DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521	DATE FILED: November 18, 2014 4:36 PM FILING ID: 1229E9457678701D CASE NUMBER: 2013CV31385
Plaintiff: COLORADO OIL & GAS ASSOCIATION v. **Defendant:** CITY OF FORT COLLINS, COLORADO	▲ **COURT USE ONLY** ▲
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COLORADO OIL & GAS ASSOCIATION'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to C.R.C.P. 56(c), the Colorado Oil & Gas Association ("COGA") submits this brief in support of its motion for summary judgment, and respectfully requests the Court to declare that the City of Fort Collins's (the "City" or "Fort Collins") five-year ban on the use of hydraulic fracturing and the storage in open pits of hydraulic fracturing waste is preempted by state law.

EXHIBIT B

I. INTRODUCTION

COGA seeks a declaration invalidating a recently-adopted moratorium enacted by Fort Collins as preempted by state law. A majority of the voters in Fort Collins on November 5, 2013, voted to adopt Ballot Measure 2A, a citizen-initiated ordinance (the "Ordinance") to place a five-year moratorium on the use of hydraulic fracturing and the storage of its waste products within the City. The City adopted Ballot Measure 2A upon certification of the November 5, 2013 election results.

Pursuant to the Oil and Gas Conservation Act, C.R.S. §§ 34-60-101 *et seq.* (the "Act"), the Colorado Oil and Gas Conservation Commission (the "Commission") comprehensively regulates oil and gas extraction and operations under authority expressly delegated by the state legislature. The Commission's rules explicitly regulate and allow oil and gas extraction and the storage and transport of waste generated by oil and gas operations—all of which is prohibited within the City by the Charter Amendment.

Accordingly, COGA is entitled to summary judgment invalidating the adoption of the Ordinance. Under Colorado law, the only way that the City's five-year bans on hydraulic fracturing activities can survive this motion is if the City can demonstrate that these operations are matters of *purely* local concern and that the state has *no* interest in their regulation.

The City cannot make this showing for at least three reasons. First, the Colorado Supreme Court in *Voss v. Lundvall Bros. Inc.*, 830 P.2d 1060, 1068 (Colo. 2002), held that the state interest in oil and gas operations is "sufficiently dominant" so as to impliedly preempt a home-rule municipality's attempt to ban oil and gas operations. Fort Collins's bans similarly conflict with the state's "sufficiently dominant" interest in oil and gas and are impliedly preempted.

Second, even if the Court views hydraulic fracturing regulation as a matter of mixed state and local concern, the Ordinance cannot survive. As stated last year by the Colorado Supreme

Court in *Webb v. City of Black Hawk*, in matters of mixed state and local concern, "the test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." 295 P.3d 480, 493 (Colo. 2013). Here, the City's five-year ban on hydraulic fracturing plainly forbids what state law allows, and is therefore preempted.

Finally, the Colorado Supreme Court held in *Board of County Commissioners v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1058 (Colo. 1992), that local governments may not regulate the technical aspects of oil and gas operations. The Ordinance intrudes upon technical areas of oil and gas development that are within the exclusive jurisdiction of the Commission.

For these reasons, the Ordinance is preempted.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269, 1270 (Colo. App. 2008). Summary judgment is not a disfavored procedural shortcut, but an integral part of the rules of procedure that is designed to secure the just and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Cont'l Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987) (applying *Celotex* in Colorado).

III. UNDISPUTED FACTS

1. Hydraulic fracturing is a well-completion technique. Fluid is pumped under high pressure into a cased wellbore that is perforated where it passes through an oil-and-gas-bearing rock formation, creating small fissures in the target rock formation and allowing trapped hydrocarbons to be produced. *See* Report of the Commission adopting new rules and

amendments to address hydraulic fracturing, December 13, 2011, and its attached Exhibit A, Proposed Statement of Basis and Purpose, at p. 9 (a true and correct copy of both documents are attached as Exhibit 1). The fluids used in hydraulic fracturing consist primarily of water, with sand or silica added as a proppant to keep the fissures from re-sealing and a small percentage of chemical additives. *Id.*; *see also* "Information on Hydraulic Fracturing" (COGCC 2013, a true and correct copy of which is attached as Exhibit 2); "Colorado Hydraulic Fracturing State Review; State Review of Oil and Natural Gas Environmental Regulations" (October 2011), at p. 8 (a true and correct copy of which is attached as Exhibit 3).

