

WON'T YOU BE MY NEIGHBOR? THE FALLOUT FROM THE COLORADO SUPREME COURT'S DECISION IN COGCC V. GVCA

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This Casenote asserts that the Colorado Supreme Court's decision in COGCC v. GVCA, while legally adequate, condones a harmful public policy that necessitates legislative correction. The case pitted two landowners whose property was adjacent to a proposed well that would drill down within a three-mile radius of an underground nuclear detonation site known as the Rulison blast zone, as well as a citizens' group from the Rulison area, against the Colorado Oil and Gas Conservation Commission (COGCC). Using different canons of statutory interpretation, the Colorado Court of Appeals and the Colorado Supreme Court reached opposite decisions, but in the end a COGCC rule permitting only surface owners, local governments, and oil and gas operators to request hearings on COGCC permitting decisions was upheld. Thus, the petitioners were denied standing until and unless they actually suffer harm from released radiation. In upholding the COGCC's narrow standing rule, the Colorado Supreme Court pointed to several other ostensible means through which the aggrieved parties could be heard, such as filing a complaint with the COGCC, appealing to their local government designee to request a hearing, or litigating in court. This Casenote first explores the history of the site, the COGCC's regulatory scheme, and the judicial progression from the filing of the complaint to the Colorado Supreme Court's decision. It then explores each of the

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potential alternate avenues proposed by the Colorado Supreme Court, and attempts to demonstrate why each is insufficient to protect landowners who are legitimately aggrieved by COGCC permitting decisions in which the surface of the well is not located directly on their land. Finally, it explores the possible solution of the legislature applying a form of the Colorado APA’s “aggrieved party” standard—which has thus far been administratively and judicially eliminated from the realm of oil and gas drill-permitting decisions—to all COGCC decisions, including those relating to drill-permit approval.

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INTRODUCTION

The Colorado Oil and Gas Conservation Commission (COGCC) is the agency statutorily charged with promoting and regulating oil and gas development in Colorado.¹ Its mandate requires that it balance the promotion of oil and gas production against the health, safety, and welfare of the public and the environment.² In 2007, two adjacent landowners and two citizens' groups tried to obtain a hearing before the COGCC to argue against a permit that would have allowed drilling within two miles of a former nuclear blast site.³ They were summarily denied the hearing for lack of standing, and thus, filed suit in district court.⁴ Four years later, in *Colorado Oil and Gas Conservation Commission v. Grand Valley Citizens' Alliance (COGCC v. GVCA)*, the Colorado Supreme Court declared that "permits" were not "orders"; thus, adjacent landowners in Colorado have no standing to initiate a hearing challenging the permitting of wells placed nearby, regardless of the potential harm.⁵

This Casenote argues that, regardless of the legal correctness of the Colorado Supreme Court's decision in *COGCC v. GVCA*, denying adjacent landowners and legitimately aggrieved parties the right to personally request a hearing challenging COGCC permitting decisions is bad public policy, violates Due Process, and necessitates legislative intervention. The agency action upheld in *COGCC v. GVCA* violates COGCC's amended mission statement, ignores a central purpose of the Colorado Administrative Procedure Act (APA), and defeats a central purpose of COGCC by allowing the agency to avoid its responsibilities as an arbiter of disputes arising out of its highly technical field of expertise.

1. Oil and Gas Conservation Act, COLO. REV. STAT. §§ 34-60-101 to -130 (2013).

2. *Id.* § 102. ("It is declared to be in the public interest to . . . [f]oster 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 the protection of the environment and wildlife resources").

3. *See infra* Part I.A (describing the history of the Rulison blast site).

4. Complaint, *Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n*, (No. 2008CV10869), 2008 WL 8881469, at *1–2 (Colo. Dist. Ct. Dec. 18, 2008) [hereinafter Complaint].

5. *See Colo. Oil & Gas Conservation Comm'n (COGCC) v. Grand Valley Citizens' Alliance (GVCA)*, 279 P.3d 646, 647 (Colo. 2012).

Pragmatically, this forces complaints into the judicial system where they face significant judicial deference to the agency's denial of standing and lack the benefit of a developed record.⁶

This Casenote begins with a brief examination of the facts, regulations, statutes, and proceedings that support the aforementioned conclusion. First, Part I examines the unique physical history of the drilling site that called attention to the overly narrow standing rules regarding requesting hearings on Application for a Permit to Drill (APD). Next, it provides an abridged evaluation of the technical and expansive set of regulations, statutes, and policies surrounding the issue of oil and gas development in place in Colorado during the litigation surrounding *COGCC v. GVCA*. Part I then recounts the judicial process through which the GVCA's demands to be heard were reduced to issues of statutory interpretation and how the requests were ultimately denied.

Part II explains why legislative intervention is required. It rejects the assertion that either the Colorado Court of Appeals or the Colorado Supreme Court erred in its decision, and instead recognizes the malleability of the canons of statutory interpretation. Part II then describes each of the potential avenues of relief that the Colorado Supreme Court believes it has left open for parties denied a hearing under its decision, and why each of these theoretical avenues is pragmatically foreclosed. Finally, Part II offers three potential legislative solutions to this denial of Due Process: (1) adopting of the Colorado APA "aggrieved party" standard; (2) permitting standing under that standard only when the Local Government Designee (LGD)⁷ has refused to vindicate those parties' rights; or, at minimum, (3) permitting such aggrieved parties to have standing if they own land adjacent to the site of the proposed

6. Complaint, *supra* note 4, at 5; *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007) ("If the language of an administrative rule is ambiguous or unclear, we give great deference to an agency's interpretation of a rule it is charged with enforcing."). *But see* Bd. of Cnty. Comm'rs of Cnty. of San Miguel v. Colorado Pub. Utils. Comm'n, 157 P.3d 1083, 1088 (Colo. 2007) (en banc) ("We may consider and defer to an agency's interpretation of its own enabling statute and regulations the agency has promulgated, but we are not bound by the agency's interpretation.") (citations omitted).

7. "Local Government Designee" is defined as "the office designated to receive, on behalf of the local government, copies of all documents required to be filed with the local government designee pursuant to these rules." 2 COLO. CODE REGS. § 404-1.100 (2013). It is essentially the office designated to communicate between COGCC and the local government.

APD. The Casenote then concludes that one of these proposals must be adopted, as divesting Colorado citizens of the opportunity to have their legitimate grievances heard cannot be what the Colorado Legislature actually intended when drafting and amending the Colorado Oil and Gas Conservation Act (the Act).⁸

I. BACKGROUND

The circumstances surrounding the litigation in *COGCC v. GVCA* are unique to the remote region of central Colorado known as the Rulison blast site.⁹ This Part presents a brief summary of the history of the site and the proposed drilling that caused the GVCA—the Garfield County citizens’ group that partnered with Western Colorado Congress and individual adjacent landowners in bringing suit¹⁰—to act. This Part then describes the state of oil and gas regulations in Colorado at the time the controversy arose, including how the then-existing regulations developed. Finally, this Part tracks the GVCA’s struggle for Due Process, initially through COGCC and then through the Colorado judicial system, and its final defeat in the Colorado Supreme Court for lack of standing under the regulations implemented by COGCC. This swath of background information can be complicated and confusing, but it is necessary for understanding why the COGCC policy sustained in *COGCC v. GVCA*, though not illegal, runs contrary to the purposes of the Colorado APA, the mission of COGCC, and Due Process.

A. *The History of the Rulison Blast Site*

In 1969, the United States Atomic Energy Commission (AEC) branch of the United States Department of Energy (DOE) decided to detonate a nuclear explosive in western Colorado.¹¹ Its target was the stubborn rock formations buried

8. Oil and Gas Conservation Act, COLO. REV. STAT. §§ 34-60-101 to -130 (2013).

9. See U.S. DEPT OF ENERGY, LEGACY MANAGEMENT, RULISON COLO., SITE, FACT SHEET (2011) [hereinafter RULISON FACT SHEET], available at <http://www.lm.doe.gov/WorkArea/linkit.aspx?LinkIdIdentifier=id&ItemID=1065>.

10. See *COGCC*, 279 P.3d at 64.

11. RULISON FACT SHEET, *supra* note 9, at 1.

deep beneath the Western Slope of the Rocky Mountains.¹² Under a project known as the Plowshare Program, the AEC detonated a 43-kiloton bomb 8,426 feet beneath the Rulison field in Garfield County, Colorado.¹³ This experiment, “designed to develop peaceful uses for nuclear energy,” was intended to fracture sandstone formations beneath the earth in order to free up large quantities of natural gas in what amounted to a nuclear version of hydraulic fracturing (commonly known as “fracking”).¹⁴ Despite assurances from the AEC and the oil and gas interests that helped fund the federal project¹⁵ that it would be both safe and profitable, the large quantity of natural gas that was released was predictably radioactive and unfit for use.¹⁶ The DOE admits that radioactive contamination remains buried deep in the bedrock surrounding the explosion, recognizing that liquid or gas tritium (a longer-lived radionuclide) still exists in sufficient quantity to pose a health risk if released.¹⁷ Given the nature of the formations, the DOE asserts that the most likely means of radiation reaching the surface is by “migrating with natural gas to a nearby producing well.”¹⁸ Therefore, the federal government has maintained subsurface rights below 6,000 feet for forty acres around the surface entry site for the blast since the detonation,¹⁹ and the DOE must be notified of any permit request within three miles of the site.²⁰ Thus, the current

12. *Id.*

13. Complaint, *supra* note 4, at 4.

14. RULISON FACT SHEET, *supra* note 9, at 1. For an amusing history of the evolution of the original shorthand “fracing” into the currently dominant “fracking,” see Simone Sebastian, *Is it Fracking or Fracing?*, FUELFIX (Dec. 23, 2011, 7:59 AM), <http://fuelfix.com/blog/2011/12/23/is-it-fracking-or-fracing/>.

