Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 17, 2015 CASE NUMBER: 2014CA1991
Larimer County 2013CV31385	
Plaintiff-Appellee: Colorado Oil and Gas Association, **v.** **Defendant-Appellant:** City of Fort Collins Colorado.	Court of Appeals Case Number: 2014CA1991
Motion for Determination of Jurisdiction	

Pursuant to section 13-4-109(1)(a) and (b), C.R.S. 2014, and C.A.R. 50(a)(2) and (3), Division I and Division V of the Colorado Court of Appeals conclude that *Colorado Oil & Gas Ass'n v. City of Longmont*, Colo. App. No. 14CA1759, and *Colorado Oil & Gas Ass'n v. City of Fort Collins*, Colo. App. No. 14CA1991, respectively, should be certified to the Colorado Supreme Court for its review prior to final determinations by the Colorado Court of Appeals.

City of Longmont, 14CA1759

This case involves a legal challenge to a citizen-initiated change to the City of Longmont's city charter ("the resolution"). The resolution bans an oil and gas drilling technique known as hydraulic fracturing (but commonly referred to as "fracking") and the storage and disposal of fracking waste within City limits. The case began when the Colorado Oil and Gas Association (COGA), an oil and gas industry trade association, filed a complaint seeking a declaratory judgment that the resolution is invalid and an injunction barring enforcement of the resolution. The Colorado Oil and Gas Conservation Commission — the state agency charged with regulating oil and gas operations in the state — was

added as a necessary plaintiff. TOP Operating Company, which owns oil and gas interests and operates oil and gas wells in Colorado, also intervened as a plaintiff. Numerous parties, including citizen and environmental and conservation groups, intervened as defendants.

Following limited discovery, the district court entered summary judgment for the plaintiffs, concluding that the resolution is preempted by the Colorado Oil and Gas Conservation Act (Act), sections 34-60-103 to -130, C.R.S. 2014, under the "operational conflict" doctrine. *See Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1056-57 (Colo. 1992) (describing the three "basic ways" by which state law can preempt a subsidiary or local jurisdiction's law). The court declared the resolution invalid and enjoined enforcement of the resolution, but stayed injunctive relief pending appeal. Thus, though declared invalid, the resolution remains in effect.

The defendants have appealed, asserting several errors. Numerous parties have filed amicus briefs urging affirmance or reversal of the judgment. These amici include county and local governments, the Colorado Municipal League, trade associations, and citizens groups.

City of Fort Collins, 14CA1991

This case involves a challenge by COGA to a citizen-initiated city ordinance which places a five-year "moratorium" on fracking and storage of fracking waste within city limits. The district court ruled in COGA's favor on summary judgment, concluding that the moratorium, which the court characterized as a ban, is preempted under both the implied preemption and operational conflict preemption doctrines. The district court has declined to stay its ruling pending appeal.

On appeal, the City of Fort Collins is joined by nine amici urging reversal. Seven amici urge affirmance. Amici have filed ten separate amicus briefs. As with the *City of Longmont* case, amici include county and local governments, umbrella government groups, trade associations, citizens groups, and environmental and conservation groups. One United States congressman has filed an amicus brief (urging reversal).

Reasons for Requesting Transfer

Under section 13-4-109, the Court of Appeals may certify a case before it to the Supreme Court if, as relevant to this case, "[t]he subject matter of the appeal has significant public interest," or "[t]he case involves legal principles of major significance." § 13-4-09(1)(a), (b). Similarly, C.A.R. 50 allows the Court of Appeals to request transfer of a case to the Supreme Court if, as relevant to this

case, "the Court of Appeals is being asked to decide an important state question which has not been, but should be, determined by the Supreme Court," or "the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the Supreme Court." C.A.R. 50(a)(2), (3), (b).

These criteria are met in these cases for the following reasons.

