COLORADO COURT OF APPEALS Court Address: 2 East 14th Avenue Denver, CO 80203	
Appeal from Larimer County District Court The Honorable Gregory M. Lammons Case No. 2013CV31385 **Appellant:** **CITY OF FORT COLLINS, COLORADO** **v.** **Appellee:** **COLORADO OIL AND GAS ASSOCIATION**	▲ COURT USE ONLY ▲ Case No. 2014CA001991
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BRIEF OF NORTHWEST COLORADO COUNCIL OF GOVERNMENTS ACTING BY AND THROUGH ITS WATER QUALITY QUANTITY COMMITTEE IN SUPPORT OF APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g)

   Choose one:

   □ It contains ___ words

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2. The brief complies with C.A.R. 28(k):

   ☑ For the party raising the issue:

   It contains, under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

   □ For the party responding to the issue:

   It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Torie Jarvis
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Attorney for Northwest Colorado Council of Governments

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Northwest Colorado Council of Governments ("NWCCOG"), acting by and through its Water Quality Quantity Committee, respectfully submits this Brief, pursuant to C.A.R. 29, as *amicus curiae* in support of Appellant, the City of Ft. Collins, Colorado (the "City").

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

NWCCOG adopts and incorporates by reference the statement of the issues presented for review in the City of Fort Collins' Opening Brief.

II. STATEMENT OF THE CASE AND STANDARD OF REVIEW

NWCCOG adopts and incorporates by reference the statement of the case and statement regarding the standard of review in the City of Fort Collins' Opening Brief.

III. INTRODUCTION

Colorado's land use planning and regulation jurisprudence has long been informed by the principle that residents familiar with and invested in their communities are best situated to decide whether particular land uses are compatible with local character and development goals. For this reason, "[l]egislative attempts to address land use legislation on a statewide basis [have] largely failed." *Droste v. Board of Cnty. Comm'rs of Pitkin County*, 159 P.3d 601, 605 (Colo. 2007) ("*Droste*") (citing Barbara J. Green & Brant Seibert, *Local Governments and*

House Bill 1041: A Voice in the Wilderness, 19 The Colorado Lawyer 2245 (Nov. 1990)). Coloradan's have relied on the inherent protections of this system in making fundamental personal and financial decisions, such as where to work, buy a home, or raise a family. At issue in this appeal is whether Colorado's communities will be stripped of a major component of their traditional land use planning authority – the ability to pause, analyze, understand, and strategize before potentially enacting land use regulations, commonly identified as a "moratorium."

It is important to state, up front, that this *amicus curiae* brief does not advocate for or against the development of oil and gas, nor does this brief seek to resolve whether components of that development such as fracking, horizontal drilling, and storage of waste by-products are, in all cases, consistent with public health, safety, and welfare. Rather, this amicus curiae brief advocates for safeguarding the authority of local governments to obtain and retain the trust of their citizens to ensure that oil and gas development is consistent with their public health, safety, and welfare. Safeguarding of local government authority begins with ensuring the availability of a first step in exercising local government police power - the opportunity to stop, observe, and study proposed or anticipated activity. The district court decision threatens to take away the longstanding right of local governments to enact moratorium and to upend well-accepted Colorado

preemption jurisprudence. NWCCOG respectfully submits this brief as *amicus curiae* to inform the Court of the serious public policy and legal consequences of the district court decision to local governments in northwest Colorado and throughout the state.

IV. INTEREST OF AMICUS CURIAE

NWCCOG is an association of county and municipal governments in the mountain region of northwest and central Colorado that work together on a regional basis. NWCCOG appears as *amicus curiae* by and through its Water Quality and Quantity Committee, a subcommittee of NWCCOG whose mission includes the protection and implementation of local government authority to protect water resources. A priority for NWCCOG is to foster informed and responsive local government, a priority at risk if the district court decision stands. Member jurisdictions of NWCCOG represent a southern portion of the gas-rich Piceance Basin which, like the Front Range of Colorado, is experiencing dramatically increased development of natural gas. NWCCOG regularly engages in planning for and reasonably regulating local impacts from oil and gas development.

