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MEMORANDUM

TO: Doug Kemper and Chane Polo, Colorado Water Congress

FROM: Stephen Leonhardt, Esq. and Kole Kelley, Law Clerk

DATE: January 18, 2019

SUBJECT: Colorado Supreme Court Decision in *Colorado Oil and Gas Conservation Commission v. Martinez* (Case No. 17SC297)

A unanimous Colorado Supreme Court reversed the court of appeals on January 14, 2019, in an opinion authored by Justice Gabriel, and held that the Colorado Oil and Gas Conservation Commission properly declined to engage in rulemaking to consider the Respondents' proposed rule. *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 (Jan. 14, 2019). The Court concluded that there was no abuse of agency discretion because the Commission's decision to decline to engage in rulemaking to consider the Respondents' proposed rule was consistent with the applicable provisions of the Colorado Oil and Gas Conservation Act and with the Commission's authority to decide how best to marshal its resources to carry out its statutory duties. *Id.* at 28.

Respondents (Martinez) had proposed a rule that would require the Commission to only issue permits for new wells if the best available science demonstrates, and an independent third party confirms, that drilling can occur in a manner that does not cumulatively impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change. *Id.* at 9. In support of this rule, the Respondents asserted that "[t]he Public Trust Doctrine demands that Colorado act to preserve the atmosphere and provide a livable future for present and future generations of Colorado residents." *Id.* at 10. In its initial order declining to engage in rulemaking, the Commission's findings included that "Colorado courts have expressly rejected a public trust doctrine." *Id.*

The Court's opinion rests on three primary reasons. The first is that the Court's review of an administrative agency's decision as to whether to engage in rulemaking is limited and highly deferential, meaning the Colorado Oil and Gas Commission receives deference to its decision. *Id.* at 14. The second major reason was that the Commission correctly determined that, under the applicable language of the Colorado Oil and Gas Conservation Act, it could not properly adopt the rule proposed by the Respondents. *Id.* at 22. The Court found that the statutory language in question could reasonably be interpreted by either the Commission's interpretation or the

Respondents' interpretation, making the statute ambiguous. *Id.* at 18. Thus, the Court looked to the goals of the Colorado Oil and Gas Conservation Act and the statutory and legislative history of enacted amendments relating to the statutes in question. The Court emphasized that the Colorado Oil and Gas Conservation Act's primary policy goal was to "foster, encourage, and promote the development, production and utilization of the natural resources of oil and gas in the state of Colorado." *Id.* at 19. The Court also viewed the legislative history as reflecting a legislative intent to promote multiple policy objectives, including continued development. *Id.* at 21. This statutory scheme does not allow the Commission to condition all new oil and gas development on a finding of no cumulative adverse impacts to public health and the environment.

The final reason was that, in declining to engage in rulemaking, the Commission reasonably relied on other reasons to deny the rulemaking. *Id.* at 26. The Court emphasized that the Commission reasonably relied on the fact that the Commission was already working with the Colorado Department of Public Health and Environment to address the concerns underlying Respondents' proposed rule, and determined that other Commission priorities took precedence at this time. *Id.* at 26. The Court held that the record amply supported the Commission's findings that the issues implicated by Respondents' petition are being addressed elsewhere, and this is exactly the type of agency action to which the court owes deference. *Id.* at 27. While the Court acknowledged that the Commission also cited Colorado's rejection of the public trust doctrine as another reason to deny the rulemaking, *id.* at 10, the Court did not further address this argument.

Concluding the opinion, the Colorado Supreme Court, *en banc*, reversed the judgment of the court of appeals, holding the Colorado Oil and Gas Conservation Commission's actions were consistent with the applicable provisions of the Colorado Oil and Gas Conservation Act.