District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3771	
COLORADO OIL AND GAS ASSOCIATION, PLAINTIFF, **v.** **CITY OF LAFAYETTE COLORADO, DEFENDANT.**	
	Case Number: 13CV31746 Division 3 Courtroom G
ORDER GRANTING MOTION FOR SUMMARY JUDGMENT	

This matter comes before the Court on Plaintiff's Motion for Summary Judgment and the responsive pleadings thereto. The Plaintiff in this case is the Colorado Oil and Gas Association (COGA), an association of oil and gas operators, and the Defendant is the City of Lafayette, Colorado. After carefully considering the pleadings, the exhibits, the arguments of counsel, and the applicable law, the Court hereby enters the following Ruling and Order:

I. BACKGROUND

Voters in Lafayette voted to adopt Ballot Measure 300, which added Section 2.3 to Chapter II of the Lafayette City Charter (the "Charter Amendment"). This section bans all oil and gas extraction and related activities[1] within the City's boundaries. COGA's Complaint seeks a declaratory judgment that the Colorado Oil and Gas Conservation Act ("COGCCA") preempts the Charter Amendment and a permanent injunction enjoining the Charter Amendment.

II. STANDARD OF REVIEW

The purpose of summary judgment is to expedite litigation, avoid needless trials and assure speedy resolution of matters. *Crawford Rehabilitation Services Inc. v. Weissman*, 938 P.2d 540, 550 (Colo. 1997). However, summary judgment is a drastic remedy that may only be granted when the moving party demonstrates to the court that he is entitled to judgment as a matter of law. *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997).

The initial burden of establishing the nonexistence of a genuine issue of material fact rests on the moving party. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Once satisfied, the initial burden of production on the moving party shifts

[1] Except wells active and producing at the time the Charter Amendment was enacted.

to the nonmoving party, but the ultimate burden of persuasion always remains on the moving party. *Id*. If the moving party meets the initial burden, then the non-moving party must show "a triable issue of fact" exists. *Greenwood Trust Co.*, 938 P.2d at 1149. The opposing party may, but is not required to, submit opposing affidavits. *Bauer v. Southwest Denver Mental Health Ctr., Inc*., 701 P.2d 114, 117 (Colo. App. 1985).

Any doubt as to the existence of a triable question of fact must be resolved in favor of the non-moving party. *Greenwood Trust Co.*, 938 P.2d at 1149. Summary judgment is to be granted only if there is a complete absence of any genuine issue of fact, and a litigant should not be denied a trial if there is the slightest doubt as to the facts. *Pioneer Sav. & Trust, F.A. v. Ben-Shoshan*, 826 P.2d 421, 425 (Colo. App. 1992).

III. APPLICABLE LAW[2]

On June 8, 1992, the Colorado Supreme Court issued two important oil and gas opinions, *Cty. Comm'rs of La Plata Cty v. Bowen/Edwards Assoc. Inc.*, 830 P.2d 1045 (Colo. 1992) and *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992).

BOWEN/EDWARDS

In *Bowen/Edwards*, owners of oil and gas interests challenged regulations enacted by La Plata County, a statutory entity. The regulations stated purpose was:

> to protect and promote the health, safety, morals, convenience, order, prosperity or general welfare of the present and future residents of La Plata County. It is the County's intent by enacting these regulations to facilitate the development of oil and gas resources within the unincorporated area of La Plata County while mitigating potential land use conflicts between such development and existing, as well as planned, land uses.

Bowen/Edwards, 830 P.2d at 1050.

The county regulations required oil and gas operators to comply with an application process before drilling wells. *Id*. The applications were subject to approval by various levels of county government. *Id*. The *Bowen/Edwards* plaintiffs claimed the Oil and Gas Conservation Act conferred exclusive authority on the Colorado Oil and Gas Conservation Commission to regulate oil and gas activity throughout the state, thereby preempting the county regulations. *Id*. at 1051.

The Court of Appeals found the Oil and Gas Conservation Act completely preempted local land use regulation of oil and gas activity. *Id*. at 1055. The Supreme Court reversed. *Id*. at 1048.

The Supreme Court noted, "The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government." *Id*. at 1055. "There are three basic ways by which a state statute can preempt a county ordinance or regulation: first, the express language of the statute may indicate state

[2] The Court does not find support in Colorado law for the City's argument that Plaintiffs must prove the Charter Amendment is invalid beyond a reasonable doubt.

preemption of all local authority over the subject matter. . . second, preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest . . . and, third, a local law may be partially preempted where its operational effect would conflict with the application of the state statute." *Id*. at 1056-57.