All local government members of NWCCOG regularly exercise their police power to protect public health, safety, and welfare through land use planning and

regulation. Among their essential land use planning tools is the power to impose moratoria. For example, the Town of Minturn currently has a moratorium in place on duplexes, multifamily units, accessory buildings, and accessory dwelling units in order to better define massing of these types of dwelling units. Minturn, Colo., Ordinance 7 (Sept. 17, 2014), http://www.minturn.org/pdf/TownCouncil/Res Ordinances2014/Ord07-2014.pdf. In 2006, the City of Aspen enacted a moratorium on new land use applications in order to review and revise the land use code as it was not keeping pace with development pressures. Aspen, Colo., Ordinance 19 (April 24, 2006), http://205.170.51.183/ WebLink8/DocView.aspx?id=75943&dbid=0. Finally, Pitkin County imposed a moratorium on development while it developed a master plan for unincorporated county areas. *E.g.,* Pitkin County, Colo., Ordinance 13-2003 (April 2, 2013), http://records.pitkincounty.com/WebLink8/DocView.aspx?id=31124&dbid=0. This moratorium was challenged, and then upheld by the Colorado Court of Appeals as an appropriate use of a moratorium in *Droste*, 159 P.3d 601. NWCCOG therefore submits this brief to support the right of member jurisdictions to adopt moratoria as a land use planning tool to fully understand and protect public healthy, safety and welfare of their communities.

V. BACKGROUND AND PUBLIC POLICY IMPLICATIONS

The public policy implications of the district court's decision are alarming; the decision flies in the face of core principles of good public policy and public process. Government at all levels - federal, state and local - has the obligation to ensure the welfare, health, and safety of its citizens; the integrity of the environment; and the protection of living beings. An important measure of good public policy is the degree to which the impacts of new development are understood by the public and appropriately mitigated. There is a positive, synergistic value in integrating federal, state, and local planning and regulatory processes to allow constituent stakeholder voices to be reflected at every level of regulation.

A. Growth In Oil and Gas Development.

Gas extraction employing the modern techniques combining horizontal drilling and high-volume fracking, together with storage of waste by-products, is one of the highest profile and controversial issues in Colorado, and undeniably, the nation. In the last decade, Colorado has experienced tremendous growth in oil and gas development spurred by new technology, including in the NWCCOG region and the Front Range. Oil and gas development increasingly is coming into already existing communities, triggering significant public and local government concern.

There are local benefits such as "…[g]ood-paying jobs, rising incomes, new businesses, a tidal wave of fresh tax revenue;" but along with those come "a fair share of problems" such as "higher crime rates, heavy truck traffic and overcrowded schools." Brad Plumer, *The economic dark side of the West's oil and gas boom*, Washington Post (Dec. 12, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/12/the-dark-side-of-the-wests-oil-and-gas-boom/.

Local governments often have to react to rapidly changing conditions associated with oil and gas development because the industry is moving into areas where it never existed before. "Examples of spatial planning for petroleum development were nearly non-existent in 2007. Because old technology had to bore straight down, surface locations were inflexible. To respond to new technologies of 'steerable' or 'directional' drilling, [counties] had to be creative" in their planning and zoning. Kim Sorvig, *What to Do When the Drillers Come to Town*, Planning Mag., Vol. 80 Issue 3, 16 (Aug/Sept. 2014). Governor Hickenlooper noted the need for responsible local government regulations as well, stating that "(t)he increased oil and gas activity that is occurring in new areas of Colorado's Front Range and that involves new technology such as horizontal drilling combined with hydraulic fracturing ("fracking") has caused a number of local jurisdictions to revisit the adequacy of their own regulations associated with

oil and gas operations." Colo. Exec. Order No. B 2014-005, "Creating The Task Force On State And Local Regulation Of Oil And Gas Operations" (Sept. 8, 2014).