15. According to the DOE, “Austral Oil Company of Houston, Texas, and the nuclear engineering firm CER Geonuclear Corporation of Las Vegas, Nevada, proposed the project. Those two firms and AEC jointly sponsored Project Rulison.” RULISON FACT SHEET, *supra* note 9, at 1.

16. See Noel Kalenian, *Project Rulison or [sic]: Or, How I Learned to Stop Worrying and Love Natural Gas*, W. HISTORY & GENEALOGY BLOG (Oct. 9, 2012, 4:51 PM), <http://history.denverlibrary.org/blog/content/project-rulison-or-or-how-i-learned-stop-worrying-and-love-natural-gas>; U.S. DEP’T OF ENERGY, RULISON FINAL PATH FORWARD 2 (2010), www.lm.doe.gov/Rulison/Path_Forward.pdf (describing how “the remaining presence of radionuclides within the produced gas made it unmarketable”).

17. RULISON FINAL PATH FORWARD, *supra* note 16, at 4 (2010).

18. *Id.* at 5.

19. RULISON FACT SHEET, *supra* note 9, at 1.

20. BRIAN J. MACKIE, PROJECT RULISON STUDY, COLO. OIL & GAS CONSERVATION COMM’N, at 7 (1998), <http://cogcc.state.co.us/Library/>

status of the Rulison nuclear fracturing experiment is that of a short-lived engineering folly producing only a nuclear waste site of unknown scale in the heart of the Colorado Rockies.

The nuclear waste lay dormant for decades, both in the earth and in the minds of the citizenry of the surrounding communities, until just before the turn of the millennium when advances in hydraulic fracturing and shifts in the energy economy made natural gas production in the area economically viable.²¹ While only two permitted wells existed within the three-mile radius from 1970 to 1996, both at the outer edges of the range, by 2007, more than twenty permitted wells were active within that radius.²² In response to increased demand and a specific request from oil and gas producer Presco, Inc. in 2004, COGCC issued Order 139-43 (the Order), which increased permissible well density within the area and mandated hearings on every permit request within one-half mile of the blast site.²³ The Order reveals no basis for the half-mile determination, and COGCC has acknowledged that a scientific basis for this determination was altogether lacking.²⁴ Against this backdrop, in 2008, two landowners with land directly overlying the blast zone—who relied on near-surface aquifers for their water—and two citizens' groups demanded a hearing before COGCC to challenge the Director's approval of permits filed by the energy production corporation Encana, Inc. (Encana) to drill within the blast zone.²⁵ Because of the hearing

PiceanceBasin/Project%20Rulison.pdf.

21. Although determining the exact point of economic viability would be an overly complex evaluation of economic, regulatory, and technological factors given the question's attenuated connection to the thrust of this Casenote, viability appears to have come with the introduction of two technological advances: the development and implementation of horizontal drilling in 1991, allowing for multiple wells to be drilled from one wellhead; and the development of "slickwater fracking" in 1998, which has been described as "[t]he optimal combination of water, sand, propants and other chemical lubricant" to effectively rupture and prop open fissures in rock and shale formations. Alex Trembath, *US Government Role in Shale Gas Fracking History: An Overview and Response to Our Critics*, BREAKTHROUGH J., Mar. 2, 2012, [http:// thebreakthrough.org/archive/shale_gas_fracking_history_and](http://thebreakthrough.org/archive/shale_gas_fracking_history_and).

22. Complaint at Exhibit 1, *supra* note 4.

23. *In re* The Promulgation and Establishment of Field Rules to Govern Operations in the Rulison Field, Garfield County, Colorado, COLO. OIL & GAS CONSERVATION COMM'N, Cause No. 139, Order No. 139-43 (Feb. 10, 2004), available at <http://cogcc.state.co.us/orders/orders/139/43.html>.

24. *Id.*; Complaint, *supra* note 4, at 5.

25. Complaint, *supra* note 4, at 1–2. The phrase "blast zone" as it occurs throughout this Casenote refers to the three-mile surface radius around the

policies implemented through COGCC regulations,²⁶ the parties were denied hearings due to lack of standing and were eventually forced to litigate against this administrative denial in the state judicial system without the benefit of a developed record from a hearing.²⁷

B. Get with the Times: The COGCC Regulatory Scheme and its Amended Mission Statement

Before exploring the litigation that prompted this Casenote, it is important to understand the regulatory backdrop against which the petitioners were denied a hearing. Upon its inception, COGCC was charged only with promoting oil and gas development and minimizing waste by requiring a certain level of efficiency in the recovery process within the state of Colorado.²⁸ However, in 2007, the Colorado General Assembly modified and expanded COGCC's purview, requiring that it balance promotion of oil and gas production against the health, safety, and welfare of the public and the environment.²⁹ Prior to these amendments, only the relevant local government and operator could request hearings on permitting decisions, and only in limited circumstances under COGCC Rules 503.b and 303.k.³⁰ Post-amendment, COGCC sought to achieve this balance between industry promotion and public welfare through significant amendment of its rules.³¹ It amended Rule 503.b, which establishes which parties may request hearings on APD decisions, by expanding the class of parties eligible to request hearings to include not only the operator and local government, but also the surface owner, the Colorado Department of Public Health and Environment (CDPHE), and the Colorado Department of Wildlife (CDOW).³² Though these

detonation site within which the DOE must be consulted before drilling. *See supra* text accompanying note 20.

26. *See infra* Part I.B.

27. Complaint, *supra* note 4, at 7. *See also infra* Part I.C.1.

28. COLO. REV. STAT. § 34-60-102 (1979).

29. Statement of Basis, Specific Statutory Auth., & Purpose: New Rules & Amendments to Current Rules of the Colo. Oil and Gas Conservation Comm'n, COLO. OIL & GAS CONSERVATION COMM'N, 2 CCR 404-1, at 2 (2008), available at http://cogcc.state.co.us/rulemaking/FinalRules/COGCCFinalSPB_121708.pdf.

30. *Id.* at 37 (describing how the former rule limited local government hearing requests to approved APDs, and operator hearing requests to denied APDs).

31. *See id.*

32. *Id.* CDOW merged with Colorado State Parks in 2011 to create Colorado

amendments expanded the class of individuals entitled to a hearing, they also restricted the grounds upon which people opposing the permit could request hearings and increased the grounds for standing for oil and gas operators.³³ Additionally, the local government must use a Local Government Designee (LGD) as a liaison among the government, COGCC, operators, and citizens.³⁴ The interplay of these regulations with provisions in the Act³⁵ and the Colorado APA³⁶ was the focus of the judicial proceedings culminating in the Colorado Supreme Court's decision in *COGCC v. GVCA*.

C. COGCC v. GVCA: *From Inception to Completion*

Over the course of their struggle to obtain a hearing on permitting decisions within the Rulison blast zone, the GVCA and its co-parties explored every avenue, from initially petitioning COGCC to finally winding up in the Colorado Supreme Court. In the end, they were denied their hearing through a narrow application of the canons of statutory construction.³⁷ This Section first examines the GVCA's failed efforts to obtain a hearing before COGCC and the district court's dismissal of its case. It then describes the judicial reasoning and dispositions in both the Colorado Court of

Parks and Wildlife. See COLO. PARKS & WILDLIFE, *about Colo. Parks & Wildlife*, <http://wildlife.state.co.us/About/Pages/About.aspx> (last visited Jan. 13, 2014). Note that the current version of Rule 503.b eliminates CDOW and CDPHE, allowing only the operator, local government, and surface owner to request a hearing regarding an APD. 2 COLO. CODE REGS. § 404-1.503.b(7) (Aug. 1, 2013). Though the elimination of the CDPHE and the non-existent CDOW is peripheral to this Casenote's focus, it evinces further shrinking of the standing category at issue. *Id.*

33. Statement of Basis, Specific Statutory Auth., & Purpose: New Rules & Amendments to Current Rules of the Colo. Oil and Gas Conservation Comm'n, COLO. OIL & GAS CONSERVATION COMM'N, 2 CCR 404-1, at 37 (2008) (describing how the current rule limits surface owner standing to allegations of health, safety, and welfare issues and violations of statute or COGCC rules while expanding operator standing to any permit that is not approved exactly as requested).

34. 2 COLO. CODE REGS. § 404-1.214 (2012). This regulation existed prior to the 2008 amendments. See COLO. OIL AND GAS CONSERVATION COMM'N, AMENDED RULES REDLINE at 82–83, *available at* http://cogcc.state.co.us/RuleMaking/FinalRules/COGCCFinalRuleAmendments_121708.pdf.