2. Hydraulic fracturing has been used to complete wells in Colorado for many decades, and tens of thousands of wells have been hydraulically fractured in Colorado. Ex. 1, p. 9; Ex. 2, p. 1.

3. On August 20, 2013, the Fort Collins City Council passed Resolution 2013-072 (a true and correct copy of which is attached as Exhibit 4), which submitted to the voters a citizen-initiated proposal to amend the Fort Collins City Code to place a five-year moratorium on the use of hydraulic fracturing and the storage of its waste products with the City. As a result, Ballot Measure 2A was placed on the November 5, 2013 ballot for a vote by City residents. Ballot Measure 2A provides: "An ordinance placing a moratorium on hydraulic fracturing and the storage of its waste products with the City of Fort Collins or on lands under its jurisdiction for a period of five years, without exemption or exception, in order to fully study the impacts of this process on property values and human health, which moratorium can be lifted upon a ballot measure approved by the people of the City of Fort Collins and which shall apply retroactively as of the date this measure was found to have qualified for placement on the ballot." *Id*. at 2.

4. On October 1, 2013, the Fort Collins City Council passed Resolution 2013-085 (a true and correct copy of which is attached as Exhibit 5) opposing the adoption of Ballot Measure 2A. The City Council found that Ballot Measure 2A "is unnecessary, is not in the best interest of the City, and could result in litigation that, if not resolved in the City's favor, could not only work to the detriment of the City, but could also establish legal precedents that would be damaging to the interests of other Colorado municipalities." *Id*. at 2. The City also determined that imposing the five-year moratorium would be inconsistent with the fact that the City and Prospect Energy had entered into an Operator Agreement using forty-eight best management practices, "and could result in costly, protracted litigation against the City." *Id*. The Resolution also noted that "significant concerns" had been raised by the City Manager that the moratorium would negatively impact the City's collaboration with the State Land Board and other entities in the "Energy by Design" process to protect biological, cultural, scenic and recreation conservation goals for the City's natural areas, while also allowing reasonable access to mineral estates. *Id*. The Resolution stated: "the 'Energy by Design' process provides the best strategy for protection of areas of land under the City's jurisdiction and outside of the City limits, and if the Initiated Measure is approved, such approval could undo [this] process and result in more significant negative impacts to the natural areas . . . ." *Id*.

5. At the election held on November 5, 2013, City voters voted in favor of Ballot Measure 2A. As a result, City adopted Ballot Measure 2A as an ordinance upon certification of the November 5, 2013 election results. Section 12-135 of the Fort Collins Code ("Code," a true and correct copy of which is attached as Exhibit 6) now states that "The use of hydraulic fracturing to extract oil, gas or other hydrocarbons, and the storage in open pits of solid or liquid wastes and/or flowback created in connection with the hydraulic fracturing process, are

prohibited within the City." Section 12-136 of the Code states that: "The prohibitions contained in § 12-135 shall not apply to oil and gas wells or pad sites existing within the City on February 19, 2013, that become the subject of an operator agreement between the operator of the same and the City, as long as such agreement includes strict controls on methane release and, in the judgment of the City Council, adequately protects the public health, safety and welfare." *Id.*

IV. ARGUMENT: THE CITY MAY NOT PROHIBIT OIL AND GAS EXTRACTION AND RELATED OPERATIONS AND ACTIVITIES

The Ordinance is preempted by comprehensive state statutes and regulations relating to oil and gas because every aspect of hydraulic fracturing involves statewide concerns. Those concerns are sufficiently dominant to preclude Fort Collins from implementing a five-year ban on activities that are regulated and permitted by the state. Even in matters that implicate both state and local interests, cities may not prohibit what the state permits, as Fort Collins has attempted through the Ordinance. Finally, cities lack authority to regulate the technical areas of oil and gas production, as the Ordinance purports to do.

A. A HOME-RULE CITY'S BAN ON ACTIVITIES THAT THE STATE ALLOWS IS PREEMPTED, EXCEPT IN MATTERS OF PURELY LOCAL CONCERN.

In evaluating whether legislation by a home-rule municipality, such as the City, is preempted by state law, the Court must first determine whether the subject matter of the legislation is of statewide concern, of mixed state and local concern, or of purely local concern. *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013); *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002). If a matter is found to be of statewide concern, "the state legislature exercises plenary authority, and home-rule cities may regulate only if the constitution or statute authorizes such legislation." *Webb*, 295 P.3d at 486.