The current and rapid expansion of oil and gas development presents challenges to how local governments approach land use planning and regulation in a manner that protects public health, safety and welfare, promotes the reasonable development of oil and gas where appropriate, and survives judicial review. "The pace of growth is driving many communities to make decisions without access to comprehensive and reliable scientific information about the potential impacts of hydraulic fracturing on their local air and water quality, community health, safety, economy, environment, and overall quality of life." *Science, Democracy, and Fracking: A Guide for Community Residents and Policy Makers Facing Decisions over Hydraulic Fracturing*, The Center for Science and Democracy, 2 (Aug. 2013), http://www.ucsusa.org/sites/default/files/legacy/assets/documents/centerforscience-and-democracy/fracking-informational-toolkit.pdf. A local government moratorium can be an essential first step in preparing local regulations that are responsive to changing technologies and localized community impacts.

The district court's order frustrates a local government's ability to plan for and potentially regulate oil and gas development in a time of rapidly changing technologies in new locations. Among the localized consequences that deserve

local government attention are potential emission of pollutants into soil, water or atmosphere; potential landscape and viewshed modification; potential impacts of heavy trucks to roadways and traffic; potential noise and light pollution; and potential incompatibility with neighboring land uses. *See* Samuel Gallaher, *Local, Regional, and State Government Perspectives on Hydraulic Fracturing-Related Oil and Gas Development*, Buechner Institute for Governance, 9, http://narc.org/wp-content/uploads/Government-Perspectives-on-Oil-and-Gas-Development-Full-Report-2013-Gallaher.pdf (last visited Feb. 6, 2015). Because a single operational site, known as a well pad, may be used to drill multiple horizontal wells, and because each well may be re-fractured multiple times, the duration of these potential consequences may be immediate to long term in duration. Well pads may also exist in isolation or near proximity, and may be concurrently or consecutively developed, lessening or magnifying the impacts.

Potential harm in some communities may be less influenced by the above factors than by incompatibility with the community's development goals or the local economy that relies on agriculture, tourism, outdoor recreation, or access to wildlands and wildlife. For example, because tourism comprises 48% of all jobs in the region, NWCCOG communities are "highly dependent on and vulnerable to changes in environmental conditions that impact tourism." Coley/Forrest Inc.,

Water and its Relationship to the Economies of the Headwaters Counties, Northwest Colorado Council of Governments, 10 (December 2011) http://nwccog.org/docs/qq/QQStudy_Outreach%20Summary%20Jan%202012.pdf.

Damage may also come from a community's loss of identity and desirability as a place to live. The arrival of an incompatible land use may be a harbinger that "the neighborhood is taking the first step toward becoming something other than the neighborhood where I chose to live. Although difficult to place in quantitive terms, the loss is great." Bradley C. Karkkamen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Envtl. L. 45, 73 (1994). The district court's order diminishes local government ability to address oil and gas impacts that may directly affect citizen quality of life.

B. A Social License to Operate is Essential to the Industry.

Oil and gas operators have a vested interest in developing the public's trust that oil and gas resources will be developed safely and responsibly, often referred to as a social license to operate. As the oil and gas developer Encana describes, "Creating long-term shareholder value and protecting our social license to operate are significant elements of Encana's strategy for sustained financial success." *Stakeholder Relations Guide: Our Guide to Effective Stakeholder Management,* Encana, http://www.encana.com/pdf/communities/canada/stakeholder_relations_

guide.pdf (last visited Feb. 5, 2014). At the same time,

> "[a] social license to operate in the United States is not a legal or physical license. Rather, it is an implied grant of ongoing approval by the public and other stakeholders. Such a license allows a company to engage in a certain activity in relative harmony with the local community and other stakeholders… A company earns the license by conforming to jointly construct(ed) norms of legal compliance and standards for appropriate business conduct that are trusted and accepted by the public. A company that fails to acquire such a license may have the legal right to operate, but will likely face ongoing conflict and controversy due to practical, economic or moral obstacles."

