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MEMORANDUM

TO: Andy Karsian, Legislative Coordinator Colorado Counties, Inc.

FROM: Barbara J.B. Green and Gerald E. Dahl

DATE: March 2, 2012

RE: **Local Government Authority to Address Impacts of Oil and Gas Operations**

You have asked us to update Barbara Green's November 16, 2011 memorandum to you in light of Judge Patrick's recent decision in the District Court for Gunnison County and the letters which have recently been sent to a number of boards of county commissioners by the Colorado Oil & Gas Conservation Commission (the "Commission") and assistant attorneys general on behalf of the Commission. We are pleased to do so.

The letters offered by the Commission and its attorneys have been widely circulated to counties that are considering the adoption of regulations to address the impacts of oil and gas operations. The letters urge local governments not to adopt the bulk of the regulations being considered by them, but instead to rely on the Commission and its proposed local government designees ("LGD's") to protect their interests. We recognize that some counties have taken this approach, but many others have not.

Counties are Not Preempted from Regulating Impacts of Oil and Gas Operations.

The letters generally take the position that counties are preempted from enacting and enforcing regulations covering the majority of the impacts posed to their local residents by oil and gas operations. The letters also suggest that local governments should enter into memoranda of understanding ("MOU") with the Commission rather than adopting regulations, and they point to the recent MOU between the Commission and Gunnison County as an example.

As Judge Patrick reiterated in his opinion, counties in Colorado have always had authority to zone and regulate land uses. That authority applies as well to the regulation of oil and gas operations, which are simply another industrial land use. As with lots of other aspects of

county authority, unless the state legislature has specifically and clearly provided that counties may not act, they retain that authority. Local government regulation of the impacts of oil and gas operations has been on-going for many years. Local governments have successfully exercised that authority by issuing permits for thousands of oil and gas operations around the state.

This raises another issue - that local regulation of oil and gas operations would create an unworkable "patchwork" of regulations, making it difficult or impossible for the industry to function in Colorado and driving this beneficial economic activity to other states. This argument has not been supported by the Colorado experience. First, the number of issued local permits for oil and gas operations continues to increase. Local permitting requirements are not slowing down this industry in Colorado at all. Second, and more fundamentally, other activities that are heavily regulated by local governments – the mining industry is a prime example – have no difficulty complying with local requirements and continuing to succeed. Mining is regulated both by the state (Division of Reclamation, Mining and Safety and the Mined Land Reclamation Board) and by local governments through their local land use regulations. This pattern of regulation has not deterred mining activity in Colorado in the slightest, and local government regulation has allowed citizens to be effectively represented in local processes.

Regulated industries, including oil and gas operations, often claim that local governments don't have authority to regulate because they are "preempted." However, the state legislature has never completely preempted counties from regulating the impacts of oil and gas operations, and local land use permit and approval processes continue to apply to oil and gas operations. This is demonstrated by a variety of court cases challenging local government regulations; the results of those cases have been, at best, mixed for the industry, and in no case has the court agreed that local land use authority is completely preempted. In fact, there are lots of examples of regulations being upheld. Not surprisingly, it takes a case-by-case analysis by a court to really determine whether a specific regulatory provision is preempted. What is true is that there remains plenty of room for local government land use regulation of the impacts of oil and gas operations.

The LGD and MOU Process Does Not Displace Local Authority.

Most local governments support what has, in the past, been a partnership between the Commission and local officials on oil and gas and look forward to strengthening this partnership going forward. Many counties are applying more resources to the LGD process to enhance coordination with the state process. Other counties are contemplating MOUs with the Commission that would establish complementary responsibilities. These LGD and MOU techniques, however, are not an effective substitute for local land use processes. In contrast to

the Commission's suggested state-level only approach, local regulations typically are adopted and enforced at public hearings - hearings at which the people actually affected by the operations have a full and fair opportunity to attend and make their views heard in their own community. The Commission has no public hearing requirement for approving oil and gas operations that compares in any way to the hearing requirements of local governments on land use matters. Local government hearings are the only effective forum for their local citizens on the impacts of proposed land use activities - and oil and gas operations are no different than any other land use activity in the potential impacts of concern to local residents.

