

THE BATTLE BETWEEN THE COLORADO OIL AND GAS CONSERVATION COMMISSION AND LOCAL GOVERNMENTS: A CALL FOR A NEW AND COMPREHENSIVE APPROACH

ANGELA NEESE*

INTRODUCTION

As natural gas prices continue to increase, spiking as high as “three times the past decade’s average,” it is clear that “America’s demand for natural gas is outstripping supply.”¹ What might be surprising, however, is that there is actually no immediate shortage of available natural gas in North America.² Although America’s yearly consumption of natural gas is expected to increase by 13 trillion cubic feet by the year 2020, the U.S. Geological Survey estimates that the United States has enough recoverable gas resources to last many decades.³ In fact, the “five producing basins in the Rocky Mountains alone have enough [natural gas] to serve 10 million American households for seventy-six years.”⁴ The problem then, simply stated, is not just that Americans are too hungry for natural gas,⁵ but that much of the available natural gas is off-limits or too expensive to recover because of restrictive local rules and lawsuits that delay or pre-

* Candidate for Juris Doctor, University of Colorado School of Law, 2005; B.S.B.A., University of Denver, 2002. The author would like to thank all the members of the editorial board who gave invaluable comments and feedback, particularly Jeffrey Lippa. The author also thanks Dennis Carnes and Gretchen VanderWerf for considerable guidance in the early stages of this article, as well as her father, Jay Neese, for fostering and encouraging an interest in the oil and gas industry.

1. Editorial, *Unnatural Gas Shortage*, WALL ST. J., June 20, 2003, at A8.

2. The Colorado School of Mines’ Potential Gas Committee, the National Petroleum Council, the Gas Technology Institute, and the U.S. Department of the Interior each use different methods for making projections of potential natural gas resources; however, all four organizations “project substantial availability of natural gas for the foreseeable future. Regardless of which estimate is used, it is evident that there is a vast supply of potential natural gas available in the U.S.” COLORADO OIL & GAS ASS’N, CLEAN ENERGY FOR COLORADO AND AMERICA: THE ROLE OF COLORADO AND THE ROCKIES TO POWER THE NEW ECONOMY 10 (Dec. 2001) [hereinafter CLEAN ENERGY FOR COLORADO].

3. *Id.*

4. *Unnatural Gas Shortage*, *supra* note 1.

5. See Steve Raabe, *Rockies’ Natural Gas Fuels Land-Use Clash; Reserves Pit Industry vs. Environmentalists*, DENV. POST, Oct. 12, 2003, at 1K.

vent domestic drilling for such natural resources.⁶ This problem has become particularly dramatic in the western United States. Due to the depletion of older gas fields in the southern United States, the West now has the largest gas reserves of any region in the continental U.S.⁷ According to the National Petroleum Council, the Rocky Mountain West now "has forty-one percent of the proven and potential gas reserves" in the lower forty-eight states.⁸ Although land use conflicts, including conflicts between surface owners and mineral owners, are nothing new in the West,⁹ "analysts see a troubling correlation between surging demand for the Rockies' natural gas and acrimony over access to gas-rich public land."¹⁰

"America's romance with natural gas started burning decades ago, when it became clear that gas was a cleaner fuel than coal or oil."¹¹ As Americans have continued to demand more and more natural gas in place of other sources of energy,¹² it has become evident that something will have to change in order for production of natural resources to keep up with the growing demand. In 2000, natural gas provided over fifty-eight percent of the total energy used by residential consumers in the United States.¹³ While sufficient natural gas resources exist domestically, and specifically in the West, these resources cannot satisfy the energy demands of the public if they cannot be accessed.¹⁴ In response to this need for change, the Bush administration has stated a commitment to work toward speeding up the development of natural resources in the Rocky Mountain region.¹⁵ The state of Colorado has also stated a com-

6. *Id.*; *Unnatural Gas Shortage*, *supra* note 1.

7. *Id.*

8. *Id.*

9. See Jeanine Feriancek & Cynthia L. McNeill, *Oil Company Surface Use: Do Farmers Need Protection?*, 9 NAT. RESOURCES & ENV'T 28, 28 (Winter 1995) ("Although complaints by the agricultural community in northeastern Colorado have received much attention, disputes between surface owners and mineral developers have occurred in many parts of the country.").

10. Raabe, *supra* note 5.

11. *Unnatural Gas Shortage*, *supra* note 1; see also TRAVIS WAGNER, IN OUR BACKYARD: A GUIDE TO UNDERSTANDING POLLUTION AND ITS EFFECTS 203 (1994) ("Compared to all other fossil fuels, natural gas is by far the cleanest throughout its life cycle.").

12. See Michael J. Wozniak, *Home Court Advantage? Local Governmental Jurisdiction Over Oil and Gas Operations*, 48 ROCKY MTN. MIN. L. INST. 12-1, 12-7 (2002) ("Predictably, growth in the West has led to increased energy demand and energy consumption.").

13. See CLEAN ENERGY FOR COLORADO, *supra* note 2, at 1. The average U.S. residential consumer uses approximately 100,000 cubic feet of natural gas per year. *Id.* The residential energy consumption in the 2000 included 52 percent natural gas, and 35 percent electricity (of which 16% was generated by natural gas). *Id.*

14. See CLEAN ENERGY FOR COLORADO, *supra* note 2, at 15; see also Raabe, *supra* note 5.

15. See Russell Gold, *Bush Efforts to Speed Gas Drilling In Rockies Are Slowed by Lawsuits*, WALL ST. J., Aug. 26, 2003, at A1.

mitment to the development of natural resources.¹⁶ But not everyone agrees that drilling in the West should be made easier.¹⁷ Environmentalists and local governments in Colorado, and throughout the West, seek to preserve communities that are free from "the environmental and aesthetic social costs of resource extractive operations."¹⁸ These conflicting interests "set[] the stage for increasing animosity as energy companies push to fulfill national demand while environmental activists and landowners resist drilling on sensitive lands."¹⁹

Here lies the heart of the battle: "[t]he Rocky Mountains' rising stature as an energy star is fueling increased tension" between natural gas producers, local governments, and environmental activists.²⁰ While many are pushing to speed the process of gaining access to the enormous reserves of natural gas in the West, many natural gas rich towns across Colorado do not want it to become easier for oil and gas companies to drill in their backyards.²¹ Throughout Colorado, many residents feel that their local communities will be sacrificed to national and corporate interests if natural gas drilling in their localities is hastened or made possible at all.²² Josh Joswick, chairman of the La Plata County Commission, explains, "[t]o those of us who have to live with the impacts, faster is not better."²³ As a result of the opposition to drilling in the West, anti-development lawsuits are on the rise.²⁴ Because these lawsuits impede oil and gas companies' ability to gain permits to drill for natural gas, they slow the ability of oil and gas companies to produce natural gas in the quantities needed to meet the increasing domestic demand.²⁵

The problem, from the industry perspective, is two-fold: not only must oil and gas companies contend with numerous local ordinances throughout Colorado and the West that are extremely restrictive of natu-

16. See Gargi Chakrabarty, *Bill Would Speed Natural Gas; Beauprez Hopes to Ease Way for Firms to Drill, Lay Pipelines*, ROCKY MTN. NEWS, Aug. 26, 2003, at 2B.

17. "Environmentalists fear . . . dire results if the [oil and gas] industry is allowed to proceed without more environmental regulation . . ." John F. Welborn, *Environmental Regulation of Oil and Gas Operations by State Conservation Agencies*, 38 ROCKY MTN. MIN. L. INST. 14-1, 14-3 (1992).

18. Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L.J. 1, 17 (2004).

19. Raabe, *supra* note 5.

20. *Id.*

21. See Wozniak, *supra* note 12, at 12-22.

22. Theo Stein, *National Needs, Local Concerns: Three Colorado Communities at Odds with President's Agenda on Natural Gas Drilling*, DENV. POST, Oct. 5, 2003, at 1B.

23. Theo Stein, *Drilling Needs Limits, Critics Tell Energy Council*, DENV. POST, Aug. 27, 2003, at 10C.

24. See Raabe, *supra* note 5.

25. Interview with Ken Wonstolen, Senior Vice President and General Counsel, Colorado Oil & Gas Association, in Denver, Colo. (Jan. 9, 2004).

ral gas drilling, and often inconsistent with state law,²⁶ they must also contend with lawsuits from local governments that are often fueled by environmental groups.²⁷ The local ordinances that seek to restrict natural gas drilling raise questions as to the extent that individual towns should be allowed to regulate natural gas production within their borders and to what extent Colorado law preempts these ordinances.²⁸

Two Colorado Supreme Court decisions in the early 1990s addressed this preemption issue, but neither decision gave an answer that was clear enough to avoid the current and continuing flood of litigation surrounding these local ordinances.²⁹ According to the court, when state oil and gas drilling regulations collide with those of local land use regulations, courts must analyze and resolve such conflicts on a case-by-case basis.³⁰ Numerous Colorado Court of Appeals decisions on the issue of natural gas production have been handed down in recent years, and many more are pending.³¹ The case-by-case regime established by the Colorado Supreme Court creates unpredictability and leads to a never-ending stream of litigation that is costly to the industry, local governments, and the citizens of Colorado.³²

26. See Wozniak, *supra* note 12, at 12-25 ("extensive local regulation"). "As long as urbanization continues in traditional producing areas, local governments will continue to attempt to limit or prevent oil and gas development through zoning, the subdivision process, or permitting conditions or denials . . ." *Id.* at 12-41. See also Laitos & Getches, *supra* note 18, at 16 ("Unfortunately, local opposition and the need to obtain local regulatory permission may ensue even after all applicable laws seem to have been satisfied. Developers may confront local regulation subsequent to obtaining the relevant state permit.").

27. See Wozniak, *supra* note 12, at 12-41 ("Environmental groups continue to advocate severe limitations on development at the local level . . .").

28. For example, an ordinance in the Town of Frederick, prior to a judgment by the Colorado Court of Appeals, required a special use permit application, unique and separate from the permit required by the Colorado Oil and Gas Conservation Commission, before a well could be drilled. This requirement raised the question of whether or not the Town of Frederick could regulate an area already regulated at the state level. *Town Frederick Ordinance Sec. 16-114(1) & (2)*, considered in *Town of Frederick v. North Am. Res. Co.*, 60 P.3d 758 (Colo. App. 2002). See also Laitos & Getches, *supra* note 18, at 2 ("Vertically, layer after layer of state and local regulatory uncertainty and confusion force the developer to spend time, money, and effort attempting to understand whether, and how, state and local law applies to the development project."); A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 603 n.242 (1993) ("Courts have great latitude in applying [preemption] tests, and, therefore, no consistent law of preemption has arisen within or among the states . . .").

29. "Colorado permits some modicum of local control over oil and gas operations. The extent of that control, however, remains unclear." Laitos & Getches, *supra* note 18, at 15.

30. See *Bd. of County Comm'rs, La Plata County v. Bowen/Edwards Assocs.*, 830 P.2d 1045 (Colo. 1992); *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992).