Evan J. House, *Fractured Fairytales: The Failed Social License For Unconventional Oil and Gas Development*, 13 Wyo. L. Rev. 5, 51 (2013). Objection to and denial of public discourse, debate, analysis, and strategizing are prime causes for failure to obtain and maintain this social license. The best way to encourage a social license to operate is through the public process found at the local level of government. Local government moratoria allow for a "time out" from swift development that allows for local government to facilitate public discourse to better understand and address community concerns.

C. Moratoria are Essential Tools to Local Government Planning and Land Use Regulation.

Local government authority to evaluate, and then potentially regulate, new land use is well established in United States jurisprudence. As early as 1876, the U.S. Supreme Court expanded local governments "police power" to include the

principle that "(w)hen one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Munn v. Illinois*, 94 U.S. 113, 126 (1876). The Supreme Court later upheld regulations creating a red-light district as a proper use of the police power, finding "[t[he management of these vocations … affect directly the public health and morals … The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors." *L'Hote v. New Orleans,* 177 U.S. 587, 596 (1900). The Supreme Court has continued to affirm broad land use authority of local governments. *See e.g., Welch v. Swasey,* 214 U.S. 91 (1909) (sustaining building height restrictions for the City of Boston that differed between two areas, of the city); *Reinman v. Little Rock,* 237 U.S. 171 (1915) (upholding a local government ordinance banning the operation of livery stables in the central business district of Little Rock); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) (affirming a Los Angeles ordinance excluding an existing brickyard from a residential area).

In *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) ("*Euclid*"), the most important of the foundational cases for local land use authority, the Court

expresses its strong deference to the local government land use decisionmaking process:

> "[T]he coming of one apartment house, if followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun … and bringing … the disturbing noises incident to increased traffic … and the occupation, by means of moving and parked automobiles, of larger portions of the street thus detracting from their safety … until, finally, the residential character of the neighborhood and its desirability … are utterly destroyed … [T]he reasons are sufficiently cogent to preclude us from saying … that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."

Euclid, 272 U.S. at 394-395.

Analogizing to the context-based nature of nuisance law, the Court in *Euclid* also found that constitutional exercise of land use authority could not be achieved by "abstract consideration" of the utility or harm of a regulated use, "but by considering it in connection with the circumstances and the locality." *Id.* at 387-8. Under this rubric, the more noxious the use, the greater discretion the local government may exercise regarding it. The Supreme Court had "no difficulty" in sustaining zoning regulations designed to "divert an industrial flow from the course which it would follow." *Id.* at 390. Local governments have the power and

responsibility to avoid the negative consequences of incompatible land uses within the context of the community as a whole.

Before a regulator exercises the power to regulate land uses, as affirmed by the U.S. Supreme Court, moratoria are commonly employed to temporarily maintain the status quo or pause decision-making while a regulator researches and formulates prudent and appropriate permanent regulations. "[T]emporary development moratoria promote effective planning. First, by preserving the status quo during the planning process, temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme…" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002). "Moratoria are widely used among land use planners to preserve the status quo while formulating a more permanent development strategy. Moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337-38 (2002) ("*Tahoe-Sierra*"). "[T]he widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established

tradition. Land-use planning is necessarily a complex, time-consuming undertaking for a community…" *Tahoe-Sierra Preservation Council*, 216 F.3d at 777.

A moratorium is a planning tool that facilitates local government consideration of important issues to then potentially develop responsive permanent regulations. At its essence, the district court decision bars local governments from enacting moratoria which is equivalent to barring local government ability to *think* and *plan* before they regulate.

