

Boulder County Court, Boulder County, Colorado  
Court Address: P.O. Box 4249, Boulder, CO 80306  
Division 7 Telephone Number: 303.441.3750

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CASE NUMBER: 2017CV30151

**PEOPLE OF THE STATE OF COLORADO, ex rel.  
CYNTHIA H. COFFMAN, in her official capacity as  
Colorado Attorney General; and THE STATE OF  
COLORADO, Plaintiffs,**  
**and**  
**COLORADO OIL AND GAS ASSOCIATION;  
AMERICAN PETROLEUM INSTITUTE,**  
*Plaintiff Intervenors,*  
**v.**  
**COUNTY OF BOULDER, COLORADO; and THE  
BOARD OF COUNTY COMMISSIONERS OF  
BOULDER COUNTY, Defendants.**

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Case Number:  
2017CV30151  
Division 3

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

This matter comes before the Court for review of Defendants' Motion to Dismiss State of Colorado's Complaint for Declaratory and Injunctive Relief, filed on March 7, 2017. The following related and responsive pleadings are also on file and addressed in this Order:

- March 17, 2017: Defendants' Motion to Dismiss Intervenors Colorado Oil and Gas Association ("COGA") and American Petroleum Institute's ("API") Joint Complaint;
- March 28, 2017: Plaintiff's Memorandum in Opposition to Boulder's Motion to Dismiss;
- March 30, 2017: Intervenors' Joint Response to Boulder's Motion to Dismiss ;
- April 11, 2017: Defendants' Reply to State's Memorandum in Opposition to Boulder County's Motion to Dismiss; and
- April 13, 2017: Defendants' Reply to Intervenors' Joint Response to Defendants' Motion to Dismiss Intervenors' Joint Complaint.

**I. BACKGROUND**

In her official capacity, Colorado Attorney General Cynthia Coffman ("State of Colorado") brings suit against Boulder County, Colorado ("Boulder County") and the Board of County Commissioners of Boulder County ("County Commissioners") for Declaratory and Injunctive Relief concerning Boulder County's moratorium on all new applications for oil and gas development. The legal issues concerning the process of extracting oil or gas

have been before the Colorado Supreme Court in recent years, and the State of Colorado alleges that Boulder County's actions are in direct contravention of the Colorado Oil and Gas Conservation Act ("the Oil and Gas Act").

In 2012, the County Commissioners adopted Resolution 2012-16, which the State of Colorado alleges has been extended continuously since then. This moratorium banned all new applications for oil and gas development activities within unincorporated Boulder County. In November 2014, prior to the Colorado Supreme Court's decisions discussed below, Boulder County adopted a moratorium that was to be in effect through July 1, 2018. In May 2016, two weeks after the Court decisions, and perhaps in response to these, Boulder County adopted a Resolution which re-imposed the moratorium with a new end date of November 18, 2016. (Boulder County refers the moratoria in effect through May 2016 as the "Expired Moratorium"). On November 17, 2016, the moratorium was extended through January 31, 2017. Most recently, on December 13, 2016, it was extended through May 1, 2017. (Boulder County refers to the May 2016 moratorium that expires on May 1, 2017 as the "Current Moratorium.")

The State of Colorado seeks a declaration that Boulder County's moratorium is preempted by the Oil and Gas Act. The State of Colorado also seeks a permanent injunction enjoining Boulder County and its County Commissioners from enforcing the moratorium. These efforts are supported by COGA and the API. Boulder County's position is that it acknowledged the effect of the Supreme Court's decisions and terminated its lengthier moratorium, but needed to ensure all existing oil and gas regulations were updated, and the purpose of the current moratorium, ending May 1, 2017, has permitted the opportunity to do so. Within the last year, Boulder County has afforded a public process concerning this issue and it is its position that the State of Colorado is asserting its interests late in the process.

In support of its Motion to Dismiss, Boulder County presents the following arguments:

- 1) The State of Colorado's complaint will become moot as the current moratorium soon expires,
- 2) The current moratorium does not violate Colorado case law because of its brief duration,
- 3) The statute of limitations has run for the State of Colorado's claim, and
- 4) The doctrine of laches precludes the State of Colorado's claim.