35. Oil and Gas Conservation Act, COLO. REV. STAT. §§ 34-60-101 to -130 (2013).

36. State Administrative Procedure Act, COLO. REV. STAT. §§ 24-4-101 to -108 (2006).

37. See *COGCC v. GVCA*, 279 P.3d 646, 648–49 (Colo. 2012).

Appeals and the Colorado Supreme Court, providing the basic foundation necessary to understand why the public policy validated through *COGCC v. GVCA* must be changed.

1. Let Bylaws be Bylaws: Why the GVCA Was Required to File Suit in the First Place

Plaintiffs' efforts to obtain hearings before COGCC on permits within the Rulison blast zone were consistently rebuffed by COGCC's Director (the Director),³⁸ who simultaneously approved operators' ADPs within the blast zone and denied the petitioners' requests for hearings no less than five times before the specific instance that led to the litigation discussed below.³⁹ With each hearing denial, the Director reiterated the parties' lack of standing to request hearings, stating that he had treated the request as a complaint under Rule 303.k.⁴⁰ Furthermore, every denial letter except the first was a form letter in which the Director simply filled in the permit numbers and well distances.⁴¹ In each letter, the Director then claimed that he had "carefully considered the arguments and information set forth" in the petitioners' complaints, that he appreciated their interest, and recommended that they monitor the radiation sampling results on the COGCC website, so as to know if they were actively being exposed to radiation.⁴² In one of these denials, the Director approved a multi-directional drill pad with the surface location and all four bottom-hole locations located within one mile of the blast site.⁴³ The petitioners were twice rebuffed from attempted appeals because the Director's decisions on APD approval were final agency actions, and thus could be appealed only through judicial review.⁴⁴ After the petitioners engaged in a similarly fruitless effort to be heard on a permitting decision executed on November 19, 2008—a day on which the Director simultaneously rubber-stamped the permit and mailed his form-denial of the petitioners' request for a

38. See *supra* text accompanying note 20.

39. Complaint, *supra* note 4, at Exhibits 6A–D.

40. See *id.*

41. *Id.*

42. *Id.*

43. *Id.* at Exhibit 6B.

44. *Id.* at Exhibit 9.

hearing as a complaint—COGCC informed them that they had “exhausted their administrative remedies.”⁴⁵ Although it is possible that the Director had given both decisions serious consideration, his actions appear from the outside to indicate a lack of concern for the petitioners’ rights, a problem that could easily be avoided by granting a hearing to allow the parties to be privy to the decision-making process.⁴⁶ Instead, the GVCA was forced to bring suit challenging the Director’s decision in the district court without the benefit of an established record of administrative proceedings in which the plaintiffs could have established injury.⁴⁷ Without such a record, the district court dismissed their complaint for lack of standing and failure to establish injury-in-fact, largely because the court impermissibly combined merits with standing.⁴⁸ The GVCA then appealed the dismissal and attempted to be heard on the merits.⁴⁹

2. *GVCA v. COGCC*: The Court of Appeals Provides Some Hope

The Colorado Court of Appeals reversed the trial court’s dismissal for lack of standing and found for the GVCA on the merits.⁵⁰ On the issue of standing, the court emphasized that Colorado has more relaxed standards than the federal courts, requiring only that the plaintiff has suffered “an injury-in-fact . . . to a legally protected interest.”⁵¹ It then explained that

45. *Id.* at 6–7, Exhibit 9.

46. *See id.* at Exhibit 9 (Complainants sought a hearing so as to participate in the decision-making process because they felt that their protests were being ignored.).

47. *Id.* at 7.

48. *See* Order Granting Defendant Encana Oil & Gas Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim at 2, *GVCA v. COGCC*, No. 2008CV10869, 2009 WL 8638448 (Colo. Dist. Ct. May 4, 2009). (stating that plaintiffs suffered no injury-in-fact because they were properly denied a hearing before COGCC under COGCC regulations). *See also* *GVCA v. COGCC*, 298 P.3d 961, 965 (Colo. App. 2010), *cert. granted*, 10SC532, 2011 WL 976732 (Colo. Mar. 21, 2011), *and rev’d.*, 279 P.3d 646 (Colo. 2012) (describing the impermissible conflation of standing and merits in the argument advocated for by COGCC and accepted by the trial court).

49. *See GVCA*, 298 P.3d at 967.

50. *Id.*

51. *Id.* at 964 (quoting *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004)) (describing how Colorado lacks the federal “cases and controversies” requirement, and that the Colorado standing test requiring an injury-in-fact to a legally

such injuries need not be economic, and may simply be injuries to statutory legal rights.⁵² Accordingly, it found that the GVCA and the adjacent landowner plaintiffs had suffered an injury-in-fact when they were denied a hearing.⁵³ The central statutory text at issue provided that “[o]n the filing of a petition concerning any matter within the jurisdiction of [COGCC], it shall promptly fix a date for a hearing thereon and shall cause notice of the filing of the petition and of the date for the hearing thereon to be given.”⁵⁴ The court went on to explain that COGCC’s argument that had swayed the trial court—that there was no injury because there was no entitlement to a hearing under this statute—impermissibly combined merits with standing, and that the statutory right need only be arguably present.⁵⁵ Thus, because the plaintiffs demonstrated an injury-in-fact to a legal interest that they arguably possessed under the statute, the court granted standing to the GVCA and reached the merits of its argument.⁵⁶

Then, engaging exclusively in statutory interpretation and avoiding the larger social implications of the conflict, the court focused on the narrow question of whether COGCC was statutorily obligated to grant the GVCA a hearing on the Encana permitting decision⁵⁷ despite the COGCC rule restricting standing to request a hearing on a permit to operators, surface owners, and relevant local governments.⁵⁸ Through a direct reading of the requirement in Section 108(7) that petitions filed “concerning any matter within the jurisdiction of [COGCC]” shall receive hearings in a timely fashion,⁵⁹ the court found in favor of the GVCA.⁶⁰ It rejected COGCC’s argument that the narrower class established in Section 108(2) of the COGA, consisting only of rules, regulations, and orders, controlled the scope of the “any

protected interest “has traditionally been relatively easy to satisfy”).

52. *Id.*

53. *Id.*

54. COLO. REV. STAT. § 34-60-108(7) (2009).

55. GVCA, 298 P.3d at 965.

56. *Id.* (explaining that under the “legally protected interest” prong of the Colorado’s standing test, plaintiffs need not prove the merits of their claim to have standing to file suit, but rather only need to show that they “have identified statutes that *arguably* give them a right to a hearing before [COGCC]”).

57. COLO. REV. STAT. § 34-60-108(7) (2009).

58. GVCA, 298 P.3d at 965–67.

59. COLO. REV. STAT. § 34-60-108(7) (2009).

60. GVCA, 298 P.3d at 967.

matter” language in Section 108(7), and read “permits” to be within the scope of COGCC actions requiring hearings upon request.⁶¹ In so doing, it emphasized the use of the phrase “any matter” and argued that limiting Section 108(2) to these three types of agency action simply bolstered a broad reading of the “any matter” language in Section 108(7).⁶² It supported this reading by pointing to Section 108’s title, which does not include the word “orders” but instead limits the section only to “[r]ules—hearings—process,” as well as by referring to “broad participation” rights found throughout the Act.⁶³

The Court of Appeals agreed with the plaintiffs’ statutory interpretation, and in so doing, specifically declined to consider the broader socioeconomic arguments proffered by the parties and amici, stating, “It is not the role of the court to overrule a legislative policy determination when the underlying statutory language unambiguously directs us otherwise.”⁶⁴ Therefore, based solely on statutory interpretation, the trial court’s dismissal was reversed, and the case was remanded with little room for the trial court to maneuver around the Court of Appeals merits findings.⁶⁵ COGCC and Encana appealed the decision, and received certiorari in the Colorado Supreme Court, opening the doors for another round of statutory interpretation.⁶⁶

3. *COGCC v. GVCA*: A Lesson in Statutory Interpretation

Like the Colorado Court of Appeals, the Colorado Supreme Court addressed *COGCC v. GVCA* as a technical question of statutory interpretation, reversing the Court of Appeals decision through a similarly narrow holding on the proper interpretation of the three provisions at issue.⁶⁷ As explained

61. *Id.* at 966.

62. *Id.*

63. *Id.*

64. *Id.* at 967 (quoting *Cotton Creek Circles, LLC v. Rio Grande Conservation Dist.*, 218 P.3d 1098, 1103 (Colo. 2009)).

65. *Id.* While the case was remanded for “proceedings consistent with this opinion,” the merits were rather conclusively addressed by the court of appeals, leaving little room for proceedings on remand. *Id.*

66. *COGCC v. GVCA*, 10SC532, 2011 WL 976732 (Colo. Mar. 21, 2011) (granting certiorari).

