

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

v.

Defendant: COUNTY OF BOULDER,
COLORADO

Defendant: THE BOARD OF COUNTY
COMMISSIONERS OF BOULDER
COUNTY.

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Case No.

Complaint for Declaratory and Injunctive Relief

INTRODUCTION

1. Half a decade ago, Boulder County's Board of County Commissioners imposed a moratorium on all new applications for oil or gas development in the County (the "Moratorium").

2. The Board has extended or re-imposed the Moratorium a total of eight times, and the Moratorium has been in place continuously since 2012, for a total of over five years.

3. The Moratorium is contrary to clearly established state law. Last year, the Colorado Supreme Court unanimously determined that local governments lack the authority to ban oil and gas development within their borders. *City of Longmont v. Colo. Oil & Gas Ass'n*, 2016 CO 29, 369 P.3d 573 (Colo. 2016) (striking down a permanent ban on oil and gas production involving the common practice of hydraulic fracturing); *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 2016 CO 28, 369 P.3d 586 (Colo. 2016) (striking down a five-year moratorium on hydraulic fracturing that had been in effect for less than two and a half years).

4. In *Longmont* and *Fort Collins*, the court held that the Colorado Oil and Gas Conservation Act (the "Act") expresses and embodies the State's interest in both the statewide development of oil and gas resources and the "uniform regulation" of oil and gas activities. *Fort Collins*, ¶¶ 27–29; *Longmont*, ¶¶ 50–53.

5. The Act thus facially preempts local bans on oil and gas development.

6. In *Fort Collins*, the court held that even a temporary five-year moratorium, which by the time of the court's ruling had been in place for only two and a half years, "materially impedes the effectuation of the state's interest in the efficient and responsible development of oil and gas resources" by "render[ing] the state's statutory and regulatory scheme superfluous, at least for a lengthy period of time." *Fort Collins*, ¶ 30.

7. Despite the Colorado Supreme Court's 2016 rulings, the Board has continued to impose its Moratorium and has even extended it.

8. Boulder's Moratorium has been in place twice as long as was the temporary ban on hydraulic fracturing that the court struck down in *Fort Collins*.

9. No other local government in Colorado is currently attempting to ban new oil and gas development.

10. Because Boulder's continuing Moratorium, on its face, defies the Colorado Supreme Court's rulings and is preempted by state law, the State seeks declaratory and injunctive relief invalidating and enjoining enforcement of the Moratorium.

PARTIES

11. The Plaintiffs are the People of Colorado ex rel. the Attorney General and the State of Colorado, represented by the Office of the Attorney General, located at 1300 Broadway, 10th Floor, Denver, Colorado 80203.

12. The Defendants are the County of Boulder, Colorado ("County"), and its governing body, the Board of County Commissioners ("Board"). The Board's office is located at 1325 Pearl Street, Boulder, Colorado 80302.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction because the events complained of occurred in Colorado and the resolution of this dispute requires the application of Colorado law. Colo. Const. art. VI, § 9(1).

14. Under §§ 13-51-101 to -115, C.R.S., and C.R.C.P. 57, this Court may declare the parties' respective rights, status, and other legal relations.

15. The Court has personal jurisdiction over the Defendants. § 13-1-124(1), C.R.S.

16. Venue is proper pursuant to C.R.C.P. 98(b)(2) and (c).

17. All necessary parties are before the Court pursuant to C.R.C.P. 57(j), an actual and justiciable controversy exists regarding the parties' respective rights, and a declaratory judgment will terminate the controversy giving rise to this proceeding.

GENERAL ALLEGATIONS

I. Because State Law Embodies an Interest in the Efficient and Responsible Development of Oil and Gas Resources, Local Laws Banning Oil and Gas Development Are Preempted.

18. The State of Colorado has a strong interest in efficient, equitable, and responsible development and production of oil and gas resources within the State. *Fort Collins*, ¶¶ 27–30; *Longmont*, ¶¶ 24–25, 53.