It must be noted that "*every delay is not the same as a total ban*." *Tahoe-Sierra*, 535 U.S. at 331-332 (emphasis added). "'Stop-gap' regulations are, by their very nature, of limited duration and are designed to maintain the status quo pending study and governmental decision making." *Williams v. Central City*, 907 P.2d 701, 706 (Colo. App. 1995). "We acknowledge that, given that moratoria are, by definition, temporary, it is redundant to refer to a moratorium as a 'temporary moratorium'… [A moratorium is] a 'waiting period set by some authority'…" *Tahoe*, at n. 21 (citations omitted). A ban, on the other hand, is permanent.

VII. LEGAL FRAMEWORK

A. Authority Of Local Governments.

The district court's decision must be viewed first in the context of the authority of Colorado local governments. The authority of Colorado local

governments to regulate oil and gas development comes from their authority to regulate the use and development of land under the local government police power, i.e. the power to regulate activities to protect the public health, safety, morality, general welfare and the environment. The Local Government Land Use Enabling Act gives local governments the authority to regulate land use on the basis of its impact on the community or surrounding areas, and "to plan for and regulate the use of land" so as to provide for the orderly use of land and the protection of the environment, consistent with constitutional rights. C.R.S. § 29-20-104; *see generally* C.R.S. § 29-20-101 *et seq*.

Home rule municipalities also have Constitutional land use authority. The Colorado Constitution, Article XX, Section 6, "reserves" for home-rule municipalities "the full right of self-government in both local and municipal matters." A home-rule city's ordinances pertaining to local and municipal matters "shall supersede within the territorial limits ... any law of the state in conflict therewith." *Id.*

Colorado courts have confirmed that under the Colorado Constitution the "exercise of zoning authority for the purpose of controlling land use within a home rule city's municipal border is a matter of local concern." *Voss v. Lundvall Bros., Inc.,* 830 P.2d 1061, 1064 (Colo. 1992) ("*Voss*"). *See also Town of Telluride v. San*

Miguel Valley Corporation, 185 P.3d 161, 168 (Colo. 2008); *National Advertising Co. v. Dept. of Highways*, 751 P.2d 632, 635 (Colo. 1988); *City and County of Denver v. State,* 788 P.2d 764, 767 (Colo. 1990). Importantly, "[l]ocal governments have a legally protected interest in enacting and enforcing their land use regulations governing the surface effect of oil and gas development." *Bd. of County Comm'rs of La Plata County v. Colorado Oil and Gas Conservation Commission,* 81 P.3d 1119, 1124 (Colo. App. 2003) ("*La Plata*"). *See also Voss,* 830 P.2d at 1066.

B. Authority of the State of Colorado.

The State of Colorado obviously also has an interest in oil and gas development and operations. That interest is expressed directly in the Colorado Oil and Gas Conservation Act (the "Act"), the declared purposes of which include "to foster, encourage, and promote the development, production, and utilization of the natural resources of oil and gas in the state of Colorado." C.R.S. § 34-60-102. Colorado courts have confirmed the state's interest in the development of oil and gas. *Bowen/Edwards Associates, Inc. v. Bd. of County Comm'rs of La Plata County,* 830 P.2d 1045, 1058 (Colo. 1992) ("*Bowen/ Edwards*").

C. Preemption Doctrine Serves to Reconcile Conflicts between State and Local Government Regulations.

The preemption doctrine establishes a priority between conflicting laws enacted by state and local governments. There are three ways in which a state statute may preempt a local regulation: express preemption, implied preemption and preemption based on operational conflict.

Express preemption occurs when a statute expressly states that state regulation is intended to preempt local regulation. The Act expressly preempts local authority in only two circumstances inapplicable to this case.[1] Implied preemption exists "if the state statute impliedly evinces a legislative intent to *completely* occupy a given field by reason of a dominant state interest." *Bowen/Edwards*, 830 P.2d at 1056-57 (emphasis added). In Colorado, the General Assembly has not intended that the state occupy the entire field of oil and gas regulation. The Act does not "militate in favor of an implied legislative intent to preempt all aspects of [local government's] statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations." *Bowen/Edwards*, 830 P.2d at 1058.

