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COLORADO GENERAL ASSEMBLY**

Attachment I

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## **LEGAL MEMORANDUM**

**TO:** Representative Kathleen Curry

**FROM:** Office of Legislative Legal Services

**DATE:** February 12, 2009

**SUBJECT:** Accommodation of mineral and surface estates and the state's authority to deny a permit to drill<sup>1</sup>

### **I. Background**

You asked the office of legislative legal services for a legal opinion concerning the relationship between mineral and surface estates and the state's authority to deny a permit to drill an oil and gas well.

### **II. Issues Presented**

- A. What is the relative dominance of the mineral estate over the surface estate, and what is the "reasonable use doctrine" in connection with a mineral estate owner's right to use the surface reasonably to access the mineral estate?
- B. Does the state have the authority to deny an application for a permit to drill an oil or gas well under the current law, for any reason?

### **III. Conclusions**

A. The mineral estate is, conventionally, considered to be the dominant estate, so that the surface owner must allow the mineral estate owner to develop the minerals. But under Colorado case law the two estates are considered mutually dominant and mutually servient, so that the mineral owner must also reasonably accommodate surface uses. House Bill 07-1252 codified the common law reasonable accommodation doctrine in Colorado in the oil and

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<sup>1</sup> This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

gas context, and specifies both that: (1) an oil and gas operator must conduct oil and gas operations in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land; and (2) an operator has a right to enter upon and use that amount of the surface as is reasonable and necessary to explore for, develop, and produce oil and gas.

B. In at least some instances, the state can deny a permit to drill. The Colorado oil and gas conservation commission (COGCC) has broad authority to do whatever may reasonably be necessary to carry out the provisions of the "Oil and Gas Conservation Act" (Act). The COGCC has the authority under the Act to "prevent" significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare. Prevention of such impacts could authorize the COGCC to deny issuance of a permit to drill.

#### **IV. Analysis**

##### **A. Reasonable accommodation**

House Bill 07-1252 codified the common law reasonable accommodation doctrine in Colorado in the oil and gas context. The bill, which enacted section 34-60-127, C.R.S., also contained the following legislative declaration:

**SECTION 1. Legislative declaration.** (1) The general assembly hereby:

(a) Finds that substantial increases in the amount of oil and gas operations and the number of rural residents has created numerous conflicts between surface owners and oil and gas operators;

(b) Determines that a clarification of the law regarding the relationship between oil and gas operators and surface owners is in the public interest; and

(c) Declares that the intent of this act is to codify the reasonable accommodation doctrine adopted by the Colorado Supreme Court in *Gerrity v. Magness*, 946 P.2d 913 (Colo. 1997).

*Gerrity* involved a dispute between a surface owner and an oil and gas operator regarding the location of some oil wells, a variety of alleged violations of the Act by the operator, and the surface owner's alleged failure to provide reasonable access. The court held that violations of the Act did not create a private right of action under the Act, but that those same violations could be relevant to common law complaints regarding the operator's alleged trespass. In evaluating the relationship between the two estates, the Supreme Court stated:

Although we have referred to the mineral estate as the dominant estate and the surface estate as the servient estate, our cases have consistently emphasized that both estates must exercise their rights in a manner consistent with the other. Hence, in a practical sense, both estates are mutually dominant and mutually servient because each is burdened with the rights of the other.

....

The right to use the surface as is reasonably necessary, known as the rule of reasonable surface use, does not include the right to destroy, interfere with or damage the surface owner's correlative rights to the surface. In the absence of statutes, regulations, or lease provisions to the contrary, unless the conduct of an operator in accessing, exploring, drilling, and using the surface is reasonable and necessary to the development of the mineral interest, the conduct is a trespass.

*Gerrity* at 927 and n.8 (citations omitted). In 2007, the General Assembly codified this doctrine in the oil and gas context. Section 34-60-127, C.R.S., states the following:

**34-60-127. Reasonable accommodation.** (1) (a) An operator shall conduct oil and gas operations in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land.