In the typical state approval process, a local resident of a rural county has no effective means of hearing the details of a specific oil and gas operation, asking questions of the operator, or communicating his or her concerns about a specific project to the Commission. In fact, private citizens do not automatically have standing to request or participate in Commission hearings. In contrast, the local process allows for a complete and public discussion of a project, its impacts, and proposed mitigation, open to anyone. In the vast majority of cases, this opportunity has paved the way for public acceptance of oil and gas projects because the local regulatory process assuages the public's fears that impacts to the local community and environment were not adequately understood or addressed. Counties may choose to handle oil and gas approvals administratively, but the opportunity to require public hearings is a basic governance concern.

The LGD process is certainly a valuable first step to raise local issues, but how does the LGD find out what the local impacts of an operation are going to be in the absence of a forum that allows questions and answers? The local government written comments permitted by the LGD process are submitted by a representative of the local government itself under very short time frames. They do not constitute a means for the actual impacted citizens to express their concerns, concerns that may be very different from those raised by the LGD. Even if the LGD requests a hearing in front of the Commission, the likelihood of persons living 100, 200 or 300 miles from Denver being able to attend is low. The harmonious and complementary exercise of state and local authority solves this problem.

With respect to MOU's, there is strong support for exploring how these agreements can minimize conflicts or provide additional eyes on the ground. However, an MOU between the Commission and a county is not a substitute for the local public forum. Nor can the Commission through an MOU somehow become an effective regulator at the local level. The MOU process could certainly be used to delegate some Commission authority to local governments willing to undertake it. For example, Gunnison County's MOU with the Commission actually is restricted to the Commission delegating its inspection powers to Gunnison County; the County's oil and gas regulations remain in place.

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March 2, 2012
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Individual counties and municipalities may choose not to regulate some or all the impacts of oil and gas operations. However, as a matter of good governance and in keeping with court decisions, each local government should decide whether and what to regulate based on a clear understanding of the scope of regulatory authority that has been granted by the legislature and confirmed by the courts.

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Following is a summary of the scope of county regulatory authority over the impacts of oil and gas development and an assessment of the validity of different types of regulations. The different types of county regulations assessed below are color-coded: **green** indicates types of local land use regulations that are not per se preempted by state law; **orange** indicates types of local land use regulations that may or may not be enforceable; and **red** indicates types of local land use regulations that would be preempted by state law and therefore, not enforceable. The oil and gas industry has a history of challenging local regulations.

CAN COUNTIES REGULATE OIL AND GAS DEVELOPMENT?

Yes. Counties can regulate the impacts of oil and gas development in the same way they regulate any other development through land use permits and regulations that are within the scope of their ordinary land use authority delegated by the Colorado General Assembly.

Local governments have a legally protected interest in enacting and enforcing their land use regulations governing the surface effects of oil and gas operations.[1]

County regulations are presumed to be valid. The party challenging local regulations has the burden of proving their invalidity beyond a reasonable doubt.[2] To win on a facial challenge to county regulations, the challenger would have to show that there is no possible set of conditions that the county could place on a permit that would not conflict with state law. [3]

WHAT IS THE SOURCE OF COUNTY AUTHORITY TO REGULATE IMPACTS OF OIL AND GAS DEVELOPMENT?

The authority to regulate impacts of oil and gas development is derived from county land use authority delegated by the Colorado General Assembly. Colorado law delegates broad authority to counties to regulate the use and development of land within their jurisdiction. The County Planning Code [4]grants counties the power to "provide for the physical development of the unincorporated territory within the county and for the zoning of all or any part of such unincorporated territory."[5] Under this statute, county authority includes the power to address

[1] Bd. of County Comm'rs of La Plata County v. Colorado Oil and Gas Conservation Commission, 81 P.3d 1119, 1124 (Colo.App. 2003).
[2] Sellon v. City of Manitou Springs, 745 P.2d 229, 232 (Colo. 1987).
[3] California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580, 107 S.Ct. 1419, 1424, 94 L.Ed.2d 577 (1987).
[4] C.R.S. §§ 30-28-101 to 137.
[5] C.R.S. § 30-28-102.

