CAMRO
Colorado Alliance of Mineral and Royalty Owners
7675 W. 14th Avenue Suite 106 Lakewood, CO 80214

Continued From Page 3

dramatic way so as to adversely affect the value of that mineral estate. It really measures the degree of surprise on the property owner.

But one factor that's really important, is the activity being regulated in an already heavily regulated scenario such that the property owner should have anticipated that new regulations would result. Well, it's true that oil and gas is heavily regulated, but historically in Colorado, if an operator has met the requirements of the COGCC, the expectation is that the resource would be entitled to be developed, and a new regulation that imposes a significant new setback, or significant new requirements, that dramatically changes that paradigm, I believe, would constitute interference with reasonable investment-backed expectations.

The final element is the character of the governmental regulation, which really is a balancing of the public benefit and the private burden. It often arises in the context of zoning authority, and courts are reluctant to find takings cases, or to award damages, in the context of a site-specific zoning decision. But where a government imposes a broad-based setback or set of rules, that do not take site-specific conditions into account, a court will strive to determine whether the public benefit could be achieved in a less dramatic fashion, in a more targeted fashion, and if it could, then I think this factor, too, would weigh in favor of a taking in the particular circumstances at hand.

So in conclusion, mineral interests are distinct property regulations in Colorado. Regulations, setback or bans that prevent access to minerals, and devalue them to zero, constitute a total take. Local constraints that result in a partial diminishment still could require compensation based on the balancing of the Penn Central factors.

December, 2017

CAMRO
Colorado Alliance of Mineral and Royalty Owners

Protecting Our Property Rights - Protecting Our Future

No mineral or royalty owner should ever forget that Jared Polis, who is now putting his hat in the ring for the governorship in next year's election, vowed to upend Colorado's oil and gas laws and render our property valueless. He had promised to fund a series of constitutional amendments in 2014. Polis backed a ballot push to add restrictions to the industry — until he agreed to an early August deal with Gov. John Hickenlooper that pulled the proposals from the 2014 ballot.

As part of the deal, Governor Hickenlooper convened a 21-member task force that spent months traveling the state collecting insight from citizens, industry executives and local officials about how oil and gas operations were conducted around Colorado.
Then, in 2016 Polis again opened his wallet for a ballot proposal targeting the energy industry. Polis gave $25,000 to "Yes for Local Control Over Oil and Gas," a group supporting Colorado ballot proposal No. 75, which if approved by voters would boost local officials authority over how oil and gas operations would be conducted in their jurisdictions — if those operations are allowed at all.

A second measure, No. 78, would have expanded the state's minimum "setback," or buffer zone, between drilling rigs and homes and other "areas of special concern" from 500 feet to 2,500 feet. State officials have said that proposal, if approved by voters, would effectively ban drilling from 90 percent of Colorado. Polis and his family contributed to a group that advocated for No. 78, Yes for Local Control over Oil and Gas, which raised a total of $55,100. Of that, $50,000 came from Polis and his father, Stephen Schutz, of SPS Studios in La Jolla, California.
Continued on Page 2

Save the Date:
Events

COGCC Flowline Rule making hearing
Monday January 8, 2018 and
Tuesday, January 9, 2018
At Colorado Oil and Gas Conservation Commission
1120 Lincoln Street Suite 801
Denver, CO 80203

71st Colorado General Assembly of the Legislature
Convenes on January 10, 2018

CAMRO will again be represented by Brett Moore of the On the Ballot lobbying firm.

House Transportation and Energy Committee
Interim meetings scheduled for 1:30 PM December 20, 2017 and 1:00 PM January 9, room 271 at the Capitol

So, CAMRO thinks that the timing is right to publish the transcript of testimony given by Wayne Forman, the attorney who educated the Governor's task force on our behalf in 2014. Any county, or municipality that considers regulating mineral production to the extent that it is prohibited fully or even partially needs to take heed. Please share this with your friends, family, and elected officials.

Wayne Forman is a shareholder in the Brownstein Hyatt Farber and Schreck Law firm.

Wayne's practice encompasses land and water issues including water law, land use litigation, condemnation and environmental law and litigation.

He represents private and public clients throughout Colorado on water rights matters and has extensive experience in land use litigation and water quality and wetlands matters. Throughout his 30-year career, Wayne has helped navigate a number of complex water and land use issues for energy companies throughout the Rocky Mountain region. His case work has established important precedents concerning the primacy of state authority to regulate Colorado's oil and gas industry in the face of conflicts with local regulations.

Wayne has also been a leading spokesman on the risks of taking claims associated with bans, moratorium and setbacks on hydraulic fracturing, having presented on that issue to the Governor's Oil and Gas Task Force and other organizations.

