Fracking and the public trust doctrine: Did the court of appeals silently adopt an 800-year-old legal principle disavowed in Colorado?

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In *Martinez v. Colorado Oil & Gas Conservation Commission*, ---P.3d ---, 2017 COA 37 (Colo. App. 2017), the Colorado Court of Appeals succeeded in doing what various public interest groups in Colorado have been trying to do for decades when it adopted the public trust doctrine to curtail fracking in the state—at least, that is, according to the Colorado Attorney General's office.

In January 2018, the Colorado Supreme Court agreed to review *Martinez*, which elevated the protection of public health and the environment to "a condition that must be fulfilled" before oil and gas drilling can commence in Colorado. In asking for that review, Colorado's Attorney General argued that the court of appeals not only rewrote Colorado's Oil and Gas Conservation Act, but "in substance, adopt[ed] the public trust doctrine." The Court has scheduled oral argument for October 16, 2018.

What is the public trust doctrine and why is the Colorado Attorney General worried about it?

Back in 1215, as part of the deal struck in the Magna Carta, the unpopular British monarch agreed to forfeit private fishing rights previously granted to members of his court. The theory behind this agreement was that certain public interests and rights were inalienable and that any title granted to public trust resources was subject to the rights of the public.

This concept was eventually codified as the public trust doctrine, under which "all the public lands of the nation are held in trust [by the government] for the people of the whole country." *Light v. United States*, 220 U.S. 523, 537 (1911). Where adopted, the government owes a duty to protect and preserve the lands and natural resources for the public. While each state is free to adopt the public trust doctrine, Colorado's voters and courts have rejected it. *See City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573 (Colo. 2016).

In *Martinez*, Colorado's Attorney General faces the prospect of the doctrine gaining a toehold in Colorado precedent. That concern undoubtedly was heightened by lawsuits throughout the country that have tried to advance environmental causes using public trust doctrine litigation, most recently on the issue of global climate change. Indeed, in neighboring New Mexico, a court of appeals recently declared that the atmosphere was a public trust resource for the benefit of the

people. More importantly, the public trust doctrine clearly has the potential to morph into a principle of extremely broad application—covering a host of public health, human safety, and environmental impact issues.

Does *Martinez* allow the public trust doctrine to emerge in Colorado*?*

In short, no. While petitioners' briefing to the Supreme Court emphasized that the children's rulemaking petition relied on and was rooted in the public trust doctrine, *Martinez* neither adopted, approved, nor implicitly endorsed the doctrine. In fact, the court disclaimed the public trust doctrine and stated that it was not addressing any arguments related to it because they had been abandoned on appeal.

Martinez, at its core, was an exercise of statutory interpretation. Its facts begin in 2013, when six children asked the Colorado Oil and Gas Conservation Commission (the body charged with regulating the state's oil and gas production) to promulgate a rule requesting that it:

> not issue any permits for the drilling of a well for oil and gas unless … that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change.

The commission denied the petition, determining that the proposed rule was beyond its authority, contradicted its nondelegable duties, and relied on the public trust doctrine, which it noted "has been expressly rejected in Colorado." It further declared that it was statutorily required to "balance" oil and gas development with public health and safety. Thus, the commission concluded, it could issue drilling permits unless the harm to public health and safety outweighed the public benefit of oil and gas development. The district court affirmed the denial.

On appeal, the children argued that the commission and district court ignored the "plain and ordinary meaning" of the statute, which states that it is in the public interest to:

> [f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado *in a manner consistent with* protection of public health, safety, and welfare, including protection of the environment and wildlife resources.

C.R.S. § 34-60-102(1)(a)(I) (emphasis added). A divided court of appeals panel agreed, holding that the term "in a manner consistent with" did "not indicate a balancing test but rather a condition that must be fulfilled." In other words, fostering balanced, nonwasteful development is in the public interest only when that development is completed "subject to" the protection of public health, safety, and welfare.

The Colorado Supreme Court recognized *Martinez* for what it is—a question of statutory interpretation

While petitioners raised the specter that the public trust doctrine had gained hold, the Colorado Supreme Court granted the petitions for writ of certiorari filed by the Colorado Oil and Gas Conservation Commission, American Petroleum Institute, and Colorado Petroleum Association, on a narrow issue of statutory interpretation. Specifically: "[w]hether the court of appeals erred in determining that the … Commission misinterpreted section 34-60-102(1)(a)(I), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare." In so doing, the Court gave no indication that it was focused on the public trust doctrine or concerned that the court of appeals had implicitly endorsed or adopted it. The Supreme Court is more likely to focus on the contagion effect suggested by amici National Association of Manufacturers, *et al*.—that other states with similarly constructed statutes will consider *Martinez* persuasive authority.

In short, while petitioners may raise and the Court may address public trust arguments, it is likely that the Supreme Court will resolve *Martinez* on standard principles of statutory interpretation and not resort to a foray into an ancient doctrine repeatedly rejected in the state. Thus, for now at least, it seems the public trust doctrine will remain dead in the (public) water in Colorado.