The Court recognized the Commission's authority.

> By law, the Commission has the authority to "promulgate rules and regulations to protect the health, safety and welfare of the general public in the drilling, completion and operation of oil and gas wells and production facilities." Section 34-60-106(11), C.R.S. (1989 Cum. Supp.) The statute further provides that the grant to the Commission of any specific power shall not be construed to be in derogation of any of the general powers granted by the Act. Section 34-60-106(4) C.R.S. (1984 Repl. Vol. 14).

Id. at 1052.

However, the Supreme Court found the Oil and Gas Conservation Act does not expressly preempt any and all aspects of a county's land use authority in areas where there are oil and gas activities. *Id*. at 1058. Instead, the Court found the Act created "A unitary source of regulatory authority at the state level of government over the technical aspects of oil and gas development and production serves to prevent waste and to protect the correlative rights of common-source owners and producers to a fair share of production profits." *Id*.

Considering whether the second form of preemption, implied preemption, exists, the Court stated, "There is no question that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions and environmental restoration." *Id*. at 1058.[3] However, the Court found, "The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes." *Id*.

Examining the third form of preemption, the Supreme Court stated, "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." *Id*. at 1059. Based on the record before it, the court was unable to determine whether an operational conflict existed between the county regulations and the Oil and Gas Conservation Act, and remanded the case for the trial court to make that determination "on an ad-hoc basis under a fully developed evidentiary record." *Id*. at 1060. However, the Court also stated:

[3] This quote is followed by the statement, "Oil and gas production is closely tied to well location, with the result that the need for uniform regulation extends also to the location and spacing of wells." That statement reflects 1992 drilling practices. With today's technology, which makes horizontal drilling possible, well location and spacing are no longer as important as they were in 1992.

> We hasten to add that there may be instances where the county's regulatory scheme conflicts in operation with the state statutory or 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 those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.

Id.

VOSS

Voss v. Lundvall Bros., Inc. involved Greeley, a home rule city. *Voss*, 830 P.2d at 1062. Greeley enacted a land use ordinance that completely banned drilling in its city limits. *Id*. The ordinance was petitioned onto the November 1985 ballot and approved by the electorate at a regular municipal election. *Id*. at 1063. The Supreme Court reviewed the purposes of the Oil and Gas Conservation Act and the authority of the Commission and concluded, "There is no question that the Oil and Gas Conservation Act evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources. . ." *Id*. at 1065-66. The court also acknowledged the "interest of a home-rule city in land use control within its territorial limits." *Id*. at 1066.

> It is a well-established principle of Colorado preemption doctrine that in a matter of a purely local concern an ordinance of a home-rule city supersedes a conflicting state statute, while in a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city. Our case law, however, has recognized that municipal legislation is not always a matter of exclusive local or statewide concern but, rather, is often a matter of concern to both levels of government:

Id. (internal citations omitted).

In determining whether the state regulatory scheme preempts local ordinances, courts consider four factors: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Id*. at 1067 (internal citations omitted).

The Court found the first factor, the need for statewide uniformity, weighed heavily in favor of state preemption. *Id*. The boundaries of the subterranean pools containing oil and gas "do not conform to any jurisdictional pattern." *Id*. The Court found extraterritorial impact also weighed in favor of the state interest. *Id*. Limiting production to only the portion of the pool that does not underlie the city can increase production costs and may make the operation economically unfeasible. *Id*. at 1067-68. The Court determined that regulation of oil and gas development has "traditionally been a matter of state rather than local control." *Id*. at 1068. Finally, the Court observed, "the Colorado Constitution

neither commits the development and production of oil and gas resources to state regulation nor relegates land-use control exclusively to local governments." *Id*.

The Colorado Supreme Court determined that the Greeley ordinance was preempted by state law. The Court stated:

> Because oil and gas pools do not conform to the boundaries of local government, Greeley's total ban on drilling within the city limits substantially impedes the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste and that furthers the correlative rights of owners and producers in a common pool or source of supply to a just and equitable share of profits. In so holding, we do not mean to imply that Greeley is prohibited from exercising any land-use authority over those areas of the city in which oil and gas activities are occurring or are contemplated.

Id.

