DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302 **Plaintiff**: PEOPLE OF THE STATE OF COLORADO *ex rel.* CYNTHIA H. COFFMAN, in her official capacity as Colorado Attorney General; **Plaintiff**: THE STATE OF COLORADO; **Plaintiff-Intervenor:** COLORADO OIL AND GAS ASSOCIATION; **Plaintiff-Intervenor:** AMERICAN PETROLEUM INSTITUTE v. **Defendant:** COUNTY OF BOULDER, COLORADO; **Defendant:** THE BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY.	▲ **COURT USE ONLY** ▲
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The State's Memorandum in Opposition to Boulder's Motion to Dismiss	

INTRODUCTION

This is a simple case. For over five years, Boulder County[1] has banned new applications for oil and gas development within its borders. No party disputes that fact. Likewise, no party can reasonably dispute that a local five-year ban on oil and gas development violates two recent decisions of the Colorado Supreme Court, *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573 (Colo. 2016), and *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586 (Colo. 2016). Through this suit, the State[2] merely seeks a court order recognizing that Boulder, like every other local jurisdiction in Colorado, is required to abide by state law.

Yet Boulder's Motion to Dismiss asserts that avoiding the Colorado Supreme Court's precedent requires only a formality. A local government may simply claim that an oil and gas moratorium is "temporary" and then extend it—or cancel and then immediately re-impose it—again and again. This labeling exercise, Boulder

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[1] Boulder incorrectly asserts that under § 30-11-105, C.R.S., the Court must dismiss all claims against the County. *See* Mot. at 2 n.1. Plaintiffs have complied with the statute by naming the Board of County Commissioners as a defendant. *Anderson v. Cty. of Adams*, 592 P.2d 3, 4 (1978) (rejecting a county's argument for dismissal under § 30-11-105 where the plaintiff had named both "the County of Adams" and "the Board of County Commissioners of Adams County" as defendants); *see also Wigger v. McKee*, 809 P.2d 999, 1003 (Colo. App. 1990) (in a suit naming both a county and its board of commissioners, explaining, "In Colorado, a county is defined as 'a body corporate and politic' and has the power to sue and be sued …. Therefore, Arapahoe County, sued properly in the name of The Board of County Commissioners of Arapahoe County … is a person under [federal law], and the suit against it may not be dismissed for lack of jurisdiction." (citing § 30-11-105, C.R.S.)).

[2] In this brief, the "State" refers to the State of Colorado and the People of Colorado *ex rel.* Cynthia H. Coffman, Attorney General.

claims, insulates a local moratorium from the Colorado Supreme Court's rulings on the basis of mootness, laches, and the statute of limitations. None of these arguments have merit.

First, Boulder's arguments turn on irrelevant assertions about the undisputed facts or mischaracterizations of the State's legal arguments. It does not matter whether Boulder describes its Moratorium as a single five-year prohibition or as two (or more) distinct legislative acts. The fact remains that Boulder has banned oil and gas development for over five years, in violation of *Longmont* and *Fort Collins*. And the State does not argue here, as Boulder claims, that *any* local government ban, of *any* duration, is illegal. This case does not present that question. The only question here is whether Boulder's Moratorium, which has been in continuous effect for over five years, violates state law. It does.

Second, Boulder's mootness arguments are flawed. The Moratorium is ongoing, and a ruling from this Court will have immediate "practical effect." This case is therefore a live controversy. Boulder's claim that it will moot this case in the future does not deprive the Court of jurisdiction now.

Finally, Boulder's strategy of publicly stating, over and over again, that it will end the Moratorium, only to extend or immediately re-impose it, does not entitle it to assert the equitable defense of laches or a defense based on a statute of limitations.

STANDARD OF REVIEW

The Motion argues both that this Court lacks subject matter jurisdiction under C.R.C.P. 12(b)(1) because this case is moot and that the Complaint fails to state a claim under C.R.C.P. 12(b)(5). Mot. at 10.