67. *COGCC v. GVCA*, 279 P.3d 646, 647 (Colo. 2012); COLO. REV. STAT. § 34-

below, the Supreme Court found the Court of Appeals' reliance on the direct "any matters" language in Section 108(7) without contextualizing it against the rest of the Act to be erroneous.⁶⁸ It reversed the Court of Appeals' decision because it viewed the mandate in 108(7) that a hearing date be set "[o]n the filing of a petition concerning any matter within the jurisdiction of [COGCC]"⁶⁹ as constrained to petitions related to a "rule, regulation, or order" as mentioned in Section 108(2).⁷⁰ Because the term "permit" is not included in this language, the court looked outside of the statute to the permitting process prescribed by Section 106(1)(f), which establishes COGCC's authority to require permits for every oil and gas drilling operation "under such rules and regulations as may be prescribed by [COGCC]."⁷¹ The court read this language as granting wide discretionary latitude to COGCC in establishing rules regarding permitting, including rules restricting access to hearings on permitting decisions.⁷² The court bolstered its interpretation by citing various other sections within the Act that separate "permit" while grouping "rule" and "order" within the same sentence and by applying various canons of interpretation to support its understanding.⁷³

Ultimately, the court concluded that the GVCA was still allowed to participate in the permitting process because any party with standing under Rule 522.a.(1) is able to file a complaint, and the Director could then use that complaint to withhold approval of a permit at his discretion.⁷⁴ Rule 522.a, which mirrors the standing provisions in the Colorado APA, permits complaints by any party who "may be directly and adversely affected or aggrieved as a result of [an] alleged violation [of COGCC regulations by any party]."⁷⁵ Apparently, the Supreme Court viewed the Director's under-supported

60-108(7) (2009); *id.* § 34-60-108(2); *id.* § 34-60-106(1)(f).

68. *COGCC*, 279 P.3d at 648–49 ("The court of appeals reasoned, and GVC argues before us, that subsection 108(7) requires a hearing in this case because GVC filed 'a petition' concerning '[a] matter' within [COGCC]'s jurisdiction. This reasoning is flawed . . . because it reads the provision in isolation rather than within the overall statutory context.").

69. *Id.* at 647–48 (analyzing COLO. REV. STAT. § 34-60-108(7) (2009)).

70. *Id.* at 648 (analyzing COLO. REV. STAT. § 34-60-108(2) (2009)).

71. *Id.* at 649; COLO. REV. STAT. § 34-60-106(1)(f) (2009).

72. *COGCC*, 279 P.3d at 649.

73. *Id.* at 648.

74. *Id.* at 649.

75. 2 COLO. CODE REGS. § 404-1.522.a(1) (2012).

assertion of safety in drilling around the blast site as an alleged violation that could properly be handled through 522.a complaints.⁷⁶ This dictum is the only consideration the majority gave to the greater policy concerns implicated by the case, and it quickly surmised that the GVCA's request for a hearing was "properly treated as a complaint." Thus, COGCC had fulfilled its duty to the plaintiffs under the Supreme Court's construction of the statutes.⁷⁷

As illustrated in these narrow, technical decisions, the courts each applied their preferred interpretive tools, resulting in opposite conclusions. The appellate court focused on plain meaning and intent, whereas the Supreme Court focused on context and supersession.⁷⁸ If either court considered the broader socioeconomic arguments that dominated the briefs of the parties and amici, they made little reference to such consideration in their opinions and instead framed their decisions as deferrals to legislative intent, despite the wide range of possible intents that can be read into the statute.⁷⁹ Furthermore, neither court addressed the APA in a substantive manner. Indeed, the Supreme Court failed to mention it at all, and the Court of Appeals asserted only that the APA supports the conclusion that "permits can be orders."⁸⁰ As such, the Colorado court system made no explicit judgment as to the propriety of denying adjacent landowners a hearing before COGCC on permitting issues. Instead, the courts deferred to an ambiguous legislative intent (displayed by its contradictory application) to interpret a handful of words. Nevertheless, the Supreme Court's determination led to the broadly sweeping social policy discussed below.

II. WHY ALL THIS MATTERS: THE REAL-WORLD IMPLICATIONS OF *COGCC v. GVCA*

COGCC v. GCVA creates bad public policy requiring corrective legislative action because the decision pragmatically

76. *Id.*; *COGCC*, 279 P.3d at 647.

77. *COGCC*, 279 P.3d at 649.

78. *See* *GVCA v. COGCC*, 298 P.3d 961, 967 (Colo. App. 2010); *COGCC*, 279 P.3d at 649.

79. *See* *GVCA*, 298 P.3d at 967; *COGCC*, 279 P.3d at 649.

80. *See* *COGCC*, 279 P.3d at 966 ("Thus, by defining an 'order' as any final agency disposition other than rulemaking . . . the state APA recognizes that a permit can be an order.").

forecloses the majority of potentially aggrieved parties from participating in the APD process. The decision violates COGCC's amended mission statement,⁸¹ ignores a central purpose of the APA,⁸² and defeats a central purpose of COGCC.⁸³ While both decisions may be legally correct due to the malleability of the canons of statutory interpretation, such an inquiry is irrelevant for the purposes of this Casenote. Regardless of legal correctness, the end result divests the vast majority of potentially aggrieved parties of the opportunity to obtain a hearing on permitting decisions before COGCC. This Section first establishes and explores the facially plausible alternate paths of relief available to an aggrieved party who lacks standing to request a hearing before COGCC: (1) filing a complaint; (2) obtaining a hearing through the relevant LGD; and (3) seeking judicial relief. It then demonstrates that, although each of these options appears plausible at first glance, an examination of pragmatic considerations reveals that none provides a viable path for an aggrieved party to be heard, essentially foreclosing any participation in the APD process. Finally, this Section suggests three potential alternative standing standards that the legislature could implement to allow these aggrieved parties a chance to vindicate their rights while still allowing COGCC to function: (1) adoption of the Colorado APA's "aggrieved party" standard; (2) adoption of that standard only where the LGD has refused to intervene on the part of an aggrieved party; and (3) adoption of that APA standard for adjacent landowners.

81. See COLO. REV. STAT. § 34-60-102(1)(a)(I) (2009) ("It is declared to be in the public interest to . . . [f]oster 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[.]").

82. COLO. REV. STAT. § 24-4-105(2)(c) (2009) ("A person who may be affected or aggrieved by agency action shall be admitted as a party to the proceeding upon his filing with the agency a written request therefor, setting forth a brief and plain statement of the facts which entitle him to be admitted and the matters which he claims should be decided.").

83. See *Colorado Oil and Gas Conservation Commission Mission Statement and Strategic Plan*, COGCC, <http://cogcc.state.co.us/General/MissionPage.htm> (last visited Nov. 2, 2013) (listing "Objective 3: serve as the primary government resource to the public regarding oil and gas development in Colorado."). Refusing to allow adjacent landowners to obtain a hearing on permitting decisions and thereby forcing them into the court system does not facilitate this objective.

A. *The Policy Upheld in COGCC v. GVCA Deprives Aggrieved Parties of Due Process and Necessitates Legislative Action*

The policy in effect after *COGCC v. GVCA* is bad public policy because it violates Due Process by depriving genuinely aggrieved parties of the opportunity to be heard. This Section first describes the facially plausible paths that a party aggrieved by a permitting decision, yet denied standing under COGCC Rule 503.b(7), may pursue to obtain justice. This Section then reveals how, pragmatically speaking, the only viable option among these paths is litigation. Finally, this Section argues that such a result is inapposite with the COGCC's mission statement, the Colorado APA, and Due Process.

1. Facially Plausible Paths to Relief After *COGCC v. GVCA*

Although the *COGCC v. GVCA* court's interpretation of COGCC's permit hearing regulations as consistent with the Act has now fully foreclosed parties—such as adjacent landowners and advocacy groups—from directly requesting hearings to challenge APD approvals, there are several other paths that purportedly remain open to such parties. The most prominent of these possibilities are (1) filing complaints with COGCC, (2) obtaining a hearing by petitioning local government through the LGD, and (3) bringing a judicial action in tort against COGCC to challenge its decision.

The first option available to aggrieved parties is to file a complaint with COGCC and hope it will persuade the Director to deny or suspend the APD. Under COGCC Rule 303.k, the Director has discretion to unilaterally withhold approval of an APD in order to allow for a hearing.⁸⁴ However, this rather broad discretion seems to be narrowed by Rule 303.m, which requires the Director to have reasonable cause based on the complaint to believe that there has been a “material violation of [COGCC]’s rules, regulations, orders or statutes, or otherwise presents an imminent threat to public health, safety and welfare, including the environment” before a permit may be

84. 2 COLO. CODE REGS. § 404-1.303.k (2012).

denied.⁸⁵ The question of imminence appears to be at the discretion of the Director.⁸⁶ Furthermore, the range of individuals with standing to make a complaint beyond those who are permitted to demand a hearing is limited to “any other person who may be directly and adversely affected or aggrieved as a result of the alleged violation.”⁸⁷ Hence, although the plaintiffs in *COGCC v. GVCA* are now clearly unable to request a hearing on APDs within the Rulison blast zone, they are still able to submit complaints for consideration by the Director and hope for the best.⁸⁸

Alternatively, or additionally, aggrieved parties without standing to request a hearing on APD decisions have the option to petition their LGD, as they might petition any public official, to request a hearing on their behalf.⁸⁹ On paper, this is a relatively simple proposition. Every local government is strongly encouraged, if not required, to appoint an LGD as a liaison among COGCC, the industry, the government, and the citizens.⁹⁰ Both county and city governments have established

85. 2 COLO. CODE REGS. § 404-1.303.m (2012). *See also* Complaint, *supra* note 4, at Exhibits 6A–D, 1, 5, 7, 9, and 11 (in which COGCC director David Neslin, in a cut-and-paste paragraph, repeatedly asserts that he is required to meet the requirements of 303(m) in order to withhold approval despite his citing only to rule 303(k), which has no such constraints facially).