31. The most recent Colorado Court of Appeals decision was decided in September of 2003. See *Bd. of County Comm'rs of La Plata County v. Colo. Oil & Gas Conservation Comm'n*, 81 P.3d 1119 (Colo. App. 2003). This case involved, as plaintiffs, the Boards of County Commissioners of five Colorado counties. See *id.*

32. See Laitos & Getches, *supra* note 18, at 14, 16, 40-41.

There is a definite need in Colorado for clearer guidelines regarding which areas of natural gas production can be regulated at the local level and which areas of regulation are reserved for the state. These guidelines would be most effective in the form of a comprehensive state statute that expressly delineates those aspects of oil and gas regulation that are reserved exclusively for the state. However, before discussing the potential benefits of clearer guidelines governing oil and gas regulation in Colorado, it is first important to understand why and how the battle has arisen between the state regulating body, the Colorado Oil and Gas Conservation Commission ("COGCC" or "the Commission"), and the local governments. Part I of this comment describes some of the primary sources of contention between local governments and the oil and gas industry and explains how these issues have led many local governments in Colorado to put up roadblocks to oil and gas development. Part II then discusses how oil and gas is currently regulated at the state level, including an explanation of the COGCC, a description of preemption law in Colorado, and an analysis of the Colorado Supreme Court decisions regarding preemption as it relates to oil and gas regulation. The discussion of state oil and gas regulations in Colorado is followed, in Part III, by a detailed breakdown of the issues that remain unsettled after the Colorado Supreme Court decisions, including the issues of land use and local permitting. Finally, Part IV considers the alternatives for dealing with the issues that the Colorado Supreme Court has left unsettled, and examines recent legislation passed in other states in response to similar obstacles. This article concludes by arguing that clearer guidelines from the state legislature, which would delineate what matters are of state versus local control, are necessary in order to put an end to the battles between the COGCC and local governments throughout Colorado. These guidelines would benefit not only the oil and gas industry but also citizens and communities throughout the state.

I. THE BATTLE: LOCAL GOVERNMENTS' ATTEMPTS TO REGULATE OIL & GAS PRODUCTION

The Colorado Oil and Gas Conservation Commission has express authority over oil and gas conservation,³³ but "additional powers" granted to the COGCC by statute give it implied authority to regulate almost all aspects of oil and gas operations.³⁴ Over time, the authority of the COGCC expanded beyond conservation to impose broad regulation

33. See Eric Twelker, *State Law as a Limit on Local Regulation of the Mineral Industry*, 15 COLO. LAW. 1657, 1658 (1986); COLO. REV. STAT. § 34-60-102 (2004).

34. Twelker, *supra* note 33, at 1659; see also COLO. REV. STAT. § 34-60-106 (2004).

of the oil and gas industry.³⁵ As the authority of the Commission expanded, however, local governments also began attempting to more directly regulate the industry.³⁶ Among the factors contributing to the expansion of local regulation in the mid-1980s was the fact that, due to population growth in Colorado, drilling activity was moving increasingly closer to municipalities and environmentally sensitive areas.³⁷ The initial dissatisfaction with oil and gas operations came primarily from farmers in Northern Colorado, who felt that the oil and gas drilling and production interfered with and damaged their crops and lands.³⁸ Colorado and the West have experienced great expansion over the past decades in what were once rural areas,³⁹ and the dissatisfaction with oil company operations has increased as competition over use of the land has increased.⁴⁰ Early on, most of the local ordinances concerning oil and gas drilling were not overly restrictive, but over time, with the increasing competition to develop the land, these ordinances have become more and more stringent.⁴¹

Before discussing the role of the Colorado Oil and Gas Conservation Commission and Colorado preemption law as it applies to oil and gas development, it is first helpful to consider more specifically why this battle between the COGCC and the local governments exists. One of the primary reasons for the ongoing conflicts is local governments' perception of the oil and gas industry as the enemy. As a result, local governments have increasingly imposed more stringent regulations on the oil and gas industry, effectively creating roadblocks to natural gas production.

35. See J. Michael Morgan & Mary Jo Check, *Local Regulation of Oil and Gas Operations in Colorado*, 22 COLO. LAW. 751, 751 (1993).

36. See *id.* ("While Commission authority expanded, many local governments also adopted oil and gas regulations under their statutory land use authority or, where applicable, their home rule authority to regulate matters of local concern.").

37. *Id.*

38. See Feriancek & McNeill, *supra* note 9, at 28. Interestingly, ranchers and farmers rely heavily on the fossil fuel production that they seek to prevent on their lands. "The average United States farm now uses three calories of fossil fuel energy to produce one calorie of food." UNIVERSITY OF COLORADO CENTER FOR THE AMERICAN WEST, WHAT EVERY WESTERNER SHOULD KNOW ABOUT ENERGY 24 (2003) [hereinafter WHAT EVERY WESTERNER SHOULD KNOW].

39. See Wozniak, *supra* note 12, at 12-3.

40. See Feriancek & McNeill, *supra* note 9, at 28; see Laitos & Getches, *supra* note 18, at 8 ("Adding fuel to the fire is the popularity of living in the West. Increasing population growth in the western United States will make mineral and surface disputes inevitable.").

41. "Local governments are brazenly claiming unprecedented authority over the extractive industry. . . ." Laitos & Getches, *supra* note 18, at 13; see Morgan & Check, *supra* note 35, at 751.

A. Oil and Gas Companies: The Enemy?

To a great extent, there is a large scale societal dislike and distrust of the oil and gas industry.⁴² These views of the oil and gas industry can be attributed to a variety of factors, including widely held misperceptions of the industry and its employees, a lack of understanding of the existence and implications of severed mineral estates, and concern about the environmental implications of oil and gas production.

1. Misperceptions of the Oil and Gas Industry

It is not clear exactly when or how the negative feelings regarding the oil and gas industry first came about, but they may have been aggravated in the late 1970s by the oil embargo.⁴³ Americans were becoming increasingly frustrated with the rising prices combined with a supply that was not meeting demand, and there was a growing belief that the oil and gas companies were significant contributors to the problems.⁴⁴ During this time, the oil and gas companies did not have good public relations and generally refused to talk to the media.⁴⁵ As a result, only one side of the story was told, and the image of the oil and gas industry was further tarnished in the eyes of the public.⁴⁶

Additionally, there is a "traditional characterization of the natural gas and oil industry as being led by 'Big Oil.'" ⁴⁷ But this characterization is largely a myth. In fact, as of 2001, independent oil and gas producers drilled over eighty-five percent of the domestic wells and produced over sixty-five percent of the natural gas consumed by Americans.⁴⁸ Many of these independents are "small, local companies who see themselves as energy farmers rather than oil tycoons, harvesting a crop that everyone needs."⁴⁹ Of course, large oil and gas companies do play a major role in the industry; however, of the major oil companies

42. Interview with Dennis Carnes, Partner, Kuhn, Carnes & Anderson, P.C., in Denver, Colo. (Jan. 9, 2004). Dennis Carnes was co-counsel for NARCO in *Town of Frederick v. North Am. Res. Co.*, 60 P.3d 758 (Colo. App. 2002). See generally *WHAT EVERY WESTERNER SHOULD KNOW*, *supra* note 38, at 30.

43. Interview with Dennis Carnes, *supra* note 42.

44. *Id.*

45. *Id.*

46. *Id.*

47. *CLEAN ENERGY FOR COLORADO*, *supra* note 2, at 17; see *WHAT EVERY WESTERNER SHOULD KNOW*, *supra* note 38, at 30 ("In recent years, independent oil and gas companies have increased their share of the global and domestic energy markets, and are a driving force in the industry.").

48. *CLEAN ENERGY FOR COLORADO*, *supra* note 2, at 17.

49. *WHAT EVERY WESTERNER SHOULD KNOW*, *supra* note 38, at 30.

active in the Rocky Mountain region, many are also leaders in environmental technology.⁵⁰

The Center for the American West at the University of Colorado, in a recent report, states, "[r]ecognizing that not all energy companies are polluting, power-hungry giants may enhance our ability to work constructively with the industry."⁵¹ The authors of the report also note that the employees of the oil and gas industry do not deserve the negative image that they are often saddled with:

We found [the men and women who work in the oil and natural gas industry] to be human beings, impossible to demonize. Moreover, we found them to be understandably frustrated human beings. Everywhere they look in American society, consumers are engaged in a carnival of energy use . . . taking an abundant supply of energy thoroughly for granted, grouching when the price of that energy inches up, *and then* condemning the people and enterprises that provide them with this comfort and luxury.⁵²

2. Lack of Understanding of Severed Mineral Estates

Another source of the dislike of the oil and gas industry is likely the result of a largely uninformed public as to the distinction between surface and mineral ownership rights.⁵³ Although it is one of the well-established principles of property law that land may be horizontally severed into surface and subsurface estates,⁵⁴ many people do not realize that when they purchase a piece of land there may be preexisting mineral owners.⁵⁵ Nor do they realize or understand that these mineral owners have the legal right to access these minerals even though such access requires use of the surface of the land.⁵⁶

An owner of real property in fee simple title may sever the surface and mineral estates by exception, lease, grant, or reservation.⁵⁷ Once the mineral estate has been severed from the surface estate, the estates are

50. CLEAN ENERGY FOR COLORADO, *supra* note 2, at 17.

51. WHAT EVERY WESTERNER SHOULD KNOW, *supra* note 38, at 30.

52. *Id.* (emphasis in original).

53. Interview with Dennis Carnes, *supra* note 42. See generally Feriancek & McNeill, *supra* note 9, at 28 ("Several factors amplify the antagonism between agricultural interests and oil companies Significantly, mineral rights are commonly severed (separately owned) from the surface estate.").

54. Christopher M. Alspach, *Surface Use by the Mineral Owner: How Much Accommodation is Required Under Current Oil and Gas Law?*, 55 OKLA. L. REV. 89, 91 (2002).

55. Interview with Dennis Carnes, *supra* note 42.

56. *Id.*

57. John Erich Johnson, *Gerrity Oil & Gas Corp. v. Magness: Colorado's Furtive Shift Toward Accommodation in the Surface-Use Debate*, 33 TULSA L.J. 943, 945 (1998).

held under separate and distinct title.⁵⁸ On much of the land in Colorado, and in Northern Colorado in particular, the mineral rights were severed from surface ownership years ago.⁵⁹ This means that many of the current surface owners were not the original mineral owners. These surface owners may be frustrated by the fact that they cannot impose contractual restrictions related to surface use in the oil and gas leases under which drilling occurs because they are not parties to the mineral leases.⁶⁰

The lack of education and understanding as to this distinction leads to much frustration when an oil and gas company decides to make use of its mineral rights and the surface owner is shocked to learn that the company has every right to do so.⁶¹ In fact, the mineral estate is considered the dominant estate.⁶² Many surface owners may not be aware that mineral estate owners have an implied easement, which burdens the surface interest and empowers mineral owners to make reasonable use of the surface in order to access the minerals below.⁶³

The misperceptions and distrust of the oil and gas industry are further aggravated because too many real estate developers are naïve when it comes to the distinction between surface and mineral rights, and therefore do not take mineral rights, or even the prior existence of wells, into consideration when determining how to develop the surface of the land.⁶⁴ There are also instances when mineral rights and preexisting wells are not taken into consideration by local officials prior to the approval of development plans.⁶⁵ Ken Wonstolen, general counsel for the Colorado Oil and Gas Association ("COGA"), recalls one specific case when a Colorado neighborhood was built around an existing well, and the well was actually fenced inside the backyard of a home.⁶⁶ In order to make the well accessible, and to comply with other regulations, the fire marshal had to tear up the back fences of all of the homeowners and

58. *Id.*

59. See Feriancek & McNeill, *supra* note 9, at 36.

60. *Id.* at 36-37.

