motions for Summary Judgment, Colorado Oil and Gas Association v. City of Longmont, No. 13CV63 (Dist. Ct. July 24, 2014). Judge Mallard held that Longmont's ban was "obvious[ly]" preempted under the operational conflict standard because the Commission "permits hydraulic fracturing and Longmont prohibits it. The Commission permits storage and disposal of hydraulic fracturing waste and Longmont prohibits it. . . . Here, giving effect to the local interest, banning fracking, has virtually destroyed the state interest in production." Exhibit 2 at 14-15. As Judge Mallard concluded, "the state interest in production, prevention of waste and protection of correlative rights, on the one hand, and Longmont's interest in banning hydraulic fracturing on the other, present mutually exclusive positions." Exhibit 2 at 16.

37. In a case factually identical to the circumstances here, on August 7, 2014, in Larimer County, Judge Lammons held that the City of Fort Collins' five-year moratorium on using hydraulic fracturing in oil and gas wells and storing hydraulic fracturing waste within the City's boundaries was preempted by state law. See Exhibit 3 (attached), Order Granting Plaintiff's Motion for Summary Judgment on First Claim for Relief and Denying Defendant's Cross-Motion for Summary Judgment, Colorado Oil and Gas Association v. Fort Collins, No. 13CV31385 (Dist. Ct. August 7, 2014). Specifically, Judge Lammons held on summary judgment that the City's moratorium was impliedly preempted by the Colorado Oil and Gas Conservation Act (the "Act"), because "[t]he five-year ban on hydraulic fracturing substantially impedes the state's significant interest in fostering efficient and equitable oil and gas production" See Exhibit 3 at 7. The Court also determined that the City's moratorium was preempted under the operational conflict test because "it prohibits what the Act expressly authorizes the Commission to permit." See Exhibit 3 at 8.

38. On August 27, 2014, in Boulder County, Judge Mallard held on summary judgment that the City of Lafayette's ban on all oil and gas extraction within the City's boundaries was preempted by the Act. See Exhibit 4 (attached), Order Granting Motion for Summary Judgment, Colorado Oil and Gas Association v. City of Lafayette, No. 13CV31746, (Dist. Ct., August 27, 2014). Judge Mallard concluded that "[t]he operational conflict in this case is obvious. The State permits drilling and Lafayette prohibits it. The State permits handling, transportation and disposal of production waste, and Lafayette prohibits it." Exhibit 4 at 11.

39. Finally, in a case not directly involving preemption, this Court held that the Charter Amendment's five-year moratorium on hydraulic fracturing activity violated the Colorado Constitution's prohibition against *ex post facto* laws with respect to Sovereign's vested

rights under a Memorandum of Understanding it had with Broomfield. Exhibit 5 (attached), Order, Sovereign Operating Company v. City and County of Broomfield, No. 14 CV 30092, LEXIS CITE (Dist. Ct., September 25, 2014) (Melonakis, J.). In reaching this holding, the Court examined whether the public interest was “advanced or retarded” by the Charter Amendment. Exhibit 5 at 11. In finding the public interest retarded, the Court stated “The charter amendment is of dubious constitutionality. Two district courts have stricken similar enactments finding that they were impliedly preempted or than an operational conflict prohibited enforcement of those enactments. Additionally, Broomfield’s own legal staff has advised its governing body that any attempt to regulate oil and gas exploration and extraction that conflicts with the rules and regulations of the Colorado Oil and Gas Commission is in contravention of the Colorado constitution.” Exhibit 5 at 11.

V. FIRST CLAIM FOR RELIEF

Declaratory Judgment That State Law Preempts The Charter Amendment

40. COGA incorporates each allegation of the preceding paragraphs as if set forth herein.

41. The Charter Amendment adversely affects COGA’s and its members’ rights, status, and other legal relations.

42. A real and substantial controversy exists between the parties regarding whether the Charter Amendment is valid and enforceable. A declaratory judgment will terminate the uncertainty and controversy giving rise to this proceeding.

43. The Charter Amendment is impliedly preempted by the state’s dominant interest in the efficient and equitable development and production of oil and gas resources, as reflected by the Act and its implementing regulations.

44. The Charter Amendment irreconcilably conflicts with state law in an area of state or mixed state and local interest, and is therefore preempted. The Charter Amendment prohibits oil and gas operations that the State permits.

45. The Charter Amendment’s ban on the storage and disposal of wastes from hydraulic fracturing is also preempted under the Safe Drinking Water Act and the Commission’s rules regarding disposal of drilling fluid into Class II injection wells, as the Commission explicitly permits such wells, which the Charter amendment forbids within Broomfield.

46. The Charter Amendment purports to regulate technical aspects of oil and gas operations in a manner preempted by the Act and its implementing regulations.

47. The Charter Amendment is superseded by procedural and substantive standards supplied by the Commission's comprehensive regulatory regime. *See* Local Government Land Use Control Enabling Act of 1974, COLO. REV. STAT. § 29-20-107.

48. The Charter Amendment constitutes an illegal, *de facto* ban on oil and gas extraction and exploration and is therefore preempted by the conflicting provisions of the Areas and Activities of State Interest Act, COLO. REV. STAT. § 24-65.1-101, et seq.

49. COGA seeks a judicial determination that the Charter Amendment is invalid and unenforceable because it is preempted by state and federal law.

VI. PRAYER FOR RELIEF

WHEREFORE, COGA respectfully requests that the Court:

Enter judgment in favor of COGA and against Broomfield on COGA's First Claim for Relief, declaring the Charter Amendment unlawful and unenforceable;

Award COGA its costs under C.R.C.P. 54(d); and

Award COGA any other relief the Court deems proper.

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