WELBORN SULLIVAN
MECK & TOOLEY, P.C.
ATTORNEYS AT LAW

1125 17th Street, Suite 2200
Denver, CO 80202
MAIN: 303/830-2500
FAX: 303/832-2366

159 N. Wolcott, Suite 220
Casper, WY 82601
MAIN: 307/234-6907
FAX: 307/234-6908

MEMORANDUM

TO: DAOGTL

FROM: Sheryl Howe

DATE: June 9, 2016

RE: June 2016 Report

Court of Appeals Rules That a Mineral Reservation in the Habendum Clause of a Deed, Not the Granting Clause, Is a Valid Reservation

In *Owens v. Tergeson*, 2015COA164, 2015 WL 6746535 (2015), the Colorado Court of Appeals upheld the district court's summary judgment in favor of parties who claimed two warranty deeds reserved minerals to the grantors in the deeds. The two warranty deeds were dated November 25, 1950 ("1950 Deeds"). One conveyed Tract A; the other conveyed Tracts B-D. *Id*. at ¶ 3. The question was whether all oil, gas and other mineral interests were reserved in the 1950 Deeds. The Furrow Defendants, who were successors in interest to the grantees in the deeds, argued that the 1950 Deeds did not reserve any interests to the grantors. The Furrow Defendants also argued that a quiet title action had quieted title to the minerals in the Furrow Defendants' predecessors, as to Tract A.

The 1950 Deed conveying Tract A provided that the grantors granted, bargained, sold and conveyed all of Tract A, together with hereditaments and appurtenances thereto belonging and all of the grantors' right, title and interest in the premises. The court's decision states "[i]mmediately after this granting clause appears a habendum clause, which states:

> TO HAVE AND TO HOLD the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said parties of the first part, for themselves their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, they are well seized of the premises above conveyed, as of good, sure, perfect, absolute and indefensible estate of inheritance, in law, in fee simple, and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and

> other grants, bargains, sales, liens, taxes, assessments and encumbrances of whatever kind or nature soever. *except reserving all oil, gas and other minerals and the right to use so much of the surface as is necessary to develop, produce and care for the same; also 1950 taxes;* and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part shall and will WARRANT AND FOREVER DEFEND."

(Enlarged font in original.) (Emphasis added). *Id.* at ¶ 13.

The deed conveying Tracts B-D contained virtually identical language, but also included after the mineral reservation language "also except a 1/128 royalty interest to second party." *Id.* at ¶ 14.

The Furrow Defendants argued that, where the provisions of a "granting clause" and those of "a warranty (or habendum) clause" conflict, the provisions of the granting clause (here, reserving no mineral interests) must prevail. *Id.* at ¶ 18. The court stated this was the common law view endorsed by the court in *Million v. Botefur*, 90 Colo. 343, 345, 9 P.2d 284, 284 (1932). However, the court noted that in *Mitchell v. Espinosa*, 125 Colo. 267, 243 P.2d 412 (1952), the supreme court rejected that rule in favor of the more modern view that the overall intent from the deed considered as a whole should control. *Id.* at ¶ 18.

The court of appeals noted that this evolution in the law has occurred in other jurisdictions as well and reviewed several decisions from other states. *Id.* at ¶ 19. The court also quoted a statement that a clear and special designation of the estate conveyed will prevail over conflicting but merely general or formal language and that this principle "is most significantly illustrated by the cases of deeds prepared on printed forms in such manner that the formal expressions of the forms conflict with words specifically inserted to indicate the real intent." W. W. Allen, Annotation, *Conflict Between Granting and Habendum Clauses as to Estate Conveyed,* 58 A.L.R.2d 1374, § 2 (1958) (footnote omitted). *Id.* at ¶ 20.

The court of appeals found that the facts in the instant case closely parallel those in *Mitchell v. Espinosa*, in that the mineral reservation is only in the habendum clause and the deed appears to be a printed form of warranty deed with the reservation language added. *Id.* at ¶ 22. The court of appeals determined that the 1950 Deeds unambiguously reserved the mineral rights to the plaintiffs' predecessors in interest (the grantors in the 1950 Deeds). *Id.* at ¶ 23.