The Court made it clear that it was *not* saying there could be no land use control over areas where there are oil and gas operations; "if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect." *Id*. at 1069. The Court stated it resolved the case based on the "*total ban*" created by the Greeley ordinance. *Id*. (emphasis in the original).

APPLICATION OF BOWEN/EDWARDS AND VOSS BY THE COURT OF APPEALS

The Colorado Court of Appeals has applied the preemption analysis described above to determine whether local oil and gas regulations are preempted by state law.

In *Town of Frederick v North American Resources Company*, 60 P.3d 758, 760 (Colo. App. 2002), a town ordinance prohibited oil and gas drilling unless the operators first obtained a special permit. To obtain such a permit, the application had to conform to requirements in the ordinance. *Id*. The "requirements included specific provisions for well location and setbacks, noise mitigation, visual impacts and aesthetics regulation, and the like." *Id.* Defendant NARCO obtained a drilling permit from the Colorado Oil and Gas Conservation Commission and drilled a well without applying to the town for the special use permit. *Id.* The town filed suit to enjoin NARCO from operating the well and NARCO counterclaimed for declaratory judgment that the ordinance was unenforceable as preempted by state law. *Id.*

In an order on summary judgment, the trial court found some provisions of the ordinance were invalid because they were in operational conflict with specific rules promulgated by the Colorado Oil and Gas Conservation Commission. *Id*. at 764. However, it also found that some provisions were valid; for example provisions requiring permits for above-ground structures and provisions regarding access roads and emergency response costs were found to be valid. *Id.* The Court of Appeals held that the trial court did not err when it invalidated certain provisions of the Town's ordinance and upheld others. *Id*. at 766.

The Court of Appeals cited *Bowen/Edwards* for the proposition that, "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest. Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest." *Id*. at 761, *Bowen/Edwards*, 830 P.2d at 1059. It also cited *Voss* as follows:

> If a home-rule city, instead of imposing a total ban on all drilling within the city, enacts land-use regulations applicable to various aspects of oil and gas development and operations within the city, and if such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect.

Town of Frederick, 60 P.3d at 762, *Voss*, 830 P.2d at 1068-69.

The court cited this *Bowen/Edwards'* language:

> the efficient and equitable development and production of oil and gas resources within the state *requires uniform regulation of the technical aspects of drilling*, pumping, plugging, waste prevention, safety precautions, and environmental restoration. Oil and gas production is closely tied to well location, with the result that the *need for uniform regulation extends also to the location and spacing of wells.*

Town of Frederick, 60 P.3d at 763, *Bowen/Edwards*, 830 P.2d at 1058 (emphasis added by the Court of Appeals) to infer the following:

> The *Bowen/Edwards* court did not say that the state's interest 'requires uniform regulation of drilling' and similar activities. Rather, according to the court, it 'requires uniform regulation of *the technical aspects* of drilling' and similar activities. The phrase 'technical aspects' suggests that there are "nontechnical aspects" that may yet be subject to local regulation

Town of Frederick, 60 P.3d at 763.

The Court of Appeals agreed with the trial court that certain provisions of the ordinance were not enforceable.

> The operational conflicts test announced in *Bowen/Edwards* and *Voss* controls here. Under that test, the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the state interest.

Id. at 765.

The court concluded, "Thus, although the Town's process may delay drilling, the ordinance does not allow the Town to prevent it entirely or to impose arbitrary conditions that would materially impede or destroy the state's interest in oil and gas development." *Id*. at 766.

Similarly, in *Cty. Comm'rs of Gunnison Cty v. BDS International, LLC,* 159 P.3d 773, 777 (Colo. App. 2006), the trial court issued an order on summary judgment in which it found numerous, but not all, county oil and gas regulations invalid as preempted by state law. The Court of Appeals affirmed the invalidation of county regulations concerning fines, financial guarantees, and access to records because they operationally conflict with state statutes or regulations. *Id*. at 785. It reversed and remanded the remaining county regulations invalidated by the trial court "so that the finder of fact may determine whether those County Regulations that do not, on their face, operationally conflict with state law nonetheless are in operational conflict with state law in the circumstances presented here." *Id*.

