NATIONAL ASSOCIATION OF ROYALTY OWNERS – CALIFORNIA, INC.
Serving the Citizens Who Own California's Natural Resources

July 25, 2014

Mr. Michael G. Ghizzoni
County Counsel
County of Santa Barbara
105 E. Anapamu Street, Suite 201
Santa Barbara, CA 93101

VIA EMAIL

Dear Mr. Ghizzoni:

As I stated in my letter to you of June 11, 2014, NARO-California represents the interests of the estimated 510,000 private citizens who own mineral rights in this state. My family and I are among the thousands of private citizens who own mineral rights in Santa Barbara County. We strongly oppose Measure P.

Once again I am sharing with you the two attached legal opinions that specifically review why the proposed ballot measure to restrict "high intensity" oil production operations in Santa Barbara County would be both illegal under California law and unconstitutional under both the state and U.S. Constitutions. In addition, you will find attached an update to the opinion letter from the law firm of Hanna and Morton, LLP together with the recent Order Granting Motions for Summary Judgment handed down by the District Court, Boulder County, State of Colorado.

The majority of mineral owners are senior citizens. Many of them rely on their royalty checks to pay their monthly bills. The rights of mineral owners are well established under the law. If Measure P is adopted in November, even if the Board of Supervisors adopts "plan amendments to codify procedures for determining exemptions", royalty/mineral owners will have no alternative but to pursue all remedies available under the law.

If measure P passes in November it will subject Santa Barbara County to costly litigation and hefty judgments. In the best interests of all of the citizens of Santa Barbara County, we urge you to advise the County Board of Supervisors to strongly oppose Measure P.

Sincerely,

Edward S. Hazard
President

cc: Members, Santa Barbara County Board of Supervisors

Founded in 1980, the National Association of Royalty Owners is the only national organization representing solely, and without compromise, oil and gas royalty owners' interests.

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July 25, 2014

Edward S. Hazard
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Re: Constitutionality of Proposed Santa Barbara County Anti-Oil Production Ordinance

Dear Mr. Hazard:

You have asked us to revisit the opinion letter we gave you on June 4, 2014. In that letter we concluded that, although charter cities, general cities and counties have the power under the California Constitution to regulate surface impacts of oil and gas production such as zoning, fire protection, public safety, nuisance, appearance, noise, fencing, hours of operation and inspection, they do not have the power to regulate down-hole methods of oil and gas producing operations. The power to regulate down-hole methods of oil and gas producing operations has been preempted by the State of California.

We also concluded that if these ordinances should pass they will certainly be challenged in the courts. That will be an expensive proposition for all concerned, including the County of Santa Barbara and the City of Los Angeles. We also concluded that if, as we anticipate, such challenges are successful there is a high probability that some or all of the challengers' attorneys' fees will be recovered from the county and the city pursuant to CCP Section 1021.5.

Having reviewed our earlier opinion, we are still of the opinion that the conclusions we reached were and still are valid. We also point out that recent events show that the doctrine of preemption is alive and well. A local ordinance in Colorado purporting to prohibit hydraulic fracturing was recently overturned on the doctrine of preemption.

Yours very truly,

Edward S. Renwick

ESR:so

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Re: Constitutionality of Proposed Los Angeles City and Santa Barbara County Anti-Oil Production Ordinances

Dear Mr. Hazard:

You have asked us to give an opinion on whether local ordinances such as those currently under consideration in the City of Los Angeles and the County of Santa Barbara, both of which purport to ban various down-hole well stimulation methods such as hydraulic fracturing, are constitutional under the California and the United States Constitution

Our conclusion is that, although charter cities, general cities and counties have the power under the California Constitution to regulate surface impacts of oil and gas production such as zoning, fire protection, public safety, nuisance, appearance, noise, fencing, hours of operation and inspection, they do not have the power to regulate down-hole methods of oil and gas producing operations. If these ordinances should pass they will certainly be challenged in the courts. That will be an expensive proposition for all concerned, including the County of Santa Barbara and the City of Los Angeles. Moreover if, as we anticipate, such challenges are successful there is a high probability that some or all of the challengers' attorneys' fees will be recovered from the county and the city pursuant to CCP Section 1021.5.

We also conclude that if we are mistaken and local governments do have the power to regulate down-hole methods of oil and gas producing operations, the contemplated prohibitions probably amount to regulatory takings which will subject the city and the county to damages under constitutional provisions prohibiting the taking of private property for public uses without just compensation.

This opinion letter will only address our first conclusion. We have read the letter dated May 20, 2014, addressed to the Santa Barbara County Board of Supervisors by the law firm of Latham and Watkins LLP which discusses the issue of taking of property for public uses without just compensation. Their opinion is thorough, we agree with their conclusions and unless you instruct us otherwise we see no need to plough the same ground in this opinion letter.

DISCUSSION

We turn now to the issue of whether charter cities, general cities, and counties have the power under the California Constitution to regulate the down-hole activities of oil and gas production. The powers of local governments to legislate are governed by the California Constitution.

1. Article XI, Section 5 of the California Constitution provides that chartered cities "may make and enforce all ordinances and regulations in respect to *municipal affairs*, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." (Emphasis supplied)

2. Article XI , Section 7 of the California Constitution provides a "county or city may make and enforce within its limits all *local, police, sanitary, and other ordinances and regulations not in conflict with general laws."*(Emphasis supplied).

However, the powers to legislate given to local government by the California Constitution are subject to a preemption rule. The preemption rule provides that if otherwise valid local legislation conflicts with state law it is preempted by state law and is void. Simply put a charter city is preempted because once the state has preempted the field the issue is no longer a "municipal affair." Similarly a non-charter city or a county is preempted because its otherwise valid local legislation conflicts with general law.

This of course raises the question of when does such a conflict exist? A conflict exists if the local legislation duplicates, contradicts or enters into an area fully occupied by general law either expressly or by legislative implication. The rule is stated in *Sherwin-Williams Company et al v City of Los Angeles (1993) 4 Cal 4th 893.* The California Supreme Court's detailed exposition of the rule with extensive supporting citations is set out in the following footnote.[1]:

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[1] "In order to resolve the issue, we must initially state the principles governing preemption analysis; then examine the statute and the ordinance, each on its own terms; and finally measure the latter against the former...The general principles governing preemption analysis are these. Under Article XI, Section 7 of the California Constitution, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."..."If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal.3d 878, 885, 218 Cal.Rptr. 303, 705 P.2d 876; accord, e.g., IT Corp. v. Solano County Bd. of Supervisors (1991) 1 Cal.4th 81, 90, 2 Cal.Rptr.2d 513, 820 P.2d 1023; People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal.3d 476, 484, 204 Cal.Rptr. 897, 683 P.2d 1150; Lancaster v. Municipal Court (1972) 6 Cal.3d 805, 807, 100 Cal.Rptr. 609, 494 P.2d 681.) "A conflict exists if the local legislation ' "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." ' " (Candid Enterprises, Inc. v. [844 P.2d 537] Grossmont Union High School Dist., supra, 39 Cal.3d at p. 885, 218 Cal.Rptr. 303, 705 P.2d 876, which quotes, without citations, People ex rel. Deukmejian v. County of Mendocino, supra, 36 Cal.3d at p. 484, 204 Cal.Rptr. 897, 683 P.2d 1150, which in turn quotes, with citations, Lancaster v. Municipal Court, supra, 6 Cal.3d at pp. 807-808, 100 Cal.Rptr. 609, 494 P.2d 681; accord, e.g., IT Corp. v. Solano County Bd. of Supervisors, supra, 1 Cal.4th at p. 90, 2 Cal.Rptr.2d 513, 820 P.2d 1023; Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 423, 261 Cal.Rptr. 384, 777

The issue presented by the proposed Los Angeles City legislation purporting to prohibit down-hole well stimulation and the proposed Santa Barbara County legislation purporting to prohibit "intense" methods of down-hole oil and gas operations is whether they duplicate, contradict or enter into an area fully occupied by general law either expressly or by legislative implication? That inquiry takes us first to an analysis of several sections of the California Public Resources Code.

First is Section 3106 of the California Public Resources Code which gives broad authority to the Supervisor of the Division of Oil, Gas and Geothermal Resources (generally referred to as "DOGGR" for short) to regulate down-hole oil and gas producing operations.