61. Interview with Dennis Carnes, *supra* note 42; see Johnson, *supra* note 57, at 945.

62. J. Michael Morgan & Glen Droegemueller, *Accommodation Between Surface Development and Oil and Gas Drilling*, 24 COLO. LAW. 1323, 1323 n.5-8 (1995). Because there is an implied right of easement on the surface estate, the mineral estate is considered "dominant," and the surface estate is considered "servient." *Id.*

63. See Johnson, *supra* note 55, at 945.

64. Interview with Dennis Carnes, *supra* note 42; interview with Ken Wonstolen, *supra* note 25.

65. See John F. Welborn, *New Rights of Surface Owners: Changes in the Dominant/Servient Relationship Between the Mineral and Surface Estates*, 40 ROCKY MNT. MIN. L. INST. 22-1, 22-35 (1994) ("In statutory towns and cities, such as Broomfield, Colorado for instance, the city fathers (and mothers) have written Master Plans without input from mineral owners.").

66. Interview with Ken Wonstolen, *supra* note 25.

move the fences back twelve feet to create an emergency fire lane.⁶⁷ Instances like this certainly upset homeowners, and, unfortunately, such conflicts likely increase the negative sentiment that many people have toward the oil and gas industry. However, the source of the problem in such instances is not the company who owns the well, but the land developer who knows about the existence of the well and chooses to ignore it. Land developers too often inform buyers that the well is of no concern, rather than acknowledging that an oil and gas company owns the rights to the minerals under the land and thus also has the legal right to be able to access the well by making reasonable use of the surface.⁶⁸

In an attempt to prevent situations like this and to better educate land owners, several Colorado statutes have been passed, including one that strengthens the notice requirement to the buyer of land.⁶⁹ This statute requires the title company to look for a severance release of the minerals beneath the surface of the property.⁷⁰ If a severance release is found, the purchaser must be explicitly informed that someone else owns the rights to the minerals and that the mineral owner has the legal right to enter the property without the land owner's permission in order to develop the minerals.⁷¹ The statute also recognizes that the owners of the mineral estate are entitled to notice of impending surface development.⁷² Statutes such as this represent only one step toward better educating land owners and citizens in communities affected by natural gas development. It is also now required in Colorado that a surface owner who does not own the mineral rights must identify the mineral owner and notify that owner before the first public hearing on the surface development proposal, thus allowing the mineral owner the opportunity to assert his rights before the surface is developed.⁷³ This requirement has shed some light on the issue and has stimulated more understanding among surface owners that property rights must be coordinated, but further education is still needed.⁷⁴

67. *Id.*

68. *Id.*

69. COLO. REV. STAT. § 10-11-123 (2004).

70. *Id.*

71. *Id.*; see Feriancek & McNeill, *supra* note 9, at 38; see also Laitos & Getches, *supra* note 18, at 8 ("Colorado's state legislature has attempted to minimize conflicts between mineral and surface owners by requiring advance notice to purchasers of real estate that they are not acquiring control over access to the underlying mineral estate.").

72. See Feriancek & McNeill, *supra* note 9, at 38.

73. See *id.* When an application for a subdivision plat or similar land use designation is made, the applicant must provide thirty days notice to mineral estate owners before the first public hearing, and the mineral owner has the right to seek damages if the notice is not sent. See COLO. REV. STAT. §§ 24-65.5-101-104, 24-67-107(4), 30-28-133(10), 31-23-215(1) (2004); Feriancek & McNeill, *supra* note 9, at 38.

74. Interview with Ken Wonstolen, *supra* note 25.

3. Concerns Regarding the Environmental Implications

Another perhaps more obvious reason why the oil and gas industry is often viewed as “the enemy” relates to environmental concerns about the industry’s operations. Although a thorough analysis of all of the environmental arguments related to the natural gas industry is not appropriate here, it is important to be aware of these environmental issues and how they relate to the question of the appropriate level of industry regulation. In general, “[s]tate goals of providing energy through natural resource development are inherently at odds with local governments which essentially favor ‘out-of-sight’ development. States are interested in uniform statewide natural resource regulation that will satisfy its citizens’ need for clean and efficient energy sources.”⁷⁵ Local governments, on the other hand, prefer to make their own determinations regarding the appropriate regulations for their community and their environment. The primary concerns of most local governments, when faced with natural gas production, include visual impacts, landscaping, buffering, habitats, plant and wildlife impacts, wetlands, and natural areas.⁷⁶

Natural gas is largely seen as “clean energy” because it is very environmentally friendly in comparison to other forms of energy, both in terms of surface impact and emissions. With regard to surface impact, in order to produce 750,000 therms⁷⁷ over twenty years, one natural gas well is needed with an initial surface disturbance of approximately two acres.⁷⁸ But once the well is drilled, the majority of the land is reclaimed leaving approximately a forty square foot operational area.⁷⁹ Producing the same 750,000 therms over twenty years using other energy sources would result in much greater surface impact. For example, to produce this same amount of energy using wind, approximately fifteen wind turbines would be needed, which would occupy an estimated eighty acres.⁸⁰ Using solar power, approximately a four-acre array of solar panels would

75. Laitos & Getches, *supra* note 18, at 16–17.

76. *Id.* at 17; see Wozniak, *supra* note 12, at 12–22.

77. “750,000 therms is the total energy consumption for approximately 470 residences for 20 years.” CLEAN ENERGY FOR COLORADO, *supra* note 2, at 5.

78. *Id.*

79. *Id.*

80. *Id.* In addition to the large number of surface acres required for wind turbines, wind power also raises a number of environmental concerns with regard to surface impact.

The nation’s wind resources—that is, places that are windy enough on a regular basis—are generally distant from centers of electricity demand. To bring significantly more wind-generated electricity to where it is used, new transmission lines must be built. Most will cover remote areas, many of them environmentally sensitive.

Thomas Tanton, *Whirlwind of Trouble: Wind Energy Has Several Financial, Environmental Disadvantages*, ROCKY MTN. NEWS, Jan. 15, 2005, at 2C. Siting for wind turbines will also “likely become even more difficult as transmission lines built to serve wind farms increasingly encroach on environmentally sensitive areas.” *Id.*

be needed, and timber would require 76,000 spruce trees twelve inches in constant diameter and 100 feet tall.⁸¹

In addition to the fact that natural gas drilling has relatively minor surface impacts, natural gas is also the most efficient and clean-burning fossil fuel.⁸² When compared with other fossil fuels, natural gas produces significantly less air pollution emissions. When burned, natural gas produces virtually no ash and emits lower levels of carbon monoxide, carbon dioxide, sulfur dioxide, and nitrogen oxides than oil or coal—the two most commonly used hydrocarbons for generating electricity.⁸³

Although environmentalists generally recognize that natural gas burns cleaner than other fossil fuels, their argument is that “cleaner” does not equate to a clean form of energy.⁸⁴ They argue that renewable energy sources, such as wind and solar power, are preferable even though these forms of energy require a greater surface impact to generate the same amount of power. At the present time, however, these renewable energy sources are not capable of creating enough energy to meet the demand.⁸⁵ Furthermore, despite a general perception to the contrary, people within the natural gas industry are not opposed to developing renewable energy sources. Rather, many in the industry believe that natural gas is a “bridge to renewable energies.”⁸⁶ Their belief is that “[g]as will get us from a fossil-fuel-dominated *here* to a renewable-energy-dominated *there*. . . . In other words, there is no reason to pit advocates of fossil fuels against advocates of solar or wind power.”⁸⁷

81. CLEAN ENERGY FOR COLORADO, *supra* note 2, at 5.

82. *Id.* at 6.

83. WHAT EVERY WESTERNER SHOULD KNOW, *supra* note 37, at 11. Measured in pounds of emissions per billion Btu, the following is a comparison of emissions for natural gas, coal, and fuel oil: Carbon Monoxide (CO)—natural gas=20, coal=30, fuel oil=30; Hydrocarbons (HC)—natural gas=3, coal=5, fuel oil=10; Nitrogen Oxides (NOx)—natural gas=100, coal=834, fuel oil=330; Sulfur Dioxide (SOx)—natural gas=1, coal=1,700, fuel oil=1,000; Particulate Matter—natural gas=5, coal=3,100, fuel oil=83; and Carbon Dioxide (CO₂)—natural gas=115, coal=210, fuel oil=165. CLEAN ENERGY FOR COLORADO, *supra* note 2, at 6 (highlighting data from the EPA and the American Gas Association).

84. Thomas F. Darin & Amy W. Beatie, *Debunking the Natural Gas “Clean Energy” Myth: Coalbed Methane in Wyoming’s Powder River Basin*, 31 ENVTL. L. REP. 10566, 10567 (2001).

85. Wind energy is viewed as the renewable energy source most likely able to compete economically with fossil fuels, but at the current time, wind power’s actual contribution has been modest. In 2002, wind power supplied less than 0.3% of the nation’s electricity, and all non-hydropower renewable energy sources combined accounted for only 2.18% of the total electricity generated. Rusty Russell, *Neither Out Far Nor In Deep: The Prospects for Utility-Scale Wind Power in the Coastal Zone*, 31 B.C. ENVTL. AFF. L. REV. 221, 225–226 n.2 (2004). “Wind still remains more expensive and less dependable than traditional sources” of energy. Tanton, *supra* note 80.

86. WHAT EVERY WESTERNER SHOULD KNOW, *supra* note 37, at 33.

87. *Id.* (emphasis in original).

B. Local Governments Put Up Roadblocks To Oil & Gas Development

Even as COGA and other organizations work to inform citizens about the oil and gas industry, severed mineral rights, and the environmental benefits of natural gas (as compared to other energy sources), their efforts are coming up against large amounts of foundation money being funneled into Colorado through groups that seed citizen alliances to bring pressure through the local governments to slow or stop oil and gas development.⁸⁸ Many in the oil and gas industry believe they are up against a “coordinated strategy to use local governments to throw up roadblocks to oil and gas development.”⁸⁹ Community organizers are being hired throughout the West to stir up citizens by creating a “the sky is falling” fear related to oil and gas drilling.⁹⁰ In order to get reelected, local officials are forced to respond to this pressure by finding ways to continually delay drilling, often without regard for the costs to the municipalities.⁹¹ Even on private lands where the surface owners may not be opposed to oil and gas production, there is often still an outside movement to stop the drilling. Most citizens in these towns understand the need for natural gas production, but they would prefer to see it somewhere else—the common “not-in-my-backyard” sentiment.⁹² As the population continues to increase in the West, this leaves oil and gas companies with a very difficult problem: how to meet increasing demand for natural gas when everywhere is someone’s “backyard”?⁹³

The efforts by local governments to delay or stop natural gas drilling include enacting ordinances that make it more difficult for drilling to occur, requiring local permits for drilling (in addition to the permits re-

88. Interview with Ken Wonstolen, *supra* note 25. “Counties and cities must deal with local citizens’ groups and environmental groups whose goals may be to severely limit, if not prohibit, all oil and gas development.” Wozniak, *supra* note 12, at 12-23. “Local concerns are more likely to be determined by public and political pressures, many times expressed by a vocal minority of interested persons.” *Id.* at 12-22.

89. Interview with Ken Wonstolen, *supra* note 25.

90. *Id.*

91. See Wozniak, *supra* note 12, at 12-22 (noting that “a vocal minority of interested persons” often “exert severe political pressure on local decision makers to limit or avoid oil and gas development.”).

92. *Id.*; see Laitos & Getches, *supra* note 18, at 18 (“The mainstreaming of environmental values and the “not in my backyard” phenomenon have provided incentives for localities to impede development by extractive industries.”).