86. *See generally* Complaint, *supra* note 4, at Exhibits 6A-D, 1, 5, 7, 9, and 11. Given that the possibility of releasing radioactive material into the air and/or water supply of the Rulison area was not deemed imminent enough to justify the director’s intervention, it is hard to see what would qualify as “imminent.”

87. 2 COLO. CODE REGS. § 404-1.522.a(1) (2012).

88. *See supra* Section I.B (describing COGCC’s treatment of the petitioners’ request for a hearing as a complaint).

89. 2 COLO. CODE REGS. § 404-1.214 (2012). This creates the LGD position to interact between the local government and the COGCC. *Id.* As the local government employee responsible for petitioning the COGCC for a hearing on a permitting decision, citizens frequently petition the LGD for intervention. *See, e.g.*, Petition, Citizens for Huerfano County, *People Need More Time to Comment on Shell Drilling in Huerfano County*, CHANGE.ORG, available at <http://www.change.org/petitions/people-need-more-time-to-comment-on-shell-drilling-in-huerfano-county> (obtaining 640 signatures petitioning the county LGD to request extended comment time pursuant to 2 COLO. CODE REGS. § 305.c) (last visited Mar. 20, 2013).

90. 2 COLO. CODE REGS. § 404-1.214 (2012). Although the language of the rule is unclear as to whether COGCC requires local governments to interact with the agency through LGDs, stating only that “[e]ach local government which designates an office . . . shall provide the [COGCC] written notice of such designation” and that “[i]t shall be the responsibility of such local governmental designee to ensure that all documents provided to [it] by the oil and gas operators and the [COGCC] or the Director are distributed to the appropriate persons and offices,” the rules do not appear to provide an alternative means of interaction. *Id.*

LGDs, and the vast majority of Colorado counties report assigned LGDs.⁹¹ The contact information for every LGD in the state is made available on COGCC's website, including phone, fax (if available), email, and business address.⁹² Each LGD is entitled to demand a hearing on an APD decision within its jurisdiction for its respective local government.⁹³ Therefore, aggrieved constituents are theoretically enabled to obtain a hearing on an APD decision by petitioning their local government through its LGD.⁹⁴ As discussed below, however, the current implementation's unrealistic parameters offer little practical opportunity for redress.⁹⁵

Finally, such aggrieved parties appear to retain the option to pursue a judicial remedy in tort. It is unclear exactly how far the petitioners similarly situated to those in *COGCC v. GVCA* will be able to go with this option. Under the ruling in *COGCC v. GVCA*, COGCC has broad discretion to promulgate rules and regulations governing permits.⁹⁶ Thus, although the APA purports that any party that may be aggrieved by agency action has standing to challenge the action,⁹⁷ COGCC permitting decisions now appear to fall outside the APA protections. This observation is bolstered by a recent order rejecting the claims of Citizens for Huerfano County (CHC; a group similar to the GVCA), in part based on the *COGCC v. GVCA* decision.⁹⁸ CHC had originally claimed that COGCC violated the APA by denying its hearing request, but because

See also A Message From the Local Government Liaisons, COGCC-LGD NEWSLETTER, (COGCC), Aug. 9, 2013, at 1, http://cogcc.state.co.us/downloads/LGD_Newsletter/LGD_Newsletter_Summer_2013.pdf (last visited Dec. 4, 2013) ("The LGD program was established in the 1990s at the request of local governments as a way to increase communication and cooperation between the different levels of government. We are aware of no similar program in other states. But as the visibility of oil and gas in communities has grown, so has the role of the LGD. We therefore encourage local governments to get engaged with operators, the public, and with us . . . to take full advantage of the opportunities this voluntary [LGD] program offers.").

91. *See Local Governments: List of Participating Local Governmental Designees*, COLO. OIL & GAS CONSERVATION COMM'N, <http://cogcc.state.co.us/Infosys/lgd/list.cfm> (last visited Nov. 17, 2012).

92. *Id.*

93. 2 COLO. CODE REGS. § 404-1.503.b(7) (2012); *id.* § 404-1.305.d (2012)

94. *Id.*

95. *See infra* Part II.A.2.

96. COLO. REV. STAT. § 34-60-106(1)(f) (2009). *See also supra* Part I.B.

97. *See* Colorado Administrative Procedure Act, *supra* note 82.

98. Order, *Citizens for Huerfano Cnty. v. Colo. Oil & Gas Conservation Comm'n* (Colo. Dist. Ct. Jan. 24, 2013) (No. 11CV913).

COGCC v. GVCA was decided during the pendency of the appeal, CHC was compelled to stipulate to dismissal of this count.⁹⁹ CHC's other allegation—that COGCC's decision to approve the permit in question was not supported by the administrative record¹⁰⁰—was doomed from the start because CHC had no opportunity to develop a record of its position through an adversarial hearing. Without the hearing, the court relied only on CHC's complaints, COGCC's responses, and whatever bits of self-documentation COGCC had created regarding the approval process.¹⁰¹ Noting initially that the record was fairly sparse, the court theorized that “[t]here is no doubt that the records, themselves, do not provide a full transcript or full insight to the evaluative process undertaken by the COGCC.”¹⁰² Then, relying primarily on a one-page memorandum response that largely related form responses to environmental and safety concerns,¹⁰³ the court asserted that “[t]he detail in [the] memo belies CHC's contention that COGCC ‘rubberstamped’ the approval process or lacked sufficiently detailed data to render an informed decision about whether to approve the [p]ermits.”¹⁰⁴ Finally, the court concluded that “it would be . . . inappropriate—where the COGCC members and staff clearly evaluated and considered the [APD] Application Materials—for the Court to substitute its judgment for that of COGCC.”¹⁰⁵ No substantive review of the actual threats of the well occurred, and the court's procedural review was superficial at best, and highly deferential to the contents of a one-page memo.¹⁰⁶ Furthermore, Colorado generally restricts review of agency

99. *Id.* at 6–7.

100. *Id.* at 12.

101. *See generally id.* In relation to this lack-of-foundation claim, the court relied expressly on only a five-line engineering review and a letter claiming to have considered the concerns and describing the rules that were in place to protect against the concerns. *Id.* This letter mentions only two site-specific elements: the depth of the aquifer and the proximity to protected habitats. *Id.* at 14. The rest of the letter could easily have been cut and pasted from a template addressing concerns regarding aquifers, wildlife, radiation, and so on.

102. *Id.* at 12.

103. *See supra* text accompanying note 101.

104. Order at 15, *Citizens for Huerfano Cnty. v. Colo. Oil & Gas Conservation Comm'n* (Colo. Dist. Ct. Jan. 24, 2013) (No. 11CV913).

105. *Id.*

106. *Id.* at 13–14.

action to an examination of the record,¹⁰⁷ so when a complaint filed with an agency stands alone against the agency's assertions, even a paltry agency record may be found sufficient to uphold the decision—as occurred in the case above.¹⁰⁸ Thus, it appears that parties that fall outside of the narrow classes granted standing to personally request hearings under COGCC Rule 503.b(7) will not be able to pursue judicial remedies to COGCC hearing denials after *COGCC v. GVCA*, and will struggle mightily to successfully challenge the permit issuance on other grounds. However, they appear free to sue the operator and COGCC after the fact under basic tort principles if the COGCC determination of safety proves incorrect and they actually suffer an injury-in-fact to a legally protected interest.¹⁰⁹ Essentially, once parties have sufficient evidence of negative effects to their health, property, or any other legally protected interest, they will still be found to have standing in Colorado.¹¹⁰ However, the denial of a hearing by COGCC cannot in itself be considered an injury-in-fact as such a hearing is now inarguably not a legally protected interest under the *COGCC v. GVCA* interpretation of COGA section 108(7).¹¹¹ It is therefore unlikely that any anticipatory request

107. See *Life Investors Ins. Co. of Am. v. Smith*, 833 P.2d 864, 867 (Colo. App. 1992) (“The standard of review for a court reviewing agency actions on appeal is whether substantial evidence exists on the record to support the findings and conclusions of the agency. And, in order for a reviewing court to set aside a decision by an administrative agency, the court must find that there is no competent evidence in the record as a whole which supports the agency’s determination.”) (citations omitted).

108. Order at 15, *Citizens for Huerfano Cnty.* (No. 11CV913). Two other claims were rejected regarding (1) COGCC’s failure to initially provide notice of the decision to the Huerfano County LGD, *id.* at 9–12, and (2) constitutional due process insufficiencies in providing notice to the citizens via the COGCC website, *id.* at 15–17. The first claim was rejected because the permit was suspended to allow the LGD an opportunity to respond, and the LGD stated that he did not want to hold a hearing and was in support of the well. *Id.* at 11. The second was rejected for lack of standing because injury-in-fact is required to challenge due process constitutionality in Colorado, and CHC had actual notice of the proposed well and pit as they had been fighting the application since before the issuance of the permit, so CHC could not attack the notice as constitutionally insufficient. *Id.* at 17. The rejection of these claims illustrates judicial reticence to undo a COGCC decision, and demonstrates the need for a broader hearing standard to allow for better agency evaluations and the development of a sufficient record to be considered on appeal.

109. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004).

110. State Administrative Procedure Act, COLO. REV. STAT. §§ 24-4-101 to -108 (2006).

111. See *COGCC v. GVCA*, 279 P.3d 646, 646 (Colo. 2012).

for relief will be eligible for judicial review, and aggrieved parties beyond the scope of Rule 503.b(7) appear to be required to wait until after they have already incurred the injury before they can obtain any relief through the judicial system.

