DISTRICT COURT, COUNTY OF LA PLATA

Civil Action No. _______

COMPLAINT FOR DECLARATORY RELIEF, WRIT FOR CERTIORARI REVIEW AND FOR RELIEF UNDER 42 U.S.C. §§ 1983 AND 1988

THE COLORADO PETROLEUM ASSOCIATION, A DIVISION OF THE ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, INC., A Colorado Corporation,

Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LA PLATA,

Defendant

COMES NOW The Colorado Petroleum Association, a Division of the Rocky Mountain Oil and Gas Association, Inc. ("CPA"), plaintiff, by and through its attorneys, Dugan & Associates, and pursuant to Rules 57 and 106 C.R.C.P. and 42 U.S.C. §§ 1983 and 1988, hereby alleges the following as its complaint for declaratory relief and for writ of certiorari review against the Board of Commissioners of The County of La Plata ("BOCC"):

INTRODUCTION

1. This case involves the BOCC's Resolution No. 1994-31 (the "Resolution"), enacted on May 24, 1994, which adopted an amendment to the La Plata Land Use System ("LPLUS") Fee Schedule. (A copy of the Resolution is attached hereto as Exhibit 1.) Specifically, this case involves the increase in fees enacted by the BOCC for permits for oil and gas facilities ("revised fee schedule"). The Resolution increased the fee for "major" facilities, e.g., compressor stations, from $1,000 to $10,000 and increased the fees for "minor" facilities, e.g., gas wells, from $350 to $5,000.

2. Plaintiff is an incorporated association whose members are actively involved in the development of natural gas in La Plata County (the "County"), i.e., the exploration for, production, storage and transport of natural gas, and who desire to continue to develop natural gas in the County and are thus subject to the revised fee schedule.

3. Plaintiff alleges that the Resolution is infirm for the following reasons: (1) the BOCC failed to provide adequate public notice and to provide for a public hearing as required by Colorado law and the LPLUS itself in violation of the plaintiff's procedural due process rights; (2) the fees are unreasonable and excessive thus resulting in a taking of the plaintiff's members' property without just compensation; (3) if the proposed "fees" are deemed to be "taxes", such taxes are unconstitutional; and (4) the unreasonable and excessive fees are preempted by the state's regulatory scheme, because the unreasonable and excessive fees act to impede and discourage the development of oil and gas resources in the County contrary to the purpose of the state's regulatory scheme which is designed to encourage the development of natural gas resources throughout the state. Plaintiff further alleges that the BOCC deprived plaintiff of its federal constitutional right to substantive and procedural due process in violation of its federal civil rights.

JURISDICTION AND VENUE

4. This action is brought under Rules 57 and 106, C.R.C.P. Pursuant to Rule 57(a), district courts have jurisdiction to issue declaratory judgments.

5. Pursuant to Rule 106, jurisdiction lies in district court for a writ for certiorari review. The act from which plaintiff appeals occurred on May 24, 1994. Thus, this complaint is timely filed.

6. This action involves a claim against a public body, the BOCC, which has its official residence in La Plata County, for an official act done by that body in La Plata County. Thus, venue is proper in La Plata County pursuant to Rule 98(b)(2), C.R.C.P.

7. Pursuant to Section 1.13.2 of the LPLUS, jurisdiction and venue are proper in this Court.

PARTIES

8. Plaintiff CPA is a voluntary, incorporated, non-profit association founded in 1920 and incorporated in Colorado in 1977. The members of the CPA include companies which develop natural gas resources in the state of Colorado, many of which are currently involved in such activity in the County and who desire to continue such development in the County.

9. CPA is suing in its representative capacity on behalf of its members. The purpose of CPA is to, *inter alia*, promote the discovery, development, production, transportation, refining,

conservation and marketing of oil and gas in the Rocky Mountain region, including the State of Colorado, and to foster the best interests of the public and the industry.

10. Members of the CPA are subject to immediate or threatened injury by the BOCC's enactment of the Resolution, because the Resolution will require them to pay substantially increased fees, fees which are unreasonable and excessive, for permits which are required for them to engage in natural gas development in the County. Since the effective date of the Resolution, one member of CPA has paid the increased fee of $5,000 for a permit for a minor oil and gas facility. Members of CPA will file additional applications in the future for oil and gas facility permits which will be subject to the County's revised fee schedule.

