

<p>DISTRICT COURT, BOULDER COUNTY, COLORADO</p> <p>BOULDER JUSTICE CENTER 1777 SIXTH STREET BOULDER, CO 80302 TELEPHONE: 303.441.3750</p>	
<p>Plaintiff: PEOPLE OF THE STATE OF COLORADO <i>ex rel.</i> CYNTHIA H. COFFMAN, in her official capacity as Colorado Attorney General;</p> <p>Plaintiff: THE STATE OF COLORADO;</p> <p>and</p> <p>Plaintiff-Intervenors: COLORADO OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE</p> <p>v.</p> <p>Defendant: COUNTY OF BOULDER, COLORADO;</p> <p>Defendant: THE BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, COLORADO.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><i>Attorneys for Plaintiff-Intervenors</i></p> <p>Mark J. Mathews, Colo. Atty. Reg. No. 23749 Julia E. Rhine, Colo. Atty. Reg. No. 45360 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Telephone: 303.332.1100 E-mail: mmathews@bhfs.com, jrhine@bhfs.com</p>	<p>Case Number: 2017CV030151</p> <p>Division: 3</p>
<p style="text-align: center;">COLORADO OIL AND GAS ASSOCIATION’S AND AMERICAN PETROLEUM INSTITUTE’S JOINT MOTION FOR SUMMARY JUDGMENT</p>	

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Pursuant to C.R.C.P. 56(c), the Colorado Oil & Gas Association (“COGA”) and the American Petroleum Institute (“API”) submit this Joint Motion for Summary Judgment (“Joint Motion”), and respectfully request that this Court invalidate Defendants’ (collectively, “Boulder” or the “County”) enactment of uninterrupted, rolling moratoria on the acceptance, processing, and approval of any application for new oil and gas development within unincorporated Boulder County (“Continuous Moratorium”). Under this Continuous Moratorium, Boulder has unlawfully banned oil and gas development within unincorporated Boulder County for over five years.

I. INTRODUCTION

Boulder’s Continuous Moratorium commenced on February 2, 2012. Through a series of extensions, the Continuous Moratorium has been in constant effect from the day it was issued through today. It is currently set to expire on May 1, 2017.

The issue raised by this Joint Motion is whether a local government may prohibit the acceptance, processing, and approval of all new oil and gas development applications—and therefore ban all new oil and gas development within its jurisdiction—for over five years. The issue is not novel.

Just last year, the Colorado Supreme Court addressed the legality of the City of Fort Collins’s five-year moratorium on the use of hydraulic fracturing (“fracking”) and the storage of associated waste within the city. The Court held that the five-year moratorium “operationally conflicts with the effectuation of state law . . . and is, therefore, invalid and unenforceable.” *City of Fort Collins v. Colo. Oil and Gas Ass’n*, 2016 CO 28, ¶ 2. The Court found an operational conflict because a five-year moratorium on oil and gas development “materially impeded the

state's strong interest in having uniform oil and gas regulation statewide." *Id.* at ¶ 30. As this case presents the identical issue, *Fort Collins* is dispositive. COGA and API respectfully request that the Court grant this Joint Motion for Summary Judgment and declare the County's Continuous Moratorium preempted as a matter of law.

C.R.C.P. 121 § 1-15(8) CERTIFICATION

Counsel for Plaintiff-Intervenors contacted counsel for Defendants and counsel for Plaintiffs regarding this motion. Counsel is advised that Plaintiffs do not oppose this motion and that Defendants oppose this motion.

II. SUMMARY JUDGMENT STANDARD

Rule 56 provides that summary judgment "shall be" granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c). Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of the rules of civil procedure that is designed to secure the just and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (emphasis added); *Cont'l Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987) (applying *Celotex* in Colorado).

III. STATEMENT OF UNDISPUTED FACTS

1. On February 2, 2012, the County adopted Resolution 2012-16, which directed the County Land Use Department "not to accept, process or approve any applications under Article 4-900 of the Land Use Code" until August 2, 2012. Pls.' Ex. 1. This provision served as an immediate ban on the acceptance, processing, or approval of any applications for oil and gas development.

2. Boulder estimated that it would take approximately six months to update its oil and gas regulations. *Id.* at S.

3. Resolution 2012-16 directed County staff “to continue analyzing whether the existing County Comprehensive Plan and existing County regulations pertaining to oil and gas activities are sufficient to protect the public health, safety, and welfare, or whether an amended Comprehensive Plan and amended regulations will be necessary to adequately mitigate impacts.” *Id.* at 4.