> "3106. (a) The supervisor shall so supervise the drilling, operation, maintenance, and abandonment of wells and the operation, maintenance, and removal or abandonment of tanks and facilities attendant to oil and gas production, including pipelines not subject to regulation pursuant to Chapter 5.5 (commencing with Section 51010) of Part 1 of Division 1 of Title 5 of the Government Code that are within an oil and gas field, so as to prevent, as far as possible, damage to life, health, property, and natural resources; damage to underground oil and gas deposits from infiltrating water and other causes; loss of oil, gas, or reservoir energy, and damage to underground and surface waters suitable for irrigation or domestic purposes by the infiltration of, or the addition of, detrimental substances.
>
> *(b) The supervisor shall also supervise the drilling, operation, maintenance, and abandonment of wells so as to permit the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate*

P.2d 157; Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 290, 219 Cal.Rptr. 467, 707 P.2d 840). Local legislation is "duplicative" of general law when it is coextensive therewith. (See In re Portnoy (1942) 21 Cal.2d 237, 240, 131 P.2d 1 [4 Cal.4th 898] [finding "duplication" where local legislation purported to impose the same criminal prohibition that general law imposed].) Similarly, local legislation is "contradictory" to general law when it is inimical thereto. (See Ex parte Daniels (1920) 183 Cal. 636, 641-648, 192 P. 442 [finding "contradiction" where local legislation purported to fix a lower maximum speed limit for motor vehicles than that which general law fixed].) Finally, local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area (see, e.g., Candid Enterprises, Inc. v. Grossmont Union High School Dist., supra, 39 Cal.3d at p.886, 218 Cal.Rptr. 303, 705 P.2d 876), or when it has impliedly done so in light of one of the following indicia of intent: "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the" locality (In re Hubbard (1964) 62 Cal.2d 119, 128, 41 Cal.Rptr. 393, 396 P.2d 809, "overruled" on another point, Bishop v. City of San Jose, supra, 1 Cal.3d at p. 63, fn. 6, 81 Cal.Rptr. 465, 460 P.2d 137; accord, e.g., IT Corp. v. Solano County Bd. of Supervisors, supra, 1 Cal.4th at pp. 90-91, 2 Cal.Rptr.2d 513, 820 P.2d 1023; Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist., supra, 49 Cal.3d at p. 423, 261 Cal.Rptr. 384, 777 P.2d 157; Cohen v. Board of Supervisors, supra, 40 Cal.3d at pp. 292-293, 219 Cal.Rptr. 467, 707 P.2d 840; Candid Enterprises, Inc. v. Grossmont Union High School Dist., supra, 39 Cal.3d at p. 886, 218 Cal.Rptr. 303, 705 P.2d 876; People ex rel. Deukmejian v. County of Mendocino, supra, 36 Cal.3d at p. 485, 204 Cal.Rptr. 897, 683 P.2d 1150)."

recovery of underground hydrocarbons and which, in the opinion of the supervisor, are suitable for this purpose in each proposed case. To further the elimination of waste by increasing the recovery of underground hydrocarbons, it is hereby declared as a policy of this state that the grant in an oil and gas lease or contract to a lessee or operator of the right or power, in substance, to explore for and remove all hydrocarbons from any lands in the state, in the absence of an express provision to the contrary contained in the lease or contract, is deemed to allow the lessee or contractor, or the lessee's or contractor's successors or assigns, to do what a prudent operator using reasonable diligence would do, having in mind the best interests of the lessor, lessee, and the state in producing and removing hydrocarbons, including, but not limited to, the injection of air, gas, water, or other fluids into the productive strata the application of pressure heat or other means for the reduction of viscosity of the hydrocarbons, the supplying of additional motive force, or the creating of enlarged or new channels for the underground movement of hydrocarbons into production wells, when these methods or processes employed have been approved by the supervisor, except that nothing contained in this section imposes a legal duty upon the lessee or contractor, or the lessee's or contractor's successors or assigns, to conduct these operations.

(c) The supervisor may require an operator to implement a monitoring program, designed to detect releases to the soil and water, including both groundwater and surface water, for aboveground oil production tanks and facilities.

(d) To best meet oil and gas needs in this state, the supervisor shall administer this division so as to encourage the wise development of oil and gas resources. (Emphasis added)

Next is Public Resources Code Section 3012 which makes it clear that the authority of DOGGR to regulate down-hole oil and gas production techniques under Section 3106 applies to lands and wells within an incorporated city even if the city tries to regulate such activities itself.

3012. The provisions of this division *apply to any land or well situated within the boundaries of an incorporated city* in which the drilling of oil wells is now or may hereafter be prohibited, until all wells therein have been abandoned as provided in this chapter.[2] (Emphasis added)

How do we conclude that section 3012 shows that the legislature intended section 3106 to control even where cities try to regulate down-hole operations? Consider this: if an incorporated city were to enact an ordinance prohibiting new oil well drilling projects within the city limits and also prohibiting any existing wells from utilizing well stimulation techniques approved by the DOGGR there is no doubt that the ordinance would *expressly contradict* section 3012 which expressly says section 3106 controls all wells still producing within the city. Accordingly the city's power to enact such an ordinance would have expressly been preempted by Public Resources Code

[2] "This division" in the code section refers to Division 3 of the Public Resources Code encompassing sections 3000 through 3865.

section 3106. It follows that if the city did not go to the extreme of prohibiting all future oil well drilling projects within the city, but nevertheless purported to prohibit well stimulation techniques even when approved and permitted by the DOGGR, the same result would obtain. If the legislature intended DOGGR to continue to regulate down-hole activities under section 3106 where a city prohibited future oil and gas well projects then, *by implication,* it certainly must have intended DOGGR to regulate down-hole activities under section 3106 where the city did not go so far as to prohibit future oil and gas well projects.

Finally, there is Public Resources Code Section 3690 which explains that some regulatory authority over oil and gas operations remains with cities and counties and has not been preempted. Section 3690 declares that enactment of the unitization chapter of the Public Resources Code shall not be deemed to have preempted the right of cities and counties to regulate such oil and gas production activities as "zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment and inspection."

> 3690. This chapter shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, *zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection.*[3](Emphasis added)

Although specifically aimed at unitization, this section is consistent with case law generally. For instance *Consolidated Rock Products Co. v Los Angeles (1962) 57 C 2d 515* holds that removal of sand and gravel may be prohibited in an area zoned for agricultural and residential uses. Similarly *Friel v Los Angeles (1959) 172 C.A. 2d 142* holds that oil well drilling was properly prohibited in a residential district in an unincorporated area.

However PRC Section 3690 seems not to apply to down-hole activities regulated by DOGGR. There are at least three reasons for this conclusion. First the only cases we have been able to find that permit local regulation of oil and gas operations all involve regulation of surface activities. Second, regulation of down-hole activities of oil and gas operations requires substantial technical knowledge and experience which most cities simply do not have. Third, the examples of permitted regulation contained in PRC Section 3690 all involve regulation of surface activities. That brings into play a well known rule of statutory construction. This is the rule of *ejusdem generis.* Under the rule, where specific words follow general words in a writing or where specific words precede general words, the general words are construed to embrace only things similar in nature to those enumerated by the specific words. In *Harris v Capital Growth Investors (1991) 52 Cal 3rd 1142m 1158* the California Supreme Court explained the rule as follows:

> "Among the maxims of jurisprudence in the Civil Code is the following: "Particular expressions qualify those which are general." (§ 3534 [enacted 1872].) The principle is an expression of the doctrine of *ejusdem generis* (or Lord Tenterden's rule), which seeks to

[3] "This chapter" refers to Chapter 3.5 of Division 3 covering Unit Operations which encompasses sections 3630 through 3690.

> ascertain common characteristics among things of the same kind, class, or nature when they are cataloged in legislative enactments.... Ejusdem generis is illustrative of the more general legal maxim *nocitur a sociis*--"it is known from its associates."

Our conclusion is that under section 3690 local government is allowed to regulate the conduct and location of oil production activities such as zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection. In other words, local governments are allowed to regulate surface activities. However it is also our opinion that section 3690 does not purport to give local governments the power to regulate the conduct of down-hole oil and gas operations.