the distribution of land development and utilization.[6] A county also has the authority to adopt a zoning plan that regulates, among other things, "the uses of land for trade, industry, recreation, or other purposes."[7]

The Local Government Land Use Control Enabling Act[8] gives local governments the authority to regulate development and activities in hazardous areas, to protect land from activities that would cause immediate or foreseeable material damage to wildlife habitat, to preserve areas of historical and archaeological importance, to regulate the location of activities and development which may result in significant changes in population density, to provide for the phased development of services and facilities, to regulate land use on the basis of its impact on the community or surrounding areas, and to otherwise plan for and regulate land use so as to provide for the orderly use of land and the protection of the environment consistent with constitutional rights. [9]

WHEN DOES STATE LAW PREEMPT COUNTY REGULATIONS?

County regulations that apply to impacts of oil and gas development are preempted by the Colorado Oil and Gas Conservation Act (COGCA) and Colorado Oil and Gas Conservation Rules (COGCC Rules) if the COGCA expressly says so, or when the operational effect of those regulations results in an operational conflict with the application of state requirements.[10]

Express Preemption

The COGCA expressly preempts local governments from charging an oil and gas operator for the cost of the county to inspect operations regulated by the COGCC.[11] Because of this provision the Gunnison County District Court struck down a county permit condition that sought to charge an operator for the cost of inspections. [12]

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[6] C.R.S. § 30- 28-115(1).
[7] C.R.S. § 30-28- 111(1).
[8] C.R.S. §§ 29-20-101 to 107.
[9] C.R.S. § 29-20-104(1); Bd. of County Comm'rs of La Plata County v. Bowen/ Edwards Associates, Inc., 830 P.2d 1045, 1056 (Colo. 1992) ("Bowen/Edwards").
[10] Bowen/ Edwards at 1055-58.
[11] C.R.S. § 34-60-106(15).
[12] Order on Plaintiff's Motion for Partial Summary Judgment As It Relates to the Fourth Claim for Relief and Defendant's Motion to Dismiss or in the Alternative Partial Summary Judgment, (September 16, 2011), Dist. Court Gunnison County, 2011 CV 127, pg 6 ¶4.

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The 2007 Amendments to COGCA Preserve Local Authority

Generally speaking any county regulations can be *impliedly* preempted when the state's interest is so dominant that it "occupies the entire field" of regulation. However, COGCC's interest in oil and gas activities is not so dominant, nor do the interests of state and county regulation of oil and gas activities conflict as to impliedly preempt county authority to regulate the development and operation of such activities. [13]

COGCC and industry representatives argue that the 2007 amendments to COGCA have over-ruled *Bowen/Edwards* so that now local regulation of impacts to wildlife, water quality, or other new areas of COGCC regulation are preempted. This conclusion cannot be true in light of the "savings provision" in the 2007 amendments. The amended COGCA states that "[n]othing in this section shall establish, alter, impair, or regulate the authority of local and county governments to regulate land use related to oil and gas operations."[14]

Even the COGCC recognizes that local regulations apply unless the local regulations *cause an operational conflict* with state requirements. COGCC Rule 201 states: "Nothing in these rules shall establish, alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations, so long as such local regulation is not in operational conflict with the Act or regulations promulgated thereunder."

What is an Operational Conflict?

A county regulation that applies to oil and gas operations is preempted when "the operational effect of the county regulation conflicts with the state statute or regulation."[15] "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest."[16]

Industry representatives and state regulators sometimes argue that entire categories of local regulations are preempted under a theory of operational conflict. ***There is no case law that says this***. In fact, courts repeatedly and consistently say that whether there is an operational conflict must be determined on a case-by-case basis, and requires a fully-developed evidentiary

[13] Bowen/Edwards at 1057.
[14] C.R.S. § 34-60-128(4).
[15] Bowen/Edwards *at* 1059.
[16] *Id.* (citing National Advertising Company v. Department of Highways, 751 P.2d 632, 636 (Colo. 1988)).

record. [17]

CAN COUNTIES REGULATE THE SAME SUBJECT MATTER AS THE COLORADO OIL AND GAS CONSERVATION COMMISSION (COGCC)?

