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ARGUMENTS FOR A BALANCE: *MARTINEZ V. COLORADO OIL AND GAS CONSERVATION COMMISSION*

I. INTRODUCTION

Colorado is a state of diverse industries including finance, real estate, agriculture, tourism, and natural resources.¹ Alongside vital industries such as tourism, oil and natural gas development contributes to Colorado's economy to a substantial degree. In a study in 2014, researchers at the University of Colorado's Leeds School of Business estimated that oil and gas contributed \$31.7 billion to the Colorado economy and supported 102,700 jobs.² Growth in both population and in oil and gas development along the Colorado Front Range has ripened the ground for conflict. One source of conflict is that many surface owners do not own the minerals underlying their land; mineral owners have an implied easement over the surface owners' land to explore, produce, and develop the mineral estate.³ Although many oil and gas companies in Colorado compensate surface owners for drilling on their land, it is not a statutory requirement. Other conflicts arise from the temporary noise, light, and odor associated with oil and natural gas development.⁴ The Colorado Oil and Gas Conservation Commission (COGCC) regulates oil and gas operations "to the extent necessary to protect public health, safety, and welfare . . . taking into consideration cost-effectiveness and technical feasibility."⁵ In *Martinez v. Colorado Oil and Gas Conservation Commission*,⁶ the Colorado Supreme Court will consider whether the state interest in oil and gas development should be balanced with the "protection of public health, safety, and welfare," or whether these must be protected as a prerequisite to oil and gas development in the state.⁷ This Article will suggest a standard that balances oil and gas development with these important public values is workable, preserves the integrity of the judicial system, and respects the role of natural resource development in Colorado's economy.

1. *Colorado Profile Analysis*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/analysis.php?sid=CO#1> (last visited Apr. 21, 2018).

2. Richard Wobbekind & Brian Lewandowski, *Oil and Gas Industry Economic and Fiscal Contributions in Colorado by County 2* (2015), <https://www.coga.org/wp-content/uploads/2015/12/COGA-2014-OG-Economic-Impact-Study.pdf>.

3. See *Garrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997) (noting that a mineral rights holder possesses an implied easement to use as much of the surface "as is reasonable and necessary to develop underlying minerals").

4. *Frequently Asked Questions*, COLO. DEP'T PUB. HEALTH & ENV'T, <https://www.colorado.gov/pacific/cdphe/oghealth/faq> (last visited Apr. 21, 2018).

5. COLO. REV. STAT. § 34-60-106(2)(d) (2016).

6. 2017 WL 1089556 (Colo. App. 2017), *cert. granted*, 2018 WL 582105 (Colo. 2018).

7. *Martinez v. Colo. Oil & Gas Conservation Comm'n*, No. 16CA0564, 2017 WL 1089556, at *4 (Colo. App. 2017), *cert. granted*, 2018 WL 582105, at *1 (Colo. 2018).

II. MARTINEZ. V. COLORADO OIL AND GAS CONSERVATION COMMISSION

In *Martinez*, a group of teens wrote to the COGCC requesting that the agency enact a moratorium on new oil and gas drilling permits until it conducted a detailed rulemaking to prove that fracking is “consistent with the protection of public health, safety and welfare, including protection of the environment and wildlife resources.”⁸ Their proposed rule would condition permit approval upon an impartial, third-party consultant finding that oil and gas development could be conducted “in a manner that does not cumulatively, with other actions, impair Colorado’s atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.”⁹ Acting by its own prerogative and advice from the Colorado Attorney General’s Office, the COGCC denied the request for a rulemaking.¹⁰ The COGCC determined the proposed Martinez moratorium would have exceeded its own statutory authority, and the agency also noted the Colorado Department of Health and Environment (CDPHE) was already addressing many of the issues raised in the petition.¹¹

Martinez appealed the COGCC’s petition denial to the district court, which affirmed the COGCC’s ruling.¹² The Colorado Court of Appeals reversed, emphasizing that oil and gas development could proceed only when it was consistent with the protection of public health, safety, and welfare.¹³ The court’s conclusion rested upon interpreting C.R.S. § 34-60-102, the legislative declaration for the COGCC, which charges the COGCC to act in the public interest to “foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.”¹⁴

In the court of appeals’ view, the phrase “in a manner consistent with” forms a condition that must be fulfilled, not a factor in a balancing test.¹⁵ The appellate holding rebuts the COGCC’s position that its statutory charge requires a balance between oil and gas development and the public aims of health, safety, and welfare.¹⁶ In other words, both the COGCC and the Colorado Court of Appeals believed the statutory lan-

8. *Id.* at *1.

9. *Id.*

10. COLO. OIL AND GAS CONSERVATION COMMISSION, Order of the Commission Cause No. 1, Order No. 1-187 (2014).

11. *Id.*

12. *Martinez*, 2017 WL 1089556, at *2.

13. *Id.*

14. COLO. REV. STAT. § 34-60-102(1)(a)(I) (2016).

15. *Martinez*, 2017 WL 1089556, at *5.