19. Effectuating these state-level policies requires uniform regulation of all aspects of oil and gas operations and development. *Fort Collins*, ¶ 29; *Longmont*, ¶¶ 22–26, 53.

20. Accordingly, the General Assembly has enacted the Colorado Oil and Gas Conservation Act (“Act”), §§ 34-60-101 to -130, C.R.S., to regulate all aspects of oil and gas development and operations within the State.

21. The intent and purpose of the Act is “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.” § 34-60-102(1)(b), C.R.S.

22. As authorized by the Act, the State, through its administrative agencies, has promulgated comprehensive regulations governing the development of oil and gas resources and operation of oil and gas activities in Colorado. *Fort Collins*, ¶¶ 28–29; *Longmont*, ¶¶ 51–52.

23. The Act and its implementing regulations contain substantive and technical requirements relating to all aspects of oil and gas development and operations. *Fort Collins*, ¶¶ 28–29; *Longmont*, ¶¶ 51–52.

24. The Act and its implementing regulations include substantive and technical requirements governing new development of oil and gas resources.

25. The regulations provide opportunities for local governments to participate in state permitting decisions through Local Governmental Designees, which can influence and collaborate in oil and gas development, including by receiving advance notice of permit applications and by providing comments regarding permits. *See, e.g.*, Colorado Oil and Gas Conservation Commission Rule 100, 214, 216(d), 305A, 305.

26. Local laws that operationally conflict with the Act are preempted. *Fort Collins*, ¶ 21; *Longmont*, ¶ 42.

27. This includes local laws that ban oil and gas development either permanently or for a “limited duration.” *Fort Collins*, ¶¶ 3, 30, 34; *Longmont*, ¶¶ 4, 53–54.

II. The County Initiated the Moratorium in Early 2012 and Has Repeatedly Extended It Year After Year.

28. Beginning in 2012 and continuing through today, the Board has enforced its Moratorium on all new applications for oil and gas development activities within the unincorporated territory of the County.

- a. The Moratorium is not merely a regulation, but a prohibition on oil and gas development activities.
- b. The Board's stated justification for the five-year Moratorium is a purported need to update County oil and gas regulations.
- c. But in the past five years, the Board has never implemented updated regulations. It has instead repeatedly extended the Moratorium and delayed its rulemaking.

29. On February 2, 2012, the Board adopted Resolution 2012-16, which first imposed the Moratorium.

- a. The resolution directed the County Land Use Department "not to accept, process, or approve any applications" for oil or gas development. Ex. A at 4 (Resolution 2012-16).
- b. It was effective immediately and was originally set to expire six months later, on August 2, 2012. *Id.*

30. Three months later, on May 1, 2012, the Board adopted Resolution 2012-46, which extended the Moratorium for six months, through February 4, 2013. Ex. B at 3-4 (Resolution 2012-46).

- a. The Board claimed that this extension was "necessary to appropriately amend" the County's regulations. *Id.* at 3.
- b. Staff proposed amendments to County oil and gas regulations, and the Board adopted those amendments in

December 2012, to take effect on the termination of the Moratorium. Ex. C (Resolution 2012-142).

- c. Because the Board continued to extend the Moratorium, the amended regulations never went into effect.

31. On February 5, 2013, the Board adopted Resolution 2013-18, which again extended the Moratorium, this time for approximately four months, through June 10, 2013. Ex. D at 5 (Resolution 2013-18).

- a. The Board claimed that the extension was necessary “to allow the staff sufficient time to prepare to accept applications under the new regulations.” *Id.* at 4.

32. On June 11, 2013, the Board adopted Resolution 2013-50, once again extending the Moratorium, through June 24, 2013. Ex. E at 2 (Resolution 2013-50).