[1] *See* C.R.S. § 34-60-106(5) precludes local government from charging an operator for the cost of the local government to inspect operations regulated by the Colorado Oil and Gas Conservation Commission; C.R.S. § 34-60-106(17)(a) gives the Commission "exclusive authority to regulate the public health, safety, and welfare aspects, including protection of the environment, of the termination of operations and permanent closure . . . of an underground natural gas storage cavern."

Finally, local regulation of oil and gas development may be preempted by virtue of an operational conflict. Operational conflict occurs "where the effectuation of a local interest would materially impede or destroy the state interest." *Id.* at 1059. Operational conflict preemption is determined through a fact-intensive inquiry determined on a case-by-case basis. *Id.* at 1059-60.

The Act expressly preserves local governmental authority. "The general assembly hereby declares that nothing in this Act shall establish, alter, impair, or negate the authority of local governments to regulate land use related to oil and gas operations." C.R.S. 34-60-128(4). "[I]f such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect." *Voss,* 830 P.2d at 1069.

VIII. ERRORS BY THE DISTRICT COURT

Other parties to this litigation are providing an analysis of significant legal issues. *Amicus curiae* NWCCOG respectfully adds its own brief supplement.

The district court erred in its legal basis for finding the Moratorium preempted because: (1) the court first characterized the temporary Moratorium as a permanent ban; (2) having characterized the Moratorium as a permanent ban, the court incorrectly applied the test for "implied preemption;" and (3) the court then,

as a fall-back, incorrectly applied to the Moratorium the test for "operational conflict preemption."

A. The District Erred By Characterizing The Fort Collins Moratorium as a "Ban".

Even though the Moratorium is temporary, the district court relies on three cases involving *permanent* bans in its evaluation of the Moratorium. *See Voss*, 830 P.2d at 1062 (where the City of Greely enacted a *permanent* ban on any oil and gas drilling within the City); *Colo. Min. Ass'n. v. Bd. of Cnty. Comm'rs of Summit County*, 199 P.3d 718 (Colo. 2009) (where County completely banned the use of cyanide and other toxic chemicals for mineral processing); *Webb v. City of Black Hawk,* 295 P.3d 480 (Colo. 2013) ("*Black Hawk*") (where City instituted a *permanent ban* of bikes on roadways). These cases are inapposite because each one involves *permanent* prohibitions, continuing into perpetuity, and without a purpose other than the ban itself.

In the district court's order, one of the "Undisputed Facts" is that the Ordinance created a moratorium, not a ban. CF at 495. However, in its analysis the court then inexplicably calls the Moratorium a ban twenty-two times. CF at 495-503. The court failed to consider the fact that a Moratorium is not permanent and that "every delay is not the same as a total ban." *Tahoe-Sierra*, 535 U.S. at 331-332.

B. The District Court Erred in Finding "Implied Preemption."

The district court also erred in finding implied preemption by failing to apply correctly the correct test and by ignoring case law on point. According to *Bowen/ Edwards,* "…preemption may be inferred if the state statute impliedly evinces a legislative intent to *completely* occupy a given field by reason of a dominant state interest." 830 P.2d at 1056-57 (emphasis added). Other Colorado courts confirm that implied preemption requires a legislative intent to completely occupy the field. *See e.g., Voss,* 803 P.2d at 1068; *Bd. Of Cnty. Comm'rs of Gunnison Cnty v. BDS International, LLC*, 159 P.3d 773, 778 (Colo. App. 2006) ("*BDS*"); *La Plata,* 81 P.3d at 1124-1125.

However, the district court misstates the test for implied preemption as being "if the state statute impliedly evinces a legislative intent to occupy a given field by reason of a dominant state interest." CF at 498. The district court omits the key word in the key phrase of the implied preemption test, looking at whether the Act shows a dominant state interest instead of properly considering whether the Act shows intent to "*completely* occupy the field."