93. See WHAT EVERY WESTERNER SHOULD KNOW, *supra* note 37, at 27.

In the American West in the 21st century, nearly every square foot of the land has someone’s memories, emotions, sense of roots, or aesthetic joy invested in it. We have run out of unloved and unlovely places, and that might well be the most urgent crisis in natural resource supply.

Id.

quired by the COGCC) and then denying these permits, placing moratoria on drilling, and filing lawsuits against oil and gas companies to delay production.⁹⁴ Not only do these actions by local governments create substantial costs for the oil and gas industry, which contribute to the ever-rising cost of natural gas, but these actions also come at a great cost to the local governments themselves.⁹⁵ For example, following the Colorado Supreme Court decisions on the issue of COGCC versus local regulation of oil and gas production in Greeley,⁹⁶ the city was forced to pay damages of hundreds of thousands of dollars.⁹⁷ Some members of the local government stated that this cost was insignificant in comparison to the fact that they had been able to stop drilling for several years.⁹⁸ While some citizens may not mind seeing their tax dollars used in order to prevent drilling, it is unclear if the public is aware of the costs that they incur due to their local government's fight against oil and gas production.

II. OVERVIEW OF STATE LEVEL OIL & GAS REGULATION IN COLORADO

Oil and natural gas operations in Colorado are regulated by the Colorado Oil and Gas Conservation Commission. The rules and regulations under the COGCC make Colorado's oil and gas industry one of the most heavily regulated in the United States.⁹⁹ In addition to heavy state regulation, local governments in Colorado retain some rights to further regulate the oil and gas industry in areas that are not preempted by state law. In order to understand the extent of state regulation of the oil and gas industry in Colorado, it is necessary to examine three basic elements:

94. See Wozniak, *supra* note 12, at 12-23.

Local governments have recently stepped up the scope and nature of their regulatory review and their proposed conditions on oil and gas development. These include a variety of regulations which overlap with the traditional jurisdiction of the state commissions. Unfortunately, many such conditions are imposed without technical support or justification.

Id.

95. See CLEAN ENERGY FOR COLORADO, *supra* note 2, at 15 ("If the nation's potential gas resources cannot be accessed, they cannot be counted upon by the public to satisfy its energy demands, thus resulting in higher consumer prices . . .").

96. Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (1992).

97. Interview with Ken Wonstolen, *supra* note 25.

98. *Id.*; see Wozniak, *supra* note 12, at 12-40.

Local governments have become much more sophisticated in enforcing their land use powers. Often, local governments have grown savvy enough not to absolutely deny a permit, but to severely condition it An absolute denial (or a moratorium) may be attacked However, a reasoned set of conditions is much more difficult to attack than a denial or a moratorium.

Id.

99. CLEAN ENERGY FOR COLORADO, *supra* note 2, at 8.

the role of the Colorado Oil and Gas Conservation Commission, Colorado preemption doctrine, and the Colorado case law interpreting this preemption doctrine as it relates to oil and gas regulation.

A. The Colorado Oil and Gas Conservation Commission

The oil and gas industry in the United States has been regulated by state conservation agencies for many years.¹⁰⁰ Nearly all of the oil and gas producing states have established conservation commissions and have delegated to these commissions broad powers and authorities to regulate most, if not all, aspects of oil and gas drilling within those states.¹⁰¹ Traditionally, the grants of power to these commissions were limited to matters protecting correlative rights and preventing waste, but more recently, the grants of regulatory authority to the state commissions have increased significantly.¹⁰²

Passed in 1951, Colorado's Oil and Gas Conservation Act ("Conservation Act")¹⁰³ states that it is in the public interest to protect against waste in the production of oil and gas.¹⁰⁴ It was for this purpose that the Conservation Act established the Colorado Oil and Gas Conservation Commission.¹⁰⁵ The mission of the COGCC is to provide for the responsible development of the oil and gas resources within the state.¹⁰⁶ Understanding the role of the COGCC within the broader picture of natural gas regulation in Colorado requires a look at the composition of the COGCC, the powers of the COGCC, and the amendment to the Conservation Act requiring that the COGCC protect public health, safety, and welfare.

1. The Composition of the COGCC

From its beginnings, the COGCC focused on increasing productivity in oil and gas mining. This emphasis on production was bolstered by the fact that historically all of its board members were from the oil and

100. Bruce M. Kramer, *The Pit and the Pendulum: Local Government Regulation of Oil and Gas Activities Returns from the Grave*, SW. LEGAL FOUND., 50TH ANN. INST. ON OIL & GAS L. & TAX'N 4-1, 4-24 (1999).

101. Wozniak, *supra* note 12, at 12-12.

102. *Id.*

103. COLO. REV. STAT. § 34-60-101 (2004).

104. COLO. REV. STAT. § 34-60-102 (2004); see Jean Feriancek, *Competing Mineral and Surface Development—One State's Struggle*, 17 NAT. RESOURCES & ENV'T 36, 37 (2002).

105. COLO. REV. STAT. § 34-60-104 (2004); see Nicole R. Ament, *A Perplexing Puzzle: The Colorado Oil and Gas Commission Versus Local Government*, 27 COLO. LAW. 73, 73 n.1-4 (Feb. 1998).

106. Colo. Oil & Gas Conservation Comm'n, *General Background*, at <http://www.oil-gas.state.co.us/Library/LPFSummarys/GeneralBackground.htm> (last visited Jan. 1, 2005).

gas industry.¹⁰⁷ Under the Conservation Act, the COGCC is currently made up of seven members appointed by the governor.¹⁰⁸ Five of the members must be experienced in the oil and gas industry, and at least two of these five members must have a college degree in petroleum geology or petroleum engineering.¹⁰⁹

Under the 1994 amendments to the COGCC, the remaining two of the seven appointed members must be employed outside the oil and gas industry and must have "formal training or substantial experience in agriculture, land reclamation, environmental protection, or soil conservation."¹¹⁰ The requirement of two non-industry members was intended to further the purposes of the COGCC and give the Commission additional credibility.¹¹¹ However, some are still not satisfied with the high degree of industry involvement in the COGCC.

In recent years, two attempts have been made to change the composition of the Commission's membership.¹¹² It was proposed that either the number of seats on the COGCC that require industry experience should be reduced or that strict conflict of interest standards should be imposed to prevent Commission service by anyone employed by, or with a financial interest in, the oil and gas industry.¹¹³ Neither attempt was successful.

2. Powers of the COGCC

Under the Conservation Act, the COGCC has "the power to make and enforce rules, regulations, and orders" and "to do whatever may reasonably be necessary to carry out the provisions of" the Act.¹¹⁴ The Act

107. Ament, *supra* note 105, at 73.

108. COLO. REV. STAT. § 34-60-104(2)(a).

109. *Id.*

110. *Id.* As of August 2004, the seven Colorado Oil and Gas Conservation Commissioners are John B. Ashby (President of Ashby Drilling Corporation), Brian Cree (Vice President of Finance and CFO for ZettaCore, Inc., a semiconductor company developing molecular memory technology), Kiberlee Miskell Gerhardt (a consulting geologist from La Plata County), Michael W. Klish (Senior Environmental Scientist for WestWater Engineering), Peter M. Mueller (Vice President and General Manager of Westport Resource Corporation's Northern Business Unit), J. Thomas Reagan (Senior Vice President and Manager of Specialized Deposits at Wells Fargo Bank West in Denver), and Lynn J. Shook (a partner with two sons in a 7500-acre family farm in Washington County). Colo. Oil & Gas Conservation Comm'n, *Biographical Sketches of Colorado Oil & Gas Conservation Commissioners*, at <http://www.oil-gas.state.co.us/General/BIOGRAPHICALSKETCHES.html> (last visited Nov. 18, 2004).

111. Ament, *supra* note 105, at 73 (citing a 1997 interview with Colorado State Senator Don Ament).

112. Kenneth A. Wonstolen, Colo. Oil & Gas Ass'n, *Local Control over Oil & Gas Development: How Far Can They Go?* (Nov. 9, 2000) (unpublished, on file with the Colorado Oil & Gas Association and the author) [hereinafter Wonstolen, *Local Control*].

113. *Id.*

114. COLO. REV. STAT. § 34-60-105(1) (2004).

also states that no oil or gas well shall be drilled until the COGCC receives notice of a company's intention to drill, and the Commission issues a permit pursuant to COGCC rules.¹¹⁵ Additionally, the Conservation Act gives the COGCC the authority to regulate the drilling, producing, and plugging of wells, as well as all other operations for the production of oil or gas.¹¹⁶ The Conservation Act states that the grant of any specific power of authority to the COGCC shall not be construed to be in derogation of any other general powers and authority granted.¹¹⁷

3. Purpose of the COGCC

In 1994, the focus of the COGCC was shifted away from the straightforward promotion of oil and gas production to include considerations of environmental impact, public health, safety, and welfare issues.¹¹⁸ Senate Bill (SB) 94-177 expanded the COGCC's purpose to include fostering, encouraging, and promoting the development, production, and utilization of the oil and gas in Colorado.¹¹⁹ This development, production, and utilization must be done "in a manner consistent with protection of public health, safety, and welfare."¹²⁰

Under the amendment, the COGCC must "prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resources resulting from oil and gas operations."¹²¹ The COGCC has interpreted this language to its fullest meaning, giving the Commission authority to consider all impacts of oil and gas operations on any part of the environment.¹²² The 1994 legislation also gives the COGCC the power to "investigate, prevent, monitor, or mitigate conditions that threaten to cause, or that actually cause, a significant adverse environmental impact."¹²³ However, the Commission's authority to prevent environmental harm does not contradict its duty to promote the development of oil and gas resource.¹²⁴ The COGCC therefore focuses on environmentally safe operations.¹²⁵ Additionally, "the COGCC applies a

115. *Id.* § 34-60-106(1)(f).

116. *Id.* § 34-60-106(2)(a).

117. *Id.* § 34-60-106(4).

118. *Id.* § 34-60-102 (2004); see Feriancek, *supra* note 104.

119. COLO. REV. STAT. § 34-60-102(1).

120. *Id.*

121. *Id.* § 34-60-106(2)(d); see Ament, *supra* note 105, at 73.

122. Ament, *supra* note 105, at 73 (citing a 1996 interview with Rich Griebbling, Director of the COGCC).

123. Colo. Rev. Stat. § 34-60-124(4); Ament, *supra* note 105, at 73.

124. Colo. Oil & Gas Conservation Comm'n, *Typical Questions from the Public About Oil and Gas Development in Colorado*, at <http://www.oil-gas.state.co.us/General/typquest.html> (last visited Nov. 7, 2004).

125. *Id.*

multitude of rules and permit conditions to protect the safety of the general public including: safety setbacks from dwellings for wells and production equipment; blowout prevention equipment; well and equipment safety specification and design standards; security fencing in high density areas; and special operations safety procedures.”¹²⁶ According to the COGCC, “public safety impacts from oil and gas operations are extremely rare and generally non-existent in Colorado.”¹²⁷

B. Colorado Preemption Doctrine

The COGCC was created by state statute, and, thus, the powers of the COGCC are conferred by the state. COGCC regulations, then, can be viewed as state regulations for the purpose of considering state preemption. Therefore, analyzing the degree of control a local government can exercise over natural gas operations and production is a matter of determining what areas of natural gas production have been preempted by the state. This analysis requires a consideration of preemption law generally, of preemption law as it applies to home rule cities, and of the limited Colorado case law related to preemption of natural gas production regulations.