We now apply the foregoing rules of law to the proposed Los Angeles City and County of Santa Barbara ordinances. On Friday February 28, 2014, the Los Angeles City Council directed the City Attorney to draft an ordinance banning "all activity associated with well stimulation, including, but not limited to, hydraulic fracturing, gravel packing, and acidizing, or any combination thereof, and the use of waste disposal injection wells." In the County of Santa Barbara an anti oil group has apparently obtained the necessary signatures to place on the November 2014 ballot an initiative measure amending the Santa Barbara County Comprehensive Plan and the Santa Barbara County Code to ban "high-intensity petroleum operations" while continuing to permit "low-intensity petroleum operations." High-Intensity Petroleum Operations means (1) Well Stimulation Treatments and/or (2) Secondary and enhanced Recovery Operations" This expressly includes, but is not limited to, hydraulic fracturing, acid well stimulation treatments, waterflood injection, steam flood injection, and cyclic steam injection. Moreover the initiative bans any land uses which support "high-intensity petroleum operations." However the ban does not apply to land uses supporting off shore production activities.

We know that PRC Section 3106 specifically gives the Supervisor of the Division of Oil, Gas and Geothermal Resources the authority to permit oil and gas operators to produce oil and gas by utilizing various down hole procedures "*including, but not limited to, the injection of air, gas, water, or other fluids into the productive strata the application of pressure heat or other means for the reduction of viscosity of the hydrocarbons, the supplying of additional motive force, or the creating of enlarged or new channels for the underground movement of hydrocarbons into production wells.*" The conclusion is inescapable that the proposed Los Angeles City ordinance and the proposed Santa Barbara County ordinance both purport to prohibit those same down-hole activities which section 3106 permits. They both therefore directly contradict PRC Section 3106. Therefore, in our opinion, the proposed ordinances are both beyond the legislative power given to cities and counties by Article XI Sections 5 and 7 of the California Constitution.

Yours very truly,

Edward S. Renwick

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LATHAM & WATKINS LLP

May 20, 2014

Board of Supervisors
County of Santa Barbara
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101

Re: Proposed Initiative to Ban "High-Intensity Petroleum Operations" Certification

Dear Honorable Supervisors,

We are writing on behalf of Californians for a Safe Secure Energy Future, a coalition created to educate the public about proven, safe oil technologies, to bring to your attention a fundamental problem with the enactment of an initiative to ban "High-Intensity Petroleum Operations" within Santa Barbara County's unincorporated area (the "Initiative"). Any such ban would raise serious constitutional questions as a regulatory taking in violation of the Fifth Amendment to the U.S. Constitution along with Article I, § 19 of the California Constitution, absent just compensation. In light of these concerns, we urge that you not go forward with the Initiative.

* * * * *

Despite the calls of some to enact a statewide ban on hydraulic fracturing, the State of California has notably declined to enact such a ban. But the proposed Initiative is impermissibly seeking to take matters into its own hands by considering a permanent measure to ban "High-Intensity Petroleum Operations," including hydraulic fracturing, cyclic steam, waterflood or steamflood injection and acid well stimulation treatments. The proposed Initiative would amend Santa Barbara County's Comprehensive Plan Policies and the Santa Barbara County Code to prohibit the use of any land within the County's unincorporated area for, or in support of, so-called "High-Intensity Petroleum Operations," including but not limited to onshore exploration and onshore production of offshore oil and gas reservoirs. The proposal states that the prohibition, if adopted, would not apply to onshore facilities that support offshore exploration or production from offshore wells or to off-site facilities or infrastructure, such as refineries and pipelines that do not directly support High-Intensity Petroleum Operations. The prohibition would apply in any zoning district within the County. Such a ban would immediately and adversely impact existing mineral rights holders lawfully and responsibly operating wells in Santa Barbara County, as well as companies with interests in developing such rights.

The Takings Clause to the U.S. Constitution and its counterpart in the California Constitution (Art. I, § 19) prohibit the taking of private property absent just compensation. This constitutional guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-124 (1978). As the Supreme Court has admonished, the Takings Clause is "an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot*., 560 U.S. 702, 734 (2010); *see also, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (emphasizing that the Takings Clause is "as much a part of the Bill of Rights as the First Amendment and Fourth Amendment"). The courts have repeatedly acted to protect those rights.

It is well established that this vital constitutional protection extends beyond actual physical takings of property to regulatory takings. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[T]here will be instances when government actions do not encroach upon or occupy property yet still affect and limit its use to such an extent that a taking occurs"). The Supreme Court has unequivocally held that where a government action deprives a landowner of "all economically beneficial use of property," the action constitutes a *per se* regulatory taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). The only question remaining for the courts in such cases is the amount of just compensation owed to the owner. *Id.* Where an ordinance purports to institute an indiscriminate ban on all oil and gas extraction, it would deprive existing mineral rights holders of all economically beneficial use of their property rights and would constitute an impermissible regulatory taking. *Cf. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981) (reasoning that enactment of Surface Mining Act did *not* deprive plaintiffs of "economically viable use of their property" because "[t]he Act does not categorically prohibit surface coal mining"), *cited in Lucas*, 505 U.S. at 1016.

But even where the government action is narrower in scope and leaves select economic uses intact, it may still constitute a regulatory taking. The Supreme Court has long held that where a regulation works an economic detriment on property rights owners and interferes with their "distinct investment-backed expectations," the property owners must receive just compensation. *See, e.g., Penn Central Transp. Co.*, 438 U.S. 104. Apart from the *per se* taking discussed above, the Court has generally "resist[ed] the temptation to adopt *per se* rules in . . . cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002). In essence, the relevant "inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle v. Chevron U.S.A. Inc*., 161 L. Ed. 2d 876, 889 (2005). As the Supreme Court has made clear, whether the regulatory action "substantially advance[s] legitimate state interests" or is believed to be dictated by the public interest is wholly irrelevant to whether it constitutes a taking. *Id.*

The Takings Clause squarely applies to an initiative ordinance adopted by voters. *See, e.g., Arnel Development Co. v. City of Costa Mesa*, 126 Cal.App.3d 330, 337 (1981) ("The city's authority under the police power is no greater than otherwise it would be simply because the

subsequent rezoning was accomplished by initiative."). Accordingly, an initiative cannot effectuate a "taking" without subjecting the city or county to the risk of monetary damages, invalidation of the measure, or both. *See, e.g., Chandis Securities v. City of Dana Point*, 52 Cal.App.4th 475, 484 (1996) (where a land use intitiative constitues a taking, the local jurisdiction will be required "to pay compensation to plaintiffs.").

An initiative banning hydraulic fracturing and other high intensity petroleum operations would automatically trigger serious constitutional concerns. While the Initiative purports to be a land use regulation, it amounts to an outright ban on all oil and gas extraction. The Initiative purports to ban not only hydraulic fracturing or acidizing, but also all necessary and conventional methods for extracting oil and gas in the County. It bans any land use activity that "supports" what the Initiative terms "Secondary and Enhanced Recovery Operation." (Initiative, at p. 6.) It then defines "Secondary and Enhanced Recovery Operation" as "any operation where the flow of hydrocarbons into a well are aided or induced with the use of injected substances..." (*Id*., at p. 7.) The list of prohibited substances—which is not exhaustive—includes water, air, steam, and any other substances. By prohibiting the injection of all substances under the guise of a land use regulation, the Initiative effectively bans virtually every technique involved in producing oil and gas from wells—including many techniques currently employed in the recovery of oil and gas in Santa Barbara County.

At a minimum, such a ban would substantially interfere with the vested rights of mineral right holders and would upend their settled expectations. However labeled and formulated, a ban on virtually all extraction methods would prevent both mineral right holders and developers from making use of their rights under previously employed methods and would cause significant losses on their investments due to the severely restricted scope of operations and the highly reduced output of oil and gas. *Cf. Penn Cent. Transp.*, 438 U.S. at 138 ("The restrictions imposed [] not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."). Indeed, an outright ban would effectively deprive them of all economically viable use of their property rights and therefore rise to the level of a *per se* regulatory taking as well.

