CAMRO
Colorado Alliance of Mineral and Royalty Owners
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Financial Assurance Committee

Governor Hickenlooper signed Executive Order D 2018-12 on July 18, 2018 to improve the environment, public health, and safety of Coloradans by directing the Colorado Oil and Gas Conservation Commission ("COGCC") to plug, remediate, and reclaim orphaned wells and sites and prevent future orphaned wells and sites. The Executive Order requires COGCC to establish a technical working group to review financial assurance requirements and report to the Governor on recommended changes by December 1, 2018. COGCC is then required to promulgate rules by September 1, 2019 to ensure the sufficiency of financial assurance, including funding plugging, remediation, and reclamation activities for future orphaned wells and sites.

The Financial Assurance Technical Working Group ("Working Group") was composed of members with significant experience with Colorado's financial assurance rules and processes, including representatives from local, state and federal government agencies, the environmental community, the oil and gas industry, and private citizens (See Appendix I). The Working Group met four times during the fall of 2018 to review Colorado financial assurance requirements, best practices in other states, and proposals for modernizing Colorado's financial assurance rules. COGCC gathered information during these meetings for the purpose of developing recommendations for revisions to Colorado's financial assurance rules. Working group members had an opportunity to review and comment on the draft recommendations prior to finalization.

I. List of Technical Working Group Participants

*** Scott Anderson (Environmental Defense Fund)**
*** Brian Cain (Extraction)**
*** Chad Calvert (Noble Energy)**
*** Ashley Campbell (Crestone Peak Resources)**
*** Jonathan Fairbairn (BLM)**
*** Morgan Cullen (Colorado Municipal League)**
*** Brad Gibson (Private Citizen, Broomfield Oil and Gas Task Force)**
*** Roger Hutson (HRM Resources)**
*** Sam Knaizer (BP)**
*** Dave Kulmann (SRC)**
*** Jason Maxey (Weld County)**
*** Kim Mendoza-Cooke (Anadarko)**
*** Warren King (The Wilderness Society)**
*** Neil Ray (CAMRO)**
*** Jep Seman (Conoco)**
*** Catie Stitt (State Land Board)**
*** Jimmy Walker (Petron)**
*** Ken Wonstolen (HighPoint Resources)**
*** Kirby Wynn (Garfield County)**
*** Mick Richardson (CO Assoc. of Homebuilders)**

November, 2018

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Protecting Our Property Rights - Protecting Our Future

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Proposition 112 failed.

However, its proponents have convinced themselves that their efforts have given them power to influence the incoming administration and the legislature to enact law that will be just as bad for mineral and royalty owners.

" It sends a huge message. And it's not just people in Boulder and Broomfield, it's people in Jefferson County, Arapahoe and around the state," said state Sen. Matt Jones, D-Louisville, a critic of the oil and gas industry who was elected Boulder County commissioner.

Anne Lee Foster, one of the organizers for 112, said" We were outspent 43 to 1. I am immensely proud of our effort. We'll keep pushing and fighting."She said" it's too early to say" whether her group, Colorado Rising, would launch another ballot initiative in 2020.

The all-Democratic statehouse may offer a chance to move on some of the issues that have been "bottled up," said State Rep. Mike Foote, D-Lafayette, who in the last two years sponsored seven bills focusing on issues such as setbacks from schools and buttressing local control over oil and gas operations.

Foote is seeking appointment to Matt Jones' senate seat. Jones resigned the senate having been elected Boulder County Commissioner.

Also seeking to replace Jones is AnneMarie Jensen She said that, if appointed, her platform would be one of oil and gas regulation reform — "right now the law is not very balanced and a lot of things could be done to improve that"

Save the Date

COGCC MONTHLY HEARING
December 17 & 18, 2018
Applications Due 10/18/2018
Protest/Intervention Due 12/03/2018
Admin Hearing/Prehearing 12/03/2018
Location Denver

School Setback Rule making hearing will take place during the December COGCC meeting
Public / Non-Party Statements Due
December 7, 2018 (5:00 PM)

January 4, 2019
The 2019 Colorado General Assembly of the Legislature Begins

May 3,2019
The 2019 Colorado General Assembly of the Legislature Ends

June 7&8, 2019
CAMRO Annual Conference and membership meeting
Pinehurst Country Club.

Pooling Rule Making

Rule 530 is the Colorado Oil and Gas Conservation Commission Rule that sets forth process for involuntary pooling of mineral interests. In 2018, the General Assembly passed Senate Bill 18-230 intended to give mineral owners additional time to review lease offers provided in connection with involuntary pooling proceedings. After the legislation took effect the Commission undertook rulemaking to implement the legislation. Rule 530 now requires operators to provide evidence to the Commission that all unleased mineral owners were provided a reasonable offer to lease or participate 60-days prior to the scheduled involuntary pooling hearing. The rule also provides that an owner will be considered a nonconsenting if the owner fails or respond or has refused a reasonable offer to lease after being provided at least sixty (60) days for review. Rule 530 previously provided that an owner will be considered a nonconsenting mineral owner after 35-days written notice.