1. General Preemption Law

The concept of preemption at the state level is not greatly different from preemption at the federal level. As a general rule, federal and state law can preempt local government ordinances.¹²⁸ Colorado statutes specifically provide for the supremacy of state enactments.¹²⁹ However, when a local ordinance is not expressly preempted by a statute at the state level, preemption analysis should focus on the intent of the state government.¹³⁰ If the state government intended to occupy the field, “as determined by the scope of the legislation and the facts of the situation,” then the regulation of the local government will be preempted.¹³¹

Preemption will also occur when it is impossible to comply with the laws of both the local and state governments, or when the local ordinance is in conflict with the purpose of the law at the state or federal level.¹³² However, in the instance of a conflict of purpose, preemption “exists only where the enactment of the lower government frustrates the purpose

126. *Id.*

127. *Id.*

128. Twelker, *supra* note 33, at 1657.

129. *Id.*; COLO. REV. STAT. § 30-15-411 (2004).

130. Twelker, *supra* note 33, at 1657.

131. *Id.*

132. *Id.* at 1657–1658.

of the higher government.”¹³³ If a conflict of purpose is identified, the local government is not entirely barred from regulating the field, as it would be with express or occupation preemption, but instead it is only required that the purpose of the state government is left undisturbed.¹³⁴ In order to leave the purpose of the state government undisturbed, a local ordinance may either be partially or totally preempted to the extent that the local law conflicts with the achievement of the state’s interest.¹³⁵

An additional consideration in determining preemption is whether an issue is one of state or local concern. Zoning, for example, is generally considered a matter of local concern.¹³⁶ Mineral development, on the other hand, “is to some degree a matter of ‘statewide concern’ as a result of delegation of authority to state boards by the Conservation Act and the Mineral Reclamation Act.”¹³⁷ However, determining whether an issue is of statewide, as opposed to local, concern is not conclusive; the presence of “statewide concern” does not automatically invalidate a local ordinance.¹³⁸ State and local law can co-exist where the concern is “mixed.”

2. Home Rule Cities and Preemption

In considering the issue of preemption of natural gas regulations, it is also necessary to consider the impact of home rule. Generally, a local government’s powers are limited to those delegated to it by the state’s constitution, but the grant of home rule authority has expanded the scope of local autonomy.¹³⁹ Home rule cities and towns within Colorado have the authority to regulate specific activities within their city limits independent of state legislative control.¹⁴⁰ The authority of a home rule municipality is derived from Article XX of the Colorado Constitution.¹⁴¹ The Home Rule Amendment was adopted in 1902, but it was through another amendment in 1912 that the more definitive grant of home rule power became available.¹⁴² According to the Colorado Supreme Court,

133. *Id.* at 1658.

134. *Id.*

135. Bd. of County Comm’rs, La Plata County v. Bowen/Edwards Assocs., 830 P.2d 1045, 1059 (Colo. 1992).

136. Twelker, *supra* note 33, at 1657.

137. *Id.*

138. *Id.*

139. Clayton P. Gillette, *The Allocation of Government Authority: The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1364 (1997).

140. Kathryn M. Mutz, *Home Rule City Regulation of Oil and Gas Development*, 23 COLO. LAW. 2771 (1994); see Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321 (1964).

141. COLO. CONST. art. XX; COLORADO MUNICIPAL LEAGUE, HOME RULE HANDBOOK 1 (1999).

142. COLO. CONST. art. XX; Klemme, *supra* note 140, at 321.

"[t]he Home Rule Amendment was intended to reiterate unmistakably the will of the people that the power of a municipal corporation should be as broad as possible within the scope of the Republican form of government" ¹⁴³ Under the Colorado Constitution, cities and towns are permitted to create charters that essentially serve as the constitution for that municipality. ¹⁴⁴

A home rule municipality's powers of self-government are limited to local and municipal matters. ¹⁴⁵ The ordinance of a Colorado home rule municipality preempts state law when the matter is of "purely local concern." ¹⁴⁶ Conversely, in statewide matters, an ordinance is void when it conflicts with a state statute. ¹⁴⁷ The categorization of subjects as being of statewide or local concern, for the purposes of the Home Rule Amendment, determines the basic legislative powers as belonging to either the state General Assembly or the home rule city. ¹⁴⁸ Colorado courts, however, have had a difficult time drawing clear lines between issues of local versus state concern. ¹⁴⁹ There are some matters that cannot be categorized as issues of purely local or state concern, but are instead of mixed local and state concern. ¹⁵⁰ As is true of preemption in general, when a matter is of both state and local concern the state law will preempt a conflicting local ordinance. ¹⁵¹ However, if the state legislature has not occupied the field, then statutes and ordinances may coexist to the extent that there is no conflict. ¹⁵²

C. Colorado Case Law on Preemption as It Relates to Oil and Gas Regulation

In 1985, a major conflict between state and local law regarding the oil and gas industry was brought to the attention of the courts when an oil and gas operator challenged Douglas County's placement of technical conditions on the construction and operation of wells. ¹⁵³ In this case,

143. *City of Ft. Collins v. Pub. Util. Comm'n*, 195 P. 1099, 1099 (Colo. 1921).

144. COLO. CONST. art. XX; Gillette, *supra* note 139, at 1365. Not all local governments in Colorado have passed home rule charters. Those that have not passed home rule charters remain statutory counties, cities, and towns. As of October of 2004, there were 83 home rule municipalities in Colorado. Colorado Department of Local Affairs, *Active Colorado Local Governments by Type*, at http://www.dola.state.co.us/LGS/localgovtinfo/LG_BY_TYPE.pdf.

145. COLO. CONST. art. XX, § 2; Mutz, *supra* note 140, at 2772.

146. Twelker, *supra* note 33, at 1657.

147. COLO. CONST. art. XX, § 2; Mutz, *supra* note 140, at 2772.

148. Klemme, *supra* note 140, at 329.

149. *Id.*

150. *Id.*; Mutz, *supra* note 140, at 2772.

151. COLORADO MUNICIPAL LEAGUE, *supra* note 141, at 4.

152. Mutz, *supra* note 140, at 2772.

153. *Osborne v. Bd. of County Comm'rs*, 764 P.2d 397 (Colo. Ct. App. 1988), *cert. denied*, 778 P.2d 1370 (Colo. 1989). Although this case brought the state versus local government

Oborne v. County Commissioners of Douglas County, the district court found in favor of the oil and gas operator.¹⁵⁴ On appeal, the Colorado Court of Appeals determined that the conditions imposed by Douglas County related to matters that had been delegated to the COGCC, and therefore the local regulations were preempted by state law.¹⁵⁵ The Colorado Court of Appeals found the Conservation Act to be a comprehensive statute, intended to be the exclusive means of regulating development, production, and utilization of oil and gas.¹⁵⁶ Therefore, the court held that "whether a conflict exists between a local regulation and the statutory scheme is irrelevant" in determining validity of local regulation.¹⁵⁷ Unfortunately, Douglas County failed to file a timely appeal with the Colorado Supreme Court, "and the chance to establish a clear preemption standard based on the appellate opinion was lost."¹⁵⁸

The Colorado Supreme Court finally had its opportunity to address this preemption issue years later when two cases regarding local regulation of oil and gas were granted certiorari in the early 1990s. In *Board of County Commissioners v. Bowen/Edwards Associates*, the Colorado Supreme Court refused to extend the Colorado Court of Appeal's holding in *Oborne* to mean that local regulation of oil and gas was completely precluded by the Conservation Act.¹⁵⁹ On the same day that the Colorado Supreme Court considered the preemption issue in *Bowen/Edwards*, it also considered the issue of home rule ordinances regarding oil and gas in *Voss v. Lundvall Brothers, Inc.*¹⁶⁰ In that case, the court took up the matter of a city of Greeley home rule ordinance that banned drilling for oil and natural gas.¹⁶¹ Greeley argued that land use control was a matter of purely local concern, and that home rule cities were free to regulate in that area even when it affected oil and gas drilling.¹⁶² The court disagreed with Greeley, finding that oil and gas operations are a matter of mixed state and local concern, and that in the event of a conflict between a home rule ordinance and state law, the state law would preempt the ordinance.¹⁶³

conflict to the attention of the Colorado courts, this conflict was certainly not the first of its kind. Wozniak, *supra* note 12, at 12-9 ("The issue of local government regulation of oil and gas development is certainly not new.").

154. 764 P.2d at 397.

155. *Id.* at 402.

156. *Id.* at 401-02.

157. *Id.* at 401.

158. Wonstolen, *Local Control*, *supra* note 112.

159. Bd. of County Comm'rs, La Plata County v. Bowen/Edwards Assocs., 830 P.2d 1045, 1045 (Colo. 1992).

160. *Id.* at 1061.

161. *Id.*

162. *Id.* at 1064; Morgan & Check, *supra* note 35, at 751.

163. Voss v. Lundvall Bros., Inc., 830 P.2d 1061, 1068-69 (Colo. 1992).

1. Board of County Commissioners v. Bowen/Edwards

In *Bowen/Edwards*, the Colorado Supreme Court addressed the issue of whether a county could enact oil and gas regulations for oil and gas operations similar to the regulation already enacted by the COGCC.¹⁶⁴ La Plata County had enacted a permit system that required oil and gas facilities to demonstrate their ability to comply with county regulations related to a number of issues, including noise mitigation measures, visual standards, wildlife mitigation, surface disturbance standards, and setback requirements.¹⁶⁵ The La Plata permit system was challenged by oil and gas operators, and the Colorado Supreme Court determined that, based on the County Planning Code and the Local Government Land Use Enabling Act, the county had the right to regulate land use as it related to oil and gas operations.¹⁶⁶ The court recognized that oil and gas operations do have some impact on a county's interest in land use control.¹⁶⁷ Therefore, the *Bowen/Edwards* court used a three-part test to determine whether the Conservation Act preempted the La Plata's land use authority.¹⁶⁸ The court held that a state statute can preempt a local ordinance any of these three ways: (1) the language of the state statute can expressly state that all local authority over the subject matter is preempted;¹⁶⁹ (2) the state statute can "impliedly [evidence] a legislative intent to completely occupy a given field by reason of a dominant state interest;"¹⁷⁰ or (3) the state statute can partially preempt a local regulation if the operational effect of the local law "would conflict with the application of the state statute."¹⁷¹

The *Bowen/Edwards* court held that the Conservation Act did not constitute express preemption, nor did the Act demonstrate the intent to occupy all aspects of oil and gas regulation.¹⁷² The court added, however, that the La Plata County regulation would be preempted if it caused an "operational conflict."¹⁷³ The court seemed to define an "operational conflict" as a situation in which the "effectuation of a local interest would materially impede or destroy the state interest."¹⁷⁴ In the event that an operational conflict exists between the local ordinance and the

164. *Bowen/Edwards*, 830 P.2d at 1048; Ament, *supra* note 105, at 74.

165. *Bowen/Edwards*, 830 P.2d at 1048; Ament, *supra* note 105, at 74.

166. *Bowen/Edwards*, 830 P.2d at 1050-51, 1056; Ament, *supra* note 105, at 74.

167. *Bowen/Edwards*, 830 P.2d at 1056.

168. *Id.* at 1056-57; Ament, *supra* note 105, at 74.

169. *Bowen/Edwards*, 830 P.2d at 1056; Ament, *supra* note 105, at 74.