Courts have recognized that similar laws constituted impermissible regulatory takings. For example, in *Braly v. Board of Fire Com'rs of City of Los Angeles*, the California Court of Appeals noted that, "[u]nder the law of [California], the landowner has a property right in oil and gas beneath the surface, not in the nature of an absolute title to the oil and gas in place, but as an exclusive right to drill upon his property for these substances." 157 Cal. App. 2d 608, 612 (2d Dist. 1958). "This is a right"—the Court held—"which is as much entitled to protection as the property itself, and the undue restriction of the use thereof is as much a taking for constitutional purposes as appropriating or destroying it." *Id.* Thus, the Court found that the mere future possibility that petitioners may be able to drill on their land afforded no adequate means of protection or substitute for the owners' right to extract oil from their property presently, and that therefore the ordinance in question was unconstitutional and invalid. Likewise, in *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, the Court of Appeals granted a writ of mandamus to compel the city, its mayor, and members of the city council to annul and rescind their revocation of a permit to drill an oil well within the city, and to reinstate such permit. 85 Cal. App. 2d 776 (2d Dist. 1948). The Court held, among other things, that since the permit had been regularly

issued and preliminary work undertaken in accordance therewith, the permittee acquired a vested property right protected by the Fifth Amendment, which could not be destroyed by the adoption of a zoning ordinance prohibiting the permitted use of the property. *Id.*

The Supreme Court has also long ago proclaimed the importance of mineral rights in the context of the Takings Clause. In the seminal case of *Pennsylvania Coal Co. v. Mahon*, a deed granted plaintiffs the surface rights to certain land but reserved to defendant the right to mine all coal under the surface owner's property. 260 U.S. 393 (1922). In an effort to protect the surface owner's interests, the state enacted—pursuant to its police powers—legislation that "forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than 150 feet from any improved property belonging to any other person." *Id.* In finding that the Act constituted a taking requiring just compensation, the Court held that the "protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." *Id.* "When this seemingly absolute protection is found to be qualified by the police power," the Court remarked, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* The Constitution, however, does not permit that to "be accomplished in this way." *Id.* The Court specifically cautioned against the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.*

The purported savings clause included in the proposed Initiative (§ 5) does not move the constitutionality needle. The self-serving and circular statement that the initiative is not unconstitutional because the Board will take care not to apply it in cases that would violate the Constitution cannot and does not shield the measure from review. Indeed, that provision merely serves as recognition that the sweeping ban the Initiative proposes to enact is fraught with constitutional perils. Nor does the potential for an exception resolve the problem. The provision leaves enormous, if not unfettered, discretion in the hands of the Board—an entity not equipped to evaluate a takings claim from a legal standpoint—and offers no guidance or set criteria for the issuance of a permit/exemption. And, in any event, this provision at most would transform a facial challenge into an as-applied one, without alleviating these constitutional concerns.

* * * * *

The serious constitutional problems raised by the proposed Initiative banning all "High-Intensity Petroleum Operations" strongly counsel against any further action in that direction. We therefore urge you not to endorse or act upon any proposals to that effect.

We appreciate your attention to this very important matter. Please do not hesitate to contact us should you have any questions or need further information.

Very truly yours,

George J. Mihlsten
of LATHAM & WATKINS LLP

Gregory G. Garre
of LATHAM & WATKINS LLP

cc: Mr. Michael Ghizzoni, County Counsel

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3771	
COLORADO OIL AND GAS ASSOCIATION, and COLORADO OIL AND GAS CONSERVATION COMMISSION, **PLAINTIFFS,** **TOP OPERATING CO.,** **PLAINTIFF-INTERVENOR** **v.** **CITY OF LONGMONT, COLORADO,** **DEFENDANT, and** **THE SIERRA CLUB, EARTHWORKS, OUR HEALTH, OUR FUTURE, OUR LONGMONT, and FOOD AND WATER WATCH,** **DEFENDANT-INTERVENORS**	DATE FILED: July 24, 2014
	Case Number: 13CV63 Division 3 Courtroom G

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motions for Summary Judgment and the responsive pleadings thereto. The Plaintiffs in this case are the Colorado Oil and Gas Association (COGA), an association of oil and gas operators, the Colorado Oil and Gas Conservation Commission (COGCC or the Commission), a statewide agency created by the Colorado Oil and Gas Conservation Act (the Act) to regulate oil and gas activity in the state, and TOP Operating Company (TOP), an oil and gas operating company with principal holdings in or adjoining the City of Longmont. The Defendants are the City of Longmont, and Defendant-Intervenors, the Sierra Club, Earthworks, Our Health, Our Future, Our Longmont, and Food and Water Watch. The Defendant-Intervenors are groups of citizens who have an interest in environmental matters.

Oral arguments on the motions for summary judgment were heard on July 9, 2014, and the Court took the matters under advisement at that time. Now, after carefully considering the pleadings, the exhibits, the arguments of counsel, and the applicable law, the Court hereby enters the following Ruling and Order:

I. BACKGROUND

Hydraulic fracturing, commonly known as fracking, is a well completion process. After a well is drilled, large quantities of water, along with some sand and chemicals, are injected down the well bore under pressure to create cracks, or fractures, in the formation. This process liberates oil and natural gas in the rock and allows it to flow up the well bore for capture and use to meet energy needs. Hydraulic fracturing makes it possible to get oil and gas out of rocks that were not previously considered a source for fossil fuel. Hydraulic fracturing is "now standard for virtually all oil and gas wells in our state and across much of the country."[1]

In December 2011, the Commission adopted rules regarding operator disclosure and reporting of chemicals used in hydraulic fracturing. It defined hydraulic fracturing as "all stages of the treatment of a well by the application of hydraulic fracturing fluid under pressure that is expressly designed to initiate or propagate fractures in a target geologic formation to enhance production of oil and natural gas." Commission Rule 100. As part of its rule-making, the Commission authored a statement of basis and purpose which states, "Most of the hydrocarbon bearing formations in Colorado would not produce economic quantities of hydrocarbons without hydraulic fracturing." Order lR-114 -Final Hydraulic Fracturing Disclosure Rule, p. 9 of 16.

Hydraulic fracturing has been used in Colorado since the 1970's. Instead of a single, vertically-drilled well common in the 1990's, well pads today have many wells drilled horizontally into different formations. Also, the well locations are moving closer to populated areas.

Many people in Colorado question the health, safety and environmental impacts of fracking. They consider the operations industrial in nature and incompatible with the residential character of neighborhoods. Many people believe that fracking in their communities causes significant health risks as a result of contamination and pollution and the presence of the wells causes property values to decline. In November 2012, the voters of Longmont passed an amendment to the city charter that bans fracking and the storage and disposal of fracking waste within the City of Longmont. That measure is now Article XVI of the Longmont Municipal Charter. Longmont maintains Article XVI is a valid exercise of its home rule police and land use authority.

II. STANDARD OF REVIEW

The purpose of summary judgment is to expedite litigation, avoid needless trials and assure speedy resolution of matters. *Crawford Rehabilitation Services Inc. v. Weissman*, 938 P.2d 540, 550 (Colo. 1997). However, summary judgment is a drastic remedy that may only be granted when the moving party demonstrates to the court that he is entitled to judgment as a matter of law. *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997).

The initial burden of establishing the nonexistence of a genuine issue of material fact rests on the moving party. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712

[1] "Information on Hydraulic Fracturing," an information sheet produced by the Colorado Oil and Gas Conservation Commission, COGA Mot. For Summ. J. Ex. 2.

(Colo. 1987). Once satisfied, the initial burden of production on the moving party shifts to the nonmoving party, but the ultimate burden of persuasion always remains on the moving party. *Id*. If the moving party meets the initial burden, then the non-moving party must show "a triable issue of fact" exists. *Greenwood Trust Co.*, 938 P.2d at 1149. The opposing party may, but is not required to, submit opposing affidavits. *Bauer v. Southwest Denver Mental Health Ctr., Inc*., 701 P.2d 114, 117 (Colo. App. 1985).

Any doubt as to the existence of a triable question of fact must be resolved in favor of the non-moving party. *Greenwood Trust Co.*, 938 P.2d at 1149. Summary judgment is to be granted only if there is a complete absence of any genuine issue of fact, and a litigant should not be denied a trial if there is the slightest doubt as to the facts. *Pioneer Sav. & Trust, F.A. v. Ben-Shoshan*, 826 P.2d 421, 425 (Colo. App. 1992).

III. APPLICABLE LAW[2]

On June 8, 1992, the Colorado Supreme Court issued two important oil and gas opinions, *Cty. Comm'rs of La Plata Cty v. Bowen/Edwards Assoc. Inc.*, 830 P.2d 1045 (Colo. 1992) and *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992).

