

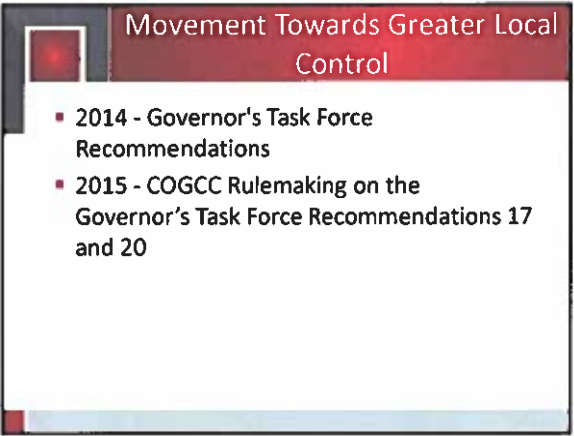
POLSNELLI

SB19-181, Local Control, Operator Agreements and Surface Use Agreement Issues
Ghislaire G. Torres Bruner



The Battlefield has moved!





Movement Towards Greater Local Control

- 2014 - Governor's Task Force Recommendations
- 2015 - COGCC Rulemaking on the Governor's Task Force Recommendations 17 and 20

Prior Local Control

- Prior Preemption Arguments – State v. Local Regulations
 - *Fort Collins* and *Longmont* cases
- Local Oil and Gas Land Use, Generally
 - Use by Right
 - Use by Special Review - Local oil and gas permits
 - MOUs (Operator Agreements)

Historical look at Local Control through Operator Agreements

- A historical look at La Plata County, Colorado MOUs
 - 2005 through 2014
 - Evolution of terms and conditions
 - Relationship between MOU terms between local government and operator and permitting through the Colorado Oil and Gas Conservation Commission (COGCC)
 - Other historical MOUs

Prop 112 to SB 19-181

- In November 2018, voters voted “no” to Prop. 112 that would serve as a ban to oil and gas development by instituting a 2,500 ft. setback from homes or occupied buildings.
- Nonetheless, Senator Fenberg and others brought for SB19-181

What Does SB19-181 say?

- SB19-181 – introduced March 1, 2019 and signed into law April 16, 2019
- confers the power to promulgate emissions controls regulations to the Colorado Oil and Gas Conservation commission
 - LDAR on a semiannual basis
 - Owners and operator of transmission lines must inspect and maintain all equipment and pipelines
 - Operators must install and continuous methane emission monitors at multi well facilities, proximate to homes or facilities with large emission potentials.

SB 19-181 power to the Local Government

- Each local government within its respective jurisdiction has authority to plan for and regulate the use of land by regulating:
- the use of the land on the basis of the impact of the use on the community or surrounding areas and
- the surface impacts of oil and gas operations in a reasonable manner to address matters and to protect and minimize adverse impacts to public health, safety and welfare and the environment.

Local Control and Rights of Surface Owners

- The right for a Local Government to assert "local control" would extent to:
- Land use
- **The location and siting of oil and gas facilities and oil and gas locations**
- Impacts to public facilities and services
- Water quality and source, noise , vibration, odor, light, dust , air emissions and air quality, land disturbance, reclamation procedures, cultural resources, emergency preparedness, coordination with first responders security, traffic and transportation impacts.

Minimize Adverse Impacts – COGCC as a resource to local government?

- * (3) (a) To PROVIDE A LOCAL GOVERNMENT WITH TECHNICAL EXPERTISE REGARDING WHETHER A PRELIMINARY OR FINAL DETERMINATION OF THE LOCATION OF AN OIL AND GAS FACILITY OR OIL AND GAS LOCATION WITHIN ITS RESPECTIVE JURISDICTION COULD AFFECT OIL AND GAS RESOURCE RECOVERY:
- * (I) ONCE AN OPERATOR, AS DEFINED IN SECTION 34-60-103 (6.8), FILES AN APPLICATION FOR THE LOCATION AND SITING OF AN OIL AND GAS FACILITY OR OIL AND GAS LOCATION AND THE LOCAL GOVERNMENT HAS MADE EITHER A PRELIMINARY OR FINAL DETERMINATION REGARDING THE APPLICATION, THE LOCAL GOVERNMENT HAVING LAND USE JURISDICTION MAY ASK THE DIRECTOR OF THE OIL AND GAS CONSERVATION COMMISSION PURSUANT TO SECTION 34-60-104.5 (3) TO APPOINT A TECHNICAL REVIEW BOARD TO CONDUCT A TECHNICAL REVIEW OF THE PRELIMINARY OR FINAL DETERMINATION AND ISSUE A REPORT THAT CONTAINS THE BOARD'S CONCLUSIONS.