A theoretical review of these three potential avenues for relief appears to grant aggrieved parties beyond the scope of Rule 503.b(7) some degree of hope for obtaining relief. As the next Section explains, however, none of these options provides any real semblance of Due Process when put into practice.

2. Reality Bites: Why *COGCC v. GVCA* Foreclosed Any Relief for These Parties Under Current Colorado Law

Despite the theoretical availability of the above-stated alternative paths to relief, a closer examination of the realities surrounding these possibilities reveals that the only pragmatically viable option left for parties aggrieved by COGCC permitting decisions who are beyond Rule 503.b(7)'s scope¹¹² is a narrow realm of after-the-injury tort litigation. This Section first examines the ineffectiveness of the COGCC complaint system, demonstrating that the likelihood of successfully blocking a permit or obtaining a Director-ordered hearing through complaints is almost zero. It then analyzes the political and economic realities that prohibit the well-intentioned LGD program from being a feasible path in all but the most egregious cases. Finally, this Section explores the option of judicial review, revealing how most Colorado citizens are unlikely to even have standing to be heard on the merits of their complaint until after the damage has already been done to their legally cognizable interests.

a. The Complaint Department

The complaint system established by COGCC is predictably ineffective. The complaint regulations themselves diminish the ability of a complaint to halt a permitting decision, and it is unlikely that such a complaint will even be deemed sufficient to require a hearing.¹¹³ As discussed above,

112. See *supra* text accompanying note 32.

113. See *supra* Part II.A.

the confluence of COGCC rules 303.k and 303.m has been interpreted to allow the Director the discretion to approve APDs that are deniable by rule.¹¹⁴ Therefore, under current COGCC practice, a complaint allows the Director to withhold a permit only if he agrees either that the alleged conduct materially violates some substantive or procedural law or regulation, or that the alleged threat to health, safety, and welfare is “imminent.”¹¹⁵ If the Director does not agree that the alleged violation meets one of these criteria, he is powerless to withhold the permit, whereas if he does find one of the criteria satisfied, it remains in his sole discretion whether or not to withhold the permit.¹¹⁶ Furthermore, if the Director does decide to withhold a permit, Rule 303.h requires him to set a hearing at the next COGCC meeting.¹¹⁷ Similarly, the oil and gas operators¹¹⁸ are always entitled to a hearing whenever a permit is not granted exactly as they requested in their APDs.¹¹⁹

An examination of the COGCC’s track record reveals that the agency also overwhelmingly tends towards permit approval in practice. As of October 2012, there were 49,236 active wells and 5,009 active drilling permits in Colorado.¹²⁰ While the

114. See Complaint, *supra* note 4, at Exhibits 6A–D, 1, 5, 7, 9, and 11, (in which the Director erroneously cites only to Rule 303.k while asserting that he only has authority to withhold a permit upon receipt of a complaint when “material violation of [COGCC]’s rules, regulations, orders or statutes, or otherwise presents an imminent threat to public health, safety and welfare, including the environment” This quotation is from Rule 303.m, and although it does not necessarily constrain 303.k in its plain meaning, COGCC has elected to interpret it as requiring such a constraint).

115. See *id.*

116. *Id.*; 2 COLO. CODE REGS. § 404-1.303.k (2012).

117. 2 COLO. CODE REGS. § 404-1.303.h (2012).

118. Operators are the corporations that extract oil and gas from the earth, and thus are the ones who apply for APDs. See COLO. REV. STAT. § 34-60-103(6.8) (2009) (“‘Operator’ means any person who exercises the right to control the conduct of oil and gas operations.”); COLO. REV. STAT. § 34-60-103(6.5) (“‘Oil and gas operations’ means exploration for oil and gas, including the conduct of seismic operations and the drilling of test bores; the siting, drilling, deepening, recompletion, reworking, or abandonment of an oil and gas well, underground injection well, or gas storage well; production operations related to any such well including the installation of flow lines and gathering systems; the generation, transportation, storage, treatment, or disposal of exploration and production wastes; and any construction, site preparation, or reclamation activities associated with such operations.”).

119. See 2 COLO. CODE REGS. § 404-1.503.b(7) (2012).

120. COLO. OIL & GAS CONSERVATION COMM’N, STAFF REPORT (Nov. 15, 2012), at 28, available at http://cogcc.state.co.us/Staff_Reports/2012/2012_11SR.pdf.

active drilling permits have remained more or less static around 5,000 since 2009, more than 8,000 active wells have been added since that time, all with COGCC approval.¹²¹ In 2011, 4,694 APDs were requested; 4,557 were approved, 128 were withdrawn by the operator, and five remain pending.¹²² A quick calculation shows that only four permits could have been denied that year.¹²³ Even operating on the extremely conservative assumption that every pending permit will be withdrawn and every permit withdrawal was a direct result of certain denial, and rounding up to the next whole percentage point, only 3 percent of APDs were denied in 2011.¹²⁴ 2012 saw only a slightly higher percentage of possible denials, at approximately 3.6 percent.¹²⁵ Additionally, this 3 percent “denial” rate reflects permits denied for any reason whatsoever, including those APDs for which hearings were actually obtained.¹²⁶

Furthermore, it is a mathematical fiction to assume that every withdrawal resulted from certain denial, as there are other possible reasons an operator might withdraw a request, such as mounting negative sentiment in the community or simple lack of funds. COGCC seems to pride itself in not denying permits, reporting in September 2013 that it had not denied a single permit *for any permit category* over the last twelve months.¹²⁷ In addition to the statistical evidence indicating that permits are never denied, the Director’s refusal to allow for a hearing on APDs to drill through water basins

121. *Id.* (41,207 active wells in January, 2009 compared with 49,236 active wells in October 2012).

122. *Id.* at 21.

123. *Id.* (only four permit requests do not fall under the categories of approved, withdrawn, or pending).

124. *Id.*

125. See COLO. OIL & GAS CONSERVATION COMM’N, STAFF REPORT (Sept. 16, 2013), at 15, available at http://cogcc.state.co.us/Staff_Reports/2013/201309_StaffReport.pdf. For 2012, out of 3,955 APD requests, 3,813 have been approved, 136 have been withdrawn, and six are still in process. Every permit request in 2012 is accounted for as either approved, withdrawn, or pending, revealing that there have been zero actual denials thus far for 2012 ($3,369 - (2,985 + 92 + 292) = 0$) (theoretically the six pending could still be denied). Therefore, if every withdrawal and every pending application is treated as a denial, the 2012 rate of APD denial was only slightly higher than 2011, approximately 3.6 percent ($142/3,955 = 0.0359$).

126. See *id.* (category includes all withdrawn permits with no explanation of why they were withdrawn).

127. *Id.* at 20.

within a nuclear blast zone reveals that these “complaints” (as the GVCA’s requests for hearings were treated) are rarely taken seriously.¹²⁸ Thus, a complaint to COGCC will almost assuredly result in a form letter informing the complainant that the APD has been approved.¹²⁹

b. The Languishing LGD Program

Similarly, although the LGD program ostensibly allows for aggrieved parties outside the bounds of 503.b(7)’s standing requirements to obtain a hearing by guaranteeing the LGD a right to request one, the political and economic realities of local government generally foreclose LGDs from satisfying the regulatory requirements for obtaining the hearing. This reality is best explained through an examination of the amicus briefs filed by local governments on both sides of the dispute in *COGCC v. GVCA*, which are remarkably policy driven even though both the court of appeals and the Supreme Court decisions were based solely on statutory interpretation.¹³⁰

Although several county governments filed amicus briefs on both sides of the dispute,¹³¹ the Gunnison County and Washington County briefs are illustrative of the counties’ arguments. Gunnison County, as amicus to the GVCA, addressed the concerns of a local government that wants its citizenry to be heard.¹³² Regarding policy considerations, the

128. See Complaint, *supra* note 4, at Exhibits 6A–D, 1, 5, 7, 9, and 11.

129. This is not intended to negate the plausibility that a complaint may initiate a dialogue between the operator and the community that results in the issuance of a permit that addresses the complainant’s concerns. Pragmatically, however, the sheer scale of permitting requests suggests that this must be a rarity.

130. See, e.g., Brief for the Bd. of Cnty. Comm’rs of the Cnty. of Gunnison, Colo. as Amicus Curiae Supporting Respondents, *COGCC v. GVCA*, 279 P.3d 646 (Colo. 2012) (No. 10SC532) [hereinafter Gunnison Amicus Brief].

131. See, e.g., *id.*; Brief for the Bd. of Cnty. Comm’rs of the Cnty. of Garfield, Colo. as Amicus Curiae Supporting Respondents, *COGCC v. GVCA*, 279 P.3d 646 (Colo. 2012) (No. 10SC532); Brief for the Bd. of Cnty. Comm’rs of the Cnty. of Washington, Colo. as Amicus Curiae Supporting Petitioners, *COGCC v. GVCA*, 279 P.3d 646 (Colo. 2012) (No. 10SC532) [hereinafter Washington Amicus Brief]; Brief for the Bd. of Cnty. Comm’rs of the Cnty. of Weld, Colo. as Amicus Curiae Supporting Petitioners, *COGCC v. GVCA*, 279 P.3d 646 (Colo. 2012) (No. 10SC532) [hereinafter Weld Amicus Brief].