16. *Id.* at *2.

guage was “clear and unambiguous” but reached opposite conclusions.¹⁷ The Colorado Supreme Court granted certiorari to determine whether the court of appeals erred in holding the COGCC had misinterpreted the statute when it balanced oil and gas development with public health, safety, and welfare.¹⁸

III. ARGUMENTS FOR A BALANCE

A balanced approach is consistent with a full reading of the COGCC’s statutory duties.

The court of appeals spends a significant portion of its opinion on the judicial interpretation of the phrase “in a manner consistent with” and similar phraseology from Colorado cases.¹⁹ In its narrow analysis, the majority disregards other statutory language that charges the COGCC with regulating oil and gas development “to the extent necessary to protect public health, safety and welfare . . . taking into consideration cost-effectiveness and technical feasibility.”²⁰ Here, the COGCC holds the statutory authority to factor in cost-effectiveness and technical feasibility into its regulatory charge, consistent with a balancing test. If the inherently ambiguous standard of “public health, safety, and welfare” were determinative, as the court of appeals held, no room would remain to consider cost, technical ability, or any other element in granting a permit.²¹ In addition to the COGCC’s longstanding practice of balancing interests in permit decisions, statute allows the agency to do so.²² The Colorado Court of Appeals’ determination is inconsistent with a full statutory reading.

A balanced approach protects the integrity of the judicial system and discourages frivolous lawsuits.

Without clear direction from the Colorado Supreme Court that the COGCC may grant oil and gas permits while balancing the impact on communities, bad actors will likely flood courts with lawsuits. One of the largest challenges of oil and gas development permitted *subject to* “public health, safety, and welfare” is that individuals have different sensitivities. What one surface owner finds acceptable may be unacceptable to another. Further, some Colorado residents may be adamantly opposed to oil and gas development, and there might never be a situation that could satisfy their personal expectations of health, safety, and welfare. A bal-

17. *Id.* at *4.

18. *Martinez*, 2018 WL 582105, at *1.

19. *Martinez*, 2017 WL 1089556, at *5–6 (noting cases that interpret “in a manner consistent with” as “subject to” rather than “balanced with”).

20. *Id.* at 8 (Booras, J., dissenting).

21. *Id.*

22. *Id.*

ancing test would allow the COGCC to implement its charge in a manner consistent with its last several decades of existence. Colorado's judicial system might be overwhelmed by citizen-activists like Martinez if the court of appeals decision were allowed to stand, and companies might be deterred from operating in Colorado over concerns of frequent litigation.

A balanced approach respects the importance of natural resource development in Colorado's economy and the value of the mineral estate.

The public interests of "health, safety, and welfare" should be considered in the COGCC's decision to grant new oil and gas drilling permits, but they should be balanced against the rights of individual property owners to develop their minerals and Colorado's interest in the tax revenues associated with natural resource development. Indeed, the tax revenues and economic impacts that Colorado receives from oil and natural gas contribute to the schools, roads, and public services that form the "health, safety, and welfare" expectations of Colorado residents and visitors.²³ Just as natural resource development often requires a mutual accommodation between the surface owner and mineral owner, it also requires activist citizens to allow the COGCC to do its job.

IV. FORESHADOWING THE OUTCOME

The *Martinez* case has received a significant amount of publicity with the Colorado Supreme Court granting certiorari over the protest of Governor Hickenlooper²⁴ and Colorado State Rep. Salazar mounting a so-far unsuccessful effort to codify the court of appeals' holding in *Martinez* within the COGCC's statutory mission statement.²⁵ The decision of the Colorado Supreme Court will be of vital interest to the energy industry in Colorado. If the court of appeals' decision is affirmed, it may raise significant ambiguity in how the COGCC conducts its permitting approval process. Though the COGCC may decline to pursue the rulemaking requested by Martinez, the youth plaintiffs would still have secured a substantial judicial victory. Unless the court of appeals' decision is reversed, the COGCC could expose itself to a new wave of litigation centered around the relative terms "public health, safety, and welfare" from activists vigorously opposed to any oil and gas development in the state. Predictably, the COGCC could also face claims from mineral owners and energy companies seeking to develop minerals in Colorado. The Colorado Supreme Court should reverse the court of appeals' holding and allow

23. See Wobbekind, *supra* note 2, at 27.

24. Kelsey Ray, *CO Supreme Court takes Martinez appeal, reopening debate on oil and gas safety*, COLO. INDEP. (Jan. 29, 2018), <http://www.coloradoindependent.com/168439/co-supreme-court-takes-martinez-appeal-reopening-debate-on-oil-and-gas-safety>.

25. Kathy Proctor, *Colorado Senate committee kills bill to rewrite state policy on oil and gas*, DEN. BUS. J. (Mar. 7, 2018), <https://www.bizjournals-com.cdn.ampproject.org/c/s/www.bizjournals.com/denver/news/2018/03/07/senate-committee-kills-bill-to-rewrite-state.amp.html>.

the COGCC to continue granting drilling permits consistent with its statutory charge and established practices.

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