Minimize Adverse Impacts

- (3)(a) To provide a local government with technical expertise regarding whether a preliminary determination of the location of an oil and gas facility or oil and gas location within the respective jurisdiction impacts oil and gas recovery:
- Once an operator files for the location and siting of the oil and gas facility or location, LG may ask director for a technical review
- After 210 days have passed, Operator may ask to COGCC for technical review if LG has not made a determination
- LG may approve without a technical review.

Getting to "YES"!



Benefits to Operator Agreements: An Alternative Regulation

Benefits of Using an Operator Agreement

- From MOU to Oil and Gas Operator Agreement concept
- Recent Oil and Gas Operator Agreements
 - Collaborative relationship between local government and operator
 - Attainment of a "social license to operate"
 - Protections to address public health and safety concerns
 - Education of the community
 - Drive technology and innovation
 - Attainment of regulatory certainty
 - Predictable timing of associated approvals
 - Predictable contractual remedies to avoid litigation

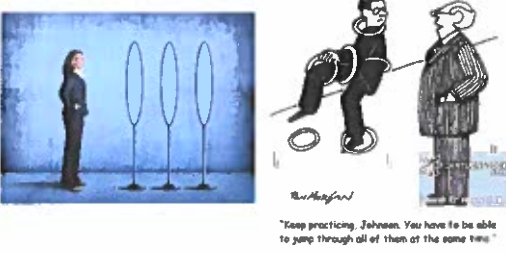
Other aspects of SB19-181

- **34-60-131. No land use preemption.** LOCAL GOVERNMENTS AND STATE AGENCIES, INCLUDING THE COMMISSION AND AGENCIES LISTED IN SECTION 34-60-105 (1)(b), HAVE REGULATORY AUTHORITY OVER OIL AND GAS DEVELOPMENT, INCLUDING AS SPECIFIED IN SECTION 34-60-105 (1)(b).
- **A LOCAL GOVERNMENT'S REGULATIONS MAY BE MORE PROTECTIVE OR STRICTER THAN STATE REQUIREMENTS.**

What does this mean to the Surface Owner?

- Surface Use Agreements
- Timing of negotiation (before or after meeting with the local government?)
- Terms
 - Surface and sub-surface rights
 - Environmental Liability and indemnification claims (who claims, Local government, Surface Owner or both).
 - Reasonable accommodation doctrine
 - Use of access roads pipeline easements
 - Reclamation
 - Soil testing
 - Baseline water testing monitoring
 - Payment for surface damages
- Location, location, location

Challenges




"Keep practicing, Johnson. You have to be able to jump through all of them at the same time."

Challenges

- Distinct land use regulations in each city and county municipal code
- Varying needs and asks among communities
- Every operator has unique characteristics
- Exact negotiation timing may vary
- If the SUA is entered before the local process does that help obtain certainty?

OA and SUA BMPs - Public Health and Safety

- Best Management Practices
 - Life Safety
 - Air Quality
 - Water Quality
 - Traffic and Utilization of Roads
 - Noise Mitigation
 - Visual Mitigation
 - Notice
 - Inspections
 - Electrification
 - Others



Operator Agreement Construction: The Basics and Drafting Tips

- Basics and Tips:
 - Effective Date
 - Recitals
 - Terms
 - Definitions
 - Boilerplate language
 - Severability
 - Force majeure
 - Amendments
 - Attorney fee issues
 - Contemporaneous related agreements
 - Exhibits



Navigating the Approval Process


- Defining the governing regulatory enforcement and applicable regulations
- Addressing for future regulations
- Delineating and confirming an application approval process
- Reducing use of municipal resources for special review approvals
- Limiting the need for hearings

Enforcing Operator Agreement Performance

- Enforcement – (environmental and contractual)
- Specific performance
- Reformation
- Excuse
- Severability
- Future regulation
- Litigation
- Other topics

Conclusion - Take Aways

- Engagement
- Collaboration
- Certainty for all parties
- Enforceable contract
- Notice
- Transparency
- Local control



Questions?

- Happy to answer!
- Ghislaine G. Torres Bruner: gbruner@polsinelli.com or 303-583-8259



Polsinelli PC provides this material for informational purposes only. The material provided herein is general and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, applicable changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

Polsinelli is very proud of the results we deliver for our clients, but you should know that past results do not guarantee future results; that every case is different and must be judged on its own merits; and that the choice of a lawyer is an important decision and should not be based solely upon advertisements.

© 2018 Polsinelli, a registered trademark of Polsinelli PC in California. Polsinelli LLP



Polsinelli PC, a registered LLP in California. polsinelli.com