Yes. Regulations that address the same subject matter as state regulations are *not* automatically preempted. Unless the local regulation would result in an operational conflict with the statutes and rules, county regulations and the state rules addressing the same subject matter may co-exist.[18] According to the Colorado Supreme Court, legislative intent to preempt local control over certain activities cannot be inferred merely from enactment of state statutes addressing certain aspects of those activities. [19] If a county offers waivers from standards or opportunities to modify standards that might cause an operational conflict with state requirements, an operational conflict would be unlikely.

CAN COUNTIES BAN ALL OIL AND GAS OPERATIONS?

Probably not. A ban on all oil and gas development within the county would be problematic because the Supreme Court said that the state's interest in efficient development and production of oil and gas preempts a local government from completely excluding oil and gas operations. [20] [Note, however, that the Supreme Court does not say that bans always are preempted. The Supreme Court found that "local land use ordinances banning an activity that a statute authorizes an agency to permit are subject to heightened scrutiny in preemption analysis."[21] That means that the court will look very, very carefully at the reason for a ban on oil and gas operations.]

CAN COUNTIES BAN OIL AND GAS OPERATIONS FROM CERTAIN ZONING CLASSIFICATIONS OR AREAS OF THE COUNTY?

Maybe (at least on non-federal lands.) There are no cases that answer this question directly. Counties have broad land use authority, and courts presume that zoning ordinances are

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[17] *Id.;* Bd. of County Comm'rs of Gunnison County v. BDS International, 159 P.3d 773 (Colo.App. 2006) ("BDS").
[18] Colorado Mining Association v. Bd. of County Comm'rs of Summit, 199 P.3d 718, 725 (Colo. 2009)("Colorado Mining Association"); BDS at 779.
[19] Bowen/Edwards at 1058.
[20] Voss v. Lundvall Bros., 830 P.2d 1061, 1069 (Colo. 1992); Colorado Mining Association, 199 P.3d 718 (Colo. 2009).
[21] *Id.* at 725.

valid.[22] Listing permitted and prohibited uses in various zoning districts is a classic local zoning function. The court has left the door open for the possibility that activities could be prohibited in some, but not all, zoning districts: in the Colorado Mining Association case, the Supreme Court said that county planning authority "probably does not include the right to ban uses from all zoning districts."[23]

With directional drilling, operators can access mineral reserves from nearby properties, so prohibiting oil and gas operations in a particular zoning category, such as residential, may be feasible. A problem would arise, however, if the zoning prevented an oil and gas operator from accessing its oil and gas reserves altogether. This would be challenged either as a regulatory taking, and/or as an operational conflict because it arguably would impede the state interest in oil and gas development.

An alternative to prohibiting oil and gas development in certain zoning districts would be to allow a variance from zoning restrictions on oil and gas development where it would be impossible to access oil and gas reserves. Another alternative would be to allow oil and gas operations anywhere under a special use permit, subject to regulatory standards and requirements designed to ensure that impacts of the operation to adjacent uses, the environment, and the community were mitigated.

CAN COUNTIES REQUIRE PERMITS FOR OIL AND GAS OPERATIONS THAT TAKE INTO ACCOUNT CONSISTENCY WITH THE COMPREHENSIVE PLAN, COMPATIBILITY WITH ADJACENT USES, IMPACT ON PUBLIC SERVICES, TRAFFIC, POLLUTION, LANDSCAPING, AND SIMILAR FACTORS WHEN REVIEWING AN OIL AND GAS OPERATION?