Nearly thirty parties participated in the Rulemaking, including CAMRO. While the comments received from the parties addressed a wide range of issues, as discussed below, CAMRO's focus was on ensuring the legislative intent to provide the full sixty (60) days to consider the offer was codified in the Rules.

In amending Rule 530, the Commission was required to promulgate a rule consistent with the revised provisions of § 34-60-116(7)(d)(I) of the Colorado Oil and Gas Conservation Act. This section now provides in part that the Commission must receive "evidence that the unleased mineral owner has been tendered, no less than sixty days before the hearing, a reasonable offer to lease upon terms no less favorable than those currently prevailing in the area." If the parties are unable to come to terms on a Lease, and the Lessor believes the offer to Lease was not reasonable the Lessor has the opportunity to file a protest with the Commission. In carrying out the provisions of Senate Bill 18-230, the Commission will not proceed to hearing on a protested involuntary pooling application, and a mineral owner must have at least sixty days to consider the proposed lease or offer to participate. The Commission has jurisdiction to consider the terms offered and whether they are reasonable under the prevailing rates in the area where the lease is located.

CAMRO, along with others, pointed out that identified deadline for filing a protest of thirty (30) days prior to the hearing might procedurally limit the lease review timeframe if the lease or participation offer was sent out sixty (60) days before the hearing. While the thirty day protest period is independent of the sixty day review period, the timeframes are interrelated for Lessors who want to file a meaningful protest. Of course, an unleased mineral owner may always file a protest to an involuntary pooling application on the protest deadline in accordance with Rule 509.a.(2) if they have not received a reasonable offer to lease. In order to address this issue the Commission determined Lease offers should be provided ninety (90) days in advance of the hearing in order to give the full sixty (60) day review period. Commission staff also explained a protest may be filed after the Protest deadline if the owner has not received the full sixty day review period, provided the Commission must receive the protest at least three (3) days before the scheduled hearing. This timing does not expressly appear in the Rule, but is part of the Act, and will be analyzed in the Rule's Statement of Basis and Purpose filed by the Colorado Attorney General with the Secretary of State.

The takeaway for mineral owners is the Act now recognizes additional time is needed to review of a lease offer. The additional time hopefully will give mineral owners an opportunity to consider these options, and to negotiate a lease if that is the preferred course of action. That said, a mineral owner should never ignore a lease offer provided in accordance with the Act. Once an offer to lease or participate is received a mineral owners should take note of the response deadline, and should contact the operator if the mineral owner would prefer to lease, and not to be considered a nonconsenting party. Typically there is room to discuss the Lease terms offered, and to better understand the company's proposed development plans and the impact on your minerals.

Identification of Operator Contact.

Several parties testified that operators are sometimes not responsive to inquiries received regarding lease offers, and involuntary pooling proceedings. The Rule now includes an obligation for the operator to provide contact information for an operator representative who will be available to answer questions. The Commission expressed its expectation that calls would be answered, and any messages would receive prompt follow-up.

Demonstration of a "Reasonable Offer"

Adams County proposed that Rule 530 be amended to require operators to include with their involuntary pooling application evidence of no less than ten lease offers accepted within the drilling unit. The Commission rejected Adams' County's proposal as inconsistent with the Act. The Act provides that a pooling order may only be entered upon "evidence that the unleased mineral owner has been tendered . . . a reasonable offer to lease upon terms no less favorable than those currently prevailing in the area at the time application for the order is made." § 34-60-116(7)(d)(I), C.R.S. The Act does not require a certain number of leases be provided to evidence that a "reasonable offer to lease" has been made. An operator must make a prima facie demonstration that an offer to lease or participate was reasonable. Once the operator has made such a demonstration, the mineral owner must show why the offer was not reasonable.

To show that an offer was not reasonable, a mineral owner may provide the Commission with copies of leases in the unit and for all cornering and contiguous units that are under the proposed lease. A mineral owner may also provide copies of lease offers to mineral owners in the area. The Commission would also accept testimony from lessors in the area as to the terms of their leases to support the mineral owners' argument that the lease offer was not reasonable. Finally, in the course of the hearing process, a mineral owner may request to serve discovery upon the operator.

Evidence of Mineral Ownership in Drilling Units

Allied Local Governments' prehearing statement requested that several Commission Rules be amended to provide that operators supply duplicates of oil and gas leases to support applications for involuntary pooling and drilling units. Evidence of ownership of mineral interests is required only when that ownership is challenged. If evidence of mineral ownership is challenged, the Commission will consider the evidence brought by the mineral owner and determine whether it is sufficient to substantiate ownership.

Good Faith

City of Boulder proposed amendments to Rule 530 that would have required operators to negotiate leases in good faith. The City asserted that when operators send the mineral owner an offer to lease concurrently with sending notice of an involuntary pooling application is not negotiating in good faith. As with all Commission Rules, operators and owners are expected to act in good faith. Stating that requirement only in this Rule, but nowhere else, may suggest good faith is only required for pooling. Moreover, while some operators may provide mineral owners with a lease concurrent with an involuntary pooling application, doing so does not mean that future lease negotiations will not be conducted in good faith.