4. On May 1, 2012, Boulder adopted Resolution 2012-46, which extended the ban on application acceptance, processing, and approval for an additional six months, through February 4, 2013. Pls.’ Ex. 2. Resolution 2012-46 took effect retroactively on April 16, 2012. *Id.* at 4.

5. Boulder stated that the extension afforded by Resolution 2012-46 was necessary to appropriately amend the County’s regulations due, in part, to the changes in oil and gas technology, including specifically acknowledging the method of fracking horizontally drilled wells. *Id.* at 1. Resolution 2012-46 “urge[d] staff to move expeditiously on this project[.]” *Id.* at 3.

6. On December 20, 2012, while the moratorium extended by Resolution 2012-46 was still in effect, the County enacted Resolution 2012-142 amending certain aspects of the County’s oil and gas regulations. Pls.’ Ex. 3. The Resolution included “comprehensive text amendments to the Land Use Code’s regulations relating to oil and gas operations . . .” *Id.* at 1. The Resolution stated that the proposed amendments “have been diligently studied and developed under a temporary moratorium . . . [and] have been drafted to implement . . . Boulder County Comprehensive Plan amendments addressing oil and gas operations and development. . . .” *Id.* at

2.

7. Resolution 2012-142 approved the proposed amendments for incorporation into the Land Use Code, “to be effective” when the Continuous Moratorium expired. *Id.* at 3. Because the Continuous Moratorium has never been lifted, the amended regulations have never gone into effect.

8. On February 5, 2013, Boulder adopted Resolution 2013-18, which again extended the ban on accepting, processing, and approving applications for oil and gas development, this time for approximately four months, through June 10, 2013. Pls.’ Ex. 4. Resolution 2013-18 took effect retroactively on January 24, 2013. *Id.* at 5. Boulder stated that the extension of Resolution 2013-18 was necessary “to allow the staff sufficient time to prepare to accept applications under the new regulations and to ensure that applications would be processed as effectively and efficiently as possible.” *Id.* at 4. As before, County staff was urged to move expeditiously. *Id.*

9. On June 11, 2013, the County adopted Resolution 2013-50, which extended the ban on accepting, processing, and approving applications for oil and gas development through June 24, 2013. Pls.’ Ex. 5. Resolution 2013-50 took effect retroactively on June 6, 2013. *Id.* at 2. Resolution 2013-50 reflects that the Board of County Commissioners did not initially vote to further extend the Continuous Moratorium, but at a joint session of the Planning Commission and the Board of County Commissioners on June 5, 2013, the Planning Commission requested the County to reconsider extending the ban. *Id.* at 1.

10. Less than two weeks later, on June 20, 2013, Boulder adopted Resolution 2013-55, which extended the Continuous Moratorium for an additional 18 months, through January 1, 2015.

Pls.’ Ex. 6. Resolution 2013-55 took effect retroactively on June 18, 2013. *Id.* at 11. Resolution 2013-55 required County staff to “analyze whether the existing county regulations pertaining to air quality standards and siting and setback regulations for oil and gas operations are sufficient to protect public health, safety and welfare and whether amending such regulations pursuant to the County’s legal authority is necessary to adequately mitigate the impacts and hazards associated with oil and gas development.” *Id.* at 10.

11. On November 25, 2014, Boulder adopted Resolution 2014-88, which extended the Continuous Moratorium for an additional three-and-a-half years, through July 1, 2018. Pls.’ Ex. 7. Boulder stated that the extension was necessary to allow continued consideration of existing and possible future regulations. *Id.* at 1-3. Specifically, County staff was again instructed to “continue to analyze whether existing County regulations pertaining to air quality standards and siting and setback regulations for oil and gas operations are sufficient to protect public health, safety and welfare and whether amending such regulations pursuant to the County’s legal authority is necessary to adequately mitigate the impacts and hazards associated with oil and gas development.” *Id.* at 3.