Yes. Courts have upheld county special use permit requirements setting out standards for granting or denying special use permits that address consistency with the comprehensive plan, compatibility with adjacent uses, impact on county services, traffic, environmental impacts, and related standards for mining activities. Because state oil and gas regulations do not displace local authority over oil and gas impacts, land use permits applied to oil and gas also are not pre-empted, assuming that the application of the local standards and requirements do not create an operational conflict with state oil and gas requirements.[24]

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[22] *Id.* at 730.
[23] *Id.* at 731.
[24] C & M Sand and Gravel v. Bd. of County Comm'rs of Boulder County, 673 P.2d 1013 (Colo.App. 1983); Town of Frederick v. North American Resources Company, 60 P.3d 758, 766 (Colo.App. 2002) ("Town of Frederick"); BDS at 778.

Note that in *Town of Frederick v. North American Resources Company,* the Court of Appeals stated that the Town's setback, noise abatement, and visual impact provisions were in operational conflict with (i.e. "contrary to") state requirements.[25] However, the court did NOT rule that *all* regulation of those subjects is preempted; the court focused its inquiry on the particular regulatory provisions of the Frederick land use code. The determination of whether a setback, noise abatement, or visual impact provision is preempted must be based on a case-by-case analysis under the operational conflict test.

CAN COUNTIES REGULATE THE "TECHNICAL ASPECTS" OF OIL AND GAS OPERATIONS?

Maybe. There is a widely circulated opinion that local governments cannot regulate the "technical aspects" of oil and gas drilling, pumping, plugging, waste, safety, and environmental restoration of wells.

However, there is no case that states that all local regulation of the "technical aspects" of oil and gas drilling is preempted. **Whether local regulations addressing technical aspects of oil and gas regulations are valid should be based on the "operational conflicts" test, determined after an evidentiary hearing.**

The Court of Appeals upheld a determination by the trial court that the Town of Frederick's setback, noise abatement, and visual impact provisions were preempted because they were "technical conditions" in operational conflict with state regulations.[26] However, the "technical aspect conflict theory" is based on a hypothetical situation given by the Colorado Supreme Court in *Bowen/Edwards* as an example of when an operational conflict between a county regulation and state laws might arise.

It is critically important to read precisely what the Supreme Court actually said on the issue:

> . . . there may be instances where the county's regulatory scheme conflicts in operation with the state 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 or land restoration requirements contrary to state law. **To the extent that such operational conflicts might exist, the county regulations must yield to**

[25] Town of Frederick at 765.
[26] *Id.*

> **the state interest. Any determination that there exists an operational conflict between the county regulations and the state. . .scheme, however, must be resolved on an ad-hoc basis under a fully developed evidentiary record**."[27]

Note that if a county tries to directly regulate the drill casing, fluids injected, process, etc., arguably it may be regulating in an arena where it has no authority because regulation of these aspects of oil and gas are not really *land use* regulations. Regulation of the land use impacts caused from these processes, however, would be within the scope of county authority.

CAN COUNTIES BAN FRACKING?

Probably not. There are no cases that establish whether local governments are allowed to ban fracking. However, whenever a local government interferes with a particular technology applied by an industry, it begs legal challenges. For example, when Summit County tried to ban the use of cyanide in mining, the Colorado Supreme Court said that the ban would impermissibly conflict with the state Mined Land Reclamation Act because the Mined Land Reclamation Board had the authority to authorize and comprehensively regulate the use of chemicals. The Summit County ban was preempted because it impeded the goals of the Mined Land Reclamation Act, it was inconsistent with the state regime for designated mining operations, and the county prohibited what the state had authorized. The court expressed concern that the ban would prohibit recovery of minerals in areas where using cyanide could be conducted in an environmentally protective manner. The Mined Land Reclamation Act is different from the COGCA, but the analysis applied by the courts would be similar when analyzing a ban on fracking. The Supreme Court noted that Summit County retains authority to exercise its delegated land use authority.

The better course of action is to regulate the impacts caused by the use of the technology instead of banning the technology altogether.

CAN COUNTIES REGULATE THE WATER QUALITY IMPACTS OF OIL AND GAS OPERATIONS?

Yes, counties have authority to protect water quality of surface water supplies. The industry takes the position that the Colorado Water Quality Control Act preempts local regulation of water quality impacts to water supplies. Courts disagree with this position. "Protection of water supplies is a matter of both state and local concern and may be regulated by local

[27] Bowen/Edwards at 1060.

governments. [28]

Can Counties Regulate Point Source Discharges?