11. In addition to the increase in costs associated with their operations in the County engendered by the revised fee schedule, the unreasonable and excessive fees have the practical effect of impeding and discouraging members of CPA from developing natural gas resources in the County.

12. The members of CPA, as a group, constitute the largest property taxpayer in the County. Members of CPA pay more than 30% of all property taxes collected in the County and approximately 20% of all taxes collected for local schools. In addition, members pay property taxes assessed at 87.5% of the actual value of annual production compared to approximately 29% of value paid by other business and approximately 19% of value assessed against homeowners. Furthermore, members of CPA are regularly assessed road fees by the County in connection with granting permits for compressor stations and other facilities, such charges falling outside the permit fee system of the LPLUS.

13. Defendant BOCC is a political subdivision of the State of Colorado.

FACTS

14. The BOCC first exercised regulatory authority over oil and gas development in the County through the enactment of Resolution 1988-53, entitled "Regulation of Oil and Gas Facilities in La Plata County, Colorado." This resolution contains a fee schedule for processing permits for oil and gas facilities. (A copy of this resolution is attached hereto as Exhibit 2.)

15. Resolution 1988-53 provides, in pertinent part, that the regulations "shall be subject to amendment" but that "[n]o such amendments shall be legally effective unless . . . [the BOCC] has conducted a duly noticed public hearing . . . prior to the adoption of any amendment."

16. The BOCC has incorporated its "Regulation of Oil and Gas Facilities in La Plata County, Colorado" into its LPLUS at Section 8.0 et seq.

17. Section 1.13.1(b) of the LPLUS requires that amendments to the LPLUS "shall be considered in accordance with state statutory procedure." Pursuant to C.R.S. § 30-28-116 (1986 Rep. Vol. 12A, Supplement), in order to amend its land use regulations the BOCC is required to provide at least fourteen days notice and to hold a public hearing.

18. Section 1.13.1(b) of the LPLUS further requires that "all amendments [to the LPLUS] require a public hearing, notice of which has been published at least 14 days in advance in a newspaper of general circulation in the County."

19. Adequate public notice was not given of the BOCC's intent to amend the fee schedule at its May 24, 1994 meeting. (See e.g. Partial Transcript of BOCC's May 24, 1994 meeting, a copy of which is attached hereto as Exhibit 3.)

20. Lacking adequate public notice, members of the CPA were not given an adequate and meaningful opportunity to present evidence to the BOCC at a public hearing prior to the adoption of the Resolution.

21. Without a meaningful opportunity to participate in a public hearing, plaintiff and its members, as well as the public, were denied an opportunity to develop an adequate record.

22. The Resolution raises the amount of the fee for a permit for a major oil and gas facility from $1,000 to $10,000 and raises the amount of the fee for a permit for a minor oil and gas facility from $350 to $5,000.

23. The effective date for the Resolution is June 1, 1994.

24. The fees for oil and gas permits contained in the Resolution are arbitrary, capricious, excessive and unreasonable. These fees are not reasonably related to, nor a fair approximation of, the administrative costs incurred by the County in processing the permit applications.

25. The fees paid by the members of the CPA may be used by the County to defray general governmental expenses unrelated to the administrative costs incurred by the County in processing oil and gas facility permits.

26. The increase in permit fees was not made a ballot issue subject to a vote of the voters of La Plata County.

27. The State of Colorado has enacted regulations to govern the development of oil and gas resources in the State of Colorado,

the "Oil and Gas Conservation Act." C.R.S. § 34-60-101, et seq. (1984 Repl. Vol. 14).

28. The purpose of the Oil and Gas Conservation Act is the achievement of the state's interest in fostering, encouraging, and promoting the development, production, and utilization of the natural resources of oil and gas in the State of Colorado. C.R.S. § 34-60-102(1) (1984 Repl. Vol. 14).

