



Court of Appeals Upends COGCC's Balancing Test

By: [Karen Spaulding](#)

On March 23, 2017, Judges Fox and Vogt of the Colorado Court of Appeals ruled against the Colorado Oil and Gas Conservation Commission (“COGCC” or “Commission”) in a direct assault on long-standing agency deference. In doing so, this panel gave unprecedented legal significance to words in the Colorado Oil and Gas Conservation Act’s (the “Act”), C.R.S. § 34-60-101 *et seq.*, Legislative Declaration, which under Colorado law is to be used as an aid in understanding an ambiguous statute. These Judges principally relied upon terms they deemed “unambiguous” in the Legislative Declaration to reach their holding that the COGCC misinterpreted its authority under the Act in denying the Plaintiffs’ petition for rulemaking.

At the outset of this matter, the Plaintiffs filed a request for rulemaking at the COGCC claiming that the public’s health, safety and welfare (“HSW”) should be elevated above development of the state’s natural resources. Specifically, Plaintiffs sought a rulemaking requiring that all permits for oil and gas wells be denied “unless the best available science demonstrates, and an independent third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair. . .” the environment and the public’s HSW and “does not contribute to climate change.”

The COGCC received public comments and held a hearing on this rulemaking petition. The Commissioners principally denied the petition based upon the COGCC’s lack of authority to adopt the proposed rule as written and that there was no statutory basis to deny permits to Operators due to the requested third party impact review.

The Denver District Court found that the COGCC’s actions were not arbitrary or capricious, and affirmed the COGCC’s denial of the rulemaking petition.

The two Judges writing for the majority in the three-judge Court of Appeals panel determined that the COGCC has the statutory authority to decide a petition for rulemaking that would require the COGCC to readjust the Act’s balance between the development and production of oil and gas resources and the protection of the public’s HSW, i.e., such that the public’s HSW is paramount and overriding. In so ruling, these Judges held that the Legislative Declaration in C.R.S. § 34-60-102(1)(a)(I) required that the “balancing” undertaken by the COGCC is not between the responsible development of oil and gas resources of the state and the public’s HSW. Rather the court determined that the balancing applies to the development, production and

utilization of natural resources, which must then be fostered and regulated “in a manner consistent with” the public’s overriding HSW and environmental concerns. The Court found the public’s HSW and the environment were determining factors and not a part of the balancing test that the COGCC has undertaken for many years. As such, the majority found that the Commission incorrectly interpreted the Act and abused its discretion when it denied the petition for rulemaking. The case was remanded to the District Court to return it to the COGCC for further proceedings consistent with the Opinion.

The majority specifically stated that the administrative record did not contain information for it to affirm the district court’s decision on alternate grounds offered by the COGCC in its briefing, such as: (1) the Commission’s other priorities; or (2) the proposed rule’s delegation of duties of the COGCC to unnamed third parties.

Further, the majority stated that it was not addressing “the merits of whether the Commission should adopt Petitioners’ proposed rule.” The limited issue decided by these two Judges was the COGCC’s statutory authority in holding the rulemaking.

Judge Booras’ dissent is more persuasive and contains the rationale for a petition for certiorari to the Supreme Court by the COGCC. Specifically, Judge Booras explained the purpose of a statute’s Legislative Declaration—to be used as a statutory aid in construction of an ambiguous statute—and that the Legislative Declaration does not override the statute’s express language, located in C.R.S. § 34-60-106(2)(d). Judge Booras stated that this section of the Act mandates that the COGCC balance health and environmental impacts with cost effectiveness and technical feasibility of oil and gas production, which does not render public health and the environment the overriding considerations. Further, Judge Booras quoted the Colorado Supreme Court’s statement in support of the COGCC’s longstanding statutory balancing requirements, as set forth recently in *City of Fort Collins v. Colorado Oil & Gas Ass’n.*, 2016CO28, that “the COGCC has promulgated an exhaustive set of rules and regulations ‘to prevent waste and to conserve oil and gas in the State of Colorado while protecting public health, safety and welfare’ [citation omitted].” [See previous article on the *Fort Collins* and related case [here](#).]

The COGCC’s petition requesting the Colorado Supreme Court reverse this Opinion must be filed by May 4, 2017. *Martinez v. COGCC*, 2017COA37 is available [here](#). For further information regarding this case, please contact [Karen Spaulding](#).