No, counties cannot regulate point source discharges. Because the Water Quality Control Division is "solely responsible for the issuance and enforcement of permits authorizing point source discharges into surface waters of the state affected by such discharges," [29] a county ordinance requiring a *point source discharge permit* for an oil and gas development activity would be preempted.

Can Counties Regulate Non-Point Source Discharges?

Yes, counties can regulate non-point source discharges. County imposition of conditions or requirements such as erosion control and sediment control to prevent or minimize non point source discharges are not per se preempted. The industry argues that the CWQCA requires the Water Quality Control Commission and Water Quality Control Division to recognize the water quality responsibilities of the COGCC to apply water quality standards through its own program. This requirement is found C.R.S. § 25-8-202(7)("SB 181").

However, SB 181 makes no mention of and does not apply to local government regulation. It involves communication and clarification of lines of authority among state agencies. In addition, non-point source pollution is not directly addressed by the CWQCA because non-point pollution is associated with land use activities, an area typically regulated by local governments.[30]

Can Counties Require Operators to Prevent Significant Degradation to Water Quality?

Yes, counties can require oil and gas operators to prevent significant degradation to surface water quality because this goal is complementary to, and not in conflict with, state regulation for water quality control. Such a requirement would not on its face "materially impede or destroy" state interests in balancing the protection of public health and safety with orderly development of oil and gas. The Court of Appeals and the Gunnison County District Court

[28] Town of Carbondale v. GSS Props., LLC, 144 P.3d 53 (Colo.App. 2005) [reversed on other grounds, 169 P.3d 675].
[29] CWQCA, § 202(7)(b)(I).
[30] BDS at 780 (county drainage and erosion regulations promote the state's interest in protecting the land and topsoil without imposing conflicting requirements; evidentiary hearing required to determine whether there is operational conflict).

both rejected the industry's claim that Gunnison County's water quality standard was preempted on its face and that an evidentiary hearing would be required to determine if there was an operational conflict between the County standard and COGCC Rules.[31]

Can Counties Require Information Required by Other Entities?

Yes, county regulations requiring an entity to provide water quality information that it must also provide to other regulators, to disclose the results of monitoring it is doing for other regulators, or to explain the extent of mitigation it is proposing to perform as a result of other permitting should not create an operational conflict.

Can Counties Regulate Impacts to Drinking Water Supplies?

Yes, county regulation of impacts of oil and gas operations to drinking water supplies should be valid unless they are in operational conflict with specific state requirements.

The industry argues that regulation of surface water drinking water supply is preempted by state water quality rules, 5 CCR 1002-31 and -38; ground water drinking water supply protection is preempted by Colorado Water Quality Control Act ("CWQCA"), 5 CCR 1002-42; and that protection of designated public water supply segments is preempted by COGCC Rules.

There are many strong arguments, however, that support a role for local regulations to protect drinking water. For example:

- Water Quality Control Division has a Source Water Assessment and Protection (SWAP) program, approved by EPA, that specifically envisions a shared regulatory approach for source water protection.[32] The intent of this program is for local governments to create source water protection plans.

- The Water Quality Control Division has entered into at least one Memorandum of Agreement with a land use agency (the US Forest Service) to protect public sources of water supply.[33] Again, this is evidence that the Division intends to share responsibility for protecting drinking water sources.

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[31] *Id.;* Order on Cross Motions for Summary Judgment (January 3, 2012), Dist. Court Gunnison County, 2011 CV 127 ("Order"), *pg 5* ¶3
[32] http://www.cdphe.state.co.us/wq/sw/pdfs/-toc-sum.pdf.
[33] http://www.cdphe.state.co.us/wq/sw/pdfs/-CDPHE_USFS_pdfs/USFS_CDPHE_MOU_Final_1009.pdf.

- Regardless of how specific the state agency regulations are, given that the courts have found, repeatedly, that local and state government share an interest in and authority for protecting water quality, it is unlikely that a court would find preemption of any **county ordinance that seeks information about where an activity that may affect water resources or public health is occurring, the nature of the water resources that may be affected, and the protections (i.e., mitigation) that the developer is proposing to protect the resource.**

Can Counties Impose Setbacks from Waterbodies Greater than COGCC Setbacks?