33. Less than two weeks later, on June 20, 2013, the Board adopted Resolution 2013-55.

- a. This time, the Board extended the Moratorium for *18 additional months*, through January 1, 2015. Ex. F at 10 (Resolution 2013-55).
- b. The Board asserted as justification for the 18-month extension that the County’s updated regulations—which had never gone into effect—“may not be sufficiently comprehensive or restrictive” and that “further delay ... is reasonable, appropriate, and necessary” to make “regulatory amendments.” *Id.* at 5, 8.

34. Then, on November 25, 2014, the Board adopted Resolution 2014-88, extending the Moratorium—which the Board still described as “temporary”—for an additional *three-and-a-half years*, through July 1, 2018. Ex. G at 2 (Resolution 2014-88).

- a. The Board once again claimed that the extension was required to allow continued consideration of additional local regulations. *Id.* at 1–3.
- b. The Board acknowledged that the “final disposition of [*Longmont* and *Fort Collins*] could affect local authority to regulate oil and gas development.” *Id.* at 1.

III. In 2016, While Boulder’s Moratorium Was Still in Effect, the Colorado Supreme Court Determined that Local Governments Cannot Ban Oil and Gas Development.

35. On May 2, 2016, the Colorado Supreme Court issued its opinions in *City of Longmont* and *City of Fort Collins*, holding that local bans on oil and gas development are preempted.

36. In *Longmont*, the Supreme Court held that a permanent ban on hydraulic fracturing, a well stimulation technique used in the vast majority of wells in Colorado, “materially impede[d] the application of state law, namely, the Oil and Gas Conservation Act and the regulations promulgated thereunder” and was preempted. ¶ 54.

37. The court explained that “a local ordinance that ... forbids what state law authorizes will necessarily satisfy” the “materially impedes” standard. *Id.* ¶ 42.

38. Because local moratoriums on oil and gas development forbid what state law authorizes, they materially impede the application of state law and are preempted. *Id.* ¶ 53.

39. In *Fort Collins*, the Supreme Court held that Fort Collins’ five-year moratorium on hydraulic fracturing, which by then had been in effect for less than two and a half years, was preempted because it “render[ed] the state’s statutory and regulatory scheme superfluous, at least for a lengthy period of time” by preventing operators who complied with State law from engaging in oil and gas development. ¶ 30.

40. The Court held that the temporary moratorium “materially impede[d] the effectuation of the state’s interest in the efficient and responsible development of oil and gas resources.” *Id.*

41. The court rejected the argument that the Fort Collins moratorium was only a “temporary ‘time-out’” that would allow the city “to study the impact of [hydraulic fracturing] ... on public health.” *Id.* ¶¶ 31–32.

42. Even a temporary ban, the court held, “deleteriously affects what is intended to be a state-wide program of regulation” and “impedes the goals of the Oil and Gas Conservation Act.” *Id.* ¶ 37.

43. In both *Longmont* and *Fort Collins*, the court rejected the assertion that questions of preemption require factual development.

44. To the contrary, “in virtually all cases,” the preemption analysis requires only “a facial evaluation of the respective regulatory schemes, not a factual inquiry as to the effect of those schemes ‘on the ground.’” *Longmont*, ¶ 15; *see also id.* ¶ 55 (explaining that any “purported factual disputes” were “immaterial” because the only “material facts” involved a legal question, namely “the interplay between [the local ban] and state law”); *Fort Collins*, ¶ 38 (rejecting the claim that the “bare factual record” prevented the court from striking down the city’s temporary ban on hydraulic fracturing).

45. Both the City of Longmont and the City of Fort Collins immediately announced that they would comply with the Colorado Supreme Court’s rulings. Ex. H (Press Release, City of Longmont, *Colorado Supreme Court Overturns Longmont’s Fracking Restrictions* (May 2, 2016) (“The case did not end as the city hoped, but we respect the Supreme Court’s decision,’ Longmont Mayor Dennis Coombs said.”); Ex. I (Press Release, City of Fort Collins, *City of Fort Collins Evaluates Colorado Supreme Court Decision* (May 7, 2016)) (“The City has no further obligation under the moratorium in light of the Court’s action, meaning no City Council or other action is required.”).