29. It is the State of Colorado's policy to encourage by every appropriate means, the full development of the state's natural resources for the benefit of all citizens of Colorado. C.R.S. § 24-33-103, et seq. (1988 Repl. Vol. 10B).

30. By charging unreasonable and excessive fees for oil and gas facilities, the revised fee schedule inhibits and discourages the development of natural gas resources in the County contrary to the State of Colorado's interest.

31. An actual legal controversy exists between the parties.

32. Judgment in this matter will serve to resolve the legal controversy.

33. The BOCC deprived the plaintiff's members of their federal constitutional rights to substantive and procedural due process under color of state law.

CAUSES OF ACTION

A) PROCEDURAL DUE PROCESS

34. Plaintiff repeats and realleges paragraphs 1-33.

35. The BOCC failed to provide adequate public notice of its May 24, 1994 meeting at which it enacted the Resolution in violation of the plaintiff's members' procedural due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution, U.S. Const., amend. XIV, and by the Constitution of the State of Colorado, Const. Colo. art II, § 25.

36. The BOCC failed to provide adequate public notice of its May 24, 1994 meeting at which its enacted Resolution in violation of C.R.S. § 30-16-116 and in violation of the LPLUS at Section 1.13.1(b). Further, failure of the BOCC to follow its own established procedures violates the plaintiff's members' procedural due process rights.

37. By depriving plaintiff of adequate public notice, the BOCC deprived plaintiff of its right to meaningfully participate

in a public hearing, to present evidence at such a public hearing and to develop a record, in violation of the plaintiff's members' procedural due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution, U.S. Const., amend. XIV, and the Constitution of the State of Colorado, Const. Colo. art II, § 25.

38. By depriving plaintiff of adequate public notice, the BOCC deprived plaintiff's members' of their right to meaningfully participate in a public hearing, to present evidence at such a public hearing and to develop a record in violation of C.R.S. § 30-16-116 and in violation of the LPLUS at Section 1.13.1(b).

B) SUBSTANTIVE DUE PROCESS - TAKINGS CLAIM

39. Plaintiff repeats and realleges paragraphs 1-38.

40. The revised fees are unreasonable, excessive, arbitrary and capricious. The revised fees are not reasonably related to, nor a fair approximation of, the administrative costs incurred by the County in processing the permit applications. Therefore, the revised fees are unconstitutional because they effect a taking of the plaintiff's members' property without just compensation in violation of the takings clause of the Fifth Amendment of the United States Constitution and the takings clause of the Colorado Constitution, Colo. Const. art. II, § 15.

C) UNCONSTITUTIONAL TAX

41. Plaintiff repeats and realleges paragraphs 1-40.

42. The revenues received by the County from application fees paid by members of the CPA for processing oil and gas facility permits may be used by the County to defray general governmental expenses unrelated to the administrative costs incurred by the County in processing oil and gas facility permits. This renders the special fee the equivalent of a tax.

43. Furthermore, the revised fees assessed for oil and gas facility permits are not reasonably designed to meet the administrative cost incurred by the County in processing the permit applications. Therefore, the revised fees constitute "taxes" imposed against the members of the CPA.

44. To the extent that the revised "fees" are deemed to be "taxes" as opposed to "special fees", these taxes were implemented in violation of the Colorado Constitution, Colo. Const. art. X, § 20, which requires that any increase in taxes be approved through a ballot issue and are therefore void *ab initio*.

D) PREEMPTION

45. Plaintiff repeats and realleges paragraphs 1-44.

46. The revised fee schedule impedes and discourages the development of oil and gas resources in the County. This practical effect of the Resolution is in direct contravention to the overall purpose of the State's regulatory scheme for oil and gas which is to promote the achievement of the state's interest in fostering the efficient development, production and utilization of oil and gas resources in the state. Therefore, the revised fee schedule is preempted by the state's regulation of oil and gas development.

E) FEDERAL CIVIL RIGHTS

47. Plaintiff repeats and realleges paragraphs 1-46.

48. BOCC, acting under color of state law, deprived plaintiff's members of the federal constitutional right to substantive and procedural due process. Pursuant to 42 U.S.C. § 1983, the BOCC's action results in a violation of the plaintiff's members' federal civil rights.

