



## Office of the County Attorney

Ben Pearlman, County Attorney • Tel: 303.441.3190 • Fax: 303.441.4794 • [ca@bouldercounty.org](mailto:ca@bouldercounty.org)  
Mailing Address: P.O. Box 471 • Boulder, Colorado 80306-0471 • [www.bouldercounty.gov](http://www.bouldercounty.gov)

To: Board of County Commissioners

From: Kate Burke and David Hughes, County Attorney's Office

Date: February 14, 2023

Re: Authorization to Initiate Litigation: *Boulder County v. Extraction et al.*

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### **Action Requested:**

The County Attorney's Office ("CAO") requests authorization to file a complaint against Extraction Oil & Gas, Inc. ("Extraction") and other necessary parties, alleging that several oil and gas leases covering county-owned lands and mineral rights have expired. The precise scope of the complaint, the date of filing, and the necessity for the lawsuit will depend on further developments as described below.

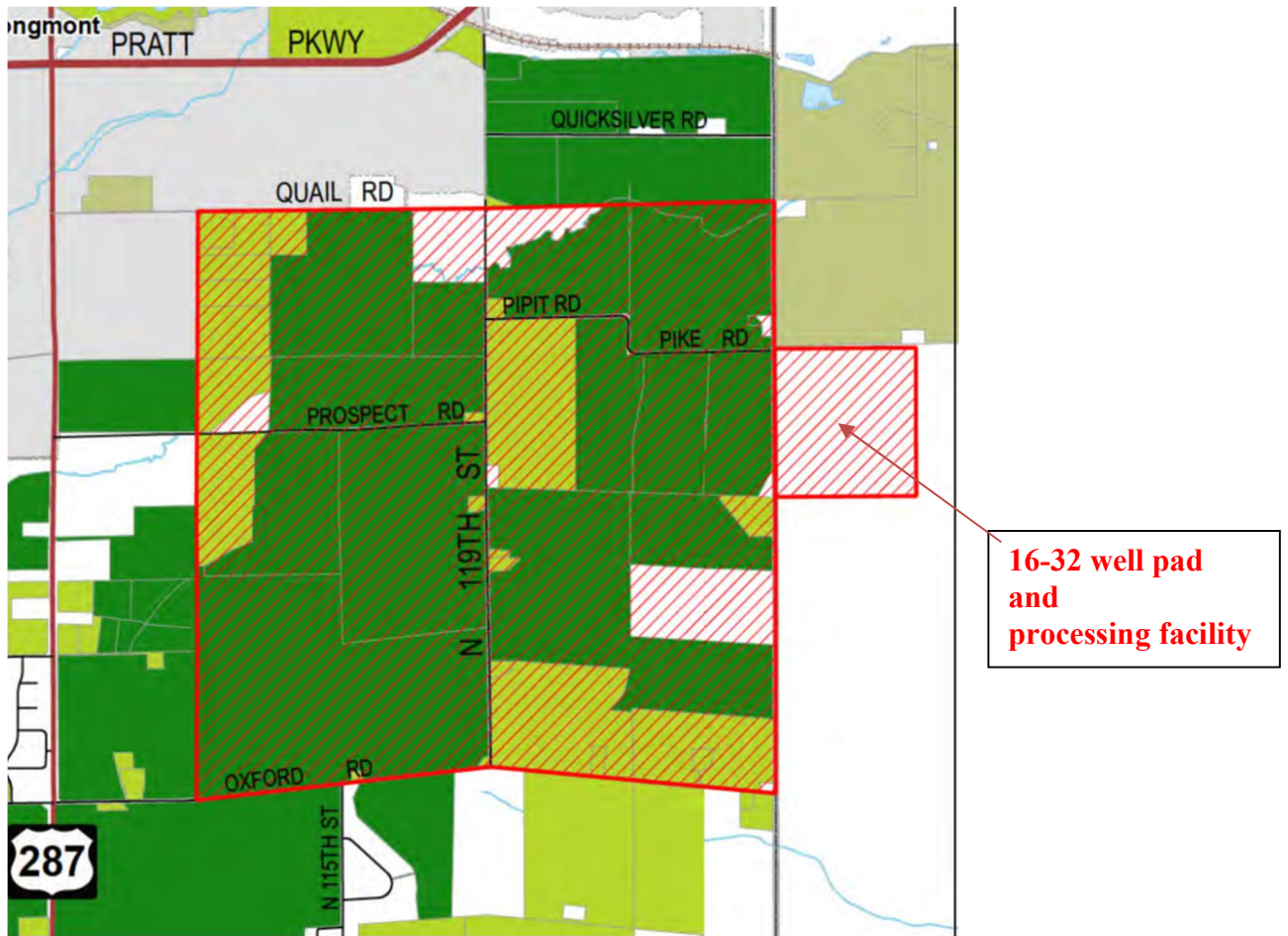
### **Background:**

#### *The Blue Paintbrush Project*

In 2018, Extraction proposed a massive drilling project in Weld County on the Boulder County border. Extraction would drill up to 32 horizontal wells on a 13-acre well pad in Weld County less than 1,000' from the Boulder County line. The project also entails a separate 10-acre storage and processing facility, together with access roads and pipelines between the facilities, all on the same property. Although the pad site is in Weld County, it is located on the Meglemre CE property over which Boulder County holds a conservation easement.

Extraction's project is named "Blue Paintbrush."