A motion to dismiss for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1) is "designed to dispose of cases without requisite jurisdiction at an early stage in the proceedings." *Tidwell v. City & Cty. of Denver*, 83 P.3d 75, 85 (Colo. 2003). "When possible, the policy of [the Colorado Supreme Court] has been to resolve disputes on their merits." *Stell v. Boulder Cty. Dep't of Soc. Servs.*, 92 P.3d 910, 914 (Colo. 2004). Thus, a party claiming that jurisdiction is lacking due to mootness bears the burden of establishing that the case is moot, and that burden "is a heavy one." *Rezaq v. Nalley*, 677 F.3d 1001, 1008 (10th Cir. 2012) (quoting *Cty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979)); *see also Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 66 (1987).

A motion to dismiss under C.R.C.P. 12(b)(5) tests the "formal sufficiency" of the complaint. *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 304 P.3d 217, 221 (Colo. 2013) (quotation omitted). Such motions are disfavored. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). The allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. *Id.* Dismissal is proper only where the allegations fail to state a plausible claim for relief. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016).

ARGUMENT

I. Boulder's Motion is based on irrelevant or incorrect assumptions.

The Motion claims that the State has made "two critical but erroneous assertions" and that those assertions require dismissal. Mot. at 2. Boulder is mistaken.

First, Boulder claims that its Moratorium is not one continuous legislative act but is instead two separate prohibitions. Mot. at 11–13. The distinction, however, is legally irrelevant. *Fort Collins* and *Longmont* held that local ordinances were preempted because they banned oil and gas development for longer than a "temporary 'time-out'" (specifically, *Fort Collins* struck down a five-year ban that was in effect for only two and a half years). *Longmont* ¶¶ 1, 53–54; *Fort Collins* ¶¶ 3, 30–37. The Supreme Court did not examine the manner in which the local governments characterized their bans; that characterization was irrelevant. *See Fort Collins* ¶ 34 (rejecting the local government's characterization of the "purpose and limited duration" of the moratorium). Boulder's characterization of the Moratorium as two separate legislative acts is likewise irrelevant.[3] What matters is that the

[3] Also irrelevant are the Motion's factual arguments about the alleged effects of oil and gas development and the policy interests that allegedly motivated Boulder's Moratorium. Mot. at 4–8. Those arguments are irrelevant to the preemption question. The very same factual arguments were made in support of the prohibitions on hydraulic fracturing at issue in *Longmont* and *Fort Collins*, and the Colorado Supreme Court rejected them. *Longmont* ¶¶ 2, 55; *Fort Collins* ¶¶ 3–4, 32, 38. As the supreme court made clear, preemption does not depend on the facts "on

County has, in fact, continuously prohibited applications for oil and gas development for over five years in violation of *Longmont* and *Fort Collins*.

Boulder cites no case suggesting that local governments can insulate their actions from preemption through an exercise in labeling. And there is no such authority. Rather, the preemption analysis is objective: if a local law materially impedes or destroys a state interest, then the ordinance is preempted. *Longmont* ¶ 42; *Fort Collins* ¶ 21. Here, it is undisputed that for more than five years, the County has prohibited and continues to prohibit the acceptance and processing of oil and gas development applications. Under *Longmont* and *Fort Collins*, this ban materially impedes or destroys the State's strong interest in the fair and responsible development of oil and gas resources. *See Longmont* ¶¶ 53–54; *Fort Collins* ¶ 30. It makes no difference that the ban was carried out through one, two, or any number of separate local government acts.

As to Boulder's second assertion, Boulder mischaracterizes the State's legal position. The State does not argue that "local governments across Colorado are forbidden by state law from enacting moratoria of any duration on oil and gas development." Mot. at 2. That issue is not presented here. Instead, this case is based on the most conservative possible reading of *Fort Collins*, which struck down a five-

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the ground" or on the particular policy disagreements between the State and local governments. It depends instead on whether, as a facial matter, a local government's actions are impeding a state regulatory scheme. *Longmont* ¶¶ 15, 42; *Fort Collins* ¶ 21.

year moratorium when it was only halfway finished. *Fort Collins* ¶¶ 3, 39. Boulder's Moratorium has already prohibited new oil and gas development for ***longer*** than five years. Under *Fort Collins*, Boulder's Moratorium is illegal.