Where matters involve mixed state and local concerns, a home-rule regulation may "exist with a state regulation only so long as there is no conflict; if there is a conflict, the state statute

supersedes the conflicting local regulation." *Id.* The relevant test applicable in this case to determine whether home-rule legislation conflicts with state law "is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 493 (*citing Commerce City*, 40 P.3d at 1284); *accord City of Northglenn v. Ibarra*, 62 P.3d 153, 165 (Colo. 2003); *Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 519 P.2d 834, 836 (Colo. 1973).

Finally, home-rule municipalities may "legislate in areas of local concern that the state General Assembly traditionally legislated in, thereby limiting the authority of the state legislature with respect to local and municipal affairs." *Webb*, 295 P.3d at 486 (emphasis added). If a local regulation conflicts with a state statute, it supersedes state law only in a matter of purely local concern. *Id.*

In characterizing a matter addressed by home-rule legislation as purely local, purely state, or mixed local and state, Colorado courts evaluate four factors: (1) whether there is a need for state uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits a particular matter to state or local regulation. *Webb*, 295 P.3d at 486; *Ibarra*, 62 P.3d at 156; *Voss*, 830 P.2d at 1067.

To defeat this motion, the City must demonstrate that its five-year ban on hydraulic fracturing and the storage of hydraulic fracturing waste and flowback are matters of purely local concern. The City cannot make this showing. The City's bans are either impliedly preempted under *Voss* by the state's dominant interest in the efficient production and development of oil and gas, or are preempted under the *Webb* test as matter of mixed state and local law by the

COGCC's comprehensive regulation of oil and gas activity. The Ordinance is also preempted because it impermissibly regulates the technical aspects of oil and gas extraction.

B. THE STATE HAS A SUBSTANTIAL INTEREST IN OIL AND GAS REGULATION.

1. Colorado case law has repeatedly confirmed the state's interest in oil and gas regulation.

Every Colorado case that has considered the nature of oil and gas regulation has held that the state has a substantial interest in this area. Indeed, no Colorado case has ever held that the regulation of oil and gas operations is a matter of purely local concern.

Voss is the key preemption case involving a ban of oil and gas operations. In *Voss*, the citizens of the City of Greeley, a home-rule municipality, voted to adopt an ordinance banning the drilling of any oil and gas well within the city limits. The Greeley City Council adopted a similar measure. Although recognizing the broad land use authority granted to home-rule jurisdictions by the Local Government Land Use Control Enabling Act, C.R.S. §§ 29-20-101 to 107, *see* 830 P.2d at 1064–65, the Court held that "[t]he state has an interest in oil and gas development and operations. That interest finds expression in the Oil and Gas Conservation Act ["Conservation Act"], §§ 34-60-101 to -126." *Id.* at 1065.

The Court analyzed Greeley's ban "against the state regulatory scheme to determine if the Greeley ordinances conflict with the state's interest in the efficient production and development of oil and gas resources in a manner preventative of waste and protective of the rights of common-source owners and producers to a fair and equitable share of production profits." *Id.* at 1066. To do so, the Court weighed the four factors to assess whether Greeley's ban would be preempted.

The Court found that "the first factor—the need for statewide uniformity of regulation of oil and gas development and production—weighs heavily in favor of state preemption of

Greeley's total ban on drilling within city limits." *Id.* at 1067. The Court relied upon the fact that oil and gas reserves do not conform to any jurisdictional pattern and that Greeley's ban could result in uneven and potentially wasteful production of oil and gas, which would conflict with the Commission's express authority to establish drilling units and to protect the correlative rights of owners and producers. *Id.* On that basis, the Court held:

> In our view, the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within the city limits.

Id.

With regard to the second factor, the Court held that "extraterritorial effect of the Greeley ordinances also weighs in favor of the state's interest in effective and fair development and production." *Id.* The Court relied upon the fact that limiting production to only one portion of a pool of oil and gas outside the city limits can result in increased production costs. *Id.* at 1067–68. Greeley's drilling ban, the Court also found, affected the ability of those with mineral interests both within and outside the city boundary to obtain an equitable share of production profits in contravention of the Conservation Act. *Id.* at 1068.