49. Pursuant to 42 U.S.C. § 1988, plaintiff is entitled to attorney's fees in connection with its civil rights action under 42 U.S.C. § 1983.

WHEREFORE, pursuant to Rule 57 C.R.C.P., the plaintiff prays that this Court:

A. Declare that the BOCC violated the procedural due process rights of the members of the CPA guaranteed by the Fourteenth Amendment of the United States Constitution and by the due process clause of the Colorado Constitution, Colo. Const., art. II, § 25, by failing to provide adequate public notice of the meeting at which the revised fee schedule was adopted and therefore that the revised fee schedule is void _ab initio_.

B. Declare that the BOCC violated the procedural due process rights of the members of the CPA guaranteed by the Fourteenth Amendment of the United States Constitution and by the due process clause of the Colorado Constitution, Colo. Const., art. II, § 25, by failing to provide the members of the CPA with a meaningful opportunity to participate in a public hearing on the proposed revised fee schedule, to present evidence at such a hearing and to develop a record and therefore that the revised fee schedule is void _ab initio_.

C. Declare that the revised fee schedule is arbitrary, capricious, excessive and not reasonably related to, nor a fair approximation of, the administrative costs incurred by the County in processing the permit applications and therefore violates the

takings clause of the Fifth Amendment of the United States Constitution and the takings clause of the Colorado Constitution, art. II, § 15.

D. Declare that to the extent that the revised "fees" are deemed to be "taxes", that the BOCC failed to follow the strictures of the Colorado Constitution, Colo. Const. art. X, § 20, which requires that a ballot issue be approved for any new tax and therefore that the "taxes" imposed by the Resolution are unconstitutional taxes.

E. Declare that the revised fee schedule is in direct conflict with the Oil and Gas Conservation Act because it impedes and discourages the development of oil and gas resources in the County and that it is therefore preempted and invalid.

F. Provide for such other and further relief that the Court may deem appropriate under the circumstances.

WHEREFORE, pursuant to Rule 106, C.R.C.P., the plaintiff prays that this Court enter an Order:

A. Finding that the defendant Board of County Commissioners of the County of La Plata abused its discretion, exceeded its jurisdiction and acted in an arbitrary and capricious manner in enacting Resolution 1994-31;

B. Finding that Resolution 1994-31, which increases the fees for minor and major permits for oil and gas facilities, is null and void; and

C. Such other and further relief that the Court may deem appropriate under the circumstances.

WHEREFORE, pursuant to 42 U.S.C. §§ 1983 and 1988, the plaintiff prays that this Court enter an Order:

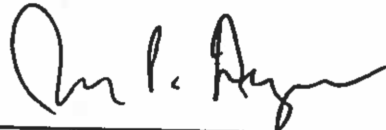
A. Declaring that the BOCC, under color of state law, deprived plaintiff's members of their federal constitutional right of substantive and procedural due process and therefore violated their federal civil rights pursuant to 42 U.S.C. § 1983.

B. That plaintiff is entitled to attorney's fees pursuant to 42 U.S.C. § 1988; and

C. Such other and further relief that the Court may deem appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 23rd day of JUNE, 1994.

DUGAN & ASSOCIATES

By: 

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Furthermore, we conclude that if we can establish at a public hearing (at which we are permitted to present evidence) that the proposed fee is not reasonably related to the costs of providing the services for which the fee is imposed, such a fee schedule will run afoul of the takings clause of the Colorado Constitution and the Fifth Amendment of the United States Constitution. If the constitutionally based takings argument is rejected, there is precedent to hold that an unreasonable fee is an illegal exercise of a municipality's power.

Another constitutional argument is that the fee schedule violates the members' right to equal protection under the law. One justification for the increased fee imposed against oil and gas producers is to cover expenses involved in maintaining county roads and repairing damage to the aquifers. Since no other persons or entities are similarly being charged, an argument lies that the oil and gas producers are being treated unfairly in violation of their right to equal protection.