BOWEN/EDWARDS

In *Bowen/Edwards*, owners of oil and gas interests challenged regulations enacted by La Plata County, a statutory entity. The regulations stated purpose was:

> to promote the health, safety, morals, convenience, order, prosperity or general welfare of the present and future residents of La Plata County. It is the County's intent by enacting these regulations to facilitate the development of oil and gas resources within the unincorporated area of La Plata County while mitigating potential land use conflicts between such development and existing, as well as planned, land uses.

Bowen/Edwards, 830 P.2d at 1050.

The county regulations required oil and gas operators to comply with an application process before drilling wells. *Id*. The applications were subject to approval by various levels of county government. *Id*. The *Bowen/Edwards* plaintiffs claimed the Colorado Oil and Gas Conservation Act conferred exclusive authority on the Colorado Oil and Gas Conservation Commission to regulate oil and gas activity throughout the state, thereby preempting the county regulations. *Id*. at 1051.

The Court of Appeals found the Colorado Oil and Gas Conservation Act completely preempted local land use regulation of oil and gas activity. *Id*. at 1055. The Supreme Court reversed. *Id*. at 1048.

The Supreme Court noted, "The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government." *Id*. at 1055. "There are three basic ways by which a state statute can preempt a county

[2] The Court does not find support in Colorado law for (1) the City's argument that Plaintiffs must prove Article XVI is invalid beyond a reasonable doubt, and (2) the Sierra Club's claim based on the public trust doctrine,

ordinance or regulation: first, the express language of the statute may indicate state preemption of all local authority over the subject matter. . . second, preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest . . . and, third, a local law may be partially preempted where its operational effect would conflict with the application of the state statute." *Id*. at 1056-57.

The Court recognized the Commission's authority.

> By law, the Commission has the authority 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." Section 34-60-106(11), C.R.S. (1989 Cum. Supp.) The statute further provides that the grant to the Commission of any specific power shall not be construed to be in derogation of any of the general powers granted by the Act. Section 34-60-106(4) C.R.S. (1984 Repl. Vol. 14).

Id. at 1052.

However, the Supreme Court found the Oil and Gas Conservation Act does not expressly preempt any and all aspects of a county's land use authority in areas where there are oil and gas activities. *Id*. at 1058. Instead, the Court found the Act created "A unitary source of regulatory authority at the state level of government over the technical aspects of oil and gas development and production serves to prevent waste and to protect the correlative rights of common-source owners and producers to a fair share of production profits." *Id*.

Considering whether the second form of preemption, implied preemption, exists, the Court stated, "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." *Id*. at 1058.[3] However, the Court found, "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." *Id*.

Examining the third form of preemption, the Supreme Court stated, "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." *Id*. at 1059. Based on the record before it, the court was unable to determine whether an operational conflict existed between the county regulations and the Colorado Oil and Gas Conservation Act, and remanded the case for the trial court to make that determination "on an ad-hoc basis under a fully developed evidentiary record." *Id*. at 1060. However, the Court also stated:

[3] This quote is followed by the statement, "Oil and gas production is closely tied to well location, with the result that the need for uniform regulation extends also to the location and spacing of wells." *Bowen/Edwards*, 830 P.2d at 1058. That statement reflects 1992 drilling practices. With today's technology, which makes horizontal drilling possible, well location and spacing are no longer as important as they were in 1992.

> We hasten to add that there may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations on land restoration requirements contrary to those required by state law or regulation. To the extent such operational conflicts might exist, the county regulations must yield to the state interest.

Id.

VOSS

Voss v. Lundvall Bros., Inc. involved Greeley, a home rule city. *Voss*, 830 P.2d at 1062. Greeley enacted a land use ordinance that completely banned drilling in its city limits. *Id*. The ordinance was petitioned onto the November 1985 ballot and approved by the electorate at a regular municipal election. *Id*. at 1063. The Supreme Court reviewed the purposes of the Colorado Oil and Gas Conservation Act and the authority of the Commission and concluded, "There is no question that the Oil and Gas Conservation Act evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources. . ." *Id*. at 1065-66. The Court also acknowledged the "interest of a home-rule city in land use control within its territorial limits." *Id*. at 1066.

> It is a well-established principle of Colorado preemption doctrine that in a matter of a purely local concern an ordinance of a home-rule city supersedes a conflicting state statute, while in a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city. Our case law, however, has recognized that municipal legislation is not always a matter of exclusive local or statewide concern but, rather, is often a matter of concern to both levels of government.

Id. (internal citations omitted).

In determining whether the state regulatory scheme preempts local ordinances, courts consider four factors: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Id*. at 1067 (internal citations omitted).

The Court found the first factor, the need for statewide uniformity, weighed heavily in favor of state preemption. *Id*. The boundaries of the subterranean pools containing oil and gas "do not conform to any jurisdictional pattern." *Id*. The Court found extraterritorial impact also weighed in favor of the state interest. *Id*. Limiting production to only the portion of the pool that does not underlie the city can increase production costs and may make the operation economically unfeasible. *Id*. at 1067-68. The Court determined that regulation of oil and gas development has "traditionally been a matter of state rather than

local control." *Id*. at 1068. Finally, the Court observed, "the Colorado Constitution neither commits the development and production of oil and gas resources to state regulation nor relegates land-use control exclusively to local governments." *Id*.

The Colorado Supreme Court determined that the Greeley ordinance was preempted by state law. The Court stated:

> Because oil and gas pools do not conform to the boundaries of local government, Greeley's total ban on drilling within the city limits substantially impedes the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste and that furthers the correlative rights of owners and producers in a common pool or source of supply to a just and equitable share of profits. In so holding, we do not mean to imply that Greeley is prohibited from exercising any land-use authority over those areas of the city in which oil and gas activities are occurring or are contemplated.

Id.

The Court made it clear that it was *not* saying there could be no land use control over areas where there are oil and gas operations; "if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect." *Id*. at 1069. The Court stated it resolved the case based on the "*total ban*" created by the Greeley ordinance. *Id*. (emphasis in the original).

APPLICATION OF *BOWEN/EDWARDS* AND *VOSS* BY THE COURT OF APPEALS

The Colorado Court of Appeals has applied the preemption analysis described above to determine whether local oil and gas regulations are preempted by state law.

In *Town of Frederick v North American Resources Company*, 60 P.3d 758, 760 (Colo. App. 2002), a town ordinance prohibited oil and gas drilling unless the operator first obtained a special permit. To obtain such a permit, the application had to conform to requirements in the ordinance. *Id*. The "requirements included specific provisions for well location and setbacks, noise mitigation, visual impacts and aesthetics regulation, and the like." *Id*. Defendant NARCO obtained a drilling permit from the Colorado Oil and Gas Conservation Commission and drilled a well without applying to the town for the special use permit. *Id*. The town filed suit to enjoin NARCO from operating the well and NARCO counterclaimed for declaratory judgment that the ordinance was unenforceable as preempted by state law. *Id*.

In an order on summary judgment, the trial court found some provisions of the ordinance were invalid because they were in operational conflict with specific rules promulgated by the Colorado Oil and Gas Conservation Commission. *Id*. at 764. However, it also found that some provisions were valid; for example provisions requiring permits for above-ground structures and provisions regarding access roads and emergency response costs were found to be valid. *Id*. The Court of Appeals held that the trial court did not err when it invalidated certain provisions of the Town's ordinance and upheld others. *Id*. at 766.

The Court of Appeals cited *Bowen/Edwards* for the proposition that, "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest. Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest." *Id*. at 761, *Bowen/Edwards*, 830 P.2d at 1059. It also cited *Voss* as follows:

> If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect.

Town of Frederick, 60 P.3d at 762, *Voss*, 830 P.2d at 1068-69.

The court cited this *Bowen/Edwards'* language:

> 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. Oil and gas production is closely tied to well location, with the result that the *need for uniform regulation extends also to the location and spacing of wells.*

Town of Frederick, 60 P.3d at 763, *Bowen/Edwards*, 830 P.2d at 1058 (emphasis added by the Court of Appeals) to infer the following:

> The *Bowen/Edwards* court did not say that the state's interest 'requires uniform regulation of drilling' and similar activities. Rather, according to the court, it 'requires uniform regulation of *the technical aspects* of drilling' and similar activities. The phrase 'technical aspects' suggests that there are "nontechnical aspects" that may yet be subject to local regulation

Town of Frederick, 60 P.3d at 763.