Regarding the third factor, the Court found that "[t]he regulation of oil and gas development and production has traditionally been a matter of state rather than local control." *Id.* In evaluating the fourth factor, the Court held that the Colorado Constitution does not direct that oil and gas operations be regulated at the state or local level. *Id.*

As a result of its analysis, the Court concluded that Greeley's ban on oil and gas drilling was preempted by state law:

> [T]he state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, 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.

Id. (emphasis added).

Even outside of the context of a ban on oil and gas development, Colorado courts have consistently recognized the state's interest in oil and gas regulation. Contemporaneously with *Voss*, the Court issued the companion opinion of *Board of County Commissioners v. Bowen/Edwards Associates, Inc.*, in which it reaffirmed the state's interest in efficient and fair development and production of oil and gas, the prevention of waste, and the protection of common-source owners and producers. 830 P.2d at 1058. While the Court did not find that the Conservation Act evidenced a legislative intent to preempt "all aspects of a county's statutory authority to regulate land use" involving oil and gas operations, it held that a local government could not regulate matters involving technical aspects of oil and gas or the location of wells. *Id.* at 1060. Thus, in addition to affirming the significant state role in oil and gas regulation, *Bowen/Edwards* provides an additional independent basis on which the City's ban is preempted, because the Colorado Supreme Court explicitly recognized that the imposition of technical conditions on the drilling and pumping of wells—such as the City's ban of hydraulic fracturing here—necessarily conflicts with the state statutory and regulatory scheme. *See infra* § IV.E.

Similarly, in *Town of Frederick v. North American Resources Company*, the Court of Appeals relied on the "state's interest in oil and gas development and operations as expressed in the [Conservation Act]" to void several of the Town's oil and gas regulations as a matter of law. 60 P.3d at 761. Relying on *Bowen/Edwards*, the court held that "the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the

state interest." *Id.* at 765.[1] Accordingly, when considering whether a local ban or regulation is preempted by state law, Colorado courts have always recognized the significant state interest in oil and gas regulation.

2. The substantial state interest in oil and gas regulation is reflected in the state's comprehensive regulatory scheme.

As the Colorado Supreme Court has determined: "There is no question that the [Conservation Act] evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources. . . ." *Voss*, 830 P.2d at 1065–66 (citing *Bowen/Edwards*). In the Conservation Act, the Colorado legislature "declared [it] to be in the public interest to":

> (I) Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources;
>
> (II) Protect the public and private interests against waste in the production and utilization of oil and gas;
>
> (III) Safeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production there from; and
>
> (IV) Plan and manage oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting,

[1] The courts in *Bowen/Edwards* and *Town of Frederick* did not apply *Webb* and *Ibarra* test, *supra* at 7, because neither case involved a home-rule municipality. Moreover, neither case involved a ban on activity permitted by the state. In *Bowen/Edwards*, the county had imposed permitting requirements for certain oil- and gas-related activities. *Bowen/Edwards*, 830 P.2d at 1051. Similarly, the Town of Frederick had also adopted permitting requirements regulating aspects of oil and gas operations. *Town of Frederick*, 60 P.3d at 760. Because the regulations at issue did not ban activities outright, and because these cases concerned statutory local governments, the courts applied the operational preemption test rather than the *Webb* test to determine preemption.

> fishing, and recreation traditions they support, which are an important part of Colorado's economy and culture.

C.R.S. § 34-60-102(1)(a).

The General Assembly has also declared that it is the "intent and purpose of the [Conservation Act] to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, welfare, the environment and wildlife resources," and "subject further to the enforcement and protection of the co-equal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom." C.R.S. § 34-60-102(1)(b).

The *Voss* Court relied on these expressions of state policy and public interest, as well as on the Conservation Act's definition of waste, to highlight the state's interest in ensuring the production of oil and gas at maximum efficient rates of production. *Voss*, 830 P.2d at 1067. Indeed, C.R.S. § 34-60-107 provides that "[t]he waste of oil and gas in the state of Colorado is prohibited by this article." Waste is specifically defined to include "the production of gas in quantities or in such manner as . . . unreasonably diminishes the quantity of oil or gas that ultimately may be produced." C.R.S. § 34-60-103(11); *accord* C.R.S. § 34-60-103(13).