The Furrow Defendants had argued that there was a distinction between a granting clause and a warranty clause and relied on *O'Brien v. Village Land Co.*, 794 P.2d 246, 251 (Colo. 1990). The court of appeals in this case found that reliance on *O'Brien* was misplaced because the habendum clause in the 1950 Deeds is not a warranty clause. *Id.* at ¶ 25. The court found that the clauses containing the reservation in the 1950 Deeds begin "TO HAVE AND TO

HOLD" and contain the reservation and that such clauses are typically classified as habendum clauses, rather than as mere warranty clauses. *Id.* at ¶ 27.

There had been a quiet title action in 1973 affecting Tract A. The district court held that the 1973 action was void because of inadequate service of process on the Gadbois, who were the plaintiffs' predecessors in interests. The Gadbois had been served only by publication in the 1973 title action. *Id.* at ¶ 30. The court of appeals found that a search of the Weld County records would have revealed the 1950 Deeds which listed the Gadbois' address as "Tulsa, Oklahoma" and a 1960 oil and gas lease which listed a specific street address in Tulsa for the Gadbois. *Id.* at ¶ 47, 48. The court held that under the circumstances, the district court properly concluded that, because Brown had failed to exercise due diligence in determining the Gadbois' whereabouts, his attempt to serve them via publication was invalid and the judgement against them was void. *Id.* at ¶ 52.

This decision is interesting to title attorneys because it confirms the trend of the court to interpret deeds as a whole to determine the parties' intent.

Tax Deed Issued by Treasurer without Diligent Inquiry for Purposes of Notice is Voidable and District Court Properly Invalidated the Tax Deed

In *Sandstrom v. Solen*, 2016 COA 29, 2016 WL 736283, ___ P.3d ___ (2016), the Colorado Court of Appeals found that a tax deed purportedly covering a 50% mineral interest was invalid, because the treasurer had not conducted a diligent inquiry for purposes of giving notice prior to issuance of the tax deed.

This case involved a 50% mineral interest in lands in Arapahoe County. The 50% mineral interest had been severed from the surface estate and was separately assessed by the Arapahoe County assessor's office as a parcel beginning in 1972. The owner of the 50% mineral interest died, the mineral interest was transferred to one person and a trustee, and the trustee later conveyed its interest to another person. At that point, the 50% mineral interest was owned by Gregory Solen (1/4 mineral interest) and Patti Ibbotson (1/4) mineral interest. The deed to Patti Ibbotson was recorded with the clerk and recorder, but the assessor's records were not updated to reflect her interest. The treasurer was billing the parcel by mailing tax bills only to Gregory Solen.

The taxes on the parcel were unpaid from 2004 through 2007. Toby Bradford purchased the 2004 tax lien and applied for a tax deed on the parcel on August 30, 2008. The treasurer sent notice to Solen of the application for tax deed but did not obtain title work or check the county clerk and recorder's records. On February 6, 2009, a tax deed was issued. In 2013, the treasurer was notified by an oil and gas lessee of Ibbotson's that she claimed ownership in the parcel. On August 26, 2013, the treasurer issued and recorded a declaration of invalid treasurer's deed. In December 2013, the treasurer filed an action seeking a declaratory judgment that the declaration of invalid treasurer's deed was a valid document, thereby cancelling title in Bradford. The district court found the treasurer's deed was void and invalid.

The court of appeals affirmed the district court's decision, but on somewhat different grounds. The court cites the portion of the tax statutes stating that a condition precedent to a tax deed requires that before any purchaser is entitled to a deed for the land, the treasurer shall serve a notice of the purchase on all persons having an interest or title of record in or to the land if, upon diligent inquiry, the residence of such persons can be determined. § 39-11-128, C.R.S. The court addressed a 2010 Colorado Supreme Court decision, *Lake Canal Reservoir Co. v. Beethe,* 227 P.3d 882 (Colo. 2010), holding that a tax deed is voidable, not void, for failure to conduct diligent inquiry. The court of appeals found that the tax deed issued to Bradford was voidable for failure to provide Ibbotson with notice. The tax deed is voidable in these circumstances because failure to provide sufficient notice pertains to the manner in which the treasurer's authority was exercised. A tax deed is void only when the taxing entity has no jurisdiction or authority to issue the deed. Here, the court found that it was undisputed that the action was commenced within the applicable statute of limitations and that the district court correctly found the tax deed was invalid.