(b) As used in this section, "minimizing intrusion upon and damage to the surface" means selecting alternative locations for wells, roads, pipelines, or production facilities, or employing alternative means of operation, that prevent, reduce, or mitigate the impacts of the oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator.

(c) The standard of conduct set forth in this section shall not be construed to prevent an operator from entering upon and using that amount of the surface as is reasonable and necessary to explore for, develop, and produce oil and gas.

(d) The standard of conduct set forth in this section shall not be construed to abrogate or impair a contractual provision binding on the parties that expressly provides for the use of the surface for the conduct of oil and gas operations or that releases the operator from liability for the use of the surface.

(2) An operator's failure to meet the requirements set forth in this section shall give rise to a cause of action by the surface owner. Upon a determination by the trier of fact that such failure has occurred, a surface owner may seek compensatory damages or such equitable relief as is consistent with subsection (1) of this section.

(3) (a) In any litigation or arbitration based upon this section, the surface owner shall present evidence that the operator's use of the surface materially interfered with the surface owner's use of the surface of the land. After such showing, the operator shall bear the burden of proof of showing that it met the standard set out in subsection (1) of this section. If an operator makes that showing, the surface owner may present rebuttal

evidence.

(b) An operator may assert, as an affirmative defense, that it has conducted oil and gas operations in accordance with a regulatory requirement, contractual obligation, or land use plan provision, that is specifically applicable to the alleged intrusion or damage.

(4) Nothing in this section shall:

(a) Preclude or impair any person from obtaining any and all other remedies allowed by law;

(b) Prevent an operator and a surface owner from addressing the use of the surface for oil and gas operations in a lease, surface use agreement, or other written contract; or

(c) Establish, alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations.

Note that this bill explicitly creates a private right of action for violation of this portion of the Act, thus reversing a portion of the holding in *Gerrity*.

The doctrine is not applied significantly differently in fields other than oil and gas. See *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 557 (Colo. 1995) (with regard to a sand and gravel operation, the court noted that the "language of the deed does not reveal any intent to create a surface interest greater than that which is normally recognized at law. First, the reservation is limited to that portion of the surface that is 'reasonably needed' to develop the severed mineral interest, consistent with the rule of reasonable use.")

## **B. Authority to deny a permit to drill**

The Act requires operators to obtain a permit before they drill a well. § 34-60-106 (1) (f), C.R.S. The Act does not explicitly give the Colorado oil and gas conservation commission (COGCC) the authority to deny a permit to drill. It does explicitly give the COGCC the authority to suspend, modify, and revoke permits. § 34-60-121 (6). The ability to deny a permit may, however, be implied from the COGCC's other duties and authorities.

The COGCC has broad general authority to administer the Act, including by promulgating rules:

**34-60-105. Powers of commission.** (1) *The commission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article, and has the power to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article. . . . (Emphasis added)*

The COGCC also has several specific grants of rule making authority related to the protection of public health and the environment, including the following:

**34-60-106. Additional powers of the commission - rules - repeal.** (2) The commission has the authority to regulate:

(d) Oil and gas operations so as to *prevent and mitigate significant adverse environmental impacts* on any air, water, soil, or biological resource resulting from oil and gas operations *to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources*, taking into consideration cost-effectiveness and technical feasibility. **(Emphasis added)**

It may be necessary to deny a permit to drill in order to prevent significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources—for instance, if the proposed location of the well was located squarely in the middle of the sole remaining habitat of a species that was threatened with extinction or where the oil or gas contained contaminants that threatened substantial risks to public health<sup>2</sup>.

While no Colorado judicial opinion has been reported regarding a denial of a permit, Texas case law does provide such an example. In *Railroad Comm'n of Texas v. Williams*, 356 S.W.2d 131, 132 (Tex. 1961), the Texas Supreme Court upheld the Texas Railroad Commission's denial of an individual's application for a permit to drill a well in order to avoid violating a spacing rule that the Commission had previously promulgated.