12. On May 2, 2016, the Colorado Supreme Court issued its opinions in *Fort Collins* and *City of Longmont v. Colo. Oil and Gas Ass’n*, 2016 CO 29, which respectively struck down the City of Fort Collins’s five-year moratorium and the City of Longmont’s ban on fracking and the storage of associated waste product. In *Fort Collins*, the Court concluded that a five-year moratorium on hydraulic fracturing rendered the state’s statutory and regulatory authority “superfluous” by preventing operators who would abide by state requirements from fracking. *Fort Collins*, ¶ 30. “In doing so, the moratorium materially impedes the effectuation of the

state's interest in the efficient and responsible development of oil and gas resources.” *Id.*

13. On May 19, 2016, Boulder adopted Resolution 2016-65, which terminated the previous Resolutions, including Resolution 2014-88 set to expire on July 1, 2018, because “the legal status of Boulder County’s current moratorium on processing oil and gas development permit applications is uncertain.” Pls.’ Ex. 8 at 1-2. In the same Resolution 2016-65 terminating the old Resolutions, the County resolved:

[a] new temporary moratorium is reasonable and necessary to protect the public health, safety and welfare of the County and prevent irreparable harm. The new moratorium begins on the date of this Resolution and ends at the close of business on November 18, 2016. The purpose of the moratorium is to allow time to formulate and public review necessary amendments to current County land use and environmental regulations governing oil and gas development in the unincorporated area.

Id. at 2.

14. The moratoria ending and commencing on May 19, 2016, both precluded the County Land Use Department from the acceptance, processing, or approval of any applications for new oil and gas development in unincorporated Boulder County.

15. The moratoria ending and commencing on May 19, 2016, both precluded any oil and gas operator from obtaining a permit or any other form of approval for new oil and gas development anywhere in unincorporated Boulder County.

16. At a meeting on May 19, 2016, just hours before the County went on to enact Resolution 2016-65, Assistant County Attorney Ben Doyle provided the County with a summary of *Fort Collins* and *Longmont* and those decisions’ implications for Boulder. Mr. Doyle advised the County, “[o]ur thought is that, were we to be challenged on our current moratorium ... we think that it’s likely that a court would find it hard to distinguish our moratorium from Fort Collins’ moratorium, which was just overturned. So it would be very hard to defend our current

moratorium.” Excerpts of Transcript of Board of County Commissioners of Boulder County (“BOCC”) May 19, 2016 Business Meeting attached as Plaintiff-Intervenors (“PI”) Ex. PI-1, at 9:9-17. Mr. Doyle also recognized that though the County was not a party to the cases, the law set forth by the decisions is binding on everyone in Colorado. *Id.* at 4:22-24.

17. On November 15, 2016, the County held a public hearing to discuss whether the Continuous Moratorium should be extended again. At that hearing, David Hughes, Deputy County Attorney, relayed the holdings of *Fort Collins* and *Longmont*: “And what the Colorado Supreme Court determined was that local jurisdictions cannot ban fracking or enact lengthy fracking moratorium.” Excerpts of Transcript of BOCC November 15, 2016 Regular Session and Public Hearing as Ex. PI-2 at 3:25-4:2. Mr. Hughes further advised the County that the test of operational conflict preemption is “whether the local regulation materially impedes or destroys a state interest and recognize that a local ordinance forbids what state law authorizes, satisfies that standard.” *Id.* at 4:18-21.

18. Two days later, on November 17, 2016, Boulder adopted Resolution 2016-130, which extended the ban on the acceptance, processing, and approval of all oil and gas development applications to January 31, 2017. Pls.’ Ex. 9. Resolution 2016-130 took effect retroactively on November 15, 2016, and provided that the decision of whether to extend the ban yet further would be considered by the County at a public hearing on December 13, 2016. *Id.* at 2.

19. On December 15, 2016, Boulder once more extended its ban on the acceptance, processing, and approval of all oil and gas development applications through May 1, 2017, with the enactment of Resolution 2016-137. Pls.’ Ex. 10. The stated rationale for Resolution 2016-137 is no different from that which Boulder had been relying upon for nearly five years—a need

to amend local regulations. *Id.* at 1.

20. From February 2, 2012, through the present, Boulder has not allowed the County Land Use Department to accept, process, or approve any application for new oil and gas development within unincorporated Boulder County.

IV. ARGUMENT: BOULDER COUNTY’S CONTINUOUS MORATORIUM IS OPERATIONALLY PREEMPTED UNDER COLORADO SUPREME COURT PRECEDENT

The sole issue in this litigation is whether a local government may prohibit oil and gas activity for five years or longer. The Colorado Supreme Court decided this exact issue last year, holding that Fort Collins’s five-year moratorium on the use of fracking “operationally conflicts with the effectuation of state law . . . and is, therefore, invalid and unenforceable.” *Fort Collins*, ¶ 2. By extending the Continuous Moratorium beyond five years, Boulder has flouted clear precedent, as publicly recognized by its own attorneys. The Continuous Moratorium should be struck down by this Court.