Bradford also argued that the assessor should have separately assessed Solen's and Ibbotson's severed mineral interests and that because Solen received notice of the outstanding taxes and the request for the tax deed, Solen was estopped from challenging Bradford's title under the tax deed. The court of appeals disagreed and found that the assessor is not required to separately assess each severed mineral interest. Further, since Ibbotson and Solen owned as co-tenants, either could have redeemed the interest for the benefit of both, under the law of co-tenancy. The record showed that Ibbotson was willing and ready to redeem. Thus, the court found that the district court had been correct in invalidating the tax deed as to the full 50% mineral interest.

Cities' Fracking Bans Struck Down

In *City of Longmont v. Colorado Oil and Gas Association*, 2016 CO 29, 2016 WL 1757509, the Colorado Supreme Court ruled that the City of Longmont's ban on hydraulic fracturing ("fracking") and on storage of wastes created in connection with fracking is invalid and unenforceable, because it operationally conflicts with applicable state law. The court affirmed the order of the district court of Boulder County, Colorado, which had entered summary judgment in favor of the three plaintiffs in the case: Colorado Oil and Gas Association, Colorado Oil and Gas Conservation Commission, and Top Operating Company.

The court noted that the virtues and vices of fracking are hotly contested, but that the court was not required by the case to weigh in on these differences of opinion, much less to try to resolve them. *Id.* ¶ 2. Instead, the court addressed whether the City of Longmont's bans on fracking and the storage of disposable fracking waste within its city limits are preempted by state law. *Id.*

In the fall of 2012, the residents of Longmont, a home-rule municipality, voted to add Article XVI to Longmont's home-rule charter. Article XVI provides:

> It shall hereby be the policy of the City of Longmont that it is prohibited to use hydraulic fracturing to extract oil, gas or other

> hydrocarbons within the City of Longmont. In addition, within the City of Longmont, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the hydraulic fracturing process, including but not limited to flowback or produced wastewater and brine.

Id. ¶ 4.

The court acknowledged that some of its prior preemption cases are confusing. *Id.* ¶ 12. The court clarified two areas of preemption law. The opinion clarifies that the question of whether a matter is one of statewide, local, or mixed state and local concern is separate and distinct from the question of whether a conflict exists between state and local law. The opinion also clarifies that the preemption analysis requires the court to assess the interplay between the state and local regulatory schemes and that in virtually all cases, this analysis will involve a facial evaluation of the respective regulatory schemes, not a factual inquiry as to the effect of those schemes "on the ground." *Id.* ¶ 15.

Longmont is a home-rule city. The Colorado Constitution recognizes the sovereignty of home-rule cities and includes a provision that the people of each city or town have the power to make a city charter which shall extend to all its local and municipal matters. "Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith." Colo. Const. art. XX, § 6. *Id.* ¶ 16. In matters of local concern, a home-rule ordinance supersedes a conflicting state statute. *Id.* ¶ 17. In contrast, when a home-rule ordinance conflicts with state law in a matter of either statewide or mixed state and local concern, the state law supersedes that conflicting ordinance. *Id.* ¶ 18.

The court found that Article XVI of Longmont's charter involves a matter of mixed state and local concern. The court stated that many operators have determined that fracking is necessary to ensure the productive recovery of oil and gas and that for these operators, banning fracking would result in less than optimal recovery and a corresponding waste of oil and gas. *Id.* ¶ 23. The court noted that such a ban could adversely impact the correlative rights of the owners of oil and gas interests in a common source or pool by exaggerating production in areas in which fracking is permitted while depressing production within Longmont's city limits. The court stated that Longmont's fracking ban could result in uneven and potentially wasteful production of oil and gas from pools that underlie Longmont but that extend beyond its city limits. *Id.* The court concluded that the state's interest in the efficient and fair development of oil and gas resources in the state suggests that Longmont's fracking ban implicates a matter of statewide concern. *Id.* ¶ 24. The court found that Longmont's ban would inhibit the efficient development of oil and gas resources. *Id.* ¶ 25. For these reasons, the court concluded that the need for statewide uniformity favors the state's interest in regulating fracking. *Id.* ¶ 26.