170. *Bowen/Edwards*, 830 P.2d at 1056-57; see Ament, *supra* note 105, at 74.

171. *Bowen/Edwards*, 830 P.2d at 1057; see Ament, *supra* note 105, at 74.

172. *Bowen/Edwards*, 830 P.2d at 1057-58; Morgan & Check, *supra* note 35, at 752.

173. *Bowen/Edwards*, 830 P.2d at 1059; Morgan & Check, *supra* note 35, at 752.

174. *Bowen/Edwards*, 830 P.2d at 1059.

state law, the "county regulation[] must yield to the state interest."¹⁷⁵ Yielding to the state interest means that local regulations may be either "partially or totally preempted to the extent that they conflict with the achievement of the state interest."¹⁷⁶

2. Voss v. Lundvall Bros.

The Colorado Supreme Court, in *Voss v. Lundvall Bros.*, examined a Greeley ordinance that banned drilling for oil and gas in all of the city's zoning districts.¹⁷⁷ Greeley, a home rule city, argued that land use control was a matter of local concern, and that the city was therefore free to regulate in that area even if the ordinance affected oil and gas drilling.¹⁷⁸ The court did not agree with Greeley's argument, instead holding that oil and gas regulation constituted a matter of mixed state and local concern, and that as such, the state law prevails over the home rule regulation.¹⁷⁹

The court used a four-part test to determine if a conflict existed between the local regulation and the state statute. The four factors considered were: (1) the need for statewide uniformity in the regulation of the oil and gas industry; (2) the extraterritorial effect of the local regulations; (3) the extent to which oil and gas regulation had "traditionally been a matter of state rather than local control;" and (4) whether the home-rule city regulation materially impedes the significant state goals.¹⁸⁰ The court determined that there was a significant need for statewide uniformity and that the Greeley regulation would affect nonresident owners of mineral interests.¹⁸¹ The court also noted that oil and gas had traditionally been regulated at the state level.¹⁸² Weighing these four factors, the court determined that the state's interests were sufficient to override the Greeley ordinance.¹⁸³ The court made clear, however, that this ban on local regulation was specific to a complete drilling ban, and that the state would not preempt all land use regulations of oil and gas development.¹⁸⁴

175. *Id.* at 1060.

176. *Id.* at 1059.

177. *Id.* at 1061; Morgan & Check, *supra* note 35, at 752.

178. *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1064 (Colo. 1992); Morgan & Check, *supra* note 35, at 752.

179. *Voss*, 830 P.2d at 1068-69; Morgan & Check, *supra* note 35, at 752.

180. *Voss*, 830 P.2d at 1067-68.

181. *Id.* at 1061, 1067-68.

182. *Id.* at 1068.

183. *Id.*

184. *Id.*

C. Case-by-Case Analysis

These two leading Colorado Supreme Court decisions, *Bowen/Edwards* and *Voss*, were decided over a decade ago, and yet these cases "leave many questions unanswered."¹⁸⁵ For example, the court did not adequately define "operational conflict,"¹⁸⁶ and "it left to speculation the type of local regulation which will offend the principles articulated in those cases."¹⁸⁷ What these Colorado Supreme Court decisions did, in effect, was create a regime in which each occurrence of stringent local regulation of the oil and gas industry must be examined by the courts on a case-by-case basis. Because the court held that state preemption of local regulation is not total, "each provision of a local oil and gas regulation must be examined to determine whether it presents a conflict."¹⁸⁸ For the past decade, the Colorado Supreme Court has declined to hear any further cases on the issue of state preemption of local government oil and gas regulation, thereby foreclosing any possibility of providing more direct guidelines for the COGCC and local governments. As a result, this case-by-case system of preemption analysis has led to more than a decade worth of costly litigation, with no end in sight. The case-by-case regime leads to a high degree of unpredictability and puts natural gas developers and local governments constantly at odds.¹⁸⁹ The litigation that often results, when the industry and the local governments are forced to look to the courts to determine which regulations are controlling, is costly to the industry (and thus to natural gas consumers) and to local governments (and thus to the taxpayers).¹⁹⁰

The lack of predictability, the high costs of litigation, and the resulting delays in production are proof that the Colorado Supreme Court has done the state a disservice by not providing a workable framework on the issue of state preemption of oil and gas regulation.¹⁹¹ *Bowen/Edwards* is considered the determinative case as to preemption, yet both sides cite this case in their briefs and point to the same language as suggestive that they will prevail.¹⁹² The lack of clear guidelines under the current Colo-

185. Morgan & Check, *supra* note 35, at 752. "Colorado permits some modicum of local control over oil and gas operations. The extent of that control, however, remains unclear." Laitos & Getches, *supra* note 18, at 15.

186. See Bd. of County Comm'rs, La Plata County v. Bowen/Edwards Assocs., 830 P.2d 1045, 1059 (Colo. 1992).

187. Morgan & Check, *supra* note 35, at 752.

188. *Id.*

189. See Laitos & Getches, *supra* note 18, at 15-16.

190. See generally *id.* at 16 ("[R]esorting to the courts always costs money and usually delays the underlying operation.").

191. See *id.* at 15; interview with Dennis Carnes, *supra* note 42.

192. Interview with Dennis Carnes, *supra* note 42; see, e.g., Town of Frederick v. N. Am. Res. Co., 60 P.3d 758 (Colo. Ct. App. 2002).

rado case law results in a number of unanswered questions that will likely lead to future legal battles.

III. COGCC V. LOCAL CONTROL: THE BATTLE CONTINUES

There is a legal theory that in court decisions it may be better to move slowly rather than doing anything too dramatic all at once.¹⁹³ In other words, a court should not say more than necessary in order to decide the case before it.¹⁹⁴ While this theory of judicial progress may be valued in some circumstances,¹⁹⁵ the *Bowen/Edwards* “maybe yes, maybe no” approach has actually caused more problems than it has resolved.¹⁹⁶ Because the Colorado Supreme Court was not clear in its two decisions regarding local regulation of oil and gas, gas operators are losing valuable time and money fighting endless battles against overly restrictive local regulations.¹⁹⁷ Most oil and gas companies are forced to employ attorneys and others to fight these battles against local governments on a full-time basis.¹⁹⁸ This not only contributes to the increasing price of natural gas, but also comes at a significant cost to the taxpayers in the counties that are fighting the oil and gas operators.¹⁹⁹

A. Issues that Remain Unsettled

There are numerous, continuous issues in the battle between the COGCC and local governments, including the issues of regulating land use; regulating public health, safety, and welfare; and local permit re-

193. This legal theory is termed “decisional minimalism.” CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3–4 (1999).

194. “[M]inimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions.” *Id.* at 4.

195. “[A] minimalist path usually. . . makes a good deal of sense *when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds).*” *Id.* at 5 (emphasis added). The issue of state preemption of oil and gas regulation in Colorado is clearly not a constitutional issue that divides people on moral or other grounds, such as would benefit from a minimalist approach.

196. Interview with Dennis Carnes, *supra* note 42.

197. See, e.g., *Town of Frederick v. North American Resources Co.*, 60 P.3d 758 (Colo. App. 1992).

198. Interview with Ken Wonstolen, *supra* note 25; see also Laitos & Getches, *supra* note 18, at 2–3 (2004) (Developers are forced to employ attorneys “who devote endless billable hours to battling with state and local regulatory agencies.”).

199. Interview with Ken Wonstolen, *supra* note 25. The cost to taxpayers comes not only from tax money being spent to fight oil and gas production, but also from lost tax revenue from oil and gas production: “The natural gas and oil industry in Colorado is an important component of the state’s economy. Benefits from the industry are both direct (to employees, the *economy and the tax base*) and indirect” CLEAN ENERGY FOR COLORADO, *supra* note 2, at 30 (emphasis added).

quirements. Even when the COGCC has attempted to implement rules to facilitate cooperation between the state and local governments, the local governments have been generally unreceptive,²⁰⁰ indicating that a different solution will be necessary for these issues to be settled. Before proposing a solution, however, it is first necessary to examine the unsettled issues which are likely to result in the most litigation under the current case-by-case regime, and to understand what cooperative attempts have already been made by the COGCC.

1. Land Use

One of the main methods that local governments are currently using in an attempt to interpret the Colorado Supreme Court decisions favorably is to draw distinctions between the technical aspects of oil and gas operations and the aspects that can be considered land use.²⁰¹ Local governments believe that if they can define a particular aspect of oil and gas production as a land use matter rather than a technical matter, then that aspect of production can be regulated at the local level.²⁰² In *Bowen/Edwards*, the court held that the Local Government Land Use Control Act and the County Planning Code confer express powers to counties and leave "no doubt that land-use regulation is within the scope of a county's legislative power."²⁰³ It is this language that municipalities generally point to as supporting their authority to regulate various aspects of oil and gas production.²⁰⁴ The *Bowen/Edwards* opinion, however, goes on to state that while there is no express prohibition of county regulation of land use aspects of oil and gas operations and development, the critical question as to a county's ability to regulate land use is whether the Conservation Act will render a particular regulation void under Colorado preemption doctrine.²⁰⁵

There is generally no disagreement that some land use matters are clearly subject to local control, such as the use of public roads and the creation of emergency plans related to oil and gas well safety.²⁰⁶ However, there are many other areas of oil and gas operations and development that certainly affect land use (since the minerals generally cannot

200. Interview with Ken Wonstolen, *supra* note 25.

201. Interview with Gretchen VanderWerf, Attorney, Gretchen VanderWerf, P.C., in Denver, Colo. (Jan. 9, 2004). Gretchen VanderWerf was co-counsel for North American Resources Co. in *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758 (Colo. Ct. App. 2002).

202. *Id.*

203. *Bd. of County Comm'rs, La Plata County v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1056 (Colo. 1992).

204. Interview with Dennis Carnes, *supra* note 42.

205. *Bowen/Edwards*, 830 P.2d at 1056.

206. See generally Wozniak, *supra* note 12, at 12-6 to 12-7.

be reached without utilizing the surface above the minerals), but that are clearly not subject to local control under the power of counties to regulate land use because these areas are already regulated by the COGCC.²⁰⁷ In many recent lawsuits, local governments have argued that they have land use regulatory powers that are much broader than those intended by the court in *Bowen/Edwards*.²⁰⁸

Local governments, such as the Town of Frederick, have honed in on the language in the Conservation Act that states that a local government has the ability to regulate such areas as land use permit conditions and local building codes.²⁰⁹ However, focusing solely on this later part of CRS § 34-60-106(15) is taking the statement out of context. The statute also clearly states that local governments may not, for example, “charge a tax or fee to conduct inspections or monitoring of oil and gas operations with regard to matters that are subject to rule, regulation, order, or permit condition administered by the [COGCC].”²¹⁰ Reading this statute as a whole, it becomes evident that the local governments are blatantly going beyond their rights in attempting to regulate numerous aspects of oil and gas operations by classifying them as matters of land use. While it is true that some of these matters may affect land use, this alone is not enough to allow a local government to regulate them. Instead, the local governments may only regulate land use matters when these matters are not preempted by the state under the Conservation Act or by the COGCC.

