

**COLORADO OIL & GAS ASSOCIATION**

HB 1255 ensures that legislative direction and intent is carried out in the implementation of the “Colorado Habitat Stewardship Act” (HB 07-1298). The bill specifies that:

- The requirement to consult with the Division of Wildlife (DOW) with respect to “decision-making that impacts wildlife resources” is applicable to the Oil & Gas Conservation Commission (COGCC), as provided in HB 1298.
- Surface owner consent is required if the COGCC seeks to restrict the use of private lands for oil and gas operations, and that failure to obtain the landowner’s consent does not authorize denial of the property right to drill a well.
- Best Management Practices for wildlife preservation must be established, and function as presumptive conditions of approval for oil and gas operations.
- Operator requests for a variance from a wildlife restriction must be decided in a timely fashion.
- If an operator appeals a wildlife mitigation measure, the COGCC must conduct a cost-benefit analysis which demonstrates that the benefits of the restriction outweigh its costs.
- For appeals of wildlife mitigation measures, the Executive Director of the Department of Natural Resources – who oversees the DOW – is recused.
- For appeals of mitigation measures proposed by the Department of Public Health and Environment (CDPHE), the Executive Director of CDPHE is recused.

HB 1255 reiterates and provides clear legislative direction regarding implementation of the Habitat Stewardship Act. It clarifies that the consultative role of DOW does not provide it with new authority over private lands via COGCC conditions of approval. It provides for improved information and fairness with respect to appeals of wildlife mitigation measures.

**PLEASE VOTE YES ON HB 1255**

**Are Minerals (Oil & Gas) Property Interests?  
Can Denial of the Right to Drill Constitute a Taking?**

**Colorado Revised Statutes**

**24-65.5-101. Legislative declaration - intent.**

The general assembly recognizes that the surface estate and the mineral estate are separate and distinct interests in real property and that one may be severed from the other. It is the intent of the general assembly that this article provide a streamlined procedure for providing notice to owners of mineral interests concerning impending surface development and to facilitate the negotiation of a surface use agreement providing for the joint use of the surface and a mechanism for resolution if an agreement is not reached. Further, it is the intent of the general assembly to include local governments in this process without creating additional liabilities for local governments.

“Mineral estate” means a mineral interest in real property that is shown by the real estate records of the county in which the real property is situated. CRS § 24-65.5-102 (4).

“Mineral estate owner” means the owner or lessee of a mineral estate underneath a surface estate that is subject to an application for development. CRS § 24-65.5-102 (5).

“Mineral estate” means a mineral interest in real property. CRS § 10-11-123(1)(a).

**Cases**

“An estate in oil and gas may be severed from the remainder of the realty, and as severed owned in fee simple. *Corlett v. Cox*, 333 P.2d 619, 623 (Colo. 1952) (citation omitted).

“[A] lease is a possessory interest in real property.” *DR/CR Family, LLLP v. Burger*, 80 P.3d 948, 952 (Colo.App. 2008).

“[] the director of the Department of Natural Resources, acting in his capacity as Supervisor of Wells ... designated Nordhaus Dunes Area. He found that any oil and gas development in the area would constitute waste .... He determined that no oil or gas exploration or development would be permitted in the area. Plaintiffs filed inverse condemnation actions against the state .... The trial court granted plaintiffs’ motion for summary disposition ... [and] awarded plaintiffs \$71,479,000 as just compensation for the property taken .... The state takes issue with the trial court’s summary disposition ruling that the director’s administrative action constituted a compensable taking. We affirm the trial court’s grant of summary disposition. *Miller Brothers Oil Corp. v. Dept. of Natural Resources*, 513 N.W. 2d. 217 (Mich App. 1994)

required to consult with the CDOW and COGCC and are not automatically subjected to timing restrictions or other limitations on their operations.

Central to the consultation process will be the COGCC Director's determination of appropriate permit conditions. Such conditions are to be generally guided by a list of best management practices, which will be collaboratively developed by stakeholders and the CDOW as discussed below. To ensure the proper evaluation and selection of conditions of approval, the Commission has also established specific factors which it believes the Director should consider, among other case-by-case considerations, in establishing appropriate permit conditions. These factors are intended to ensure that the adverse impacts and means to minimize those adverse impacts are appropriately evaluated by the COGCC Director in determining any conditions of approval deemed necessary to minimize adverse impacts to wildlife resources.

As required by HB 07-1298, Rule 1202 provides that no permit-specific condition of approval for wildlife habitat protection shall be imposed without surface owner consent. This prohibition includes permit-specific conditions for wildlife habitat protection that modify, add to, or differ materially from the general operating requirements in Rules 1203 and 1204. The Commission anticipates that if the surface owner does not consent to a permit-specific condition recommended by the CDOW, then the COGCC Director will consider whether minimizing adverse impacts from the proposed activity can be acceptably achieved through alternative conditions to which the surface owner will consent. The Commission also expects that if such alternative conditions cannot be identified, then the Director will weigh the impact to wildlife resources if the condition in question is omitted versus the impact to the operator and the State if the permit or approval is withheld. In some circumstances, the Director may issue the permit or approval without the condition. In other circumstances, the Director may withhold the permit or approval because unacceptable impacts to wildlife resources would otherwise result. In no event, however, would the permit or approval be issued with permit-specific wildlife conditions to which the surface owner has not consented. This decision would be made on a case-by-case basis and will be subject to review by the Commission. The Commission believes that this approach is consistent with the statutory mandate to balance recovery of the oil and gas resource with protection of Colorado's wildlife resources.

The Commission intends that the list of best management practices will be developed in the following manner. By January 1, 2009, COGCC staff will form a stakeholder group to develop a compilation of science-based, technologically, and economically feasible practices for minimizing adverse impacts from oil and gas operations in sensitive wildlife habitat. This group will include COGCC and CDOW staff as well as representatives of the oil and gas industry, wildlife and outdoor groups, and surface and mineral owners. Subgroups may be formed to address different types of sensitive wildlife habitat or different oil and gas development basins as appropriate. The participants will seek to develop consensus recommendations for presentation to the Commission by June 2009. The Commission will consider the resulting recommendations at one of its regularly scheduled meetings, and it will take such action on them as it deems appropriate. After approval by the Commission, the list of best management practices will be published in a guidebook, maintained on the Commission's website, and updated periodically as appropriate.