Another factor the court considered is the extraterritorial impact of the local regulation, or a "ripple effect that impacts state residents outside the municipality." *Id.* ¶ 27. The court cited an earlier Colorado case that found a drilling ban in a city could result in increased production costs, and render the total drilling operation economically unfeasible. *Id.* ¶ 27. The court stated

that Longmont's fracking ban, which limits fracking to those parts of a pool outside city limits, likewise increases the cost of producing oil and gas and reduces royalties. The court noted that Longmont's fracking ban might create a "ripple effect" across the state by encouraging other municipalities to enact their own fracking bans, which could ultimately result in a de facto statewide ban. The court concluded that the extraterritorial impact factor also weighs in favor of the state's interest in fracking. *Id.* ¶ 28.

Two other factors in the analysis, whether the state or Longmont had traditionally regulated fracking and the fourth factor, whether the Colorado Constitution commits the matter to either state or local regulation, did not suggest either a statewide or purely local concern. The court noted that state control of oil and gas development and production began in 1915, and home-rule cities are authorized to control land use through zoning. *Id.* ¶ 29. Based on the four factors, the court concluded that Article XVI involves a matter of mixed state and local concern. *Id.* ¶ 31.

The court found the state law preempted Article XVI due to operational conflict between them. The court stated it will "analyze an operational conflict by considering whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance that authorizes what state law forbids or that forbids what state law authorizes will necessarily satisfy this standard." *Id.* ¶ 42.

The State of Colorado's interest in oil and gas development is expressed in the Oil and Gas Conservation Act, §§ 34-60-101 to -130, C.R.S. (2015), and the regulations promulgated thereunder by the Colorado Oil and Gas Conservation Commission ("Commission"). *Id.* ¶ 50. The court quoted the Act which provides "[i]t is the intent and purpose of this article 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, and welfare, including protection of the environment and wildlife resources, and subject further to the enforcement and protection of the coequal 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." § 34-60-102(1)(b), C.R.S. (2015). *Id.* ¶ 50. The court cited several rules by the Commission that pertain to fracking and stated that the Oil and Gas Conservation Act and the Commission's pervasive rules and regulations "convince us that the state's interest in the efficient and responsible development of oil and gas resources includes a strong interest in the uniform regulation of fracking." *Id.* ¶ 53. The court concluded that by prohibiting fracking and the storage and disposal of fracking waste, Article XVI materially impedes the effectuation of the state's interest. *Id.* ¶ 54. The court therefore held that state law preempts Article XVI. *Id.* ¶ 54. The court upheld the district court order enjoining Longmont from enforcing Article XVI. *Id.* ¶ 3.

In *City of Fort Collins v. Colorado Oil and Gas Association*, 2016 CO 28, 2016 WL 157630, the Colorado Supreme Court held that Fort Collins' five-year moratorium on fracking and the storage of fracking waste within the city is a matter of mixed state and local concern, that the moratorium operationally conflicts with the effectuation of state law, and that the moratorium is preempted by state law and is invalid. The reasoning in the *Fort Collins* case is very similar to that in the *Longmont* case discussed above. Fort Collins is also a home-rule city and in an

election held on November 5, 2013, the citizens of Fort Collins voted in favor of a citizen-initiated ordinance placing a moratorium on hydraulic fracturing and the storage of its waste products within the City of Fort Collins or on lands under its jurisdiction for a period of five years, in order to fully study the impacts of this process on properties, property values and human health. *Id.* ¶ 3.

The court found that Fort Collins' fracking moratorium renders the state's statutory and regulatory scheme superfluous, at least for a lengthy period of time, because it prevents operators who abide by the Commission's rules and regulations from fracking until 2018. The court concluded that the moratorium materially impedes the effectuation of the state's interest in the efficient and responsible development of oil and gas resources. *Id.* ¶ 30. The court distinguished a prior Colorado case involving a moratorium (not involving oil and gas development) by noting that Fort Collins' moratorium freezes a practice that has come to be prevalent across the state, so rather than maintaining the status quo, Fort Collins' moratorium substantially disrupts it. *Id.* ¶ 34. Also, the court found that the fracking moratorium for five years was different in kind from a brief moratorium. *Id.* ¶ 35. The court determined that Fort Collins' moratorium is not merely a regulation and that it is a prohibition that lasts for five years. *Id.* ¶ 37. Thus, the court found that Fort Collins' five-year moratorium operationally conflicts with the Oil and Gas Conservation Act and the rules and regulations promulgated pursuant thereto and that the Act preempts Fort Collins' moratorium. *Id.* ¶ 39. The court stated it expresses no view as to the propriety of a moratorium of materially shorter duration. *Id.* ¶ 40.