The Blue Paintbrush wells are designed to drill vertically approximately a mile and a half down and then drill westward for two miles into Boulder County to extract oil and gas from underneath four square miles of Boulder County open space lands. The drilling area is designated by the Colorado Oil and Gas Conservation Commission ("COGCC") as a drilling and spacing unit, or DSU. The DSU lies 93% in Boulder County and only 7% in Weld County:



The wellbores will be hydraulically fractured or “fracked” to facilitate oil and gas extraction. The county objected to the Blue Paintbrush project and the formation of the Blue Paintbrush DSU when Extraction applied for permits at the COGCC (for more information, see <https://bouldercounty.gov/property-and-land/land-use/planning/oil-gas-development/#eight-north>).

Nonetheless, the COGCC granted all permits necessary to complete the project. The county went on to file two lawsuits related to the project: one challenging the COGCC’s hearing process and one alleging that the county’s conservation easements and many of the pre-existing oil and gas leases over lands in the DSU did not allow for the huge development. Neither of those suits were successful, although the COGCC did make changes to its evidentiary rules in response to the suits.

### *The Mineral Rights Dispute*

In April 2022, after the lawsuits concluded at the appellate courts, the county learned that Extraction was preparing to construct the Blue Paintbrush well pad and planned to start drilling the wells in September 2022. Suspecting that the county owned significant mineral rights in the DSU, the CAO initiated a thorough investigation into the county's mineral ownership in the DSU. In early June, Extraction sent notice that it had accelerated its drilling schedule to begin July 6. After negotiations and the intervention of Boulder County legislators and the COGCC, Extraction agreed to pause its drilling plans pending the mineral ownership questions, although it began work on the Blue Paintbrush well pad itself in June, which is now largely complete.

In September 2022, the mineral title inquiry wrapped up. The reports indicate that numerous oil and gas leases over county property in the DSU have expired for non-production. As a result, the county may own as much as 64% of the mineral acres in the DSU free of any oil and gas leases. Extraction disputes the expiration of most of the Blue Paintbrush DSU leases and the extent of the county's unleased mineral ownership. Due to the parties' dispute, a court order is necessary to determine whether the specific leases at issue have indeed expired.

### *The COGCC Forced Pooling Proceeding*

In July, as the county and Extraction continued discussions on the mineral rights dispute, Extraction filed an application with the COGCC for an order pooling county-owned minerals in the Blue Paintbrush DSU against the county's wishes, pursuant to Section 34-16-116(6), C.R.S., known as the forced pooling statute. The statute allows the COGCC to order an unwilling mineral owner into a working interest relationship with an operator for development of the "nonconsenting" owner's minerals. The nonconsenting owner is charged with its proportionate share of the costs of developing the wells and production facilities plus a penalty of an additional 100% (for 200% total) of its share of several preparatory costs. The nonconsenting owner's share of the costs is taken out of its share of revenues until fully paid, after which the nonconsenting owner receives its full share of revenue. The nonconsenting

owner remains liable for operational costs throughout the lifetime of the well.

To be eligible to request the forced pooling order, Extraction must demonstrate that it owns or controls more than 45% of the mineral rights in the DSU. If the county and its outside experts are correct and the leases under review have expired, the county will own over 60% of the mineral rights and Extraction will not be eligible to obtain a forced pooling order. However, the COGCC will not inquire into or resolve any dispute involving oil and gas leases; that question must be decided by a court.

The county is actively opposing the forced pooling application before the COGCC. The hearing on the application has been repeatedly postponed and is currently expected to occur in early April. The county has requested significant information from Extraction on its mineral ownership claims, which has yet to be provided but is now due February 10. The CAO needs to review any information Extraction ultimately does provide to determine whether it will affect the need for or scope of a lawsuit. However, the CAO requests Board authorization for such a filing in preparation for doing so if and when necessary. If the lease lawsuit is filed, the CAO will ask that the COGCC hearing be postponed until resolution of that litigation and expects that the COGCC will grant that request.

**Outline of the Proposed Complaint:**

The CAO is drafting a complaint that will make the following claims for each of the leases suspected of termination:

1. Declaratory judgment claims finding the leases have expired for lack of production;
2. Failure of Extraction and other defendants to record releases of the leases upon their expiration as required by statute;
3. The county's entitlement to damages for the failure to release the leases as allowed by statute; and
4. Claims for ongoing surface and mineral trespasses on those properties where leases have expired and wells and other facilities continue to operate.

Due to procedural rules, all parties with any interests in the leases, as mineral owners alongside the county or as working interest owners alongside Extraction, must be named as parties. Staff has attempted to consult with each named party in advance of filing the complaint.

The City of Longmont owns mineral rights subject to one of the leases identified in the complaint and shares the county's position that the lease has expired for non-production. Therefore, Longmont is expected to join the lawsuit as a co-plaintiff with the county. There are three other parties, a partnership and two individuals, who also own some mineral rights subject to certain of the leases named in the suit. Staff has contacted these parties and will continue discussions with them to determine how they may avoid or participate in the lawsuit.

**Potential Outcomes:**

If the county is successful with its claims, one or more historic oil and gas leases will be released and the county will own the mineral rights subject to those leases outright. If the subject leases are found to have expired, Extraction will not control more than 45% of the mineral rights in the DSU and will not be able to drill or operate the Blue Paintbrush wells without the permission of the county as majority mineral owner.

If the county is unsuccessful, Extraction will nonetheless have to forcibly pool approximately 600 acres of mineral lands where it agrees that the county owns the minerals without an existing lease. In that case, the county will pursue the legal arguments against the forced pooling of government-owned minerals that it has raised in the COGCC proceeding.