II. This case presents a live dispute.

Boulder argues that this case should be dismissed as moot because (1) last year, Boulder "terminated" its "expired" Moratorium and immediately replaced it with a new "current" prohibition, and (2) the Moratorium "will likely be moot before this litigation can resolve" the Complaint. Mot. at 11–16. Neither argument is sound.

A. The ongoing Moratorium continues to undermine the important state interests recognized in *Fort Collins* and *Longmont*.

A case is not moot if the requested relief will have a practical effect. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1102 (Colo. 1998); *Sinclair Transp. Co. v. Sandberg*, 350 P.3d 924, 927 (Colo. App. 2014). Here, it is undisputed that for more than five years, no one has been permitted to initiate new oil and gas development in unincorporated Boulder County. It is also undisputed that, today, Boulder would reject any new application for oil and gas development. The ongoing Moratorium thus continues to harm the state interests that the Colorado Supreme Court recognized as dispositive in *Longmont* and *Fort Collins*. *Longmont* ¶¶ 50–54; *Fort Collins* ¶¶ 27–30. A court order enjoining the Moratorium will redress that harm, just as the Colorado Supreme Court's orders in *Longmont* and *Fort Collins* did.

Here again, Boulder assumes that local governments may circumvent the holdings of *Longmont* and *Fort Collins* through a labeling exercise: claiming that a "current" moratorium is new and that a previous version of the same prohibition is "expired," regardless of how long the prohibition has actually remained in place. A litigant cannot unilaterally moot a dispute by re-characterizing its own actions. Under Boulder's position, a local government could avoid preemption by repeatedly enacting, terminating, and replacing a series of moratoria that added up to an extended continuous prohibition, then claiming that any challenge to that prohibition is moot as to all but the most recent enactment. That is contrary not only to common sense and to objective reality, but to the holdings of *Longmont* and *Fort Collins*.[4]

B. Boulder cannot avoid the State's legal claims by asserting that it intends to voluntarily moot this case on a future date.

Mootness depends on whether the controversy is live right now, not whether it might become moot in the future. *Lopez*, 963 P.2d at 1102; *Sinclair Transp. Co.*, 350 P.3d at 927. It is undisputed that the Moratorium remains in place. Boulder's claim that it will finally allow the Moratorium to terminate on May 1, 2017, after five

[4] Boulder's "retroactivity" argument regarding the alleged precedential effect of *Longmont* and *Fort Collins*, Mot. at 12–13, is specious. If credited, it would mean that the city in *Fort Collins* had two moratoria in place, one before the Supreme Court's decision and one after. Yet the lower court enjoined the Fort Collins moratorium as it existed at the time, and the Colorado Supreme Court affirmed that decision. The city did not, as Boulder implies it should, get "one free pass."

years of extensions, is a speculative assertion about Boulder's future behavior, not a valid basis for dismissal.

Boulder does not cite any Colorado authority dismissing a case based on a "likelihood" of future mootness. Mot. at 15–16. And Boulder's own course of action distinguishes this case from the Massachusetts decision it cites, which involved a local building moratorium that had already expired by the time of the court's decision. *Id.* at 15 (citing *Tra-Jo Corp. v. Town Clerk of Methuen*, 317 N.E.2d 822 (Mass. 1974)). The upcoming May 1 termination date is not the Moratorium's first. For more than five years, Boulder has extended the Moratorium whenever it approached its announced termination—sometimes within days of the scheduled end date. *See* Compl. at 6–11. Simply pointing to the latest announced termination date of May 1, the ***ninth*** such termination date announced for the Moratorium, does not make this case moot.

III. The equitable doctrine of laches does not insulate illegal conduct like the Moratorium from judicial review.

Laches "cannot be raised by motion to dismiss" and must instead be "affirmatively pleaded in an answer." *McPherson v. McPherson*, 145 Colo. 170, 172, 358 P.2d 478, 479 (1960); *see also Terry v. Terry*, 154 Colo. 41, 43, 387 P.2d 902, 903 (1963). Boulder's laches argument thus does not provide a basis for dismissal.[5] But

[5] Boulder cites *Williams v. Rock-Tenn Services, Inc.*, 370 P.3d 638 (Colo. App. 2016) for the proposition that it may argue laches in a motion to dismiss. But *Williams* did not address laches. It instead involved a "statutory exception" to a wrongful

even if Boulder could raise its laches defense through a motion to dismiss, the defense fails. Boulder lacks the "clean hands" necessary to assert the equitable defense of laches. Further, Boulder cannot establish the three required elements of laches.