A. The *Fort Collins* and *Longmont* decisions

In *Fort Collins* and the companion *Longmont* decision, the Court began its operational conflict analysis by examining the legal question of whether Fort Collins’s five-year moratorium and Longmont’s ban involved matters of statewide, local, or mixed state and local concern. *Fort Collins*, ¶ 15; *Longmont*, ¶ 19. As the Court stated, a local government ordinance regulating fracking “involves a matter of mixed state and local concern because it implicates the need for uniform statewide regulation and the extraterritorial impact of a fracking ban, on the one hand, and the local government’s traditional authority to exercise its zoning authority over land use where oil and gas development occurs, on the other.” *Fort Collins*, ¶ 16; *Longmont*, ¶¶ 20-26.

For issues of mixed state and local concern, “[w]e will analyze an operational conflict by considering whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes will necessarily satisfy this standard.” *Longmont*, ¶ 42; *see also Fort Collins*, ¶ 21. Under this test, “the question of whether the local regulation is valid turns on whether it conflicts with state law. This is so because in such cases, state law preempts any conflicting local regulation.” *Fort Collins*, ¶ 17 (citations omitted); *Longmont*, ¶ 32 (citations omitted).

Applying this test, the Court held that Longmont’s ban and Fort Collins’s five-year moratorium were operationally preempted because they conflicted with state law. *Fort Collins*, ¶ 39; *Longmont*, ¶ 54. The Court’s analysis relied upon the state’s “strong interest” in oil and gas development, as expressed in the Oil and Gas Conservation Act (the “Act”). *Fort Collins*, ¶ 29; *Longmont*, ¶ 53. As noted by the Court, the Act declares:

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, consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources, and subject further to the enforcement and protection of the coequal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom.

§ 34 -60-102(1)(b), C.R.S. (2015).

As further evidence of the state’s “strong interest,” the Court cited the “exhaustive set of rules and regulations to prevent waste and to conserve oil and gas in the State of Colorado while protecting public health, safety, and welfare[.]” that the Oil and Gas Conservation Commission

(“Commission”) promulgates pursuant to its authority under the Act. *Fort Collins*, ¶ 29; *Longmont*, ¶ 52. Surveying the hundreds of pages of regulations from the Commission, the Court concluded:

These rules and regulations comprehensively regulate the fracking process, from requirements that operators disclose substantial information about fracked wells and give notice of an intent to conduct fracking activities, to a prohibition on certain production, special purpose, and flowback pits containing exploration and production waste within defined floodplains. As we concluded in *Longmont*, the Oil and Gas Conservation Act and the Commission’s pervasive rules and regulations, which evince state control over numerous aspects of fracking, convince us that the state’s interest in the efficient and responsible development of oil and gas resources includes a strong interest in the uniform regulation of fracking.

Fort Collins, ¶ 29; *see also Longmont*, ¶ 52.

The Court then explained that local governments that ban or impose a “lengthy” moratorium on fracking render the state’s statutory and regulatory authority “superfluous” by preventing operators from fracking even if they abide by state law and regulation. *Fort Collins*, ¶ 30; *Longmont*, ¶ 53. Accordingly, Longmont’s ban and Fort Collins’s five-year moratorium “materially impede[d] the effectuation of the state’s interest in the efficient and responsible development of oil and gas resources.” *Fort Collins*, ¶ 30; *Longmont*, ¶¶ 53-54.

In reaching this holding, the Court rejected Fort Collins’s argument that its moratorium’s limited duration and “purpose” to protect public health, safety and welfare saved it from preemption. *Fort Collins*, ¶ 34. Regardless of Fort Collins’s purpose in enacting its moratorium, the moratorium nonetheless “freezes a practice that . . . has come to be prevalent across the state. Thus, rather than maintain the status quo, Fort Collins’s moratorium substantially disrupts it.”

Id. (citations omitted). Moreover, the Court ruled that a five-year moratorium is “different in kind from a brief moratorium that is truly a ‘temporary time-out.’” *Id.* at ¶ 35.