It is well established that the state may deny a permit without effecting an unconstitutional taking of private property without just compensation, even if doing so prevents development of a mineral resource, so long as the denial is sufficiently justified. *See Cottonwood Farms v. Board of County Comm'rs*, 763 P.2d 551 (Colo. 1988) (upholding the denial of a rezoning application to allow a proposed rock quarry despite a claim that mining was a use by right).

The COGCC has believed since at least 2004 that it has the authority to deny a permit. 2 CCR 404-1, Rule 303.k (1), states:

**k. Withholding approval of Application for Permit-to-Drill, Form 2.**

(1) *The Director may withhold approval of any Application for Permit-to-Drill, Form 2, for any proposed well when, based on information supplied in a written complaint submitted by any party with standing under Rule 522.a.(1), other than a local governmental designee, or by staff analysis, the Director has reasonable cause to believe the proposed well is*

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<sup>2</sup> Note that, in 1969, the federal department of energy exploded an atomic bomb deep underground near Rulison, CO, in an attempt to free natural gas from its formation, but the gas was found to be too radioactive to be sold. The federal government now prohibits drilling below 6,000 feet in the blast zone.

*in material violation of the Commission's rules, regulations, orders or statutes, or otherwise presents an imminent threat to public health, safety and welfare, including the environment. . . . (Emphasis added)*

Rule 303.k (1) specifically authorizes the director of the COGCC to withhold issuance of a permit to drill if issuing the permit "presents an imminent threat to public health, safety and welfare, including the environment." The rule is authorized under the statutes cited above.<sup>3</sup>

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<sup>3</sup> In 2007, the General Assembly enacted two related bills giving the COGCC additional rule making authority concerning the protection of public health and wildlife resources, House Bill 07-1341 (regarding public health) and House Bill 07-1298 (regarding wildlife resources). As amended by House Bill 08-1411 relating to the deadline for the rule making, House Bill 07-1341 specified the following:

**34-60-106. Additional powers of the commission - rules - repeal.**  
(11) (a) By July 16, 2008, the commission shall:  
(II) Promulgate rules, in consultation with the department of public health and environment, to *protect the health, safety, and welfare of the general public in the conduct of oil and gas operations. . . . (Emphasis added)*

As amended by House Bill 08-1411 relating to the deadline for the rule making, House Bill 07-1298 added the following new section 34-60-128 to the Act, which states in relevant part:

**34-60-128. Habitat stewardship - rules.** (1) This section shall be known and may be cited as the "Colorado Habitat Stewardship Act of 2007".  
(2) The commission shall *administer this article so as to minimize adverse impacts to wildlife resources* affected by oil and gas operations.  
(3) In order to *minimize adverse impacts to wildlife resources, the commission shall:*  
. . . .  
(d) *Promulgate rules* by July 16, 2008, in consultation with the wildlife commission, to establish standards for minimizing adverse impacts to wildlife resources affected by oil and gas operations and to ensure the proper reclamation of wildlife habitat during and following such operations. . . . (Emphasis added)

Pursuant to these authorities, the COGCC amended rule 303.k (1), cited above, by adding the phrase "or a material threat to wildlife resources", and renumbered it as rule 303.m (1), which states:

**303. REQUIREMENTS FOR FORM 2, APPLICATION FOR PERMIT-TO-DRILL, DEEPEN, RE-ENTER, OR RECOMPLETE, AND OPERATE; FORM 2A, OIL AND GAS LOCATION ASSESSMENT.**  
**m. Special circumstances for withholding approval of Application for Permit-to-Drill, Form 2, or Oil and Gas Location Assessment, Form 2A.**  
(1) *The Director may withhold approval* of any Application for Permit-to-Drill, Form 2, or Oil and Gas Location Assessment, Form 2A, for any proposed well or oil and gas location *when*, based on information supplied in a written complaint submitted by any party with standing under Rule 522.a.(1), other than a local governmental designee, or by staff analysis, *the Director has reasonable cause to believe the proposed well or oil and gas location is in material violation of the Commission's rules, regulations, orders or statutes, or otherwise presents an imminent threat to public health, safety and welfare, including the environment, or a material threat to wildlife resources. . . . (Emphasis added)*