132. See Gunnison Amicus Brief, *supra* note 130, at 2 (“A complete, accurate and neutral review of applications to drill will ensure that all of these interests are honored. A right of concerned citizens to obtain a hearing before the COGCC on contested applications is necessary to ensure that sound review.”).

brief described the fiscal and temporal roadblocks to effective implementation of the LGD system.¹³³ First, Gunnison County objected to the imposition of an unfunded mandate, requiring it to pay out-of-pocket—if it could come up with the funds—to represent its citizens’ interests¹³⁴ against what is arguably one of the richest industries in the world.¹³⁵ If the county does not have the funds to spare, this forecloses entirely the citizens’ ability to obtain a hearing via the LGD.¹³⁶ Gunnison County then addressed the ineffectiveness of requiring county governments to approve hearing requests, stating that the timeline under which local governments have to respond—a mere ten days from approval¹³⁷—makes government intervention practically impossible.¹³⁸ The LGD must obtain approval from the county commissioners before filing a request for a hearing, although the commissioners may not even meet within that time span.¹³⁹ If an aggrieved citizen is lucky enough to get the local LGD to address its county commissioners within the ten-day timeframe, the commissioners may still disagree with the LGD for reasons other than the merits of the complaint, again foreclosing the aggrieved party’s ability to be heard.¹⁴⁰ From Gunnison County’s perspective, it was stuck with an unfunded and untenable mandate that essentially redirects citizens’ frustrations from the agency denying them a hearing to the local government itself.¹⁴¹

Alternatively, the perspective of Washington County reveals the danger in the LGD system when the county government’s interests lie in the promotion of oil and gas exploration and development.¹⁴² The Washington County brief

133. *Id.* at 14–15.

134. *Id.*

135. *See, e.g.*, ENCANNA CORPORATION, ANNUAL REPORT 2011 6 (2011), <http://www.encana.com/pdf/investors/financial/annual-reports/2011/annual-report-2011.pdf> (reporting \$8,467,000,000 in revenues net of royalties for 2011, and \$128 million in earnings for 2011).

136. Gunnison Amicus Brief, *supra* note 130, at 14.

137. 2 COLO. CODE REGS. § 404-1.305.e(2) (2013) (previously codified as COLO. CODE REGS. § 404-1.305.d(2) (2012)).

138. Gunnison Amicus Brief, *supra* note 130, at 14.

139. *Id.*

140. *Id.*

141. *See id.* at 14–15.

142. *See* Washington Amicus Brief, *supra* note 131, at 2 (arguing that “[w]ithout the continued smooth functioning of the APD process, the development

acknowledged that “numerous landowners located near proposed drill sites had some misgivings about such proposed drilling,”¹⁴³ but went on to say that they, as county commissioners, “are in the best position to determine whether any proposed land use is in the best interest of the County.”¹⁴⁴ The Washington County brief pointed out that the initial notice of an APD allows twenty days for the LGD to comment, with an optional thirty-day extension if a written request is submitted,¹⁴⁵ but utterly ignores the financial realities of the unfunded mandate. Additionally, the Washington County brief asserts that APDs are unlike land use determinations simply due to the number of permit requests, which it claims is so high that allowing citizens to obtain hearings themselves would result in 600 hearings per month—without providing any support for this figure.¹⁴⁶ Moreover, if presumed to be an accurate reflection of monthly requests for hearings received by COGCC, the 600-hearings figure seems to assume that every request would be granted. It ignores the inevitability of a middle ground in which some, but not all, complaints result in hearings, even under the “aggrieved party” standard advocated for by the *COGCC v. GVCA* plaintiffs and examined in more detail below.¹⁴⁷ Weld County similarly asserted that allowing citizens to have hearings would stall its economy, as well as that of the entire state.¹⁴⁸ In so doing, Weld County ignores the fact that oil and gas production is a pollution-producing industrial activity,¹⁴⁹ and that the Weld County Department of Health and the Environment purports to consider “air and water pollution [as] important issues” in every land use

of oil and gas in Washington County will be stalled along with Washington County’s economy”).

143. *Id.* at 4.

144. *Id.* at 5.

145. *Id.* at 6.

146. *Id.* at 7.

147. *See infra* Part II.B.

148. *See* Weld Amicus Brief, *supra* note 131, at 3 (arguing that “[w]ithout the continued smooth functioning of the APD process, the development of oil and gas in Weld County and the State of Colorado alike will be stalled, along with Weld County’s economy”).

149. *See* LISA SUMI, OIL AND GAS ACCOUNTABILITY PROJECT, OIL AND GAS AT YOUR DOOR? A LANDOWNER’S GUIDE TO OIL AND GAS DEVELOPMENT 41 (2d ed. 2004) (describing the various pollutants that can be released during the production stage of a well).

determination.¹⁵⁰ Hence, through the LGD system, it appears that a county government that wishes to vindicate the rights of its citizenry will often be precluded from doing so, whereas a county government whose interest lies in promotion of development might ignore its citizens' requests to be heard. Thus, an aggrieved adjacent landowner is unlikely to succeed in obtaining a hearing before the COGCC through the LGD program.

c. . . . And They're Right Back Where They Started

Finally, the last-ditch option of bringing a private cause of action through the judicial system is equally unviable because under the Colorado Supreme Court's decision in *COGCC v. GVCA*, parties aggrieved by COGCC decisions do not benefit from the APA's presumption in favor of reviewability. Under *COGCC v. GVCA*, the Colorado APA, and COGCC regulations, a party is essentially excluded from the court system until either the damage has already been done or it can demonstrate imminence with scientific certainty.¹⁵¹ It is thus immediately apparent that an aggrieved citizen lacks a legal means to block a permit, regardless of the seriousness of his interest or the severity of the potential injury. Rule 305(e)(3) states that approval of an APD is final agency action and subject to judicial review.¹⁵² However, the Colorado Supreme Court's binding *COGCC v. GVCA* interpretation of the relevant COGCC statutes gave precedence to a clause granting COGCC broad discretion.¹⁵³ As such, COGCC is exempt from the APA

150. *Land Use and Planning: Frequently Asked Questions*, WELD CNTY. DEPT OF PUB. HEALTH & ENV'T, <http://www.co.weld.co.us/Departments/HealthEnvironment/EnvironmentalHealth/LandUse.html> (last visited Oct. 25, 2013).

151. See *supra* Part II.A.

152. 2 COLO. CODE REGS. § 404-1.305.e(3) (2013) ("If the approval of a Form 2 or Form 2A [APD] is not suspended as provided for herein, the issuance of the approved Form 2 or Form 2A by the Director shall be deemed a final decision of the Commission, subject to judicial appeal." Pursuant to 2 COLO. CODE REGS. § 404-1.305.e(2) (2013), the APDs are suspended "[i]f a party, Surface Owner or local government requests a hearing before the Commission pursuant to Rule 503.b . . .").

153. COLO. REV. STAT. § 34-60-106(1)(f) (2013) ("The Commission also has the authority to require . . . (f) That no operations for the drilling of a well for oil and gas shall be commenced without first giving to the commission notice of intention to drill and without first obtaining a permit from the commission, *under such rules and regulations as may be prescribed by the commission . . .*" (emphasis

presumption in favor of judicial reviewability of its permitting decisions.¹⁵⁴ Therefore, this option is equally unviable as a means of protecting even the strongest of interests against the granting of a permit prospectively, and an aggrieved party is left to wait until the damage has been done, at which point he can then try to recover for his losses in tort. Alternatively, the aggrieved party could try to obtain certiorari from the United States Supreme Court after being denied standing all the way up the Colorado judicial chain and without the benefit of a record, which is a difficult task, especially since the United States Supreme Court generally defers to a state supreme court's interpretation of state law.¹⁵⁵

A pragmatic evaluation of the viability of these alternate paths to obtain a hearing on a permitting decision reveals only mirages of power to assuage the public's fear that it has no voice in the negotiations between the oil and gas industry and the government.¹⁵⁶ Realistically, these options are often no more effective than simply ignoring the problem altogether. Therefore, because (1) legislative intent was far from clear (as evidenced by the complex interpretive schemes implemented by the courts in *COGCC v. GVCA*), and (2) every potential path to relief is practically closed off by the decision, it is critical that the legislature amend the Act so as to clarify its intent and allow aggrieved parties who are currently denied standing under Rule 503.b(7) some semblance of a voice.¹⁵⁷

B. Three Suggestions for Achieving a Middle Ground

The current debate is frozen between two absolutes: the near-complete divestiture of the right of an aggrieved party to argue for vindication, and the complete administrative gridlock

added)). *See also supra* Part I.C.3 (describing the court's interpretation).

154. *See supra* notes 94–97 (explaining that when agency action is committed to agency discretion by law, there is no APA presumption in favor of reviewability).

155. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (declaring that on questions of state law “[t]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word” (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting))).

156. *See supra* Part II.A.