First, the public interest in these cases is significant. Oil and gas development has long been a significant economic activity in the state. Fracking has occurred and is occurring throughout Colorado. Indeed, according to the parties, the use of fracking as a technique of recovering oil and gas has become the norm, not the exception. In response, in some counties and local jurisdictions, elected representatives and citizens have succeeded in limiting or banning fracking. According to the briefs (which were filed several months ago), the City of Boulder, Boulder County, the City of Broomfield, and the City of Lafayette have also adopted bans or moratoria on fracking. There is pending litigation challenging all of these bans and moratoria. These cases are the most publicized disputes between the state, industry, and anti-fracking advocates. They would appear to be the test cases for determining whether county and local governments may regulate or prohibit fracking and related activities. A final decision on that issue in these cases will likely determine the fate of similar litigation and regulatory efforts (existing or

contemplated) throughout the state, and will likewise have profound economic and social consequences.

Second, these cases raise a number of important legal issues as to which decisions by the state's highest court are advisable and, in some aspects, necessary.

- The parties strongly disagree whether the resolution and the moratorium are impliedly preempted by state law. This disagreement focuses on a number of Supreme Court decisions. And a decision on this issue (as with the issue of operational conflict preemption) will have applicability beyond the fracking and the general oil and gas contexts. As the City of Longmont says in its opening brief, "at its core, this case is as much about the principles of preemption as it is about minerals or public health."
- In *City of Longmont*, certain appellants and amici directly challenge the continued viability of the rationale applied by the Supreme Court in *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1068 (Colo. 1992), in which the court held that "the state's interest in efficient oil and gas development and production throughout the state . . . is sufficiently dominant to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits." According to these parties and amici, the Act, as well as conditions and practices in the

oil and gas industry, have changed such that the considerations on which the court based its holding have little or no vitality. The Court of Appeals, however, is bound by *Voss* — only the Supreme Court can decide whether it should continue to be followed. *People v. Novotny*, 2014 CO 18, ¶ 26 (the Supreme Court alone can overrule its prior precedents concerning matters of state law).

- The parties and amici strongly disagree about the test applicable to determine "operational conflict" preemption. They point to Supreme Court cases articulating the test as whether "the effectuation of a local interest would materially impede or destroy the state interest," *Bowen/Edwards*, 830 P.2d at 1059, and Supreme Court cases articulating the test as "whether the home-rule city's ordinance authorizes what the state statute forbids, or forbids what the state statute authorizes," *Webb v. City of Black Hawk*, 2013 CO 9, ¶ 43. Whether these two articulations of the test mean different things, or are reconcilable, or apply in different contexts is central to the parties' disputes. The Supreme Court is best suited to decide the meaning and applicability of its own precedents.
- In *City of Fort Collins*, the City and amici distinguish certain of the Supreme Court's precedents on the ground this case involves a moratorium — a temporary prohibition — rather than a total ban. They

thus raise the issue whether Supreme Court preemption analysis even applies to the measure at issue.

Third, given the identities and number of entities involved in these cases, substantial public and private resources are being consumed. In light of the public interest in and importance of the subject matter of the cases and of the legal issues implicated, they would seem to be cases as to which certiorari review by the Supreme Court is eminently appropriate. *See* C.A.R. 49. Such review now, before final determinations by the Court of Appeals, will conserve substantial public (including judicial) and private resources, and will provide more expeditious finality on issues of continuing, widespread, and urgent public concern.

Fourth, these cases have been randomly assigned to different divisions of the Court of Appeals. And while they share many of the same issues, not all arguments made in one case are made in the other. The potential for inconsistent judgments by the Court of Appeals therefore exists. Any such inconsistency could create problems for the district courts and would do little, if anything, to bring closure to the ultimate issue — whether county and local governments may prohibit fracking.

The City of Longmont begins its opening brief by saying something that any citizen of Colorado who pays attention to state affairs knows: "Few public policy issues in Colorado have been the subject of more intense debate, discussion, and regulatory activity in recent years than the use of hydraulic fracturing in oil and gas drilling." These cases are at the forefront of this development. Accordingly, it is

appropriate for the Colorado Supreme Court to decide the issues presented in these cases.

Therefore, these cases are referred to the Supreme Court with the request that the court accept certification pursuant to section 13-4-109(1) and C.A.R. 50.

BY THE COURT:

Furman, J.
Hawthorne, J.
Richman, J.