The Court of Appeals agreed with the trial court that certain provisions of the ordinance were not enforceable.

> The operational conflicts test announced in *Bowen/Edwards* and *Voss* controls here. Under that test, the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the state interest.

Id. at 765.

The court concluded, "Thus, although the Town's process may delay drilling, the ordinance does not allow the Town to prevent it entirely or to impose arbitrary conditions that would materially impede or destroy the state's interest in oil and gas development." *Id*. at 766.

Similarly, in *Cty. Comm'rs of Gunnison Cty v. BDS International, LLC*, 159 P.3d 773, 777 (Colo. App. 2006), the trial court issued an order on summary judgment in which it found numerous, but not all, county oil and gas regulations invalid as preempted by state law. The Court of Appeals affirmed the invalidation of county regulations concerning fines, financial guarantees, and access to records because they operationally conflict with state statutes or regulations. *Id*. at 785. It reversed and remanded the remaining county regulations invalidated by the trial court "so that the finder of fact may determine whether those County Regulations that do not, on their face, operationally conflict with state law nonetheless are in operational conflict with state law in the circumstances presented here." *Id*.

In an unpublished opinion, *Town of Milliken v. Kerr-Magee Oil and Gas Onshore LP*, 2013WL1908965, the Court of Appeals found that C.R.S. § 34-60-106(15), part of the Oil and Gas Conservation Act, prohibited the town from imposing fees for safety and security inspections on active oil and gas wells. *Id*. *1. That statute prohibits local governments from imposing inspection fees on oil and gas companies "with regard to matters that are subject to rule, regulation, order, or permit condition administered by the commission" except for "reasonable and nondiscriminatory fee[s] for inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes." *Id*. at *3. The town did not claim its inspections were within the exception in the statute. *Id*. Instead, it claimed its inspections were different from those conducted by the Commission. *Id*. The court stated, "it is irrelevant whether the Commission actually conducts inspections like those performed by the Town's police department. The relevant inquiry is whether the Town's inspections concern 'matters that are subject to rule, regulation, order, or permit condition administered by the commission.'" *Id*.

CASES INVOLVING REGULATIONS THAT PROHIBIT WHAT THE STATE PERMITS

COLORADO MINING ASSOCIATION V. SUMMIT COUNTY

The Colorado Supreme Court discussed preemption again in *Colorado Mining Association v. Cty. Comm'rs of Summit Cty.*, 199 P.3d 718 (Colo. 2009). Summit County invoked its statutory land use authority to adopt an ordinance that banned the use of toxic or acidic chemicals, such as cyanide, in all mineral processing in the county. *Id*. at 721. "The effect of this ordinance is to prohibit a certain type of mining technique customarily used in the mineral industry to extract precious metals, such as gold." *Id*.

The Court noted that the General Assembly decided to allow the Mined Land Reclamation Board ("the Board") to authorize the use of toxic or acidic chemicals, "under the terms of an Environmental Protection Plan designed for each operation sufficient to protect human health, property, and the environment." *Id*. The Court found "Summit County's ordinance would entirely displace the Board's authority to authorize the use of such mining techniques." *Id*. The Court concluded, "Summit County's existing

ordinance is not a proper exercise of its land use authority because it excludes what the General Assembly has authorized. Due to the sufficiently dominant state interest in the use of chemicals for mineral processing, we hold that the MLRA [Mined Land Reclamation Act] impliedly preempts Summit County's ban on the use of toxic or acidic chemicals, such as cyanide, in all Summit County zoning districts." *Id.*

The Court observed, "a patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources." *Id.* at 731.

WEBB V. BLACK HAWK

Last year, the Colorado Supreme Court addressed preemption in the case of *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013). Black Hawk, a home-rule city, adopted an ordinance that banned bicycling from outside the city into the city; it banned bicycling through the city. *Id.* at 482. C.R.S. § 42-4-109(11) permits local governments to ban bicycles on roads if there is an alternate route, such as a bike path. There were no alternate routes for bicycles in Black Hawk.

The Court applied the four factor test described in *Voss* and concluded that "the regulation of bicycle traffic on municipal streets is of mixed state and local concern. . ." *Id.* at 492. "[W]e next look to determine whether Black Hawk's ordinance conflicts with state law. The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 492. The Court found that Black Hawk's ordinance conflicts with and is preempted by state statute, specifically C.R.S. § 42-4-109(11). *Id.*

"Black Hawk does not have authority, in a matter of mixed state and local concern, to negate a specific provision the General Assembly has enacted in the interest of uniformity. A staple of our home-rule jurisprudence articulates that a municipality is free to adopt regulations conflicting with state law only when the matter is of purely local concern." *Id.* at 493.

IV. ANALYSIS

THE COLORADO OIL AND GAS CONSERVATION COMMISSION REGULATES HYDRAULIC FRACTURING

Longmont argues at length that the Commission does not regulate hydraulic fracturing. The Court is not persuaded. The Commission regulates the oil and gas industry and hydraulic fracturing is a common practice in that industry. Plaintiffs described the state's comprehensive regulatory scheme in their Motions. The Court will not repeat that description here, but suffice it to say that the Court finds there is a comprehensive regulatory structure in place in Colorado to regulate the oil and gas industry.

Longmont complains that the Commission does not issue permits to frack, it does not tell operators whether to frack a well, it does not tell operators how often to frack a well, it does not tell operators how much fracking fluid to use in a well, etc. Instead, these decisions are left to the operators and the professionals who advise them. The Court does not see a problem with this arrangement. The purpose of the agency is to provide oversight of the industry, not to micromanage it.

The Court finds the Commission regulates hydraulic fracturing.[4]

IMPLIED PREEMPTION

As noted above, the *Bowen/Edwards* Court described three ways a state statute can preempt local government regulations: (1) express preemption where the statutory language indicates state preemption of all local authority over the subject matter, (2) implied preemption, where a state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest, and (3) operational conflict preemption.

Plaintiffs urge the Court to find that the state has a dominant interest in the regulation of the technical aspects of oil and gas activity to support an implied preemption analysis.

Plaintiffs maintain that implied preemption applies in this case because hydraulic fracturing involves a technical aspect of oil and gas production, which is a matter of state concern. *Bowen/Edwards* suggests technical conditions are matters of state, not local, interest. The *Bowen/Edwards* court found the Oil and Gas Conservation Act created, "A unitary source of regulatory authority at the state level of government over the **technical** aspects of oil and gas development and production serves to prevent waste and protect the correlative rights of common-source owners and producers to a fair share of production profits." *Bowen/Edwards* , 830 P.2d 1058 (emphasis added). The *Bowen/Edwards* court provided an example of how an operational conflict might occur: "For example, the operational effect of the county regulations might be to impose **technical** conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent such operational conflicts might exist, the county regulations must yield to the state interest." *Id*. at 1060 (emphasis added).

". . . a statute will preempt a regulation where the effectuation of a local interest would materially impede or destroy the state interest. *Bowen/Edwards, supra*. Therefore, a county may not impose **technical** conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed by state law or regulation." *BDS*, 159 P.3d at 779 (emphasis added).

"[T]he local imposition of **technical** conditions on well drilling where no such conditions are imposed under state regulations . . . gives rise to operational conflicts and requires that the local regulations yield to the state interest." *Town of Frederick*, 60 P.3d at 765 (emphasis added).

[4] Commission rules specific to hydraulic fracturing include: Rule 205A which requires operators to disclose, maintain, and make available a chemical inventory of products used in hydraulic fracturing. The Commission can require testing for water pollution, per Rule 207. Rule 305(c) requires fracking information in Oil and Gas Location Assessment Notices. Rule 305 E requires operators to give landowners notice of hydraulic fracturing operations. Rule 316C requires operators to give the Commission advance notice of fracking operations. Operators are also required to file Completed Interval Reports, which contain details about the hydraulic fracturing operations. Rule 317j requires operators to test well casing in advance to ensure they can withstand the pressures that will be applied during fracking.