157. *See supra* Part I.C (describing the decisions' opposing yet mutually viable interpretations of the statutory language).

harbingered by COGCC and its amici if the list of parties with standing to obtain hearings on APD decisions is expanded. This Section argues that it is possible to reach a compromise. It therefore assembles three solutions that broaden the category of parties with standing to be heard on a permitting decision in a manageable fashion: (1) adoption of an “aggrieved party” standard, (2) an alternative path to vindication only upon an LGD’s refusal to request a hearing, and (3) a narrow standing expansion to include legitimately aggrieved adjacent landowners within 503.b(7)’s short-list.¹⁵⁸ None of these suggestions propose to alter any other aspect of the permitting process, and no rule but 503.b(7) would be altered. As such, these proposals constitute a narrowly-tailored solution to a glaring regulatory deficiency.

The first proposal is not a new proposition,¹⁵⁹ and it is more restrictive than the result reached by the Court of Appeals. Adoption of the Colorado APA’s “aggrieved party” standard will certainly broaden the scope of parties with standing to be heard on a permitting decision, but it would be unlikely to reach the point of freezing the agency.¹⁶⁰ Borrowing from the definition of “aggrieved” from the APA, a standard could be created under which parties are entitled to a hearing if they have “suffered actual loss or injury or [are] exposed to potential loss or injury to legitimate interests including, but not limited to, business, economic, . . . governmental, recreational, or conservational interests.”¹⁶¹ Aesthetic considerations have been eliminated from the APA language in this proposal because current derricks are not aesthetically pleasing to most.¹⁶²

158. See *supra* note 32 and accompanying text (listing the parties entitled to request a hearing under 503.b(7) as the operator, local government, surface owner, CDPHE, and CDOW, and explaining that the current rule includes only the operator, local government, and surface owner).

159. See *COGCC v. GVCA*, 279 P.3d 646, 649 (Colo. 2012) (Hobbs, J., dissenting) (arguing denial of aggrieved citizens is arbitrary and capricious in violation of the Colorado APA).

160. See Gunnison Amicus Brief, *supra* note 130, at 15 (stating that the mandate to interpose the local governments is an “unnecessary mandate. There is no reason based on ‘administrative burden’ that should preclude the state from holding hearings when properly requested by local citizens. Counties, including Gunnison County, almost uniformly allow broad hearing rights to citizens on local zoning matters, and this has not created a procedural nightmare.”).

161. COLO. REV. STAT. § 24-4-102(3.5) (2013).

162. *Id.* (original APA language includes aesthetic considerations).

This solution is the broadest of the three. To alleviate the fear that COGCC will suffer from a debilitating flood of hearings, the legislature could require proof of some probability beyond mere potential for loss as a condition to standing. Additionally, if COGCC is incapable of granting a hearing to every party legitimately aggrieved by the permits it grants, perhaps it should approve fewer permits, or perhaps the legislature could increase COGCC funding to process additional hearings. The oil and gas industry has more than enough money to tolerate mild increases in severance taxation¹⁶³ and excise taxation¹⁶⁴ to support the regulatory agency that industry activities have necessitated.¹⁶⁵

Alternatively, the legislature could allow aggrieved parties the rights specified above only if their LGD refuses to vindicate their rights for them, as suggested by Justice Gregory Hobbs, the lone dissenter in *COGCC v. GVCA*.¹⁶⁶ Such a statute could permit the LGD the standard time to respond to the initial approval, and then either allow a legitimately aggrieved citizen the same ten-day window thereafter, or even allow only a few days based on the presumption that the request would be ready to submit upon the LGD's failure to act.¹⁶⁷ This proposal would

163. A severance tax is “[a] tax imposed on the value of oil, gas, timber, or other natural resources extracted from the earth.” BLACK’S LAW DICTIONARY 1597 (9th ed. 2009). An article by Randy Udall of the Aspen Community Office for Resource Efficiency estimated that as of 2007, “[b]ecause of our low severance tax rates, Colorado [was] foregoing \$1 million a day in severance tax revenues.” RANDY UDALL, TORCHED AND BURNED: WHY DOES COLORADO SUBSIDIZE THE WORLD’S MOST PROFITABLE INDUSTRY 7 (2007), available at <http://aspencore.org/wordpress/wp-content/uploads/2012/06/torched-and-burned.pdf>. See also *id.* at 2 (stating that “[a]lthough Colorado’s nominal severance tax rate is 5%, the state actually collects less than 2% . . .” because (1) “Colorado—unlike other states—allows energy companies to deduct the county property taxes they pay from their severance tax bill. This loophole—the ‘ad valorem’ deduction—currently costs the state \$200 million or more each year”; and (2) “[t]hree-fourths of the state’s wells pay no severance tax at all . . . because Colorado exempts ‘stripper wells’ from severance fees.”). This state of affairs does not appear to have changed materially since 2007.

164. An excise tax is “[a] tax imposed on the manufacture, sale, or use of goods . . . , or on an occupation or activity (*such as a license tax or an attorney occupation fee*).” BLACK’S LAW DICTIONARY 646 (9th ed. 2009) (emphasis added).

165. See, e.g., *ENCANA CORPORATION*, *supra* note 135, at 8.

166. See *COGCC v. GVCA*, 279 P.3d 646, 649 (Colo. 2012) (Hobbs, J., dissenting).

167. For the purposes of this Casenote, the assumption is that such a rule would be most easily contained within 2 COLO. CODE REGS. § 404-1.503.b(7) (2012).

allow the LGD system to operate effectively within local governments that are willing and able to implement it as intended, while still allowing aggrieved parties to be heard in situations where the LGD cannot or will not represent them.¹⁶⁸ This proposal also carries the risk of bogging COGCC down in hearings, but if COGCC intends to take its mandate to protect the health, safety, and welfare of the Colorado citizenry seriously, it must find a way to bear this burden.¹⁶⁹ Without the benefit of a record, or even an argument on the other side of the equation, it is difficult to see how COGCC can accurately judge the negative impacts of its permitting decisions.

As a final alternative, the legislature should at least mandate standing to request a hearing on a COGCC permitting decision for adjacent landowners who meet a version of the APA's legitimately aggrieved standard discussed in option one. The facts of *COGCC v. GVCA* indicate this necessity.¹⁷⁰ In that case, the adjacent landowners of property within three miles of the detonation who relied on near-surface aquifers for water had no standing to challenge the Director's assertion of safety upon the granting of a permit to drill within one mile of a still-radioactive nuclear blast site.¹⁷¹ If such landowners have no standing, then COGCC's assurances of safety are without meaning, and the legislature may as well repeal the requirement that the COGCC make its decisions consistent with public health.

While any of these solutions would be better than the current state of affairs, the APA's "aggrieved party" standard will protect the widest range of legitimately aggrieved Colorado citizens' Due Process rights. Standards similar to the APA's "aggrieved party" standard are applied throughout the government without the negative consequences that the

168. See *supra* Part II.B.

169. COLO. REV. STAT. § 34-60-102(1)(a)(I) (2013) (declaring it to be in the public interest to "[f]oster 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 . . ." (emphasis added)). Because the language requires that oil and gas development be done *consistently with* protection of public health, safety, and welfare, the legislative addition of this second mandate during the 2007 amendments was instructing COGCC to restrict development to that consistent with public health, safety, and welfare. At the least, it is a dual mandate.

170. See *supra* Part I.A.

171. See *supra* Parts I.A, I.C.3.

COGCC predicts. Any of these solutions would allow the aggrieved parties in *COGCC v. GVCA* to request the hearing to which fundamental fairness so clearly entitles them.¹⁷² Furthermore, none of these solutions would entitle everyone who requests a hearing to be heard, despite the arguments of COGCC and its amici.

CONCLUSION

The State of Colorado faces an expanding industry that is encroaching ever further into sensitive and densely populated areas.¹⁷³ COGCC is dually charged with promoting oil and gas development and with protecting the people and environment of Colorado from that very development.¹⁷⁴ It faces this challenge in a climate of technological advances that far outpace scientific understanding of their potential consequences. As such, the regulatory scheme is essentially trying to keep up. If affected citizens are not permitted to develop their side of the record through administrative and adjudicative processes when opposing an APD, it is almost unfathomable that an unfunded LGD program and an underfunded state regulatory system will achieve the balance between oil and gas interests and public health and safety that is required of it by the state legislature. The facially available alternatives to standing for parties aggrieved by COGCC permitting provisions are demonstrably insufficient. Therefore, the current situation created by the Colorado Supreme Court's decision in *COGCC v. GVCA* cannot be squared with COGCC's dual mandate, and a legislative amendment is necessary to ensure that legitimately aggrieved Coloradans are protected.

172. Note that the third solution would permit only the landowners, not the citizens' groups in *COGCC* to obtain a hearing.

173. See COLO. OIL & GAS CONSERVATION COMM'N, STAFF REPORT (Jan. 7, 2013), at 15, *available at* http://cogcc.state.co.us/Staff_Reports/2013/201301_StaffReport.pdf (reporting that between 2000 and 2012, annual drilling permits have increased in the following counties containing urban centers: Arapahoe (from 0 to 35); Boulder (up from 1 to 22; net increase of 21); Broomfield (from 0 to 36); El Paso (from 0 to 18, with no permits issued in the county until 2009); Larimer (from 2 to 13; net increase of 11); and Weld (from 509 to 1732; net increase of 1223). As of December 20, 2012, no annual drilling permits were issued in Denver County and Jefferson County, and Douglas County is oddly absent from the chart); *see also supra* text accompanying note 22 (showing significant increase in permits permitted within the three-mile Rulison blast zone).

174. COLO. REV. STAT. § 34-60-102(1)(a)(I) (2013).