Since the practical result of the fee is to discourage oil and gas production in La Plata County, and if we can establish these facts at public hearing or trial, then an argument lies that this regulation is preempted by the state's statutory scheme of regulating oil and gas production the intent of which is to promote production of natural resources in the state.

Finally, there appear to be no procedural bars to bringing this suit.

II) APPLICABILITY OF RULE 106(a)(4)

An important preliminary question which must be resolved before proceeding with a judicial challenge to the revised fee schedule is whether Rule 106 is applicable to the instant facts. It is our opinion that Rule 106 is applicable and that our complaint should be filed under both Rule 106 and Rule 57, which provides for declaratory relief.

Rule 106(a)(4) provides, in pertinent part, that a party may petition the district court:

> Where any governmental body . . . exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law . . .

The first threshold requirement is whether there is a "plain, speedy and adequate remedy otherwise provided by law." At first blush, the availability of a Rule 57 action for declaratory relief appears to preclude bringing an action under Rule 106. However, in Snyder v. City of Lakewood, 542 P.2d 371, 375 (Colo. 1975), the Colorado Supreme Court addressed the issue of whether attacks on rezoning decisions by municipalities should be brought under Rule 57 or Rule 106. The Court held that "Rule 106(a)(4) is now an exclusive remedy to challenge a *rezoning* determination where the entire *general* zoning ordinance is not challenged and where a review of the record would be an adequate remedy." (Emphasis in original.) The Court's reasoning was based in large part on its determination that when a municipality enacts a general zoning ordinance it is acting in a legislative capacity but when it enacts a rezoning ordinance the process is adjudicative in nature. Id. at 373-74.

Unfortunately, La Plata County has not adopted a "zoning ordinance" which it is amending but has instead adopted a master land use plan pursuant to 30-28-106. Therefore, the rule set forth in Snyder is not applicable per se to the facts at hand. This is especially true since it has been held that amendments to a master land use plan are advisory only and legislative in nature. Stuart v. Board of County Commissioners, 699 P.2d 978 (Colo. App. 1985). However, the Court's reasoning in Snyder and the specific language of the County's oil and gas regulations lend support to the applicability of Rule 106 to the instant facts.

The Snyder Court set forth three requirements for determining whether an action by a municipal legislative body, such as the Board of County Commissions of La Plata County ("County"), is quasi-judicial. Specifically, in order for an action to be deemed quasi-judicial in nature there must be state or local laws which require: (1) that the body give adequate notice to the community before acting; (2) that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) that the body make a determination by applying the facts of a specific case to certain criteria established by law. Id. at 374. The facts in this case meet the requirements of the Snyder test.

First, the terms of the County's Land Use System regulations provide for a public hearing and a 14 day public notice requirement. La Plata County Land Use System at Section 1.13.1(b). (A copy of the pertinent parts of the Land Use System regulations are attached hereto.) While Section 8.1.8 of the Land Use System provides that application fees shall be imposed in connection with issuing permits for oil and gas operations and facilities, this section provides that such fees will be enacted by separate resolution by the County. The County might argue that this language removes the fee schedule from the Land Use System regulations and, therefore, from the public hearing and public notice requirements. However, such an argument should prove to be a futile exercise in sophistry and semantics especially in light of the specific language of the resolution by which the County originally adopted its oil and gas regulations.

The language of the County's resolution which originally enacted the County's regulation governing oil and gas operations in the County, Resolution No. 1988-53, includes the fee schedule at issue herein (but at the original fee amounts) and provides that such regulation "shall be subject to amendment" but that "[n]o such amendments shall be legally effective unless . . . this Board [of County Commissioners] has conducted a duly noticed public hearing, held in accordance with the requirements of Colorado law, prior to the adoption of any amendment." (A copy of Resolution No. 1988-53 is attached hereto.) Thus, the first two elements of the Snyder quasi-judicial test - public notice and public hearing requirements - are met by local law.

It can be argued that the third element is met by the takings clause of the Colorado Constitution, Article II, Section 15, which requires a fee or special assessment to be reasonably related to the costs of providing the service. (This standard is discussed in more detail below.)