Finally, the Court clarified how the operational conflict test should be applied. “In virtually all cases,” the Court stated, the preemption analysis “will involve a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes ‘on the ground.’” *Longmont*, ¶ 42; *see also Fort Collins*, ¶ 21. Accordingly, the Court dismissed factual arguments challenging the safety of fracking and asserting that commercially-viable alternatives to fracking existed. *Longmont*, ¶ 55. These and other factual issues were “immaterial” to the preemption question presented by the litigation, which concerned “the interplay between the [moratorium] and state law.” *Id.* To resolve this issue, the Court only had to answer the “far narrower” legal question of whether the local government ban was preempted by state law. *Id.* at ¶ 2.

B. The Continuous Moratorium is preempted under *Fort Collins*

As the *Fort Collins* Court stated, a five-year moratorium is not “sufficiently different from a perpetual ban that the former may be a valid exercise of zoning authority even if the latter constitutes a material impediment to the effectuation of the state’s interest,” *Fort Collins*, ¶ 31. Under this holding, Boulder’s Continuous Moratorium, which has now exceeded five years in duration, is illegal.

Fort Collins compels the following conclusions:

- Because the Continuous Moratorium implicates the state’s strong interest in the uniform development of oil and gas resources as well as the County’s land-use authority, the Continuous Moratorium presents an issue of mixed state and local concern. *Fort Collins* ¶ 16; *see also Longmont*, ¶ 31.

- Because the Continuous Moratorium presents an issue of mixed state and local concern, the question of whether it is valid turns on whether it materially impedes or destroys a state interest by authorizing what state law forbids or by forbidding what state law authorizes. *Fort Collins*, ¶ 17 (citations omitted); *see also Longmont*, ¶ 32 (citations omitted).
- Because the Continuous Moratorium renders the state’s authority “superfluous” by preventing operators from engaging in oil and gas development even if they abide by state law, it materially impedes the state’s interest in the efficient and responsible development of oil and gas resources. Therefore, it is preempted. *Fort Collins* ¶ 30; *see also Longmont*, ¶ 53.

For over five years, uniformity in Colorado oil and gas regulation has been impossible because Boulder forbids what other Colorado jurisdictions allow. Oil and gas operators who follow the state’s rules and regulations are nonetheless ineligible to apply for drilling permits in unincorporated Boulder County. It does not matter if oil and gas operators in Boulder County abide by state law—they can’t get permit approval from Boulder. Accordingly, the Continuous Moratorium renders superfluous the state’s statutory and regulatory scheme for oil and gas development. *Id.* at ¶ 53; *Fort Collins*, ¶ 30. Boulder’s Continuous Moratorium, no less than Fort Collins’s moratorium, “freezes a practice that . . . has come to be prevalent across the state.” *Longmont*, ¶ 34 (citations omitted).

Boulder is anticipated to argue that public safety, the alleged dangers of fracking, and the need for comprehensive local government regulations necessitated the Continuous Moratorium. But the Colorado Supreme Court has made it clear that “[i]n virtually all cases,” the preemption analysis “will involve a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes ‘on the ground.’” *Longmont*, ¶ 42; *see also Fort Collins*, ¶ 21. Accordingly, this Court should reject arguments regarding the County’s purpose in repeatedly extending the Continuous Moratorium. This case instead turns on the “far

narrower” legal question of whether the local government prohibition is preempted by state law. *Longmont* at ¶¶ 2, 55.

Boulder will also argue that *Fort Collins* is not controlling because it instituted two different moratoria: one from February 2, 2012, to May 19, 2016, and the other from May 19, 2016, to the present. But this is artifice. The moratoria ending and commencing on May 19, 2016, equally precluded County staff from accepting, processing or approving any applications for oil and gas development, and equally made it impossible for any oil and gas operator to obtain a permit for oil and gas development in unincorporated Boulder County. For all intents and purposes, they are the same moratorium.

Boulder’s obvious intent in swapping moratoria was to buy more time to continue its ban on oil and gas development despite *Fort Collins*. That decision was a central topic of discussion at the morning meeting on May 19, 2016, which preceded the County’s afternoon enactment of Resolution 2016-65 ending one moratorium and beginning another. After summarizing *Fort Collins* and *Longmont*, Assistant County Attorney Ben Doyle advised the County: [O]ur thought is that, were we to be challenged on our current moratorium . . . we think that it’s likely that a court would find it hard to distinguish our moratorium from Fort Collins’ moratorium, which was just overturned. So it would be very hard to defend our current moratorium.” Ex. PI-1 at 9:10-17.