Minimum Percentage Ownership Requirements

In their prehearing statements Adams County and Allied Local Governments proposed that Rule 530 be amended to establish a minimum 51% ownership interest in the lands sought to be involuntarily pooled in order to file an application. The Commission did not adopt any minimum threshold, and industry was quick to point out the Act prohibits the Commission from setting a minimum percentage ownership requirement. "The commission, upon the application of any interested person, may enter an order pooling all interests . . . ." § 34-60-116(6), C.R.S. (emphasis added). CAMRO thinks the proposed amendment would not only violate the Act, it would disadvantage small mineral interest owners. Because the Act authorizes "any interested person" to file an application for involuntary pooling, it empowers small percentage owners to seek pooling and to be paid for their minerals that another owner is draining.
The concept of minimum percentages to pool has been raised in the last several legislative sessions however, and it would not be surprising to see it come up again next year.

More to Come.

At the conclusion of deliberations the Commission suggested the revisions to Rule 530 to implement the modified timeframe was only a start on the work needed to update Rule 530. The Commission was interested in additional mineral owner protections, options related to notice and electronic communication and considering how the Commission would exercise its jurisdiction regarding reasonableness. Accordingly, more may be coming on Rule 530.

Limitations on update.

Of course, CAMRO's summary is not intended as legal advice, and if you receive information regarding involuntary pooling, or any Commission proceeding, it always is a good idea to take advantage of the contacts provided at the Commission, and in the filings, and to seek independent legal counsel as needed.

Effective Date.

The Commission adopted the proposed amendments, which added to and amended Rules 501, 503, 504, 506, 507, 509, 510, 511, 512, 519, 522, 528, and 530, at its hearing on October 3, 2018, in Cause No. 1R, Docket No. 180900646. The amendments to most rules will become effective, per § 24-4-103, C.R.S., twenty days after publication in the Colorado Register. Any revision that alters the timing of submission of applications or other documents to the Commission, or that implement the electronic filing system, will become effective for the March 2019 hearing cycle. Thus applications for that cycle will be due on January 10, 2019.

Payment of Proceeds Cases

Certain of the Payment of Proceeds Cases that were heard by the COGCC last July are being appealed to Denver District Court. The Commission had ruled it did not have Jurisdiction to hear those cases since it was subject to a contract dispute and the Statute provides that the Commission has no jurisdiction in contract disputes. The attorneys for the producers are appealing the Commission decision. As an example, here is what the producers seek in the Casey issue which was one of the five cases heard last July.

WHEREFORE, Plaintiffs respectfully request that judgment enter in their favor, and against the Commission and Richard N. Casey, as follows:

A. A determination that the Commission's Order is in violation of Section 118.5 of the Oil and Gas Act;

B. A determination that the Commission's Order is arbitrary and capricious, an abuse of discretion, unsupported by the record, a denial of a statutory rights, and/or otherwise contrary to law;

C. A ruling setting aside and/or vacating the Commission's Order;

D. A declaration that Casey's claims involve no bona fide contractual interpretation related to any payment and deduction language in his Lease, and that the determination of the amount of proceeds due, if any, is a question of fact for the Commission to decide as the factfinder;

E. In the alternative, a declaration as to the meaning of any ambiguous contractual term in the Lease that is relevant to this payment of proceeds dispute if (and only if) the Court determines judicial interpretation is so warranted;

F. A ruling compelling the Commission to exercise jurisdiction over this payment of proceeds dispute, as provided in Section 118.5, and remanding this claim to the Commission for further proceedings; and

G. Any other further relief the Court deems appropriate.

Oral Arguments Heard by the Colorado Supreme Court in the Appeal of the Martinez Case

In mid August, the Colorado Supreme Court heard oral arguments in the appeal of the lower courts decision. The COGCC's state attorney, Colorado Solicitor General Frederick R. Yarger, argued that the Appellate court erred when it relied on its interpretation of just a portion of the amended oil and gas act and did not take into consideration the act as a whole. Yarger also argued that the Commission properly considered the Martinez rulemaking request in its denial.

The appellate court ruled in favor of Martinez who had been denied a rulemaking requiring the Commission cease issuing permits to drill until it could prove that there is no harm to the environment, wildlife and health, safety, and welfare of the State's Citizens. The Appellate Court had only considered the Legislative Declaration in the amended act that discussed the Commission's duty to balance environmental, wildlife, and health safety and welfare with its duty to issue permits to drill.

The Martinez Rulemaking would have mandated a zero cumulative effect concept to not only the Commission's duties, but also extend to the end user. This concept derives from the Public Trust Doctrine which no Colorado Court has embraced. In some states the Public Trust Doctrine has been applied to air, water, shorelines, and has been used to preclude regulatory takings lawsuits.

The Justices asked many probing questions mostly focused on the statute and how the Commission applied its interpretation of authority under the statute. The court will issue its ruling in the coming months.