The legislature has never articulated an intent to *completely* occupy the field as required to meet the implied preemption doctrine. To the contrary, as noted above, the Act confirms local authority to regulate land use related to oil and gas.

Amendments to the Act in 2007 explicitly protect "the authority of local governments to regulate land use related to oil and gas operations." C.R.S. § 34-60-128 (4); *see also* C.R.S. § 34-60-127 (4)(c). Clearly, the legislature would not have explicitly included this language if it intended to completely occupy the field of oil and gas development and production.

Case law confirms that that Act does not evince legislative intent to completely occupy the field of oil and gas regulation. The Colorado Supreme Court has clearly stated that the Act does not "militate in favor of an implied legislative intent to preempt all aspects of [local government's] statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations." *Bowen/ Edwards*, 830 P.2d at 1058. The district court's implied preemption ruling is in direct conflict with existing case law.

C. The District Court Erred in Finding Operational Conflict Preemption.

The district court incorrectly applied the operational conflict test when it ruled that the Moratorium creates an operational conflict with the Act because it "prohibits what the Act permits." The proper test for operational conflict between a local land use regulation and the Act is not whether the local regulation prohibits what the Act permits but whether "the effectuation of a local interest would

materially impede or destroy the state interest." *Bowen/ Edwards*, 830 P.2d at 1059-60. The district court erroneously relied on the rule articulated in *Black Hawk*, a completely distinguishable case involving a completely different state statute and a *permanent ban* of bikes on roadways. 295 P.3d at 485.

The court's ruling also was not supported by the evidence. A determination of operational conflict must be made "on an ad-hoc basis under a fully developed evidentiary record." *Bowen/ Edwards*, 830 P.2d at 1059-60. There is no fully developed evidentiary record in this case. *See BDS*, 159 P.3d at 779 (where a fully developed evidentiary hearing was required as a prerequisite to determine extent of operational conflict with the Act).

IX. THE DISTRICT COURT'S RULING IMPLIES AN UNCONSTITUTIONAL DELEGATION OF A MUNCIPAL FUNCTION.

The district court's ruling that the Act impliedly preempts local government regulation transforms the Act into an unconstitutional legislative delegation of a municipal function to the COGCC. Article V, Section 35 provides that "[t]he General Assembly shall not delegate to any special commission … any power to make, supervise or interfere with any municipal improvement, money, property or effects … or perform any municipal function whatever." The purpose of this provision is "to prevent a legislative commission from intruding upon a city's right

of self-government in matters of local concern," including "land use planning." *Voss,* 830 P.2d at 1069. In finding the Act impliedly preempts the Moratorium, the decision effectively means that the Act "*completely* occup[ies]" the entire field leaving no room for the exercise of local government land use authority. *Bowen/Edwards,* 830 P.2d at 1056-57. Under this logic, the Act is a delegation to the COGCC of the important municipal function of land use planning and regulation. Such a delegation is unconstitutional.

X. CONCLUSION

Local governments are democratically accountable stewards of their populations' well-being. They understand the crucial importance of "place" and "pace" in promoting well-being. In other words, the environment within which people live, raise families, work and play, the housing in which they live, the spaces around them, are all crucial to their health and well-being. Since local government holds many of the levers for promoting well-being in Colorado it makes sense to ensure its authority to shape the locality in a healthy direction. Local governments will face a nearly impossible task to regulate land use appropriately if they are denied the predicate opportunity to analyze, plan for, and craft the regulations without the pressure of concurrent development. The district court's order not only ignores local government obligation and authority to address

public health, safety, and welfare in a considered manner, the order eliminates a primary local government tool to do so in contravention of Colorado law.

The district court's decision is contrary to Colorado's tradition of land use planning and regulation at the local government level, and it runs counter to the longstanding expectations of all citizens of Colorado who look to their local governments to protect their quality of life. For the reasons above, NWCCOG respectfully requests that the district court's ruling be reversed.

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of February, 2015, a true and correct copy of the foregoing was served *via* ICCES on the following:

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