As the *Voss* Court noted, the Conservation Act established the Commission and vested it with broad authority to enforce the Act's provisions, make and enforce rules and orders, and do whatever may be reasonably necessary to carry out the provisions of the Conservation Act. C.R.S. § 34-60-105(1); *Voss*, 830 P.2d at 1065. The Commission also is vested with authority to regulate 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." C.R.S. § 34-6-106(2)(d); *see also* C.R.S. § 34-60-106(1)(c) (Commission regulates well construction to prevent the escape of oil and gas, the pollution of water supplies and blowouts and other dangerous conditions). In addition, the legislature gave the Commission the authority to regulate the spacing of wells, C.R.S. § 34-60-106(2)(c), including to establish or amend drilling and spacing units. C.R.S. § 34-60-106(11)(a)(I)(A).

The Conservation Act also specifically vests the Commission with authority to issue permits for oil and gas wells, § 34-60-106(1)(f), and to regulate the drilling, shooting, and chemical treatment of hydrocarbon wells, § 34-60-106(2)(a),(b). "Shooting" is the process of fracturing the rock in the target formation, which once was accomplished by detonating high explosives in the wellbore, but which now is typically accomplished by hydraulic fracturing. *See* The Dictionary for the Oil and Gas Industry 244 (Univ. of Texas Ext., 1st ed. 2005). "Chemical treatment" refers to any process, including hydraulic fracturing, that involves the use of a chemical to affect an operation. *Id.* at 44.

Under the authority of the Conservation Act, the Commission has adopted a comprehensive set of oil and gas regulations covering drilling, developing, producing and abandoning wells (300 Series), safety, including groundwater sampling (600 Series), aesthetics and noise control (800 Series), waste management (900 Series), protection of wildlife (1200 Series), among other areas. 2 CCR 404-1, *available at http://cogcc.state.co.us/RR_Docs_new/Rules_new2.html*. These regulations, which are discussed in more detail below, unequivocally reflect the state's substantial interest in the regulation all aspects of oil and gas operations.

C. THE CITY'S BANS ON OIL AND GAS EXTRACTION AND RELATED OIL AND GAS ACTIVITIES ARE IMPLIEDLY PREEMPTED BY THE STATE'S "SUFFICIENTLY DOMINANT" INTERESTS.

Despite the state's substantial interest in—and regulation of—oil and gas operations, the Ordinance purports to ban for five years all hydraulic fracturing within the City, as well as the storage in open pits of hydraulic fracturing waste and flowback. These provisions are impliedly preempted by the state's dominant interest in efficient and equitable oil and gas production.

In *Voss*, the Colorado Supreme Court held that the state's interest in the efficient and equitable development and production of oil and gas, as manifested in the Conservation Act, was "sufficiently dominant" to override Greeley's ban on oil and gas operations. *Voss*, 830 P.2d at 1068. The Court did not make clear whether the home-rule city's ban was impliedly preempted due the state's dominant interest, or whether the ban was preempted due to its irreconcilable conflict with state law in a matter of mixed state and local interest.

The answer to the precise basis for the *Voss* decision came 17 years later in *Colorado Mining Ass'n v. Board of County Commissioners*, 199 P.3d 718 (Colo. 2009). In that case, Summit County banned a widely-used mining technique involving the use of cyanide or other chemicals in heap or vat leach mining operations. In evaluating the ban, the Court first noted that "local land use ordinances banning an activity that a statute authorizes an agency to permit are subject to heightened scrutiny in preemption analysis," *id.* at 725, and that "[c]ourts examine with particular scrutiny those zoning ordinances that ban certain land uses or activities." *Id.* at 730. The Court next reasoned that the Mined Land Reclamation Act ("MLRA") and its implementing regulations set forth a "sufficiently dominant state interest in the controlled use of chemicals to process valuable minerals." *Id.* at 732. In finding that dominant state interest, the Court afforded "significant weight" to a statement in the MLRA that extraction of minerals is "necessary and proper," and that the legislature "encouraged the development of an

economically sound and stable mining and minerals industry" and "encouraged the orderly development of the state's natural resources." As discussed above, these MLRA's legislative declarations have counterparts in the Act, many of which the *Voss* Court similarly relied upon.

Echoing *Voss*, the Court concluded that "a patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources." *Id.* at 731. As such, the Court held that "[d]ue to the sufficiently dominant state interest in the use of chemicals for mineral processing, . . . the MLRA impliedly preempts Summit County's ban." *Id.* at 721.