Boulder’s sleight-of-hand attempt to circumvent Colorado Supreme Court precedent should not be rewarded. Under Boulder’s theory, a local government could always avoid the holding in *Fort Collins* by indefinitely banning oil and gas development through a series of

uninterrupted shorter moratoria. This was obviously not the intent of the Colorado Supreme Court. This Court should not sanction such a blatant ploy.

The practical effect of the Continuous Moratorium is that all of unincorporated Boulder County has been off-limits for new oil and gas development for over five years, materially impeding the state's interest in the efficient and fair development of oil and gas resources. The County cannot postpone its duties to regulate in a manner consistent with state law any longer.

V. CONCLUSION

For the foregoing reasons, COGA and API respectfully request that this Court enter summary judgment in their favor, declaring the Continuous Moratorium invalid and unenforceable.

Dated this 20th day of March, 2017.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/ Mark J. Mathews

Mark J. Mathews, #23749

Julia E. Rhine, #45360

ATTORNEYS FOR PLAINTIFF-INTERVENORS
COLORADO OIL AND GAS ASSOCIATION and
AMERICAN PETROLEUM INSTITUTE

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2017, I electronically filed a true and correct copy of the foregoing **COLORADO OIL AND GAS ASSOCIATION'S AND AMERICAN PETROLEUM INSTITUTE'S JOINT MOTION FOR SUMMARY JUDGMENT** with the clerk of Court via the Colorado Courts E-Filing system which will send notification and service of such filing to the following:

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s/ Paulette M. Chesson

Paulette M. Chesson, Paralegal

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY
BUSINESS MEETING

May 19, 2016, approximately 10:30 a.m.

Morning and Afternoon Sessions on Oil and Gas

The above morning and afternoon sessions were transcribed from an audio recording by Jana Mackelprang, Certified Realtime Reporter, Registered Professional Reporter, and Notary Public.

EXHIBIT PI-1

1 COMMISSION ATTENDEES:
2 Elise Jones, Chair
3 Cindy Domenico, Vice Chair
4 Deb Gardner, Commissioner

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1 P R O C E E D I N G S

2 All right. Next up, Item No. 7 is from
3 the County Attorney's office, an update on the Colorado
4 Supreme Court decisions in the two oil and gas cases
5 that were recently decided.

6 MR. DOYLE: Good morning, Commissioners.
7 Ben Doyle, assistant county attorney.

8 You asked us to update you on these recent
9 Supreme Court decisions. The first one is Longmont
10 versus the Colorado Oil and Gas Association, and there
11 was some other parties there, but those are the two main
12 ones, as well as COGCC. And the second case was the
13 City of Fort Collins versus COGA.

14 Normally we provide you legal advice in
15 executive session. As you know, we've had two noticed
16 executive sessions on this subject in the last couple of
17 weeks.

18 In this instance, you've indicated that
19 you're willing to waive attorney-client privilege just
20 on the narrow issue of the meaning of these two cases
21 for our current moratorium. So that's what I'm here to
22 speak to today.

23 In the Longmont case, the Court overturned
24 the ban imposed by that city's voters on the grounds
25 that it operationally conflicted with the State's

1 interest in oil and gas development.

2 Similarly, in the Fort Collins' case, the
3 Court overturned the five-year moratorium imposed by
4 Fort Collins voters, again, on the exact same grounds,
5 using the same test, finding that it operationally
6 conflicted with the State's interest in oil and gas
7 development.

8 Our office closely tracked these cases,
9 including participating in the drafting and submission
10 of amicus briefs, as you may recall, supporting Longmont
11 and Fort Collins' respective positions.

12 We believe that the attorneys in those
13 cases did an excellent job defending local government
14 and making a series of important points about the
15 critical role that local jurisdictions do play and
16 should play when it comes to regulation of oil and gas.

17 Ultimately, however, the current state of
18 the laws established by the legislature, as well as
19 prior Supreme Court decisions, State Supreme Court
20 decisions, did result in outcomes here in these two
21 cases that generally favored the oil and gas industry.

22 Although the County was not a party to
23 these cases, the law set forth is binding on everyone in
24 Colorado, so not just Longmont and Fort Collins. And
25 for that reason, we think that you all should consider

1 the effect of the decisions on our own moratorium.