IV. The Board Has Refused to Lift Its Moratorium Despite the Colorado Supreme Court's Decisions.

46. On May 19, 2016—two weeks after the *Longmont* and *Fort Collins* opinions were issued—the Board held a public hearing to discuss the decisions.

47. During the hearing, members of the Board criticized the State's legislative and regulatory efforts with respect to oil and gas development as inadequate.

48. But counsel for the Board said on the record: “[W]ere 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.”

49. Counsel for the Board nonetheless suggested that the Board could continue to impose its moratorium: “[W]e do think that there's some ability to—if you feel that the current regulations do need updating, ... to adopt a new moratorium, but, really, only for the period of time that is truly necessary to update our regulations.”

50. At the conclusion of the May 19 hearing, the Board adopted Resolution 2016-65, re-imposing the Moratorium with a new end date of November 18, 2016. Ex. J at 2 (Resolution 2016-65).

- a. Echoing a now-familiar refrain, the Resolution stated that “the County's current oil and gas regulations need to be updated.” *Id.*

51. On November 17, 2016, the Board once again extended its Moratorium.

- a. The Board adopted Resolution 2016-130, which extended the Moratorium for more than two months, until January 31, 2017. Ex. K (Resolution 2016-130).

- b. Two days earlier, on November 15, 2016, counsel for the Colorado Oil and Gas Conservation Commission testified at a public Board hearing that “[i]f the moratorium is extended, it would be contrary to the Supreme Court cases.”

52. On December 13, 2016, the Board voted to once again extend the Moratorium, this time for another three months until May 1, 2017. Ex. L at 1 (Resolution 2016-137).

- a. The stated justification was identical to that on which the County had relied for nearly five years—a purported need to update local regulations. *Id.*
- b. The Moratorium remains in place as of the date of this Complaint.
- c. The Moratorium has now been in effect for over five years, longer than the intended duration of the moratorium in *Fort Collins*, which was struck down after being in effect for less than two and a half years.

53. On January 26, 2017, the Attorney General sent a letter to the Board citing the Supreme Court’s decisions in *Longmont* and *Fort Collins* and stating that the County’s Moratorium “violates state law.” Ex. M at 1 (Letter from Cynthia H. Coffman, Attorney General, to Boulder County Commissioners (Jan. 26, 2017)).

- a. The letter further stated that the County must rescind its Moratorium or face legal action. *Id.* at 1–2.
- b. The Board responded with a letter justifying its ongoing Moratorium using the same rationale the County has relied on for over five years—a purported need to update local regulations. Ex. N (Letter from Ben Pearlman, Boulder County Attorney, to Cynthia Coffman (Jan. 27, 2017)).

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- c. The Board did not agree to rescind the Moratorium or provide assurance that it would not once again extend the Moratorium beyond its current end date of May 1, 2017.

CLAIM FOR RELIEF

(Declaratory Judgment and Injunction)

54. The State incorporates the above allegations by reference.

55. The Moratorium is preempted by the Act and its implementing regulations and is therefore unlawful and invalid.

56. The State seeks a declaratory judgment that the Moratorium is preempted.

57. The State seeks a permanent injunction enjoining the County and the Board from enforcing the Moratorium.

PRAYER FOR RELIEF

Based on the above allegations, the State respectfully requests that the Court

1. Declare that the County's Moratorium on oil and gas development is preempted by the Colorado Oil and Gas Conservation Act and its implementing regulations;
2. Permanently enjoin the enforcement of the Moratorium or the creation of any similar moratorium or restriction on new oil or gas development in Boulder County;
3. Enter judgment in favor of Plaintiffs and against the Defendants on all claims;
4. Award Plaintiffs costs under Colorado Rule of Civil Procedure 54(d); and
5. Award Plaintiffs any other relief that the Court deems just and reasonable.

Dated February 14, 2017.

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/s/Frederick R. Yarger

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