The Court extensively discussed and relied on its decision in *Voss* to void the County's ban as impliedly preempted: "We find *Voss* particularly instructive because, if a home-rule city may not enact a ban prohibiting what the state agency may authorize under the statute, surely a statutory county may not do so." *Id.* The Court confirmed that its holding in *Voss* was based on implied preemption: "We held that the state interest manifested in the state act was 'sufficiently dominant' to override the local ordinance. [Citation omitted.] Sufficient dominancy is one of the several grounds for implied state preemption of a local ordinance." *Id.* at 724. But in contrasting *Bowen/Edwards*, the Court made clear that the state interest did not impliedly preempt all aspects of local land-use regulations applicable to oil and gas operations. *Id.* The home-rule city's ban in *Voss* was impliedly preempted because it addressed matters involving the efficient and equitable production of hydrocarbons:

> We found [in *Voss*] the ban to be unenforceable because "the state's interest in efficient development and production of oil and gas in a manner preventative of waste and protective of the correlative rights of common-source owners and producers to a fair share of production profits preempts a home-rule city from totally excluding all drilling operations within the city limits. *Id.* at 1069."

Id.[2]

The City's five-year ban on the use of hydraulic fracturing and the storage of hydraulic fracturing waste, no less than Greeley's oil and gas ban, intrude into these areas of oil and gas operations in which the State has a sufficiently dominant interest. Indeed, all of the key considerations the *Voss* Court relied upon in finding preemption remain true today: oil and gas reserves still do not conform to any jurisdictional pattern, and the City's ban could result in uneven and potentially wasteful production of oil and gas. Moreover, the City's ban affect the ability of those with mineral interests both within and outside the city boundary to obtain an equitable share of production profits, as limiting production to only one portion of a pool of oil and gas outside the city limits can still result in increased production costs. Furthermore, the City's bans conflict with the Commission's express authority to prevent waste, establish drilling units and to protect the correlative rights of owners and producers. Equally obvious is that the City's ban will have extraterritorial effect by forcing operators to complete wells outside the City but prohibiting well completions from extending into the City limits. This diminishes the availability of resources from neighboring jurisdictions as well. Thus, the City's ban will create the same "patchwork" of local prohibitions that the Court proscribed in *Voss, Colorado Mining Ass'n* and *Ibarra*.

[2] In another notable case involving a municipal ban, the Supreme Court held that state law preempted a home-rule city ordinance banning unrelated sex offenders from living together. *Ibarra*, 62 P.3d 151. There the Court held that the City's ban would create a "'patchwork approach' to the placement of certain foster care children," the effect of which would "ripple" outside of the municipality. *Id.* at 161. The Court concluded that the state's interest in fulfilling its statutory mandates to protect delinquent children in need of state supervision and treatment "is *sufficiently dominant* to override a home-rule city's interest in regulating the number of registered juvenile sex offenders who may live in one foster care family." *Id.* at 163 (emphasis added).

For these reasons, the City's bans are impliedly preempted by the state's sufficiently dominant interest in the efficient and equitable development and production of oil and gas resources.

D. THE CITY'S BANS PROHIBIT CONDUCT THAT THE STATE ALLOWS AND IS THEREFORE PREEMPTED.

The Ordinance is preempted for another reason: it prohibits what is authorized by the state. Just last year, the Supreme Court in *Webb* struck down Black Hawk's ban on bicycles travelling from outside its boundaries, on the grounds that, in this area of mixed local and state concern, the ban failed to comply with the state statute requiring that local governments provide alternative bicycle paths as a condition of banning bicycles on city streets: "Black Hawk does not have authority, in a matter of mixed state and local concern, to negate a specific provision the General Assembly has enacted in the interest of uniformity." *Webb*, 295 P.3d at 492–93.

This holding is consistent with *Colorado Mining Ass'n*, in which the Court relied upon the following "common themes" in *Voss* and *Bowen/Edwards*: "(1) the state has a significant interest in both mineral development and in human health and environmental protection, and (2) the exercise of local land use authority complements the exercise of state authority but cannot negate a more specifically drawn statutory provision the general assembly has enacted." 199 P.3d at 730.

Consistent with the Act's directives to foster efficient and responsible production of oil and gas resources, to prevent waste and to protect environmental and wildlife resources, the Commission had adopted regulations comprehensively regulating and authorizing oil and gas operations, specifically including hydraulic fracturing.