There is no definition of "technical" in the Colorado Oil and Gas Conservation Act or in case law. In this context, one could interpret the word "technical" as referring to a matter within the purview of a petroleum engineer, as opposed to other matters that are regulated on oil and gas drilling sites (such as roads or above-ground structures). Hydraulic fracturing is clearly within the purview of a petroleum engineer; it might be a "technical" aspect of oil and gas production that is not subject to local control under the case law. Numerous Commission Rules apply to technical aspects of the hydraulic fracturing process.[5]

Implied preemption can also occur where there is a significant, dominant state interest. "There is no question that the Oil and Gas Conservation Act evidences a **significant interest** on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources. . ." *Voss*, 830 P.2d at 1065-66 (emphasis added).

Rejecting implied preemption, the *Bowen/Edwards* court stated, "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." *Bowen/Edwards*, 830 P.2d at 1058. That statement comments on the state interest in oil and gas activity, generally. No appellate court has determined whether the state interest in hydraulic fracturing, a widely used completion method which generates a great deal of revenue in this state, is sufficiently dominant to give rise to an implied preemption analysis.

This Court is not going to go so far as finding that implied preemption applies in this case, though it recognizes the possibility that implied preemption may apply. Instead, the Court will take the traditional approach of conducting an operational conflict analysis.

OPERATIONAL CONFLICT PREEMPTION

THE FOUR FACTORS

"The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government." *Bowen/Edwards*, 830 P.2d. at 1055. Courts consider four factors in preemption analysis: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Voss*, 830 P2d at 1067.

The first factor, the need for statewide uniformity, weighs in favor of preemption. Just as in *Voss*, the oil and gas reserves that exist today still do not conform to local governmental boundaries. Patchwork regulation can result in uneven production and waste.

The second factor also weighs in favor of preemption because Longmont's ban on hydraulic fracturing has extraterritorial impact. Synergy Resources Corporation (Synergy), an oil and gas producer, drilled a well from a well pad outside the City of

[5] For example, Rule 341 requires operators to monitor pressures during the process.

Longmont. The well bore went under acreage that was both in the City of Longmont and outside the city limits. Because of the fracking ban, Synergy fracked only the portions of the well that did not underlie Longmont. As a result, the Synergy well produced less oil and gas than it would have produced had the entire well been fracked. The oil and gas located under the Longmont acreage remained in the ground because hydraulic fracturing was not used to extract it. The people who would have benefitted from that greater production, the oil and gas company operators and royalty owners, were impacted. If they were not Longmont residents, this would constitute an extraterritorial impact.

The Longmont situation, like the Greeley situation in *Voss*, limits production to only a portion of the reserve.

This extraterritorial impact was described in the affidavit of Synergy's President and CEO, Edward Holloway.

> [T]he inability to hydraulically fracture the portion of the wellbore that passes beneath Longmont's borders causes that acreage to contribute proportionately fewer hydrocarbons than the acreage outside of Longmont. Because proceeds from the well are distributed ratably by acreage, Longmont's ban would cause mineral owners in Longmont acreage to receive a higher percentage of the proceeds than their acreage actually contributes to the production, and simultaneously causes mineral owners outside of Longmont to receive a lesser percentage of the proceeds than their acreage actually contributes to the wells' production. In other words, it impairs the correlative rights of mineral owners outside of Longmont.

COGA Mot. For Summ. J., Ex 7.

The third factor favors preemption because oil and gas activity has traditionally been governed by the Commission, a statewide agency.

The fourth factor does not apply because the Colorado Constitution does not address whether oil and gas activity should be regulated by state or local government.

STATE AND LOCAL INTEREST

The threshold consideration in this case, as it was in *Voss*, is whether Longmont's total ban of hydraulic fracturing and ban on storage and disposal of hydraulic fracturing waste within the City derives from a purely local concern. "It is a well-established principle of Colorado preemption doctrine that in a matter of a purely local concern an ordinance of a home-rule city supersedes a conflicting state statute, while in a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city. *Voss*, 830 P.2d at 1066. Case law recognizes "that municipal legislation is not always a matter of exclusive local or statewide concern but, rather, is often a matter of concern to both levels of government." *Id.*

"In matters of mixed local and state concern, a home-rule municipal ordinance may coexist with a state statute as long as there is no conflict between the ordinance and the

statute, but in the event of a conflict, the state statute supersedes the conflicting provision of the ordinance." *Id.*

The State has an "interest in the efficient development and production of oil and gas resources in a manner calculated to prevent waste, as well as in protecting the correlative rights of owners and producers in a common pool or source to a just and equitable share of the profits of production . . ." *Id.* at 1062. The State's interest in oil and gas production is manifested in the Oil and Gas Conservation Act. *Id.* at 1064

In order to develop a record of local interest, Longmont produced affidavits of various citizens who have concerns about hydraulic fracturing. "In constitutional terms, the local interest outweighs the state interest." Longmont's Resp. at 6. Rod Brueske believes "weak enforcement of regulations. . . will endanger his family and his respiratory health." Shane Davis suffered "major impacts" to his health when he lived near fracking operations in Weld County. Jean Ditslear is aware that fracking "can cause endocrine diseases and cancer." Kaye Fissinger described the following damages that will result from fracking: "water contamination and chemical spills; chemicals and carcinogens emitted into the air in the City; her immune system and overall health will be at risk; and her property values will decrease. Bruce Baizel, Director of Oil and Gas Accountability Project, a program of Intervenor Earthworks, supervised the preparation of a report that indicates more than 60% of the wells in Colorado are not inspected and the number of spills has "significantly increased." Nanner Fisher, a realtor, believes fracking "negatively affects the value of a home."

The Intervenors submitted an affidavit of a person with knowledge who attests to the serious health, safety, and environmental risks associated with hydraulic fracturing. In addition, the Defendants submitted several articles and other exhibits that support their position that hydraulic fracturing causes serious health, safety, and environmental risks.[6]

The Court is not in a position to agree or disagree with any of these exhibits that support the Defendants' position that hydraulic fracturing causes serious health, safety, and environmental risks .

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

While the Court appreciates the Longmont citizens' sincerely-held beliefs about risks to their health and safety, the Court does not find this is sufficient to completely devalue the State's interest, thereby making the matter one of purely local interest.

Instead, the Court finds this matter of mixed local and state interest.

[6] The Court will not describe the information in this Order. However, the Court read all the exhibits and the Court observes that there is a significant amount of work being done in this area.

OPERATIONAL CONFLICT ANALYSIS

The Commission argues that Longmont's complete ban of hydraulic fracturing negates the Commission's authority to regulate and permit the "shooting and chemical treatment of wells," as authorized by the Colorado Oil and Gas Conservation Act (the Act). C.R.S. § 34-60-106(2). Hydraulic fracturing involves chemical treatments of wells. The Commission Rules[7] authorize and regulate the storage and disposal of exploration and production waste. *See* Comm'n 900 Series Rules. Longmont's Article XVI bans the storage and disposal of fracking waste within the City of Longmont. The Commission, COGA and TOP cite numerous Commission Rules that they characterize as "in conflict" with Longmont's ban. They are in conflict because the rules contemplate development and production of oil and gas resources; Article XVI's ban on hydraulic fracturing has halted development and production of oil and gas resources in Longmont.

Longmont does not contest the Commission's authority to regulate hydraulic fracturing and the storage and disposal of waste produced in the hydraulic fracturing process. Longmont does not contest the fact that the Commission is charged with fostering production "in a manner consistent with protection of public health, safety and welfare, including protection of the environment and wildlife resources."[8] Instead, Longmont complains that the Commission is not doing its job to Longmont's satisfaction.

> Article XVI does not interfere with the State's interest, which is to foster production while protecting human health and the environment. § 34-60-102(1)(a), C.R.S. (2013). Instead, the State is currently failing to comply with this statutory mandate, because it is failing to regulate fracking or to protect human health and the environment from fracking.

Longmont's Resp. at 5.

The State's interest is codified in the legislative declaration in the Oil and Gas Conservation Act: The General Assembly declared that it is in the public interest to: (I) Foster the responsible, balanced development, production, and utilization of natural resources of oil and gas in the state of Colorado . . . (II) Protect against waste[9] . . . (III) Safeguard, protect and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas . . . C.R.S. § 34-60-102(1)(a)(I), (II), and (III). Further "it is the intent and purpose of this article 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 . . ." C.R.S. § 34-60-102(1)(b). Many cases reiterate these State interests in production of oil and gas resources, prevention of waste, and protection of correlative rights.