Maybe counties can impose setbacks from waterbodies greater than COGCC setbacks. The Gunnison County District Court found that a greater setback, on its face, was *not* preempted unless the operator establishes in an evidentiary hearing that such a setback would materially impede or destroy the state interest.[34] Several counties have adopted greater setback requirements.

COGCC Rules require a 300 foot setback only for designated public water supply segments. The industry and COGCC argue that a county is preempted from imposing additional setbacks, either for water bodies that are not public water supply segments, or for more than 300 feet. The District Court in Gunnison County rejected a claim that Gunnison County's setback from all water bodies in the County was preempted on its face. An evidentiary hearing would be required to determine if the County setback was in operational conflict with COGCC Rules.[35] Neither the Court of Appeals nor the Colorado Supreme Court has ruled on this question.

Can Counties Regulate the Injection of Fracking Fluids into Aquifers?

No, federal law would preempt county regulation of injection of contaminants into aquifers during fracking. Counties cannot regulate the injection of fracking fluids. Protection of underground drinking water supplies is preempted by the Safe Drinking Water Act and regulation of injection of fracking fluids beyond benzene, in particular, is preempted by federal Energy Policy Act of 2005.

Can Counties Require the Installation of Monitoring Wells as a Condition of Permit Approval?

Yes, counties can require monitoring of wells unless the requirement creates an operational

[34] Order, pg 5 ¶2; BDS at 780.
[35] Id.

conflict with COGCC Rules.

CAN COUNTIES REGULATE IMPACTS OF OIL AND GAS DEVELOPMENT ON WILDLIFE HABITAT?

Yes. County regulation of impacts to wildlife habitat of oil and gas operations should be valid so long as they do not create an operational conflict with State requirements. Counties have express statutory authority to control the impacts of development on wildlife habitat under the Local Government Land Use Control Enabling Act[36] and Areas and Activities of State Interest ("1041")[37].

The industry argues that the amended COGCC Rules that establish wildlife habitat protection standards preempt all local regulation of oil and gas wildlife impacts. However, the Gunnison County District Court recently upheld Gunnison County's wildlife habitat regulations against a facial challenge by the oil and gas industry. The court ruled that it is not clear that these regulations would operationally conflict with state regulations, and that an evidentiary hearing would be required to make that determination.[38]

CAN COUNTIES REGULATE OIL AND GAS ACTIVITIES OCCURRING ON STATE LAND BOARD LANDS?

Yes. Counties have the authority to regulate oil and gas activities on State Land Board lands. The Colorado Supreme Court has upheld county zoning authority over state lands.[39] There is no reason that the analysis would be different for oil and gas operations.[40]

CAN COUNTIES IMPOSE NOISE REGULATIONS ON OIL AND GAS OPERATIONS?

No. The County Powers Statute does not allow counties to regulate noise impacts caused by oil and gas operations.[41]

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[36] C.R.S. §§ 29-20-101 to 107.
[37] C.R.S. 24-65.1-101 *et seq.*
[38] Order, pg 5 ¶3.
[39] Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation Bd., 809 P.2d 974, 982-85 (Colo. 1991).
[40] Bowen/Edwards at 1058.
[41] C.R.S. § 30-15-401(1)(m)(II)(B).

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CAN COUNTIES REQUIRE FINANCIAL GUARANTEES?

According to the Court of Appeals, counties cannot require financial guarantees that duplicate or conflict with the state regulations' financial cap.[42]

Counties may be able to require financial requirements to ensure compliance with county permit conditions.

CAN COUNTIES REQUIRE THAT AN OIL AND GAS OPERATOR GIVE THE COUNTY ACCESS TO RECORDS?

No, according to the Court of Appeals, counties cannot require access to records because "the state statute and rule exclude the county by omission as an entity authorized to inspect the records" that the COGCC requires to be kept.[43]

[42] BDS at 779.
[43] *Id.*