In an unpublished opinion, *Town of Milliken v. Kerr-Mcgee Oil and Gas Onshore LP*, 2013WL1908965, the Court of Appeals found that C.R.S. § 34-60-106(15), part of the Oil and Gas Conservation Act, prohibited the town from imposing fees for safety and security inspections on active oil and gas wells. *1. That statute prohibits local governments from imposing inspection fees on oil and gas companies "with regard to matters that are subject to rule, regulation, order, or permit condition administered by the commission" except for "reasonable and nondiscriminatory fee[s] for inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes." *3. The town did not claim its inspections were within the exception in the statute. *Id*. Instead, it claimed its inspections were different from those conducted by the Commission. *Id*. The court stated, "it is irrelevant whether the Commission actually conducts inspections like those performed by the Town's police department. The relevant inquiry is whether the Town's inspections concern 'matters that are subject to rule, regulation, order, or permit condition administered by the commission.'" *Id.*

CASES INVOLVING REGULATIONS THAT PROHIBIT WHAT THE STATE PERMITS

COLORADO MINING ASSOCIATION V. SUMMIT COUNTY

The Colorado Supreme Court discussed preemption in *Colorado Mining Association v. Cty. Comm'rs of Summit Cty.*, 199 P.3d 718 (Colo. 2009). Summit County invoked its statutory land use authority to adopt an ordinance that banned the use of toxic or acidic chemicals, such as cyanide, in all mineral processing in the county. *Id*. at 721. "The effect of this ordinance is to prohibit a certain type of mining technique customarily used in the mineral industry to extract precious metals, such as gold." *Id.*

The Court noted that the General Assembly decided to allow the Mined Land Reclamation Board ("the Board") to authorize the use of toxic or acidic chemicals, "under the terms of an Environmental Protection Plan designed for each operation sufficient to protect human health, property, and the environment." *Id.* The Court found "Summit County's ordinance would entirely displace the Board's authority to authorize the use of such mining techniques." *Id.* The Court concluded, "Summit County's existing

ordinance is not a proper exercise of its land use authority because it excludes what the General Assembly has authorized. Due to the sufficiently dominant state interest in the use of chemicals for mineral processing, we hold that the MLRA [Mined Land Reclamation Act] impliedly preempts Summit County's ban on the use of toxic or acidic chemicals, such as cyanide, in all Summit County zoning districts." *Id.*

The Court observed, "a patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources." *Id*. at 731.

The City maintains this case is inapplicable to its case because it interpreted a different statute. The Court finds this case is applicable here because it discussed the same preemption principles this Court must apply in this case, even though the controversy arose in the context of a different statute.

WEBB V. BLACK HAWK

Last year, the Colorado Supreme Court again addressed preemption in the case of *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013). Black Hawk, a home-rule city, adopted an ordinance that banned bicycling from outside the city into the city; it banned bicycling through the city. *Id.* at 482. C.R.S. § 42-4-109(11) permits local governments to ban bicycles on roads if there is an alternate route, such as a bike path. There were no alternate routes for bicycles in Black Hawk.

The Court applied the four factor test described in *Voss* and concluded that "the regulation of bicycle traffic on municipal streets is of mixed state and local concern. . ." *Id.* at 492. "[W]e next look to determine whether Black Hawk's ordinance conflicts with state law. The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 492. The Court found that Black Hawk's ordinance conflicts with and is preempted by state statute, specifically C.R.S. § 42-4-109(11). *Id.*

"Black Hawk does not have authority, in a matter of mixed state and local concern, to negate a specific provision the General Assembly has enacted in the interest of uniformity. A staple of our home-rule jurisprudence articulates that a municipality is free to adopt regulations conflicting with state law only when the matter is of purely local concern." *Id.* at 493.

IV. ANALYSIS

IMPLIED PREEMPTION

As noted above, the *Bowen/Edwards* Court described three ways a state statute can preempt local government regulations: (1) express preemption where the statutory language indicates state preemption of all local authority over the subject matter, (2) implied preemption, where a state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest, and (3) operational conflict preemption.

Plaintiff urges the Court to find that the state has a substantial, dominant interest in the regulation of oil and gas activity, as reflected in the State's comprehensive regulatory scheme, to support an implied preemption analysis.

Implied preemption can occur where there is a significant, dominant state interest. "There is no question that the Oil and Gas Conservation Act evidences a *significant interest* on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources. . ." *Voss*, 830 P.2d at 1065-66 (emphasis added). However, *Bowen/Edwards* rejected implied preemption. The *Bowen/Edwards* Court stated, "The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes." *Bowen/Edwards*, 830 P.2d at 1058.

The Court will follow *Bowen/Edwards* and conduct an operational conflict analysis.