The State of Colorado contends that the current moratorium is part of a collective and illegal series of moratoria and, therefore, that its claim is neither moot nor filed after the

statute of limitations has run. Further, the State of Colorado argues that the laches is improperly asserted and does not apply to this matter.

## II. STANDARDS OF REVIEW

C.R.C.P. 12(b)(1) and (5) permit the Court to review and dismiss claims pre-trial. C.R.C.P. 12(b)(1) includes consideration of subject matter jurisdiction. Although a Defendant may invoke the lack of jurisdiction as a defense, the plaintiff bears the burden of establishing the trial court's jurisdiction. *Lee v. Banner Health*, 214 P.3d 589, 594 (Colo. App. 2009). The court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). In assessing subject matter jurisdiction, courts must look to the underlying substance of the complaint with respect to the facts alleged and the relief sought. *Barry v. Bally Gaming, Inc.*, 320 P.3d 387, 390 (Colo. App. 2013). In adjudicating a motion to dismiss for lack of subject matter jurisdiction, the trial court may consider evidence outside the pleadings. *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2016).

C.R.C.P. 12(b)(5) allows dismissal of a complaint for failure to state a claim upon which relief can be granted. The purpose of a motion under C.R.C.P. 12(b)(5) is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). When reviewing a motion to dismiss, the Court must accept the material allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). When deciding a motion to dismiss, the "court may consider only matters stated in the complaint and must not go beyond the confines of the pleading." *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014, 1018 (Colo. App. 2004). Dismissal is appropriate only if a complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Warne v. Hall*, 373 P.3d 588, 589 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Motions to dismiss pursuant to C.R.C.P. 12(b)(5) are generally disfavored. *Rector v. City & Cnty. of Denver*, 122 P.3d 1010, 1013 (Colo. App. 2005). If relief could be granted based on the facts stated in the complaint, then the complaint is sufficient. *Schlitters v. State of Colorado*, 787 P.2d 656, 658 (Colo. App. 1990).

## III. ANALYSIS

In Colorado, local governments are not authorized to ban oil and gas development within their borders, as this is an issue solely within the State's governance. *City of Longmont v. Colo. Oil & Gas Ass'n.*, 369 P.3d 573, 578 (Colo. 2016). Not only did the State's

highest Court invalidate a permanent ban on hydraulic fracturing, but in the same year the Court also struck down a five-year moratorium on fracking that had been in effect for only half its term. *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 593-95 (Colo. 2016). State law preempts local law; thus, counties and municipalities cannot enact provisions which are in contravention of those contained in the Oil and Gas Act. *Id.*; *Longmont*, 369 P.3d at 579.

The State of Colorado articulates a “strong interest in efficient, equitable, and responsible development and production of oil and gas resources within the State.” Compl. ¶ 18. In turn, Boulder County expresses the County Commissioner’s intent to protect the health, safety, and welfare of County citizens from the harmful effects of oil and gas development.” Mot. To Dismiss p. 3.

A. *The State of Colorado has presented a live controversy substantiating this Court’s jurisdiction, and such claim is not barred by the Statute of Limitations*

Mootness depends on whether the controversy is live right now, not whether it might become moot in the future. *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). Boulder County’s argument that the State of Colorado’s claim will become moot on May 1 due to the moratorium’s expiration is undercut by the practice of renewing each moratorium with a subsequent one. Boulder County’s practice has been, each time that the existing moratorium nears its expiration, to enact another “short-term” moratorium. This Court cannot conclude that the issue will indeed be moot on May 1, 2017 because Boulder County’s practice has been to renew each expiring moratorium with the enactment of an additional one with a prospective expiration date. It is beyond the Court’s authority to speculate as to what may occur on May 1, 2017; what is clear is that the moratorium remains in effect as of today’s date, and the State is not precluded from seeking the relief requested.