Transportation Costs after the First Commercial Market Must be Reasonable, But Need Not Enhance Value, To Be Deductible from Royalty Payments

In *Lindauer v. Williams Production RMT Company*, 2016 COA 39, 2016 WL 908452, the Colorado Court of Appeals held that transportation costs beyond the first commercial market need not enhance the value of the gas, such that actual royalty revenues increase in proportion to those costs, to be deductible from royalty payments. *Id.* ¶ 53. The plaintiffs claimed that Williams Production RMT Company n/k/a WPX Energy Rocky Mountain, LLC ("WPX") improperly deducted transportation costs incurred beyond the first commercial market in calculating royalties on natural gas in certain months from July 2000 to July 2008. *Id.* ¶ 4. The district court had entered judgment in the plaintiffs' favor after a bench trial. *Id.* ¶ 2. The court of appeals reversed and remanded the district court's decision with directions to enter judgment in favor of WPX. *Id.* ¶ 2.

This case involves gas produced from the Piceance Basin. WPX paid the cost to transport natural gas from the wellhead to the point of sale, including compression, gathering and processing the gas at a plant. WPX did not deduct any of these costs incurred before the gas reached the tailgate of the processing plant from the royalties paid to plaintiffs. *Id.* ¶ 5. The court found there is a commercial market for gas at or near the tailgate in the Piceance Basin, but WPX sold some of the gas in downstream markets where higher prices are sometimes available. WPX entered into long-term contracts with pipeline companies to reserve capacity on the mainline pipelines to transport the gas from the tailgate to the downstream markets. *Id.* ¶ 6.

There were two types of charges in the downstream transportation charges: a demand charge paid to reserve space on the mainline pipeline and a commodity charge paid per unit volume actually shipped. The first charge, the "demand charge," is paid by WPX whether or not it uses the pipeline to ship gas, but WPX deducted the demand charges from plaintiffs' royalties only in months where gas is shipped. *Id.* ¶ 7. WPX deducts the commodity charges before paying royalties. *Id.* The parties agreed that the tailgate at the processing plant is the first commercial market for the gas. *Id.* ¶ 8.

The court reviewed both *Garman v. Conoco Inc.,* 886 P.2d 652 (Colo. 1994) and *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001) and concluded that the cases do not require post-marketability transportation costs to meet the enhancement test in order to be deducted from royalty payments. *Id.* ¶ 18. The enhancement test refers to proof that actual royalty revenues increase in proportion to the costs assessed against the royalties. *Id.* ¶ 9.

The court reviewed language from *Garman* and concluded that *Garman* required transportation costs for gas that is already marketable to be reasonable, but did not require that such costs must also increase royalty revenues. *Id.* ¶ 29. The court indicated *Garman* requires enhancement in order for certain processing costs to be deductible, but does not require post-marketability transportation costs to meet the enhancement test to be deductible. *Id.* ¶ 27, 30.

The court also discussed the *Rogers* case and stated that the court was not persuaded that the *Rogers* court intended to extend the enhancement test to include transportation costs incurred by lessees to move gas to downstream markets. Rather, the court interpreted language in *Rogers* to refer to "certain processing costs" that enhance the value of marketable gas, being the same category of costs to which *Garman* applied the enhancement test. *Id.* ¶ 33.

The court also concluded that other considerations militate against requiring transportation costs to meet the enhancement test. *Id.* ¶ 43. The court noted that imposing an enhancement requirement on transportation costs, particularly on a month-by-month basis, ignores the commercial realities of the marketplace. *Id.* ¶ 44. The court stated that an enhancement test which compared gas prices in downstream markets to those in the Piceance Basin does not account for the significant increase in the volume of gas produced from the wells as a result of downstream marketing. Also, operators must invest in long-term transportation contracts to guarantee access to downstream markets and to obtain higher downstream prices. *Id.* ¶ 45, 46. WPX had shown that plaintiffs received over $6,000,000 in additional royalty revenues over the eight-year period that they would not have received had the gas been sold locally. In rejecting the plaintiffs' claims, the court found that a rule that allowed WPX to deduct transportation costs based solely on a month-by-month comparison of prices would give plaintiffs a "free ride" by allowing them to enjoy the long-term benefits of WPX's downstream marketing strategy in certain months, while avoiding paying their proportionate share of the costs in other months. *Id.* ¶ 49.