A. Boulder has unclean hands and cannot assert the equitable defense of laches.

Boulder seeks to use laches, an equitable defense, to insulate from legal review a Moratorium that is illegal under recent, on-point Colorado Supreme Court precedent. Boulder cannot invoke the doctrine of laches in this manner. "[L]aches is an equitable remedy. … Therefore, one seeking application of this doctrine has an obligation to 'do equity.'" *In re Marriage of Lodeski*, 107 P.3d 1097, 1103 (Colo. App. 2004). "[O]ne who has engaged in improper conduct regarding the subject matter of the cause of action may, as a result, lose entitlement to an equitable remedy." *Id.* "Many different forms of improper conduct" amount to unclean hands, and "the conduct need not be illegal." *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000). The conduct need only "relate[ ] in some significant way to the claim [the party] now asserts." *Id.*

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termination claim. *Id.* at 641–42. The court allowed that particular affirmative defense to be raised at the dismissal stage in the "narrow circumstances" of that case. *Id.* at 642. Specifically, "the applicability of the defense [was] clearly indicated and … appear[ed] on the face of the pleading … used as a basis for the motion." *Id.* (quotation omitted). Boulder does not cite any case where that standard has been applied to dismiss a complaint based on laches.

Boulder has attempted to avoid state law, and benefit itself, by labeling its Moratorium "temporary," and then repeatedly extending or re-imposing it. This conduct, which is contrary to public policy and relates directly to Boulder's laches defense, disqualifies Boulder from asserting laches. *See Perfect Place, LLC v. Semler*, 2016 COA 152, ¶ 65 (explaining that a party cannot receive an "unfair benefit" or impose an "unfair detriment" on another party that is "contrary to law").

B. Boulder cannot establish the elements of laches.

As a separate matter, Boulder cannot establish the three elements of laches: (1) full knowledge of the facts by the party against whom the defense is asserted, (2) unconscionable delay in pursuing an available remedy, and (3) reliance by and prejudice to the party asserting the defense. *Johnson v. Johnson*, 380 P.3d 150,154 (Colo. 2016); *see also Robbins v. People*, 107 P.3d 384, 388 (Colo. 2005).

With respect to the knowledge and delay elements, for five years Boulder has committed to ending the Moratorium, either after rulemaking or after the courts clarified the law in the *Longmont* and *Fort Collins* cases. *See, e.g.*, Compl. Ex. B at 3 ("[T]he Board urges staff to move expeditiously on this project, so that the Board can end the Temporary Moratorium sooner if appropriate plans and regulations are in place."); Compl. Ex. G at 1 (noting "ongoing litigation involving Longmont, Fort Collins, and Broomfield progressing through the state courts, final disposition of which could affect local authority to regulate oil and gas development"). Although the State had knowledge of the so-called "temporary" Moratorium itself, it did not

have knowledge that Boulder would continue to re-impose the Moratorium year after year, even in the wake of *Longmont* and *Fort Collins*. When it became clear that Boulder had unambiguously violated the holding of *Fort Collins* by allowing its Moratorium to remain in place for over five years, the State promptly took legal action. Compl. at 11. This was neither unreasonable nor unconscionable. *See Kirby v. Union Pac. Ry. Co.*, 119 P. 1042, 1051 (1911) ("The fact that the railroad company has failed to seek redress for numerous past wrongs clearly may not be urged as a defense against … an action which seeks protection by injunction against an anticipated future injury."). The State should not be punished for taking Boulder at its word.

