

<p>DISTRICT COURT, BOULDER COUNTY, COLORADO</p> <p>BOULDER JUSTICE CENTER 1777 SIXTH STREET BOULDER, CO 80302 TELEPHONE: 303.441.3750</p>	
<p>Plaintiff: PEOPLE OF THE STATE OF COLORADO <i>ex rel.</i> CYNTHIA H. COFFMAN, in her official capacity as Colorado Attorney General;</p> <p>Plaintiff: THE STATE OF COLORADO;</p> <p>and</p> <p>Plaintiff-Intervenors: COLORADO OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE</p> <p>v.</p> <p>Defendant: COUNTY OF BOULDER, COLORADO;</p> <p>Defendant: THE BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, COLORADO.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><i>Attorneys for Plaintiff-Intervenors</i></p> <p>Mark J. Mathews, Colo. Atty. Reg. No. 23749 Julia E. Rhine, Colo. Atty. Reg. No. 45360 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Telephone: 303.332.1100 E-mail: mmathews@bhfs.com, jrhine@bhfs.com</p>	<p>Case Number: 2017CV030151</p> <p>Division: 3</p>
<p style="text-align: center;">COLORADO OIL AND GAS ASSOCIATION’S AND AMERICAN PETROLEUM INSTITUTE’S JOINT RESPONSE TO BOULDER’S MOTION TO DISMISS</p>	

The Colorado Oil and Gas Association (“COGA”) and American Petroleum Institute (“API”), by and through undersigned counsel, submit this Response to Defendants’ Motion to Dismiss their Joint Complaint.

I. INTRODUCTION

It is undisputed that Boulder County has banned oil and gas development for over five years (“Continuous Moratorium”). It is also beyond dispute that a five-year ban on oil and gas development violates state law, as recognized by the Colorado Supreme Court in *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 2016 CO 28, 369 P.3d 586 (Colo. 2016).

Boulder County seeks to avoid these undisputed facts in its Motion to Dismiss (“Motion”) by arguing that the Continuous Moratorium is really two distinct moratoria ending and beginning on the same day. This lawsuit is moot, Boulder argues, because the “first” moratorium terminated on May 16, 2016, and the “second” moratorium will “likely be moot before this litigation can resolve” the Complaint. Mot. at 4. Boulder also claims this lawsuit is time barred because it was filed more than two years after enactment of the “first” moratorium on February 2, 2012. Mot. at 4-5.

Boulder’s Motion fails because these claims turn upon an irrelevant labeling exercise. It does not matter whether Boulder describes the Continuous Moratorium as a single five-year prohibition or as two distinct legislative acts. The fact remains that Boulder has banned oil and gas development for over five years, and this ban remains in place. This case is not moot because Boulder County currently refuses to accept, process and approve oil and gas applications in violation of state law. As such, this case presents a live controversy not subject to a mootness claim. Additionally, this case is not time barred because a statute of limitations does not begin to run until illegal conduct has been discontinued. Because Boulder presently bans oil and gas development, any applicable statute of limitations period has not even commenced, let alone expired. Accordingly, COGA and API respectfully request that this Court deny Boulder’s Motion to Dismiss.

II. STANDARD OF REVIEW

Boulder’s Motion contends this Court lacks subject matter under C.R.C.P. 12(b)(1) because this case is moot, and that the Complaint fails to state a claim under C.R.C.P. 12(b)(5). Mot. at 3.

A motion to dismiss for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1) is “designed to dispose of cases without requisite jurisdiction at an early stage in the proceedings.” *Tidwell v. City & Cty. of Denver*, 83 P.3d 75, 85 (Colo. 2003). Because “the policy of [the Colorado Supreme Court] has been to resolve disputes on their merits,” a party claiming that jurisdiction is lacking due to mootness bears the burden of establishing that the case is moot, and that burden “is a heavy one.” *Stell v. Boulder Cty. Dep’t of Soc. Servs.*, 92 P.3d 910, 914 (Colo. 2004); *Rezaq v. Nalley*, 677 F.3d 1011, 1008 (10th Cir. 2012) (quoting *Cty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979)).

Motions to dismiss under Rule 12(b)(5) are “viewed with disfavor and are rarely granted under our notice pleadings.” *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992) (internal quotation marks omitted). “[T]he allegations of the complaint must be viewed in the light most favorable to the plaintiff.” *Id.* Accordingly, a trial court may not dismiss a complaint for failure to state a claim unless it appears that the plaintiff has not stated a claim for relief that is plausible on its face. *Warne v. Hall*, 2016 CO 50, ¶¶ 2, 24.

III. ARGUMENT

A. *Boulder’s Motion is based on a mischaracterization of COGA and API’s suit.*

The Motion argues that COGA/API has made “two critical but erroneous assertions” regarding Boulder’s ban and that these assertions require dismissal. Mot. at 2-3.