2 While these cases have been working their
3 way through the court system over the last couple of
4 years, we've seen a few other developments on the
5 regulatory, legislative, and litigation fronts which I
6 just wanted to briefly summarize for you.

7 First, the governor's task force that was
8 put in place to help avoid some proposed statewide
9 ballot measures on state and local regulation of oil and
10 gas development completed its work. There was some
11 positive recommendations for changes at the state level
12 that came out of the task force; however, overall, the
13 results were disappointing for those who seek greater
14 local control over industrial operations close to homes,
15 schools, other residents, businesses, as well as
16 operations that threaten sensitive environmental and
17 natural resources. That was the first thing that's
18 happened over the last couple of years.

19 Second, COGCC has conducted several
20 rulemakings, one, sort of, during or prior to the task
21 force on oil and gas operations in the floodplain. That
22 was a rulemaking that we participated in. In addition,
23 a rulemaking on large scale facilities and a couple of
24 other issues, like how the process for making complaints
25 to COGCC works.

1 really be able to assert our local control in the same
2 way we do around many other land use issues.

3 So maybe, Ben, one of -- I mean, we have
4 this moratorium in place that's set to expire on
5 7/1/2018, and we put it in place, I think, for good
6 reason, and all of which we've not been able to complete
7 at this point, but what would be your recommendation
8 about what we do going forward?

9 MR. DOYLE: Well, we have been discussing
10 that as a staff, and our thought is that, were we to be
11 challenged on our current moratorium -- we have been not
12 been challenged yet, but if that were to happen, then we
13 think that it's likely that a court would find it hard
14 to distinguish our moratorium from Fort Collins'
15 moratorium, which was just overturned.

16 So it would be very hard to defend our
17 current moratorium.

18 COMMISSIONER GARDNER: Okay.

19 CHAIR JONES: So, in effect, then, it
20 basically invalidates what we had in place, which would
21 make us need to fall back on our current regulations in
22 order for the permitting of oil and gas permits.

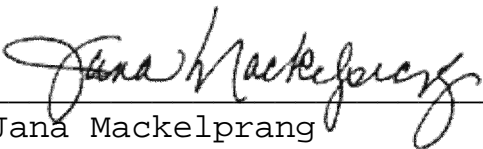
23 And I have to say that I'm concerned about
24 that because we put those regulations in place several
25 years ago; and at the time I thought they were as good

1 CERTIFICATE

2 STATE OF COLORADO)
)ss.
3 CITY AND COUNTY OF DENVER)

4 I, Jana Mackelprang, Certified Realtime
5 Reporter, Registered Professional Reporter, and Notary
6 Public for the State of Colorado, do hereby certify
7 that this transcript was taken in shorthand by me from
8 an audio recording and was reduced to typewritten form
9 by computer-aided transcription; that the speakers in
10 this transcript were identified by me to the best of
11 my ability and according to the introductions made and
12 the information provided; that the foregoing is a true
13 transcript of the conversations; that I am not an
14 attorney nor counsel nor in any way connected with any
15 attorney or counsel for any of the parties to said
16 action or otherwise interested in its event.

17 IN WITNESS WHEREOF, I hereunto affix my
18 hand and notarial seal this 13th day of February, 2017.
19 My commission expires January 24, 2020.

20
21 
22 _____
23 Jana Mackelprang
24 CRR, RPR, Notary Public
25 Calderwood-Mackelprang, Inc.



BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY

REGULAR SESSION AND PUBLIC HEARING

November 15, 2016, approximately 10:31 a.m.

Docket DC-16-0004 Amendments to Oil and Gas Development
Regulations

The above regular session and public hearing was transcribed from an audio recording by Jana Mackelprang, Certified Realtime Reporter, Registered Professional Reporter, and Notary Public.

EXHIBIT PI-2

1 COMMISSION ATTENDEES:
2 Elise Jones, Chair
3 Cindy Domenico, Vice Chair
4 Deb Gardner, Commissioner

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P R O C E E D I N G S

1 First Requested Section

2 (The count on FTR is 17:58:18.)

3 MR. HUGHES: I'm not Kim. That's okay.

4 David Hughes, deputy county attorney.

5 Good afternoon, Commissioners.

6 I wanted to talk a little bit about the
7 Planning Commission's second recommendation, which is
8 for a moratorium, which Kim already read the precise
9 wording to you. Yeah.