COGCC Issues New Rules Regarding Large Facilities in Urban Mitigation Areas and Requiring Operators to Share Additional Information with Municipalities

Several new rules and rule revisions were adopted by the Colorado Oil and Gas Conservation Commission ("COGCC" or "Commission") at a hearing in January, 2016. This rulemaking was effective March 16, 2016. The rulemaking arose out of two recommendations from Governor Hickenlooper's Oil and Gas Task Force. The Governor formed the task force under a deal reached in August of 2014 which included agreements to take four different proposed ballot initiatives off the November, 2014 ballot. Recommendations 17 and 20 from the Governor's Oil and Gas Task Force pertain to coordination between operators and local governments relating to siting large scale facilities in urban mitigation areas and long-term planning for oil and gas locations.

The new rules define a Large UMA Facility to mean "any Oil and Gas Location proposed to be located in an Urban Mitigation Area and on which: (1) the operator proposes to drill 8 or more new wells; or (2) the cumulative new and existing on-site storage capacity for produced hydrocarbons exceeds 4,000 barrels." Urban Mitigation Area was already defined in the COGCC rules, 100 Series, prior to this new rulemaking, to mean an area where (A) At least twenty-two (22) Building Units or one (1) High Occupancy Building Unit (existing or under construction) are located within a 1,000' radius of the proposed Oil and Gas Location; or (B) At least eleven (11) Building Units or one (1) High Occupancy Building Unit (existing or under construction) are located within any semi-circle of the 1,000' radius mentioned in (A) above.

Rule 305A requires an operator proposing a Large UMA Facility to deliver a written Notice of Intent to Construct a Large UMA Facility not less than 90 days prior to initiating the Form 2A process with the Commission and before the operator has finalized a specific location with the Surface Owner. The Notice is to be delivered to the local government with land use authority over the proposed location of a Large UMA Facility and the Surface Owner of the lands on which a Large UMA Facility is proposed. Rule 305A.b. requires the Notice to include a description and depiction of the proposed Oil and Gas Location and the planned facilities; a description of the siting rationale for proposing to locate the facility within the Urban Mitigation Area, including a description of other sites considered and the reasons such alternative sites were rejected; and an offer to consult with the local government with land use authority over the proposed location to seek agreement regarding siting the Large UMA Facility, considering alternative locations and potential best management practices.

The local government with land use authority over the proposed Large UMA Facility has 30 days to accept in writing an operator's offer to consult. Rule 305A.c. sets forth requirements of the consultation process, including that the Surface Owner will be invited to participate; the Director will participate at the request of either the local government or the operator; if the local government and operator are unable to reach agreement, the operator shall offer in writing to engage in mediation with the local government; if the local government agrees to mediation, the operator and local government shall jointly select a mediator or mediators, equally share the cost of mediation, and upon selection of a mediator(s), the mediation shall conclude within 45 days unless the parties agree to an extension of time; and the Director is not a party to the mediation, but at the request of either the local government or the operator, the Director shall provide

technical assistance to the parties or the mediator to the extent the Director is able. Rule 305A.d. provides that within 30 days of receiving the Notice of Intent to Construct a Large UMA Facility, the Surface Owner may request a meeting with the operator and Director regarding siting of the Large UMA Facility, and the Director will schedule the meeting.

Rule 305A.e. provides several exceptions to the Large UMA Facility notification and consultation process, including that the local government with land use authority has opted out of the Rule 305A notification and consultation processes; the operator and local government with land use authority have an existing agreement regarding siting of oil and gas locations and the proposed Large UMA Facility is within the scope of the agreement; the Large UMA Facility is proposed to be located within an approved site-specific development plan (as defined in § 24-68-102(4)(a), C.R.S., which includes, for example, a planned unit development plan, subdivision plat and other types of agreements that establish vested property rights as defined in § 24-68-103, C.R.S.) and which governs the location of wells or production facilities on the surface estate; or the location is within acreage identified as an oil and gas operations area in an approved "Application for Development" as defined in § 24-65.5-101, et. seq., C.R.S., which includes, for example, a subdivision plat or planned unit development or similar land use designation.