Another land use issue has recently arisen in the battle between state and local regulation regarding the need for uniformity.²¹¹ In *Voss*, the Colorado Supreme Court identified the need for uniformity in oil and gas regulations.²¹² In the recent litigation concerning regulations imposed by the Town of Frederick, the town focused on the word “uniform” and argued that they were complying with the need for uniformity by making their regulations uniform throughout its jurisdiction.²¹³ This argument, however, is clearly erroneous when the relevant portion of the *Voss* opinion is read in context. The court explained that the need for uniformity was a factor that weighed in favor of state preemption related to oil and

207. See *id.* at 12-12 to 12-13.

208. See, e.g., *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758 (Colo. Ct. App. 2002); *Bd. of County Comm’rs of La Plata County v. Colo. Oil & Gas Comm’n*, 81 P.3d 1119 (Colo. Ct. App. 2003).

209. See *N. Am. Res. Co.*, 60 P.3d at 758 (Colo. App. 2002); see generally COLO. REV. STAT. § 34-60-106(15) (2004).

210. COLO. REV. STAT. § 34-60-106(15).

211. *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1067 (Colo. 1992) (identifying need for statewide uniformity of regulation as one factor in preemption analysis); interview with Dennis Carnes, *supra* note 42.

212. *Voss*, 830 P.2d at 1067–68.

213. *N. Am. Res. Co.*, 60 P.3d at 758; interview with Dennis Carnes, *supra* note 42.

gas regulations because there was a need for statewide uniformity.²¹⁴ Regulations that are uniform within the Town of Frederick's jurisdiction but differ from the regulations imposed by the COGCC, and therefore differ from the statewide regulations, clearly do not promote the type of uniformity of which the court was speaking.²¹⁵

Land use conflicts such as these demonstrate the result of the ambiguous nature of the Colorado Supreme Court's decisions. Both sides are able to find language in the opinions that support their view. Although in the specific conflicts discussed immediately above it seems that the local governments are merely reading the court's language out of context, issues like these continue to arise in lawsuits and therefore need to be addressed in a more definitive manner.

2. Permitting

Another contentious and ambiguous matter that remains unresolved is the question of permitting. The Colorado Supreme Court has not said that local governments cannot require permits.²¹⁶ However, based on the court's preemption discussion, it seems clear that if a drilling permit has already been approved by the COGCC and a local government subsequently denies a local permit for the same drilling operation, then this local denial essentially prohibits what the state has already allowed.²¹⁷ In this situation the local permitting decision should be preempted.²¹⁸ Therefore, if a local government has a permitting process that allows it to deny a permit, then under the preemption doctrine, the local ordinance would be facially invalid.²¹⁹ On the other hand, if a local government has a permitting process but cannot deny a permit because of preemption, then the permitting process serves no purpose. An ordinance that requires a permit application with an application fee, when the permit cannot legally be denied, is in reality a tax, and a local government has no authority to tax oil and gas production.²²⁰

The Colorado Supreme Court has held that local governments cannot eliminate drilling in their locality altogether, through ordinances or permitting, but the court said that local governments can delay produc-

214. *Voss*, 830 P.2d at 1067-1068.

215. Interview with Dennis Carnes, *supra* note 42.

216. Bd. of County Comm'rs, La Plata County v. Bowen/Edwards Assocs., 830 P.2d 1045, 1056 (1992).

217. See generally *id.* at 1056-60; interview with Dennis Carnes, *supra* note 42.

218. See generally *Bowen/Edwards*, 830 P.2d at 1056-60; interview with Dennis Carnes, *supra* note 42.

219. Interview with Dennis Carnes, *supra* note 42; see COLO. REV. STAT. § 30-15-411 (2004) (providing for the supremacy of state enactments).

220. COLO. REV. STAT. 34-60-106(15).

tion.²²¹ The court's language in its two opinions leaves completely unanswered, however, the questions of how long production can be delayed and at what point a delay becomes, in effect, a denial.²²² This issue has not yet been litigated, but the reality is that delaying oil and gas production can be a form of denial. Especially in towns that are experiencing rapid growth, if oil and gas drilling is delayed for very long, through regulations, permitting requirements, lawsuits, and the like, the possibility of drilling a well can be foreclosed by the "paving over" of the surface of the land.²²³ By delaying oil and gas production, local governments are able to favor real estate development on the land. When this development involves building structures on the land, development could prevent the possibility of future oil and gas production on that land, because, despite the supremacy of the mineral estate, oil and gas drilling operations must be located a minimum distance from buildings that are in existence prior to oil and gas drilling, as well as a minimum distance from property lines.²²⁴ Additionally, extensive delays can also preclude oil and gas production because a producer's mineral lease may expire during the delay period. Of the many issues that are left unanswered by the ambiguous nature of the Colorado Supreme Court decisions in *Bowen/Edwards* and *Voss*, the question of when the right to delay crosses over into the prohibited area of denial may be both the most contentious and the most important that the court, or alternatively the legislature, will have to face in the near future.

221. See *Bowen/Edwards*, 830 P.2d at 1058; *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1068-69 (Colo. 1992).

222. Interview with Gretchen VanderWerf, *supra* note 201.

223. *Id.* Once the surface of the land is developed, such as for commercial or residential purposes, the development might well foreclose a mineral owner's ability to access the natural gas under the surface.

224. The Colorado Oil and Gas Conservation Commission Rules require:

(1) At the time of initial drilling of the well, the wellhead shall be located a distance of one hundred fifty (150) feet or one and one-half (1-1/2) times the height of the derrick, whichever is greater, from any occupied building, public road, major above ground utility line or railroad.

(2) A well shall be a minimum distance of one hundred fifty (150) feet from a surface property line.

COGCC, RULES AND REGULATIONS 603(a) (March 30, 2003), at [http://oil-gas.state.co.us/RR_Docs/Rules Complete.pdf](http://oil-gas.state.co.us/RR_Docs/Rules%20Complete.pdf). Additionally, if an area is "high density" (as defined in COGCC RULES 306(b)), at the time of initial drilling, the wellhead location shall be not less 350 feet away from any building. *Id.* at 603(d). The same 350 foot setback from any educational facility, assembly building, hospital, nursing home, board and care facility, or jail shall apply at the time of initial drilling. *Id.* at 603(e)(2).

B. COGCC Attempts to Gain Local Input Meet Little Success

In the same way that federalism concerns arise when the federal government preempts state laws, the same type of questions arise when local ordinances are preempted by state law: why should local governments not, as a matter of policy, be able to make their own decisions regarding oil and gas operations that affect their communities? In recognition of the desire for local government involvement, Colorado law provides for what is probably “the most extensive level of local involvement” in the oil and gas permitting process, as compared to the level of local involvement provided for in the laws of other states.²²⁵

For example, in 1998, the COGCC implemented Rule 303, also called the Local Designee Rule (“LDR”).²²⁶ This rule provides specific guidelines to ensure that local governments are informed about oil and gas decisions, such as COGCC permitting decisions.²²⁷ It also sets out a specific procedure by which local governments can give input on or object to these decisions. Under Rule 303, each local government is allowed to assign a “local designee”—a person to whom all of the relevant information will be provided and through whom the local government can play a role in the process.²²⁸ It can certainly be argued that the LDR preempts local permitting processes because it represents a state regulation that covers the same ground as the local permitting requirements.²²⁹ This is an issue that has not yet been litigated, but one that is likely to be a contentious topic in the future. The question of preemption by the LDR is especially interesting given the fact that, as of early 2004, only one municipality had taken advantage of the liberal COGCC Rule 303 by appointing a local designee, while many other local governments continue to impose more stringent permitting processes and continue to deny permits.²³⁰

In addition to the LDR, the COGCC has made further attempts to gain local input by adopting the “local public forum” and “public issues” hearing procedures to further address specific issues of health, safety, and welfare.²³¹ The purpose of a local public forum is to allow elected officials, local government personnel, and local citizens to express their concerns and opinions which are not completely addressed by the com-

225. Laitos & Getches, *supra* note 18, at 18.

226. COGCC, RULES AND REGULATIONS 303(d), at http://oil-gas.state.co.us/RR_Docs/RulesComplete.pdf.

227. *Id.*

228. *Id.*

229. Interview with Dennis Carnes, *supra* note 42.

230. Interview with Ken Wonstolen, *supra* note 25.

231. Colo. Oil & Gas Comm’n Regulations & Rules of Practice, 2 COLO. CODE REGS. § 404-1, Rule 508 (2003).

mission's rules or by the applicant's proposed plan.²³² "These procedures provide unparalleled local involvement in statewide oil and gas commission . . . hearings to the extent they affect health, safety, welfare, or the environment."²³³ Thus far, the LDR and the "local public forums" have not reduced the tensions between the local governments and the COGCC. It appears, then, that the only way to put an end to the contentious nature of the oil and gas regulation issues is for the state legislature or the Colorado Supreme Court to step in and lay down clearer guidelines.

IV. HOW THESE ISSUES CAN BE RESOLVED: A COMPREHENSIVE STATUTE

Given the aforementioned societal issues and the many problems left unresolved by the Colorado Supreme Court, the question becomes how to deal with the conflicting views of oil and gas production regulation. Many natural gas production advocates think that favoring surface development to the exclusion of mineral development would be to upset hundreds of years of property law.²³⁴ Where oil and gas companies have preexisting rights to subsurface minerals, it would be contrary to property law to deny them their legal right to use the surface in order to extract these minerals.²³⁵

The conflicts between state and local regulation of natural gas development could be solved by either the state legislature or by the courts. Years ago, COGA tried to get the Colorado state legislature to address this issue in a more comprehensive manner, but the proposals failed.²³⁶ Thus, the issue has instead been left to the courts. Unfortunately, the Colorado Supreme Court has indicated, over the past decade, an unwillingness to create clearer determinations as to what areas of state law preempt local law with regard to natural gas development.

While Colorado is at the heart of the battle over natural gas regulation, due to the Rocky Mountain West's abundance of untapped natural resources, the issues faced at the state and local level in the Colorado are not wholly unique. Two states in particular, Kentucky and Ohio, have recently passed comprehensive legislation that addresses these same issues, and Colorado would be well-advised to follow suit.

232. Wozniak, *supra* note 12, at 12-14.

233. *Id.* at 12-15.

234. Alsapach, *supra* note 54, at 91.

235. Johnson, *supra* note 57, at 945; Morgan & Droegemueller, *supra* note 60, at 1323.

236. Interview with Ken Wonstolen, *supra* note 25.

A. *Kentucky's Comprehensive Statute*

Expressing concerns very similar to those of the oil and gas industry in Colorado, Michael Wallen, the President of the Kentucky Oil and Gas Association, stated, in March of 2003, “[h]aving consistent and fair regulations statewide is essential if the oil and gas industry in Kentucky is going to grow, benefiting thousands of Kentuckians who work everyday in this important industry, all the while attempting to insure our nation’s future energy supply.”²³⁷ The Kentucky legislature agreed that consistent regulations were necessary for the state’s future, and on March 20, 2004, Kentucky Governor Paul Patton signed this new legislation into law. The amended and significantly more comprehensive Kentucky statute, which began as House Bill 524, effectively preempts all local regulation of oil and gas development in the state, but leaves to the local governments the necessary control over zoning issues.²³⁸ The amended statute states:

(1) It is hereby declared to be the public policy of this Commonwealth to foster conservation of all mineral resources, to encourage exploration for such resources, to protect correlative rights of land and mineral owners, to prohibit waste and unnecessary surface loss and damage and to encourage the maximum recovery of oil and gas from all deposits thereof now known and which may hereafter be discovered; and to promote safety in the operation thereof. To that end, KRS 353.500 to 353.720 is enacted and shall be liberally construed to give effect to such public policy.