OPERATIONAL CONFLICT PREEMPTION

THE FOUR FACTORS

"The purpose of the preemption doctrine is to establish a priority between potentially conflicting laws enacted by various levels of government." *Bowen/Edwards*, 830 P.2d. at 1055. Courts consider four factors in preemption analysis: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Voss*, 830 P2d at 1067.

The first factor, the need for statewide uniformity, weighs in favor of preemption. Just as in *Voss*, the oil and gas reserves that exist today still do not conform to local governmental boundaries. Patchwork regulation can result in uneven production and waste.

The City maintains the Charter Amendment does not affect a need for statewide uniformity because: 1) the City has a minimal number of wells; 2) it allows existing wells to continue operating; 3) it does not prohibit the transfer of ownership of existing wells; and 4) there have been no new wells drilled in the City since 1994. The City argues the number of gas wells drilled in Colorado has more than tripled between 1994 and 2012, but no new wells have been drilled in the City since 1994.

Patchwork regulation in this case would occur if drilling and associated oil and gas activity is banned in the City, but it is permitted elsewhere. The City's argument seems to be that patchwork regulation is acceptable if it is unlikely any operator will want to drill in Lafayette. In other words, if the conflict between state interest and local interest is merely hypothetical, different standards should apply. If a conflict is unlikely because oil and gas operators will not want to drill in the Lafayette, the interest in statewide uniformity in regulation is diminished.

The Court is not persuaded. No Colorado cases have ever applied a sliding scale approach to a preemption analysis in which it considered the number of times the local regulation would be applied.

The second factor also weighs in favor of preemption because Lafayette's ban on drilling and associated activity has extraterritorial impact. As noted by the City, to the extent any operator wants to extract from oil and gas reserves under the City, such extraction can be done by way of horizontal drilling. By definition, such horizontal drilling would have extraterritorial impact because the wells would necessarily be in a location other than the City.

The third factor favors preemption because oil and gas activity has traditionally been governed by the Commission, a statewide agency.

The fourth factor does not apply because the Colorado Constitution does not address whether oil and gas activity should be regulated by state or local government.

STATE AND LOCAL INTEREST

The threshold consideration in this case, as it was in *Voss*, is whether Lafayette's total ban on drilling and associated oil and gas activity derives from a purely local concern. "It is a well-established principle of Colorado preemption doctrine that in a matter of a purely local concern an ordinance of a home-rule city supersedes a conflicting state statute, while in a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city. *Voss*, 830 P.2d at 1066. Case law recognizes "that municipal legislation is not always a matter of exclusive local or statewide concern but, rather, is often a matter of concern to both levels of government." *Id.*

"In matters of mixed local and state concern, a home-rule municipal ordinance may coexist with a state statute as long as there is no conflict between the ordinance and the statute, but in the event of a conflict, the state statute supersedes the conflicting provision of the ordinance." *Id.*

The State has an "interest in the efficient development and production of oil and gas resources in a manner calculated to prevent waste, as well as in protecting the correlative rights of owners and producers in a common pool or source to a just and equitable share of the profits of production . . ." *Id.* at 1062. The State's interest in oil and gas production is manifested in the Oil and Gas Conservation Act. *Id.* at 1064

The City claims protection of public health, safety, and welfare, including protection of the environment and wildlife resources, are all matters of local concern for a home rule municipality. Susan L. Harvey, a petroleum and environmental engineer, the City's retained expert, submitted an affidavit in which she discussed the local impacts of surrounding oil and gas extraction. The Court does not disagree that protection of public health, safety, and welfare and protection of the environment are legitimate matters of local concern. However, the Court does not find they are matters of *exclusively* local concern.

The Court does not find Lafayette's concerns about protecting public health, safety, and welfare, including protection of the environment, sufficient to completely devalue the State's interest, thereby making the matter one of purely local interest.

The Court recognizes that some of the case law described above may have been developed at a time when public policy strongly favored the development of mineral resources. Lafayette is essentially asking this Court to establish a public policy that favors protection from health, safety, and environmental risks over the development of mineral resources. Whether public policy *should* be changed is a question for the legislature or a different court.

The City submitted an unpublished New York case that found towns may ban oil and gas production within municipal boundaries. Whether the law in Colorado will change remains to be seen. In the meantime, this Court must follow Colorado precedent.

The Court finds this matter is one of mixed local and state interest.