Therefore, based on the specific and unambiguous language of the County's Land Use System regulations and of the very regulation at issue, it can be easily argued that any amendment to the regulation, including the fee schedule, is quasi-judicial in nature and that pursuant to Snyder, Rule 106(a)(4) applies as the exclusive remedy.

The most immediate concern regarding filing under Rule 106(a)(4) is the thirty day requirement. A complaint filed

under Rule 106 is due by June 23, 1994, one week from today. This deadline presents no problem for us in terms of preparing the complaint but it does force you to make a decision as quickly as possible, preferably by next Wednesday.

Generally, the major problem with proceeding under Rule 106 is the standard of proof - one must establish that the County's action was an abuse of its discretion or that the County exceeded its jurisdiction. Such a determination must be based on the record of the public hearing. However, in this case, there was no public hearing and this failure forms the basis of our procedural due process argument. Our other constitutional arguments have their own standards, e.g., the equal protection argument in this case is based on the rationality standard, so the abuse of discretion standard should not present the obstacle it normally poses when one proceeds under Rule 106.

We strongly recommend also filing under Rule 57 for Declaratory Relief. This will provide a "back-up" in the event the district court holds that Rule 106 is not applicable or that both Rule 57 and Rule 106 are applicable.

III) CAUSES OF ACTION

There are several causes of action which can be pled in a complaint based upon the instant facts. These causes of action (and the basis of these claims) include: failure to provide adequate procedural due process (failure to given adequate notice of the change in the fee schedule and to provide for a public hearing); a takings claim (the fee is not reasonably related to the costs associated with the service provided); illegal special fee (the fee is not reasonably related to the costs associated with the service provided); equal protection (gas producers are treated differently from others using county services); and preemption (the County's excessive fee schedule discourages gas production contrary to the state regulatory scheme which is aimed at encouraging gas production).

a) Procedural Due Process

Our first cause of action is that the members' procedural due process rights were violated by the County's failure to provide adequate public notice of a public hearing and to

provide the opportunity to participate in a public hearing and present evidence. As set forth above, the public notice/public hearing requirements are set forth on the face of the County's Land Use System regulations and the resolution adopting the first fee schedule for oil and gas operation and facility permits. Failure to follow their own procedural requirements render the fee schedule void ab initio.

b) Takings Argument

Our second cause of action is that the fees are not reasonably related to the costs incurred in providing the services for which the fees are imposed. Unreasonable user fees are violative of the takings clause of the Fifth Amendment of the United States Constitution. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980) (a user fee violates the taking clause if it is not "reasonably related to the costs of using [the government service]"); United States v. Sperry Corp., 493 U.S. 52, 60 (1989) (a user fee is not a taking if it represents a "fair approximation of the cost of the benefits supplied", quoting Massachusetts v. United States, 435 U.S. 444, 463 (1978)). (Emphasis supplied.)

Furthermore, the Colorado Supreme Court has held that a special assessment which is unreasonable and unjust or which does not confer a benefit to the person against whom the tax is assessed, violates the takings clause of the Colorado Constitution, Article II, Section 15. Ochs v. Town of Hot Sulphur Springs, 407 P.2d 677 (Colo. 1965); City and County of Denver v. Greenspoon, 344 P.2d 679, 681 (Colo. 1959); Santa Fe Land Improvement Company v. City and County of Denver, 2 P.2d 238, 240 (Colo. 1931); and Ross v. City and County of Denver, 2 P.2d 241, 243 (Colo. 1931).

Pursuant to the delineations of charges set forth in Bloom, infra, the fee at issue herein is a "special fee" as opposed to a "special assessment." While the Colorado cases involving the Colorado Constitution's takings clause deal with "special assessments" as opposed to "special fees", the reasoning of these cases is equally applicable to "special fee" cases.

c) Illegal Special Fee

In Bloom v. City of Fort Collins, 784 P.2d 304, 307-9 (Colo. 1990), the Colorado Supreme Court distinguished charges imposed by municipalities among *ad valorem* taxes, excise taxes, special assessments and special fees. Based on the Court's definitions of these types of charges, the fee imposed by the County is a "special fee" and not a tax. Thus, any attack on the fee must fall under the parameters set forth in Bloom.