Boulder first claims that the Continuous Moratorium is not a single prohibition, as COGA and API assert, but is instead two separate prohibitions. Mot. at 2 (citing to Joint Compl. at ¶ 2). As an initial matter, COGA and API recognize that on May 19, 2016, Boulder went through the motions of terminating one ban on processing oil and gas applications while simultaneously creating a new, identical ban. See Joint Compl. at ¶ 2 (referring to “uninterrupted *moratoria*” and “each new moratorium or moratorium extension.”) (emphasis added). But whether a moratorium is sustained by a local government through one or several legislative actions is irrelevant. The Colorado Supreme Court held in *Fort Collins* that a local ordinance banning oil and gas development for five years was preempted by state law because it banned development for longer than a “temporary time-out.” *Id.*, at ¶¶ 32, 34- 35. The Supreme Court was not interested in how Fort Collins characterized or sustained its ban. See *id.*, at ¶ 34 (rejecting argument that moratorium’s “purpose and limited duration” could save it from being preempted). Instead, it focused on the fact that Fort Collins’s ban rendered the state statutory and regulatory scheme for oil and gas development “superfluous” for a lengthy period of time. *Id.*, at ¶30.

Under *Fort Collins*, Boulder’s characterization of the Continuous Moratorium as two separate legislative acts is inconsequential. What matters is that the County has continuously refused to accept, process and approve oil and gas applications for over five years in violation of *Fort Collins*. Boulder cannot cite to a single decision supporting its claim that local governments can evade state law by fragmenting clearly illegal action into smaller acts that may or may not be legal individually.

Boulder’s second and equally meritless contention is that COGA and API have taken the position that local governments across Colorado are forbidden by state law from enacting moratoria of any duration. Mot. at 2-3. But COGA and API have not made this claim because it

is irrelevant to this litigation. This case is not about whether local governments may prohibit oil and gas development for “any” duration. This case instead concerns the legality of Boulder’s ban on oil and gas development for over five years, an issue squarely resolved in the negative by the Colorado Supreme Court.

B. *This case is not moot because the requested relief in this case will have a practical effect.*

Boulder asserts this case should be dismissed for lack of subject matter jurisdiction on mootness grounds because (1) this Court should consider Boulder’s legislative acts banning the exact same activity and having the exact same effect as distinct acts; and (2) the moratorium currently in place “will likely be moot” before a resolution in this case may be obtained. Mot. at 4 (incorporating by reference Boulder’s Motion to Dismiss the Plaintiffs’ Compl. at 11-6).

These arguments are without merit.

A case is not moot if the requested relief will have a practical effect. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P2d 1095, 1102 (Colo. 1998). It is undisputed that if today an operator submitted to Boulder County an application for new oil and gas development, the County would refuse to process it. The Continuous Moratorium therefore continues to harm the interests of COGA and API and their respective members who are barred from initiating oil and gas development in Boulder County. A court order declaring the Continuous Moratorium invalid and unenforceable will redress this harm.

There is no legal or practical reason why this Court should consider each of Boulder’s legislative acts separately. Boulder terminated a ban on application processing and instituted a new ban on application processing on the very same day in the very same document. Pls.’ Ex. 8 to State’s Motion for Summary Judgment. Boulder’s mootness argument turns on the untenable position that a local government can avoid preemption by enacting a continuous series of

moratoria, and then claim that any challenge is moot as to all but the most recently enacted moratorium. This Court should not sanction this transparent effort to avoid the holding in *Fort Collins*.

Regarding Boulder's second theory, mootness depends on whether the controversy exists right now, not whether it might become moot in the future. *Sinclair Transportation Co. v. Sandberg*, 350 P.3d 924, 927 (Colo. App. 2014). It is undisputed that the Continuous Moratorium remains in place. And Boulder's claim that the Continuous Moratorium may be lifted as early as May 1, 2017, is only speculation, which is not a valid basis for dismissal, particularly since Boulder has extended this moratorium no fewer than eight times. No Colorado court has ever dismissed a case based on the "likelihood" of future mootness. Boulder's mootness claim is without merit.

C. The statute of limitations defense does not apply to Boulder's continuous violation of the law.

Boulder argues that COGA's and API's "claims regarding the 'Expired Moratorium' are barred by the statute of limitations." Mot. at 4. But there is no expired moratorium. Boulder County has continued its ban for over five years without interruption. Because the Continuous Moratorium is ongoing, its harms are ongoing, and COGA's and API's members continue to be illegally barred from initiating oil and gas development in Boulder County. A statute of limitations does not begin to run until the illegal conduct has been discontinued. *See Hoery v. United States*, 64 P.3d 214, 218–19 (Colo. 2003) (explaining in the tort and nuisance contexts that, for purposes of when a statute of limitations begins to run, claims only accrue once the offending conduct has ceased). Because Boulder's ban is still in place, any applicable statute of limitations period has yet to commence. Accordingly, Boulder's statute of limitations argument must fail.

IV. CONCLUSION

Each day that Boulder's Continuous Moratorium remains in place it violates state law. Accordingly, this case presents a live controversy not subject to dismissal on mootness or statute of limitations grounds. The Motion to Dismiss should be denied.

Respectfully submitted this 30th day of March, 2017.

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s/ Mark J. Mathews

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ATTORNEYS FOR PLAINTIFF-INTERVENORS
COLORADO OIL AND GAS ASSOCIATION and
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2017, I electronically filed a true and correct copy of the foregoing **COLORADO OIL AND GAS ASSOCIATION'S AND AMERICAN PETROLEUM INSTITUTE'S JOINT RESPONSE TO BOULDER'S MOTION TO DISMISS** with the clerk of Court via the Colorado Courts E-Filing system which will send notification and service of such filing to the following:

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