10 So that was based on three studies that
11 the Planning Commission referenced from the dia- --
12 public meeting. And Jeff also talked a little bit about
13 those studies, one study looking at the toxicity of
14 fracking fluids, another study looking at the effect of
15 fracking fluids on prenatal mice, and the third looking
16 at associations between fracking and certain symptoms,
17 health symptoms.

18 So the moratorium recommendation raises
19 the applicability of two Colorado Supreme Court cases
20 that Kim mentioned earlier. This is a case involving a
21 Longmont ordinance that banned fracking and a Fort
22 Collins ordinance which placed a five-year moratorium on
23 fracking.

24 And what the Colorado Supreme Court
25

1 determined was that local jurisdictions cannot ban
2 fracing or enact a lengthy fracing moratorium. Both of
3 these decisions were based on something called state
4 preemption. And preemption is essentially a legal term
5 for who gets to decide an issue and make laws about that
6 issue. The purpose of the preemption doctrine is to
7 establish a priority between potentially conflicting
8 laws enacted by various levels of government.

9 So when faced with this type of preemption
10 question, what courts do is they first look at the
11 particular matter and they say, Is it a statewide
12 matter? Is it a purely local matter? Or is it a matter
13 of mixed state and local concern?

14 In the Fort Collins and Longmont cases,
15 what the Colorado Supreme Court decided was oil and gas
16 development is a mixed issue of local and state concern.

17 So in that circumstance, then the Court
18 applied another test. And that test is whether the
19 local regulation materially impedes or destroys a state
20 interest and recognize that a local ordinance forbids
21 what state law authorizes, satisfies that standard, for
22 the Court ultimately found that both the ban and the
23 moratorium failed that test.

24 A couple of other things I wanted to note
25 about the Colorado Supreme Court decisions: First of

1 all, the Court really didn't weigh in on fracing policy.
2 The Court recognized that the vices and virtues of
3 fracing was a hotly contested issue, and stated that it
4 respected the competing views on the matter, but the
5 Court said it wasn't called on to weigh in on those
6 arguments or, much less, tried to resolve them.

7 It viewed this as a narrow issue based on
8 this preemption issue, you know, who gets to be the
9 decider versus is fracing, as a matter of policy, a bad
10 thing or a good thing?

11 Longmont really did try in its case to get
12 the Court to look at this policy issue. It said to the
13 Court: Look, there is a factual dispute here, a very
14 serious factual dispute that needs to be decided. We
15 think -- Longmont said we think that fracing cannot be
16 done safely in the Longmont city limits, and we think
17 the Court needs to resolve that factual issue before it
18 can make a decision about preemption or who gets to
19 decide.

20 And the Colorado Supreme Court rejected
21 that argument. They said that the safety arguments that
22 the City was raising was immaterial to the issue that it
23 was deciding on preemption.

24 Another important argument that the City
25 raised was the inalienable rights argument. Essentially

1 what the City said was: Look, when it comes to our
2 citizens' rights under the Colorado constitution, if a
3 state law impedes our ability to regulate what we think
4 are important state rights, then the Court shouldn't
5 consider preemption, that the local jurisdiction should
6 be able to override the State when it comes to certain
7 inalienable rights of its residents.

8 And the Colorado Supreme Court also
9 rejected that argument. It noted that no Colorado case
10 had ever made that determination before and that there
11 wasn't any particular provision in the constitution that
12 called for that. And it also determined that, if it
13 applied this sort of inalienable rights analysis, then
14 local jurisdictions could almost always override state
15 law, and that's not how Colorado government is
16 structured.

17 So based on the way that the Colorado
18 Supreme Court analyzed the moratorium in Fort Collins
19 and the ban in Longmont, a moratorium of the nature and
20 duration recommended by the Planning Commission is
21 unlikely to withstand a legal challenge, in the County
22 Attorney's office's opinion.

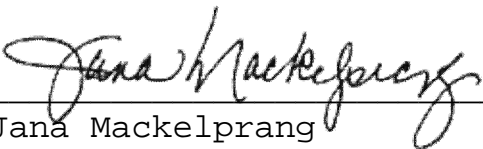
23 Now, even though there are legal
24 restraints in adopting local bans and lengthy moratoria,
25 that does not prevent you, as county commissioners, from

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