In Bloom, the Court held that a special fee is valid "where the fee is is reasonably designed to defray the cost of the service provided by the municipality." See also Loup-Miller Construction Company v. City and County of Denver, 676 P.2d 1170 (Colo. 1984); and Western Heights Land Corp. v. City of Fort Collins, 363 P.2d 155 (1961). Conversely, it follows that a special fee which is not "reasonably designed to defray the cost of the service provided by the municipality" is an illegal fee.

The reasonableness test is identical to the test for a takings clause challenge. In other words, if we meet the test we should prevail on both the takings causes of action (federal and state) and the illegal special fee action. However, all three causes of action should be pled in the event the court rules that one or two causes of action are inapplicable to the facts at hand.

The Court in Bloom also held that a "special fee . . . might be subject to invalidation as a tax when the principal purpose is to raise revenues for general municipal purposes rather than to defray the expenses of the particular service for which the fee is imposed." 784 P.2d at 308, citing Zelinger v. City and County of Denver, 724 P.2d 1356 (Colo. 1986) While the purpose of the permit fee scheme is to defray expenses involved in regulating the gas companies, if the fees are unreasonably high and excessive of costs, the excess funds will end up as general revenue, or as revenue for the Planning Department to use to defray the costs of expenses not associated with oil and gas regulation. Therefore, as a practical matter, the use of excess fees for general purposes renders the fee illegal. This provides a second approach to attack the fee. However, this defect can be cured by the County if it specifically provides that the oil and gas fees

received by the County are to be used exclusively to met its expenses in regulating oil and gas activity.

d) Equal Protection

Another constitutional argument is that the fee schedule violates the equal protection clause of the United States Constitution, U.S. Const. amend. XIV, and that of the Colorado Constitution, Colo. Const. art. II, § 25. The equal protection clause applies when similarly situated persons are subject to different treatment. J.T. v. O'Rouke, 651 P.2d 407, 413 (Colo. 1982). In this case, Bob Bright, the head of the LaPlata County Planning Department, justified the fee in the Durango Herald based upon the costs incurred by the county in maintaining county roads as a result of the use of county roads by the gas companies and based upon the alleged adverse affect of drilling on the county aquifers. Since no other entities, including residents using water wells and county roads, are assessed a special fee for similar use, the gas companies are being treated differently. However, since the classification does not create a suspect class, i.e., one based on race or religion, the test is one of rationality, the lowest threshold. It is very hard to prevail in the face of a rationality test. See e.g. Board of County Commissioners v. Flickinger, 687 P.2d 975, 982-83. Nonetheless, we believe that this cause of action is worth pursuing.

e) Preemption

Finally, if we allege and can demonstrate that the practical effect of the increase in fees is to discourage oil and gas development in La Plata County, we might be able to prevail on an argument that these fees are preempted by the State's general oil and gas regulatory scheme.

In Bowen/Edwards v. Board of County Commissioners, 830 P.2d 1045, 1059 (Colo. 1992), the Colorado Supreme Court recognized that "[s]tate preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." The Court opined that determinations of conflict had to be determined on an "ad hoc basis under a fully developed evidentiary record" and remanded the case to district court. Id. at 1060.

In the instant case, the substantial fees, which are not reasonably related to the costs incurred by the County in regulating oil and gas activities, act to discourage development of oil and gas resources which is in direct contravention to the "achievement of the state's interest in fostering the efficient development, production and utilization of oil and gas resources in the state." Id. at 1059-60, citing section 34-60-102(1), 14 C.R.S. (1984).

IV) POSSIBLE PROCEDURAL BARS

As discussed in our memo of June 15, the standing issue should not present a procedural bar to an association bring the suit in its representative capacity.

In addition, as set forth above, the terms of the Land Use System regulations provide that any appeal from a final decision issued by the Board of County Commissioners is appealable to the La Plata District Court under Rule 106. Land Use System at Section 1.13.2 Thus, there is no exhaustion of administrative remedies argument which would preclude our filing suit in district court.

Finally, as discussed above, the suit should be filed by Thursday, June 23 to met the 30 day deadline for Rule 106 actions.