With respect to the reliance and prejudice inquiry, the party asserting laches has the burden of demonstrating that those conditions are satisfied. *Robbins*, 107 P.3d at 388. Boulder does not even attempt to do so, instead asking the Court to "assume that the County suffered prejudice." Mot. at 18. Even if "assumed prejudice" were appropriate—and Boulder cites no authority to that effect[6]—there is no basis for assuming prejudice here. Boulder had notice of the *Fort Collins* and *Longmont*

[6] The two federal cases cited by Boulder do not support Boulder's "assumed prejudice" argument. Mot. at 18 (citing *Perry v. Judd*, 840 F. Supp. 2d 945, 954 (E.D. Va. 2012) and *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 807 (8th Cir. 1979)). In *Perry*, the court did not merely assume prejudice but analyzed it in depth. 840 F. Supp. 2d at 954–55. And *Goodman* did not hold that prejudice can be assumed; it stated only that prejudice is more likely to be found where there is a lengthy delay. 606 F.2d at 807.

decisions, and its own counsel advised that continued imposition of the Moratorium would violate state law. *See* Colo. Oil & Gas Ass'n Mot. for Summ. J. (filed March 20, 2017), Ex. PI-1 at 4:22–5:1, 9:3–17. Yet Boulder unilaterally re-imposed and extended its Moratorium three times ***after*** *Fort Collins* and *Longmont* were decided. Compl. at 10–11. The State did nothing to encourage "reliance" on Boulder's part. Boulder knew the state of the law, by virtue of its own counsel's advice, and disregarded it. Nor did the State "prejudice" Boulder; Boulder's own unlawful conduct did.

IV. The statute of limitations does not apply to Boulder's continued violation of the law and, if it applies, it does not bar this suit.

As the Court of Appeals recently held, "a case should be dismissed under Rule 12(b)(5) based on a statute of limitations only in exceptional circumstances." *Campaign Integrity Watchdog, LLC v. All. for a Safe & Indep. Woodmen Hills*, 2017 COA 22, ¶¶ 26–27. Exceptional circumstances are not present here.

Boulder has not pointed to any case suggesting that a local preemption claim brought by the State is subject to a statute of limitations. Indeed, application of a limitations period would be inappropriate in this context. The State does not seek backward-looking relief, but rather forward-looking relief to ensure future compliance with settled state law, making application of a limitations period inapt. *Cf. Town of Grand Lake v. Lanzi*, 937 P.2d 785, 788 (Colo. App. 1996); *Town of Lyons v. Bashor*, 867 P.2d 159, 160 (Colo. App. 1993) ("Because each day of noncompliance

with a zoning or subdivision ordinance constitutes a separate violation, the statute of limitations does not bar the Town from filing suit to enjoin new and future violations."); *cf. also Flinn v. Treadwell*, 207 P.2d 967, 970 (Colo. 1949) ("For the promotion of the general welfare, the police power deals with the circumstances as they may arise."). Under Boulder's legal theory, a local government would be free to indefinitely enforce a repeatedly-extended "temporary" local ordinance that materially impedes or destroys a state interest, as long as the State did not sue within two years of its original enactment. That is contrary to basic preemption principles.

Even assuming Boulder is correct that a two-year statute of limitations applies to the State's preemption claim, Mot. at 21, that defense does not apply here, for two reasons. First, the Moratorium is an ongoing "continuing" or "permanent" wrong. *See Campaign Integrity Watchdog*, 2017 COA ¶¶ 33, 35 (applying the continuing violation doctrine to reverse a dismissal based on the statute of limitations); *cf. Hoery v. United States*, 64 P.3d 214, 218–19 (Colo. 2003) (explaining that, in the tort and nuisance contexts, "[f]or continuing intrusions … each repetition or continuance amounts to another wrong"). Second, Boulder repeatedly extended or re-imposed its Moratorium, and the State brought this legal action shortly after the latest-announced extension in December 2016, which clearly brought the

Moratorium within *Fort Collins*. *See* Compl. Ex. L, at 1.[7] This lawsuit is well within Boulder's claimed two-year limitations period.

CONCLUSION

The motion to dismiss should be denied.

Dated March 28, 2017.

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/s/Frederick R. Yarger

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[7] Boulder argues that the statute of limitations bars relief only with respect to the "expired" Moratorium, not as it was re-imposed in May 2016. Mot. at 20–21. Thus, even under Boulder's own view of this case, the statute of limitations does not bar the State's claim against the current, ongoing Moratorium.

CERTIFICATE OF SERVICE

I have served this ***State's Memorandum in Opposition to Boulder's Motion to Dismiss*** on all parties by Colorado Courts E-Filing on March 28, 2017.

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