The doctrine of mootness instructs courts not to grant relief “when the court’s ruling would have no practical legal effect.” *Davidson v. Comm. for Gail Schoettler, Inc.*, 24 P.3d 621, 623 (Colo. 2001). With regard to the Expired Moratorium -- terminated by the County Commissioners on May 19, 2016 -- the Court agrees that any order issued by this Court would have no practical legal effect, and any consideration of the Expired Moratorium is barred by the Statute of Limitations. C.R.S. § 13-80-102(1)(h) (providing a two year limit on filing claims against governmental entities after a cause of action accrues). However, with regard to the Current Moratorium, the Court finds that that there has been a continued practice by Boulder County of banning oil and gas development in Boulder County which is in contravention of state law.

*B. In its entirety, Boulder County's moratorium is not of shorter duration than that struck in the Fort Collins case*

Boulder County also expresses its position is that its current moratorium, of one year's duration, is distinguishable from the Court's ruling in *Fort Collins*. In *Fort Collins*, the Colorado Supreme Court held that a five-year moratorium on oil and gas processing was invalid. 369 P.3d at 593-95. However, the order reflected "no view as to the propriety of a moratorium of materially shorter duration." *Id.* at 594. Further, Boulder County argues that considering the Expired Moratorium along with the Current Moratorium results in retroactive application of *Fort Collins*. This Court is not persuaded. A moratorium of six months, followed by an identical moratorium of six months, results in a moratorium of twelve months, and the reality is that Boulder County has barred applications since 2012.

The Oil and Gas Act does not create exceptions to its application on the basis of a county's efforts to ensure that any development occurs safely and in consideration of the safety of citizens. In evaluating the preemption by state law of county ordinances, the law does not permit the Court to give weight to the County Commissioners' efforts. The recourse of those citizens who have participated in Boulder County's public process may not best be considered the County Commissioners; as the Oil and Gas Act is a state law, state representatives may be better positioned to address the concerns of county residents. Neither is there an exception in the Oil and Gas Act for a temporary moratorium, regardless of its duration. Whether Boulder County's moratoria are regarded as one continuous ban or two separate bans, the Court finds no legal distinction can be drawn: Boulder County currently imposes a moratorium that does not comply with *Fort Collins*. Because the Court finds that Boulder County has consistently banned oil and gas development in Boulder County in violation of Colorado law, the Court finds that the State of Colorado's claims are not moot. And for the aforementioned reasons, the State of Colorado has sufficiently pleaded that Boulder County violated and continues to violate Colorado law.

*C. The Doctrine of Laches does not bar the State's claims.*

Boulder County argues that the filing of a Complaint by the State of Colorado eight months after the adoption of the May 2016 moratorium constitutes an unconscionable delay that has prejudiced the County. Laches "cannot be raised by motion to dismiss" and must instead be "affirmatively pleaded in an answer." *McPherson v. McPherson*, 358 P.2d 478, 479 (Colo. 1960). However, if the Court were to consider the merits of this argument, this does not, in the Court's opinion, bar the State from presenting its claims and does not result in a dismissal on this basis.

Laches is an equitable remedy. *In re Marriage of Lodeski*, 107 P.3d 1097, 1103 (Colo. App. 2004). “The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another.” *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 73 (Colo. 1996). In this case, the State of Colorado and Intervenors had knowledge of the moratoria imposed by Boulder County. The State advised the County on January 27, 2017 that it intended to bring this action; the County indicates that it was only permitted until February 10 – a two-week period – to rescind the Current Moratorium. It remains undisputed, however, that Boulder County was on notice as early as May 2016 of the current state of the law, and discussions occurring after the Supreme Court decisions issues reflect this. Certainly, Boulder County would not take the position that failure to enforce a regulation for an eight-month period renders that regulation unenforceable. The State of Colorado’s actions are not regarded as unreasonably delayed, and Boulder County was unjustified in placing reliance on the State’s inaction for eight months.

#### IV. CONCLUSION

Based on the foregoing analysis, the Court denies Defendants’ Motion to Dismiss. Defendants are permitted 14 days from the date of this Order to file a Response to Plaintiffs’ Motion for Summary Judgment and Plaintiff Intervenors’ Motion for Summary Judgment.

Dated: April 26, 2017

BY THE COURT:



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Norma A. Sierra, District Court Judge