Testimony by Wayne Forman before the Governor's Task Force, Rifle CO - 2014

I intend to briefly address today the law on takings and the framework for assessing when regulations that devalue oil and gas assets would constitute a takings under the Constitution. The place we need to start is the US Constitution. The Fifth Amendment provides that private property shall not be taken for public use without just compensation. The Colorado Constitution has an analogous provision that's even a little broader than the federal constitution. It provides that private property shall not be taken or damaged without the payment of just compensation.

So the typical takings context that people think of is where the government comes in and takes your property physically, appropriates it, or allows someone else to use or occupy your property. That's not what we're dealing with today.

We're dealing with the law of regulatory takings. And since the US Supreme Court case in 1922: if regulations go too far in diminishing the value of private property rights, compensation is required.

Now, in the succeeding 90 years, the task has been to determine what does it mean when regulations go too far. All of these cases are difficult, fact-intensive cases, which usually means expensive, protracted litigation. I'm aware of a couple of takings cases that have recently been filed: one against the State of Illinois, and one in Mora County in New Mexico, over regulation of oil and gas. So this is going to be the new round, new generation of litigation over regulation of oil and gas.

There are two general types of regulatory takings: a total take, and a partial take. But before we get into those two types, the first question that we need to ask is: are mineral interests subject to the takings clause at all? Is it a property right in and of itself on which the takings clause operates?

Now, it's very clear that property rights are defined by state law, and in Colorado, we have historically treated mineral interests as a separate and distinct property right from surface estate. There are cases that hold that. Russell Coal, involving the subsurface coal estate, the Grynberg, also a coal case, and the McKay case, which is a Federal Court of Claims case involving a clay resource, a clay mine in Jefferson County. All of those cases recognize that severed mineral interests are distinct and separate property rights on which the Fifth Amendment operates.

Now, a number of cases from other states similarly have held that severed mineral interests are protected by the takings clause. I'll just review them briefly. The Miller Brothers case out of Michigan was an oil and gas case. Whitney Benefits, a Federal Court of Claims case, was coal. Shelly Materials, a decision by the Ohio Supreme Court, on sand and gravel. Two of those cases resulted in judgments finding takings of the mineral estate. All of them recognized that minerals are subject to the takings clause.

Now, back to the 2 types of regulatory takings. The first is a total regulatory take. This doctrine was espoused in 1992 by the US Supreme Court Lucas case. And it holds that a government may not eliminate all economically valuable uses of private property without paying compensation. It is a categorical rule, and if property rights, including mineral interests, are devalued to the point of zero, the government needs to pay compensation as a result of that regulatory impact.

The clearest application of the total take doctrine in the oil and gas context is probably the Miller Brothers case that I just mentioned. That was a Michigan case in which the State of Michigan prohibited oil and gas development on about 4500 acres of land. The trial court found first that it was a total taking, both of the mineral interest, the owned mineral interest and the leased mineral interest, and found that a total take was appropriate and awarded $72 million in damages to the interest holders. The Court of Appeals affirmed, finding that it was indeed a taking, and a categorical taking, but reversed on the damages number for further consideration.

So the bottom line on the total take is if a local regulation or setback or ban, or a statewide setback or regulation, prevents access to severed mineral interest, that will result in a total take, and compensation will be due.

There's an exception to the total take doctrine. That is, if the activity that is being regulated would have constituted a public nuisance under state law. So the Court has directed us to look at background principles of property law and nuisance law in order to determine whether operating oil and gas well exploration-development would constitute a public nuisance. A public nuisance is an unreasonable interference with the right to common to the public. I think it would be quite a difficult showing in Colorado in particular, but probably elsewhere, to show that oil and gas exploration-development as a general proposition constitutes a public nuisance in Colorado. In fact, Colorado law has for decades promoted and encouraged development of responsible oil and gas resources without waste. So I think that would be a difficult showing, and I don't think that this exception would insulate a total take of a severed mineral interest in Colorado.

So the next category of taking is a partial take. Under United States Supreme Court precedent, that requires a balancing of factors. And the court in the Penn Central case in 1978 identified 3 primary factors as guideposts for deciding whether a regulation that impacts a property right, in this case, an oil and gas interest, but doesn't devalue it to zero, requires compensation under the Constitution.

The first element is the economic impact of the regulation on the claimant. That's typically measured by the value of the property interest, both before and after the impact of the regulation is felt. There's no litmus test, there's no strict percentage that has been adopted to say that a regulation has to diminish a property interest by x amount in order to constitute a taking. But the test that has been articulated in cases, qualitatively, requires a serious financial loss or a substantial diminution of value. Now that prong could be satisfied if a regulation, a ban, or a substantial setback substantially reduces the value of an operative mineral estate.

The second balancing test in the Penn Central test is whether the regulation has interfered with distinct investment-backed expectations, so what this measures is how much skin in the game does the mineral interest owner have and to what extent has the government changed the ground rules in a

Continued on page 4