Accordingly, the Ordinance conflicts with state law because it "negates" hydraulic fracturing activities that the Commission extensively authorizes and regulates.[3] The Commission took hydraulic fracturing into consideration when it comprehensively updated its regulations in 2008, analyzed groundwater quality trends in 2009, adopted a special notification policy in 2010, and designed a new groundwater sampling program during 2011. Ex. 3 at 19. It amended its Rules in December 2011 for the specific purpose of addressing hydraulic fracturing concerns. Ex. 2 at 9. As amended, the Commission Rules use the term "hydraulic fracturing" at least 41 times.

The Commission's technical review of a proposed hydrocarbon well typically begins when an operator files an application for a permit to drill a well ("APD" or "Form 2") and an Oil and Gas Location Assessment ("OGLA" or "Form 2A"). Rule 303. The Commission's Rules provide specific rights to local governments to review the APD and the OGLA, extend deadlines for review, request consultation, present arguments and evidence to the full nine (9) member Commission as to why any proposed well should not be permitted, and to appeal any of the Commission's decisions or determinations pursuant to the State Administrative Procedure Act. Rules 305.d, 305.e, 306.b, 509, 510, 528. Among other things, the Commission requires the producer to provide extensive information regarding both the surface and bottom-hole locations of the proposed well and the topography, soils, vegetation, wildlife, water sources, land uses, dwellings, and other structures in the proposed well's proximity. *Id.* The Commission imposes

[3] The Ordinance is a temporary yet total ban. *See Deighton v. City Council of Colo. Springs*, 902 P.2d 426, 428 (Colo. App. 1994) ("A moratorium is 'a suspension of activity; a temporary ban on the use or production of something.'") (quoting Webster's Third New International Dictionary 1469). The fact that the ban will expire in five years does nothing to remove it from the scope of what is preempted while it is in effect. Further, the temporary nature of the ban does not change the fact that, for five years, the Ordinance bans what the state authorizes and intrudes upon technical areas of oil and gas development. Accordingly, the Ordinance is preempted. *Webb*, 295 P.3d at 486; *Bowen/Edwards*, 830 P.2d at 1058.

specific requirements on the technical design of the well. Rule 317. To evaluate the information regarding the proposed well and its potential impact upon the proposed location, the Commission's employs a technical staff that receives specific training on hydraulic fracturing technology and developments. Ex. 3 at 29–30.

The Commission also requires producers to test their well casings in advance to verify that they can withstand the pressures that will be applied during hydraulic fracturing. Rule 317(j). It mandates that the operator design its well such that hydraulic fracturing fluids are confined to the target formations, and to monitor and record pressures continuously during hydraulic fracturing operations to assure that hydraulic fracturing fluids are confined to the target formation and that wellbore integrity is maintained. Rule 341. Within thirty days after completing or re-stimulating a formation, operators must file a Completed Interval Report (Form 5A) that summarizes the fracturing treatment. Rule 308B.

The Commission also regulates the chemicals used in hydraulic fracturing. It requires producers to maintain Material Safety Data Sheets and an inventory of all chemical products used down hole, including hydraulic fracturing fluids. Rule 205. Upon the conclusion of a hydraulic fracturing treatment, producers must report the total volume of water or other base fluid that was used in the hydraulic fracturing treatment, information regarding each chemical or additive used in the hydraulic fracturing fluid, the maximum concentration of each chemical added to the fracturing fluid, and the chemical abstract service number for each such chemical. Even if the supplier of the fluid claims that its specific formula is a trade secret, specific information about the chemicals nevertheless must be provided to the Commission or to any health care professional who requires such information. Rules 205A(b)(5) and (d)(2).

Producers must notify landowners and local governments in advance of their intention to hydraulically fracture a well. Additionally, they must provide landowners with a copy of the Commission's informational brochure on hydraulic fracturing, (Ex. 2), instruct them on how to access additional information regarding the proposed well on the Commission's website, and inform them of their right to oppose or comment upon the proposed operations. Rule 305(c).

The Commission also extensively regulates the handling, transportation, and disposal of waste products associated with the drilling and operation of oil and gas wells. *See* Rules 316A, 323, 324A, 325, 326, 326, and 901–08. The Commission may authorize the disposal of produced water by evaporation in a properly constructed and permitted pit or by injection into a properly designed and permitted disposal well. Rules 907(c)(2) & 325. An operator must apply to the Commission for a permit to construct a pit. Rule 903. The Commission specifically regulates the locations of pits, their design, and the materials used to construct them. Rules 902–04. The Commission also regulates the closure of pits, the disposal of materials from pits, and the reclamation of land where a closed pit was located. Rules 905, 1001–04.

