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2019–2020 Colorado Oil and Gas Law Update

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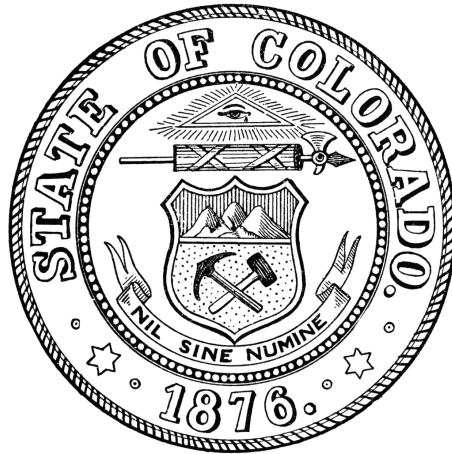


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2019–2020 COLORADO OIL AND GAS LAW UPDATE

William D Farrar[†]

I. COLORADO ENACTS SWEEPING CHANGES TO ITS OIL AND GAS CONSERVATION ACT	360
A. <i>Rulemaking Proposed to the Colorado Oil and Gas Conservation Commission</i>	360
B. <i>The Martinez Trilogy</i>	361
1. The Trial Court	361
2. The Intermediate Appellate Court Opinion	362
3. The Colorado Supreme Court Opinion	362
II. THE GENERAL ASSEMBLY’S STATUTORY CHANGES	363

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I. COLORADO ENACTS SWEEPING CHANGES TO ITS OIL AND GAS
CONSERVATION ACT

Colorado courts and the state’s legislature were quite active in 2019 and 2020 on the oil and gas administrative law front. Namely, the Colorado General Assembly enacted changes to the Colorado Oil & Gas Conservation Act in response to the Colorado Supreme Court’s decision in *Colorado Oil & Gas Conservation Commission v. Martinez*.¹ While the *Martinez* case was not principally a substantive oil and gas case, the resulting fallout from the Colorado Supreme Court’s decision made sweeping changes to the state’s statutory laws. The decision will also result in major administrative law changes affecting the Colorado oil & gas industry. This Article will review the *Martinez* trilogy of cases and summarize the statutory changes resulting from the General Assembly’s action.

A. *Rulemaking Proposed to the Colorado Oil and Gas Conservation Commission*

Xiuhtezcatl Martinez and several other youths proposed a new rule relating to permitting oil and gas wells to the Colorado Oil & Gas Conservation Commission (the “Commission”).² The Commission is the administrative body responsible for rulemaking under the Colorado Oil & Gas Conservation Act (the “OGCA”).³ Among other things, the proposed rule would:

[P]reclude the Commission from issuing any permits for the drilling of an oil and gas well unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado’s atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.⁴

After extensive public input, the Commission unanimously declined to engage in rulemaking regarding the proposed rule, finding that:

(1) “[t]he [p]roposed [r]ule, if adopted, would have required the Commission to readjust the balance crafted by the General Assembly under the [OGCA] and is therefore beyond the

1. Colo. Oil & Gas Conservation Comm’n v. Martinez, 433 P.3d 22, 25 (Colo. 2019).

2. *Id.* at 25–26.

3. COLO. REV. STAT. § 34-60-102(1)(a)(1) (2019).

4. *Martinez*, 433 P.3d at 25–26.

Commission’s limited grant of statutory authority’; (2) ‘the [p]roposed [r]ule hinges on conditioning new oil and gas drilling on a finding of no cumulative adverse impacts, which is beyond the Commission’s limited statutory authority’; (3) Colorado courts have expressly rejected the public trust doctrine; (4) ‘[t]he Commission, in cooperation with the [CDPHE] is currently addressing many of the concerns in the [p]etition’; (5) ‘[m]ost, if not all, of the relief sought in the [p]etition related to air quality is within CDPHE’s⁵ jurisdiction, and not [the Commission’s] jurisdiction’; and (6) ‘[t]here are other Commission priorities that must take precedence over the proposed rulemaking at this time.’⁶

Following the refusal to engage in rulemaking, Martinez and the others initiated an action in Colorado state district court, which was ultimately appealed to the Colorado Supreme Court.

B. *The Martinez Trilogy*

1. The Trial Court

Martinez challenged the Commission’s order in Denver district court, after which the American Petroleum Institute and the Colorado Petroleum Association intervened as defendants.⁷ Martinez argued that the Commission had “acted arbitrary and capricious, abused its discretion, and otherwise acted contrary to law” by refusing to engage in rulemaking.⁸ Under the version of the OGCA that was in effect at the time, the Commission was responsible for making rules that, among other things, “[f]oster 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.”⁹ The district court disagreed with Martinez’s argument that the OGCS required a fulfillment of public protection rather than a balancing test, holding instead “that the pertinent statutory language is clear and requires the Commission to ‘strike a balance between the regulation of oil and gas operations and protecting public health, the environment, and wildlife resources.’”¹⁰

5. *Id.* at 26.