The operational conflict in this case is obvious. The Commission permits hydraulic fracturing and Longmont prohibits it. The Commission permits storage and disposal of

[7] The Court rejects the City's argument that only a statute can preempt a local ordinance. The *Voss* Court stated, "a state statute *or regulation* supersedes a conflicting ordinance. . ." *Voss*, 830 P2d at 779 (emphasis added).

[8] C.R.S. § 34-60-102(1)(a)(I)

[9] Waste is defined in the Colorado Oil and Gas Conservation Act as ". . . operating. . . any oil and gas well or wells in a manner which causes or tends to cause reduction in quantity of oil and gas ultimately recoverable from a pool. . . C.R.S. § 34-60-103(13).

hydraulic fracturing waste and Longmont prohibits it.[10] While Plaintiffs no longer take the position that a ban on fracking is a de facto ban on drilling, various affidavits filed in this case attest to the almost exclusive use of hydraulic fracturing as a well completion process in the Wattenburg Field, the formation underlying Longmont. *See, e.g.*, Affidavit of John Seidle, a petroleum consultant, Ex . 3 to COGCC's Mot. for Sum. J. ("Operators have been fracture stimulating Wattenburg wells for over thirty years and, in my experience, hydraulic fracturing is currently the only completion technology utilized in the Wattenburg field . . ."); Affidavit of Murray Herring, Vice President of TOP Operating Company, Ex. B to TOP's Mot. For Summ. J. ("In accordance with standard industry practice in the Wattenburg Field, TOP plans to use hydraulic fracturing as to the targeted formation(s) in all wells . . . To my knowledge, every economic well in the Wattenburg Field drilled in the last twenty years has been hydraulically fractured.")

"State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." *Bowen/Edwards*, 830 P.2d at 1059. Here, giving effect to the local interest, banning fracking, has virtually destroyed the state interest in production. The fracking ban has ended production in Longmont. TOP, the primary operator in Longmont and owner of mineral leases in Longmont "will not and cannot economically drill and complete these wells without the ability to conduct hydraulic fracturing operations, which it is currently unable to do in view of Longmont's fracking ban." TOP's Mot. For Summ. J., Ex. B.

Just as the drilling ban in *Voss* substantially impeded "the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste" and protects the correlative rights of owners, *Voss*, 830 P.2d at 1068, Longmont's fracking ban has the same effect.[11]

Longmont's ban on hydraulic fracturing prevents the efficient development and production of oil and gas resources. While the Defendants were able to identify some wells in Colorado that produced oil and gas without fracking, it is undisputed that fracking results in efficient production of oil and gas.

Longmont's ban on hydraulic fracturing does not prevent waste; instead, it causes waste. Because of the ban, mineral deposits were left in the ground that otherwise could have been extracted in the Synergy well. Mineral deposits are being left in the ground by all the wells that are not being drilled due to the fracking ban.

Longmont's ban on hydraulic fracturing does not protect correlative rights of owners; it impairs the correlative rights of owners. See COGA Mot. For Summ. J., Ex 7, the affidavit of Synergy's President, Edward Holloway (Because proceeds from the well are distributed ratably by acreage, Longmont's ban causes mineral owners in Longmont to

[10] Plaintiffs also argues that Longmont's ban on storage and disposal of fracking waste is preempted by the Federal Safe Drinking Water Act, which authorizes disposal of oilfield waste associated with hydraulic fracturing by underground injection wells. Since the Court can resolve this issue under state operational conflict preemption law, the Court does not reach the issue of preemption under the Federal Safe Drinking Water Act. The same holds true for the arguments based on the Areas and Activities of State Interest Act.

[11] Longmont urges the Court to distinguish *Voss* based on the "sea change" that has occurred in the manner in which oil and gas wells are drilled today. Longmont maintains current drilling operations are quite different than operations in 1992, when the case was decided. Plaintiffs argue that Longmont is urging the Court to overrule *Voss*, which it cannot do. The Court finds that *Voss* is binding precedent on this Court, and *Voss* is the law this Court must follow.

receive a higher percentage of the proceeds than their acreage actually contributes to the production. It causes mineral owners outside of Longmont to receive a lesser percentage of the proceeds than their acreage actually contributes to the wells' production.)

COGA argued that *Bowen/Edwards* does not apply because this situation involves a total ban, not a regulation. The Court finds a ban is an ultimate regulation, and *Bowen/Edwards* does apply. The *Bowen/Edwards* example of an operational conflict describes the current situation in Longmont:

> "the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells . . ."
>
> Here, the City banned a technical process commonly used to bring wells to production; it imposed the technical condition of no hydraulic fracturing on any oil and gas activity in the City.
>
> ". . . under circumstances where no such conditions are imposed under the state statutory or regulatory scheme"
>
> The Commission and its rules permit hydraulic fracturing. There is no hydraulic fracturing ban imposed under the state statutory or regulatory scheme

"To the extent such operational conflicts might exist, the county regulations must yield to the state interest." *Bowen/Edwards*, 830 P.2d at 1060. This is the law this Court must follow.

There is no way to harmonized Longmont's fracking ban with the stated goals of the Oil and Gas Conservation Act. As described above, 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. There is no common ground upon which to craft a means to harmonize the state and local interest. The conflict in this case is an irreconcilable conflict.

The *Colorado Mining Association* and *Webb* cases, both Colorado Supreme Court cases, are instructive. They are preemption cases, but not oil and gas cases. In *Colorado Mining Association*, the Colorado Supreme Court found Summit County's ban on a certain type of mining technique was preempted by state law. *Colorado Mining Association*, 199 P.3d at 721. The Court stated "Summit County's existing ordinance is not a proper exercise of its land use authority because it excludes what the General Assembly has authorized." *Id.* In this case, Longmont's Article XVI excludes and prohibits what the General Assembly has authorized through the Colorado Oil and Gas Conservation Commission. The Court stated, "a patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources." *Id*. at 731. The same can be said about this case: Longmont's ban on hydraulic fracturing creates a patchwork of oil and gas extraction methods that inhibits what the General Assembly has recognized as a necessary activity in the Oil and Gas Conservation Act and it impedes the orderly development of Colorado's mineral resources.

In *Webb*, the Colorado Supreme Court examined Black Hawk's ban of bicycles on city streets. *Webb*, 295 P.3d at 482. The Court stated, "The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 492. Here, Longmont's Article XVI forbids hydraulic fracturing which is authorized by the state.. "Black Hawk does not have authority, in a matter of mixed state and local concern, to negate a specific provision the General Assembly has enacted in the interest of uniformity." *Id.* at 493. Similarly, Longmont does not have the authority, in a matter of mixed state and local concern, to negate the authority of the Commission, derived from the Oil and Gas Conservation Act. It does not have the authority to prohibit what the state authorizes and permits.

This Court, like the courts in *Voss, the Town of Frederick*, and *BDS*, finds it can resolve this matter in an order on summary judgment. The operational conflict in this case is obvious and patent on its face. There are no genuine issues of material fact in dispute. There is no need for an evidentiary hearing to determine whether the ban on hydraulic fracturing, as a practical matter, creates operational conflicts.

V. CONCLUSION

Based on the foregoing analysis. the Court GRANTS Summary Judgment in favor of the Plaintiffs and against the Defendants. The Court finds Article XVI of the Longmont Municipal Charter, which bans hydraulic fracturing and the storage and disposal of hydraulic fracturing waste in the City of Longmont, is invalid as preempted by the Colorado Oil and Gas Conservation Act.

COGA, the Commission, and TOP each filed claims for declaratory judgment finding Article XVI of the Longmont Municipal Charter is invalid as a result of operational conflict preemption. Those claims are GRANTED.

VI. STAY OF INJUNCTION

COGA, the Commission, and TOP each requested an order enjoining the City of Longmont from enforcing Article XVI of the Longmont Municipal Charter. The Court GRANTS that request, but STAYS the order during the time permitted for filing a notice of appeal, pursuant to C.R.C.P. 62. If the Defendants seek an order for stay pending appeal, this Court will grant that request.

In other words, there shall be no hydraulic fracturing activity in the City of Longmont until further order of Court, either from this Court or a higher court.

July 24, 2014

D.D. Mallard
District Court Judge