An operator may initiate the Form 2A process (Form 2A is a Drillsite/Access Road Reclamation Form which, except on Federal or Indian owned surface land, must be filed in conjunction with Form 2, which is the Application for Permit to Drill, Deepen, Re-enter, Recomplete and Operate form) once any of the following occur: the operator and local government with land use authority reach agreement regarding a proposed Large UMA Facility site; the proposed Large UMA Facility is subject to an exception pursuant to Rule 305A.e.; the local government with land use authority waives the Rule 305A procedures in writing; the local government with land use authority fails to respond in writing within 30 days of receiving the notice; at least 90 days have passed since the local government with land use authority received the notice and the local government and the operator have engaged in consultation, but have not reached agreement. (In this last instance, the Form 2A will be docketed for a Commission hearing). Rule 305A.f.

In addition to the notices set forth above, Rule 305A.a.(3) provides an operator shall notify any Proximate Local Governments within 1,000 feet of the proposed site that a permit to construct a Large UMA Facility is being sought not less than 45 days prior to submitting a Form 2A. "Proximate Local Governments" are defined as any home rule or statutory city, town, territorial charter city, combined city and county, or county within 1,000 feet of the proposed site. *Id.* This new rule could require notification of a nearby city or county even though that city or county is not the local government with land use authority over the proposed site. The Director will respond in writing to any Proximate Local Government comments regarding specific best management practices reasonably related to potential significant adverse impacts to public health, safety and welfare, including the environment and wildlife resources, that are within the Commission's jurisdiction to remedy with the proposed Large UMA Facility. Rule 305.A.a.(3)B.

The Commission shall consult with the Colorado Department of Public Health and Environment on an Application for Permit to Drill, Form 2, or an Oil and Gas Location

Assessment, Form 2A, where the operator submits an Application for an Oil and Gas Location Assessment, Form 2A, for a Large UMA Facility. Rule 306.d.(1).A.iii.

Rule 604.c.(4) states that Large UMA Facilities should be built as far as possible from existing building units and operated using the best available technology to avoid or minimize adverse impacts to adjoining land uses. A Form 2A for a Large UMA Facility will not be approved until best management practices addressing certain items are incorporated into the oil and gas location assessment permit; the matters to be addressed are listed in Rule 604.c.(4).B and include fluid leak detection, repair, reporting and record keeping for all above and below ground on-site fluid handling, storage and transportation equipment; zero flaring or venting of gas upon completion of flowback, excepting upset or emergency conditions, or with prior written approval from the Director for necessary maintenance operations; and storage tank pressure and fluid management; among others. The Director may also impose site-specific conditions of approval to ensure that anticipated impacts are mitigated to the maximum extent achievable. Rule 604.c.(4)C.

Rule 302.c. requires that, beginning May 1, 2016, all operators that have filed a Form 1 with the Commission (being any party wishing to engage in oil and gas operations that are regulated by the Commission) shall register with each municipal local jurisdiction (defined as a home rule or statutory city, town, territorial charter city, or combined city and county) and county in which it has an approved drilling unit or a pending or approved Form 2 or Form 2A. A municipal local jurisdiction may request any operator registered within its jurisdiction provide the following information:

> (a) Based on an operator's current business plan as of the date of the request, a good-faith estimate of the number of wells the operator intends to drill in the next five years in the local jurisdiction. A publicly traded company's well estimates may be based on reserves classified as "proved undeveloped" for SEC reporting purposes.
>
> (b) A map showing the location within the local jurisdiction of an operator's existing well sites and related production facilities; sites for which the operator has approved, or has submitted applications for, drilling and spacing orders, Form 2s or Form 2As; and, sites the operator has identified for development on its current drilling schedule for which it has not yet submitted applications for Commission permits.

An operator will provide the well estimates requested pursuant to this subsection using reasonable business judgment based on information known to the operator as of the date the estimates are requested. Well estimates are subject to change at any time at the operator's sole discretion.