6. *Id.* at 22.

7. *Id.* at 26.

8. *Id.*

9. *Id.* at 28.

10. *Id.* at 26.

2. The Intermediate Appellate Court Opinion

Martinez appealed the district court's decision to the intermediate court of appeals.¹¹ In a split decision, the court of appeals disagreed with the district court, holding that the OGCA's language regarding "balancing" modified the language "development, production, and utilization of the natural resources" and that the language "in a manner consistent with protection of public health, safety, and welfare" created a requirement that must be fulfilled.¹² That is, the Commission was to "balance" development, production, and utilization, but any rule had to also fulfill a requirement that it be consistent with "public health, safety and welfare." The appellate court reversed and remanded the case to the district court for referral to the Commission for further rulemaking proceedings. Importantly, the appellate court did not address the merits of the proposed rule but instead established that the Commission did, in fact, have the ability to engage in rulemaking.¹³

3. The Colorado Supreme Court Opinion

The Commission appealed to the Colorado Supreme Court, which in the end disagreed with the divisional court of appeals's interpretation of the COGA and upheld the Commission's refusal to enter into rulemaking.¹⁴ The Court noted that the standard of review of the Commission's refusal is under an "abuse of discretion" standard.¹⁵ In reaching its decision, the Court reviewed the legislative history of the COGA beginning in 1955 and noted:

[W]e do not read this lengthy statutory history as reflecting a legislative intent[] to establish the protection of public health, safety, and welfare as a check on oil and gas development. Nor do we perceive in this history an intent[] to condition further oil and gas development on a finding of no cumulative adverse impacts to public health or the environment. Rather, we view this history as reflecting a legislative intent to promote multiple policy objectives, including the continued development of oil and gas resources and the protection of public health and the environment, without

11. *Martinez v. Colo. Oil & Gas Conservation Comm'n*, 434 P.3d 689, 690 (Colo. App. 2017).

12. *Id.* at 692–93.

13. *Id.* at 696.

14. *Colo. Oil & Gas Conservation Comm'n v. Martinez*, 433 P.3d at 25–26 (Colo. 2019).

15. *Id.* at 27.

conditioning one policy objective on the satisfaction of any other.

The Court then held that the Commission's decision declining to engage in rulemaking to consider Martinez' proposed rule was consistent with the applicable provisions of the COGA and with the Commission's authority to decide how best to carry out its statutory duties.¹⁶

II. THE GENERAL ASSEMBLY'S STATUTORY CHANGES

In response to the Colorado Supreme Court's decision in *Martinez*, the Colorado General Assembly enacted Senate Bill 181, establishing statutory changes to the Colorado Oil and Gas Conservation Act.¹⁷ The enacted law changed the preamble of the COGA that had been interpreted in *Martinez* to be a balancing test that included cost-effectiveness and feasibility. The preamble now requires that the Commission "regulate oil and gas operations in a reasonable manner to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources and shall protect against adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations."¹⁸

Indeed, the Commission has issued its own analysis of the new law online and outlined changes including new rulemaking and a change from "fostering" oil and gas development to "regulating" oil and gas development.¹⁹ New staff and resources are being added to the Commission as well as increased public input.²⁰ In addition, the Commission would be required to adopt rules that: (1) revamp the Commission's hearing procedures; (2) require public disclosure of the locations of flowlines; (3) establish criteria for the selection of drilling development locations including alternative locations; (4) require proof of wellbore integrity; (5) minimize the aggregate impact of oil and gas development in consultation with the Colorado Department of Public Health and Environment; and (6) change the overall "mission" of the Commission.²¹ Senate Bill 181 also charged the Colorado

16. *Id.* at 33.

17. S.B. 19-181, 72d Gen. Assemb., 1st Sess. (Colo. 2019).

18. § 34-60-106(2.5)(a) C.R.S. (2019).

19. *What's Next for Colorado's New Oil and Gas Law*, COLO. OIL & GAS COMM'N, https://cogcc.state.co.us/documents/sb19181/Overview/Whats_Next_for_Colorados_New_Oil_and_Gas_Law.pdf [<https://perma.cc/6JK3-B46R>].

20. *Id.*

21. Colo. S.B. 19-181 § 12.

Department of Public Health and Environment to enact rules to minimize air and water pollution from oil and gas activities.²²

The resulting statutory and administrative changes will promote a more regulated oil and gas industry. The Commission will be required to establish rules that regulate the oil and gas industry in a way that will protect the public health and environment. This means that oil and gas development may have to accommodate public health and the environment even though the rules require additional expenditures or protective measures beyond that used in the current customs and practices of the oil and gas industry. No doubt, there will be many contested case hearings as industry and concerned members of the public seek to apply the new laws and rules to their respective positions. It will take time to implement these changes and understand their full effect.

22. Colo. S.B. 19-181 § 34-60-106(13).