OPERATIONAL CONFLICT ANALYSIS

The State's interest is codified in the legislative declaration in the Oil and Gas Conservation Act: The General Assembly declared that it is in the public interest to: (I) Foster the responsible, balanced development, production, and utilization of natural resources of oil and gas in the state of Colorado . . . (II) Protect against waste[4] . . . (III) Safeguard, protect and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas . . . C.R.S. § 34-60-102(1)(a)(I)(II)(III). Further "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 . . ." C.R.S. § 34-60-102(1)(b). Many cases reiterate these State interests in production of oil and gas resources, prevention of waste, and protection of correlative rights.

The operational conflict in this case is obvious. The State permits drilling and Lafayette prohibits it. The State permits handling, transportation and disposal of production waste, and Lafayette prohibits it.

"State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." *Bowen/Edwards*, 830 P.2d at 1059. Here, giving effect to the local interest, banning drilling, has virtually destroyed the state interest in production.

Just as the drilling ban in *Voss* substantially impeded "the interest of the state in fostering the efficient development and production of oil and gas resources in a manner that prevents waste" and protects the correlative rights of owners, *Voss*, 830 P.2d at 1068, Lafayette's drilling ban has the same effect. Lafayette's ban on drilling prevents the efficient development and production of oil and gas resources.

[4] Waste is defined in the Colorado Oil and Gas Conservation Act as ". . . operating. . . any oil and gas well or wells in a manner which causes or tends to cause reduction in quantity of oil and gas ultimately recoverable from a pool. . . C.R.S. § 34-60-103(13).

Lafayette's ban on drilling does not prevent waste. Instead, it causes waste because mineral deposits are being left in the ground that otherwise could be extracted.

There is no way to harmonize Lafayette's drilling ban with the stated goals of the Oil and Gas Conservation Act. As described above, the state interest in production, prevention of waste and protection of correlative rights, on the one hand, and Lafayette's interest in banning drilling on the other, present mutually exclusive positions. There is no common ground upon which to craft a means to harmonize the state and local interest. The conflict in this case is an irreconcilable conflict.

The *Colorado Mining Association* and *Webb* cases, both Colorado Supreme Court cases, are instructive. They are preemption cases, but not oil and gas cases. In *Colorado Mining Association*, the Colorado Supreme Court found Summit County's ban on a certain type of mining technique was preempted by state law. *Colorado Mining Association*, 199 P.3d at 721. The court stated "Summit County's existing ordinance is not a proper exercise of its land use authority because it excludes what the General Assembly has authorized." *Id.* In this case, Lafayette's drilling ban excludes and prohibits what the General Assembly has authorized through the Colorado Oil and Gas Conservation Commission. The court stated, "a patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources." *Id*. at 731. The same can be said about this case: Lafayette's ban on drilling creates a patchwork of oil and gas regulation that inhibits what the General Assembly has recognized as a necessary activity in the Oil and Gas Conservation Act and it impedes the orderly development of Colorado's mineral resources.

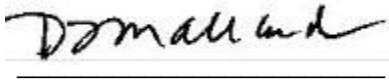
In *Webb*, the Colorado Supreme Court examined Black Hawk's ban of bicycles in city streets. *Webb*, 295 P.3d at 482. The court stated, "The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 492. Here, Lafayette's drilling ban forbids what the state authorizes. "Black Hawk does not have authority, in a matter of mixed state and local concern, to negate a specific provision the General Assembly has enacted in the interest of uniformity." *Id.* at 493. Similarly, Lafayette does not have the authority, in a matter of mixed state and local concern, to negate the authority of the State. It does not have the authority to prohibit what the state authorizes and permits.

This Court, like the courts in *Voss*, *the Town of Frederick*, and *BDS*, finds it can resolve this matter in an order on summary judgment. The operational conflict in this case is obvious and patent on its face. There is no need for an evidentiary hearing to determine whether the ban on drilling, as a practical matter, creates an operational conflict.

CONCLUSION

The Court finds the Charter Amendment banning drilling is invalid as preempted by the Colorado Oil and Gas Conservation Act. Accordingly, the Court GRANTS Summary Judgment in favor of COGA and against the City of Lafayette on the first claim for relief, declaratory judgment that the Colorado Oil and Gas Conservation Act preempts the Charter Amendment. The Court also GRANTS summary judgment in favor of COGA and against the City of Lafayette on the second claim for relief; the Court orders a permanent injunction enjoining the Charter Amendment.

August 27, 2014



D.D. Mallard
District Court Judge