(2) The General Assembly finds that governmental responsibility for regulating all aspects of oil and gas exploration, production, development, gathering and transmission rests with state government. The department shall promulgate regulations relating thereto and take all actions necessary to assure efficient oil and gas operations . . .²³⁹

Some advocates of local control have been very critical of this new Kentucky legislation because they believe it is nothing more than deregulation of the oil and gas industry, and therefore “a death knell to environmental protection.”²⁴⁰ Another perspective of this comprehensive statute views it not as a deregulating of the oil and gas industry, but as a

237. Michael Wallen, Editorial, *House Bill 524: Oil and Gas Regulation*, THE COURIER-J. (Louisville, KY), March 21, 2003, at 14A, available at 2003 WL 3290754.

238. KY. REV. STAT. ANN. § 353.500 (Michie 2004).

239. *Id.*

240. Wallen, *supra* note 237.

significant move toward uniform statewide regulations.²⁴¹ While proponents of the oil and gas industry are very pleased with the uniformity created by this legislation, many opponents of the industry are also able to recognize the benefits of this comprehensive legislation. The Sierra Club, an environmental group typically critical of the oil and gas industry, initially opposed the statutory amendment but now acknowledges that, despite the lack of local control, the statute does not disregard environmental concerns because it mandates comprehensive regulation of all aspects of the industry's impacts on public health, safety, and property.²⁴²

B. Ohio's Comprehensive Statute

On September 16, 2004, Ohio Governor Bob Taft signed into law legislation very similar in impact to that adopted by Kentucky six months earlier. The amended statute declares that the Division of Mineral Resources Management ("DMRM"), the state agency that oversees oil and gas regulation, has exclusive authority to regulate the permitting, location, and spacing of oil and gas wells in the state.²⁴³ The statute also repeals all provisions of current law that grant or allude to the authority of local governments to adopt concurrent requirements with the state concerning oil and gas exploration and operation.²⁴⁴

Tom Stewart, executive vice president of the Ohio Oil and Gas Association, explained, prior to the enactment of the legislation, that "Ohio's natural gas potential [was] not being realized because of inconsistent piecemeal local oil and gas regulation" including "local prohibitions" of drilling.²⁴⁵ Stewart states that a primary justification for the comprehensive new Ohio statute is the recognition that "[a] state wide benefit requires state wide oversight."²⁴⁶ The amended Ohio statute is expected to offer this statewide benefit by providing "consistent regulation based on sound regulatory principles designed to protect human health, safety and the environment and ensure proper conservation and orderly development of the state's natural resources."²⁴⁷ While local governments certainly have their concerns, the Ohio Oil and Gas Asso-

241. *Id.*

242. Tom Fitzgerald, *2003 Regular Legislative Season Wrap-up*, The Cumberland (May 2003), at 1, 5, available at <http://kentucky.sierraclub.org/newsletter/pdf/news0503.pdf>.

243. OHIO REV. CODE ANN. § 1509.02 (West 2004).

244. *Id.*

245. Ohio Oil and Gas Association, *Ohio House Passes Oil & Gas Legislation* (Feb. 2004), at <http://www.ooga.org/issues/HB278WebPage2.htm>.

246. Ohio Oil and Gas Association, *Oil and Gas Legislation Looks to Open Drilling, Stop NIBY Regulation* (Oct. 2003), at <http://www.ooga.org/issues/HB278WebPage2.htm>.

247. *Id.*

ciation, and others who advocated for the legislation, are confident that the DMRM will be able to address these concerns. During the time that the legislation was being debated, the Ohio Township Association and the County Commissioners Association compiled a list of concerns they had with regard to urban drilling.²⁴⁸ In response, with the exception of a noise concern, all of the concerns raised by the local government groups are covered in the rulemaking amendment to the Ohio statute.²⁴⁹

The adoption of the new, comprehensive legislation in Kentucky and Ohio is too recent for the full effects to yet be analyzed, but the creation of uniform regulatory statutes will certainly put an end to many of the constant legal battles that resulted from inconsistent local regulations.

C. A Call for a New and Comprehensive Approach in Colorado

After many years of confusion and frustration in Colorado, stemming from the drastic variation in regulations at the state and local level and from locality to locality, the time has never been better to turn our attention back to the legislature. There is a great need for the creation of a more comprehensive oil and gas statute.²⁵⁰ In the absence of a more defined distinction between those areas of natural gas production that can be regulated at the local level, as opposed to at the state level, new natural gas production will be delayed and, therefore, more costly for the oil and gas industry.²⁵¹ Furthermore, delaying new natural gas production will cause natural gas prices to continue to rise to all-time highs, hurting consumers and the economy in Colorado and nationwide, and leading to increasing energy shortages. Clearer distinctions as to how local governments can and cannot regulate natural gas production would negate the need for the excessive number of lawsuits that are filed due to the current case-by-case regime. These clearer distinctions would have numerous positive effects, including lowering costs to the natural gas producers and individual towns, reducing the burden on courts, and speeding up the production of natural gas, thereby lowering costs to consumers nationwide.²⁵²

248. Ohio Oil and Gas Association, *Ohio House Passes Oil & Gas Legislation* (Feb. 2004), at <http://www.ooga.org/issues/HB278WebPage2.htm>.

249. *Id.* Noise was not covered in the rulemaking amendment because it is "a short-term issue that most felt was too hard to define." *Id.*

250. Laitos & Getches, *supra* note 18, at 40.

251. "Often, [local] restrictions are imposed unexpectedly, so that the developer cannot anticipate or prepare for them. As a result of this relentless and ever changing regulation, [natural gas] developers must devote time, resources and legal talent to the task of seeking to overcome round after round of regulatory obstacles." *Id.* at 32-33.

252. See CLEAN ENERGY FOR COLORADO, *supra* note 2, at 15 ("If the nation's potential gas resources cannot be accessed, they cannot be counted upon by the public to satisfy its energy demands, thus resulting in higher consumer prices. . . ."). There are numerous other po-

CONCLUSION

The lack of clear direction from the Colorado courts is causing numerous problems for both the oil and gas industry and the citizens of Colorado. In addition to the time required for natural gas producers to obtain permits to drill, the costs of lawsuits are incredibly high for both the oil and gas producers and local communities.²⁵³ Especially in a time when a recessionary economy is taking its toll on businesses and communities alike, it seems that the lack of clear direction from Colorado's courts is not to anyone's benefit.²⁵⁴ This is particularly true when the continually increasing costs of natural gas are taken into consideration.

The effects of the imbalance between natural gas supply and demand are widely felt and are expected to become more prominent in the near future. The record high natural gas prices experienced in 2002 have already harmed businesses and consumers.²⁵⁵ Alan Greenspan has warned that continually high prices for natural gas is a "very serious problem" that could continue to oppress the economy.²⁵⁶ The high prices affect numerous industries, including steel and chemical manufacturers, and hurt individual consumers as well.²⁵⁷ For those who use natural gas, its cost accounts for about sixty percent of their heating bills.²⁵⁸ As a result, customers are expecting to pay more and more to heat their homes.²⁵⁹ Colorado State Representative Diane Hoppe talked of receiving a call from an elderly constituent, during the summer

tential benefits to be gained from natural gas production: "The natural gas and oil industry in Colorado is an important component of the state's economy. . . . Benefits from the industry are both direct (to employees, the economy and the tax base) and indirect (generated jobs, business investments and their positive contribution to local economies)." *Id.* at 30.

253. See Laitos & Getches, *supra* note 18, at 2.

Unfortunately, no matter how worthy their motive, the sheer quantity of these multi-layered and sequential state and local barriers makes resource development very time-consuming and expensive. The relentless nature of these non-federal regulations sometimes discourages or halts otherwise useful and legally valid resources extractive operations. This consequence benefits neither the local governments imposing the regulations nor the frustrated developer. The American resource market is a victim as well because such barriers slow or even halt the movement of needed commodities to demanding consumers.

Id.

254. See CLEAN ENERGY FOR COLORADO, *supra* note 2, at 15 ("If the nation's potential gas resources cannot be accessed, they cannot be counted upon by the public to satisfy its energy demands, thus resulting in higher consumer prices. . . .").

255. Valerie Richardson, *Natural Gas Shortage Seen; More Drilling Recommended; Task Force Warned of an Impending Crisis*, WASH. TIMES, Aug. 26, 2003, at A4, available at 2003 WL 7718122.

256. *Unnatural Gas Shortage*, *supra* note 1.

257. See Gold, *supra* note 15.

258. Chakrabarty, *supra* note 16.

259. Richardson, *supra* note 255.

months, who asked where she could buy an affordable electric heater because she had heard that natural gas prices were going to rise so high that she would not be able to afford to run her furnace during the winter.²⁶⁰

Concerns like this highlight the pertinent question: who benefits when lawsuits make it more difficult for oil and gas companies to access the resources available in the West? Jim Lightner, former Chief Executive of Denver-based oil and gas company Tom Brown Inc., answers, "[n]ot American consumers, and not the poor people whose heating bills are going up."²⁶¹ United States Representative Bob Beauprez (R-CO) underscores the contradiction he sees with regard to the needs of American consumers compared to the ability to provide these resources, stating, "[t]he federal government has encouraged the use of natural gas by all sectors of the economy, from industry to families, all the while limiting more and more areas available to explore for natural gas."²⁶² He emphasizes, "[i]t brings to mind Third World countries run by tyrannical governments holding up humanitarian supplies of food from around the world while its people starve to death."²⁶³ Gas producers are frustrated because they see that there is no need for people to "starve" at the hand of excessively high gas prices, arguing that "natural-gas price hikes could be contained if they were allowed to drill wells efficiently. . . ."²⁶⁴

Making the predicament even worse, when producers are unable to access the potential natural gas resources in quantities sufficient to meet demand, the result is forced reliance on less environmentally friendly fuels.²⁶⁵ Despite all of the benefits of natural gas,²⁶⁶ there unfortunately seems to be no end in sight to battles that are being fought between the COGCC and the local governments—at least not until either the Colorado Supreme Court or the state legislature steps up and provides clearer guidelines. Since the Colorado Supreme Court has already expressed hesitancy to further address the question of preemption related to oil and gas development, attention should now turn to the legislature. The time is right to call for a new and comprehensive oil and gas statute.

The reality of the situation is that the Colorado legislature could develop guidelines to either strongly favor state level control of the oil and gas industry or to strongly favor more local control. Guidelines in favor of complete state level control of the oil and gas industry would be preferable, because uniform statewide governance would lower energy bills. Greater state level control would also help to ensure adequate supplies of

260. *Id.*

261. Raabe, *supra* note 5.

262. Richardson, *supra* note 255.

263. *Id.*

264. Chakrabarty, *supra* note 16.

265. *See generally* CLEAN ENERGY FOR COLORADO, *supra* note 2, at 15.

266. *See infra* Part I(A)(3).

natural gas to meet demands, while still ensuring protection of statewide interests such as safety and environmental protection.²⁶⁷ In the absence of guidelines providing for total state level control of oil and gas regulations, any form of clearer guidelines, even guidelines in favor of increased local control, would better serve the interests of both the citizens of Colorado and the oil and gas industry. Clear guidelines, in any form, would put an end to much of the costly litigation and the constant delays in natural gas production that drive up the cost of this precious natural resource.²⁶⁸

267. See Laitos & Getches, *supra* note 18, at 4 (“[I]t is in the interest of both developers and state and local governments to impose a more rational and unified set of regulatory rules on resource extractive operations.”).

268. *Id.* (“Increasing predictability would help to avoid the delays, confusion, and litigation that the current system encourages.”).