Finally, drilling fluids may never be disposed in a pit, but must be injected into a disposal well that has been approved and permitted by the Director, delivered to a commercial solid waste disposal facility, or treated for use in land applications at a centralized exploration and production waste management facility. Rule 907(d). The Commission has been delegated the authority to permit underground injection wells under the Environmental Protection Act. 2 CCR 404-1, Rule 325; 42 U.S.C. § 300g-2. Before the Commission permits injection of fluids, the operator must demonstrate that the injection operations will not pollute any underground source of potable water. Rule 324A(d). The operator cannot commence operations for the underground disposal of fluids without written authorization from the Director of the Commission. Rule 325.

To obtain such authorization, the operator must file an Underground Injection Formation Permit Application and an Injection Well Permit Application. Rule 325. Operators must file a monthly report of fluids injected. Rule 316A. Produced and injected water must be measured. Rule 330. The operator also must provide detailed technical information and perform a mechanical integrity test. Rule 325, 326. The Commission must publish a notice of the permit application and consider comments submitted by interested stakeholders, like the City, before deciding whether to permit the proposed injection well. Rule 325 (l)–(n).

All of these regulations are negated if the City's bans are upheld. The City's bans are preempted under the conflict test applied in *Webb,* and other Colorado cases, because it impermissibly prohibits what state law allows.

E. THE CITY'S BAN IMPERMISSIBLY INTRUDES INTO TECHNICAL ASPECTS OF OIL AND GAS.

A final basis on which the Court may find that the Ordinance is preempted is that it seeks to regulate technical aspects of oil and gas operations, which the Colorado Supreme Court has held necessarily conflicts with the state scheme of oil and gas regulation. This specific issue was addressed in *Bowen/Edwards*, 830 P.2d at 1045. In that case, an operator challenged La Plata County's oil and gas regulations, claiming that they were entirely preempted by state law. Though the County did not ban oil and gas operations, it adopted regulations that required oil and gas operators to obtain County approval for any oil and gas facility, and imposed application and approval requirements based on the nature of the proposed facilities. *Id.* at 1050. The Court held that a local government could not regulate matters involving technical aspects of oil and gas or the location of wells:

> There is no question that the efficient and equitable development and production of oil and gas resources within the state requires uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration. Oil and gas production is closely tied to well location,

> with the result that the need for uniform regulation extends also to the location and spacing of wells.

Bowen/Edwards, 830 P.2d at 1058 (citing *Voss*).

The Court found that local government regulations may be in operational conflict with the state regulatory scheme, and to the extent those regulations cannot harmonized, the state's regulations would prevail. *Id.* at 1060. The Court was clear that any local regulation of the technical aspects of oil and gas operations would necessarily conflict with the state statutory scheme and the need for uniformity in that area:

> We hasten to add that there may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent such operational conflicts might exist, the county regulations must yield to the state interest.

Id.

Ten years later, the Colorado Court of Appeals applied this same operational conflict test in *Town of Frederick*, 60 P.3d 758, and, *citing Bowen/Edwards* and *Voss,* voided several Town regulations on oil and gas operations: "the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the state interest." *Id.* at 765. And in *Board of County Commissioners v. BDS International, LLC*, the Court of Appeals, in assessing whether Gunnison County's oil and gas regulations were preempted, reaffirmed that a local government may not impose technical conditions on oil and gas wells. 159 P.3d 773, 779 (Colo. App. 2006).

In the present case, the City seeks to ban for five years the use of hydraulic fracturing and the storage of resulting waste—which are highly technical matters involving well drilling and environmental protection that are regulated and authorized by the Commission. For this reason too, the Ordinance is preempted.

V. CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court grant summary judgment in favor of COGA declaring that the Ordinance's five year bans on the use of hydraulic fracturing and the storage of hydraulic fracturing wastes are preempted and, thus, invalid and unenforceable.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2014, I electronically filed a true and correct copy of the foregoing **COLORADO OIL & GAS ASSOCIATION'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** via the ICCES electronic filing system which will send notification of such filing to the following:

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