



Colorado's "Commercial Discovery Rule" Keeps Boulder County Leases Alive

By: [Karen Spaulding](#)

The Colorado Court of Appeals ("COA") recently applied the "commercial discovery rule" to stave off the Boulder Board of County Commissioner's ("Boulder") argument that Crestone Peak Resources Operating LLC's ("Crestone Peak") two oil and gas leases terminated when it temporarily shut-in the wells on these leases due to pipeline maintenance undertaken by Anadarko. *Board of County Comm'ners of Boulder County v. Crestone Peak Resources Operating LLC*, 20210COA67 (May 13, 2021) can be accessed [here](#).

Unapologetically, Boulder decided to sue Crestone Peak to terminate the leases in 2019 after having accepted tens of thousands of dollars in royalties after the wells re-commenced production¹ in 2014, through the time of the filing of the lawsuit. Boulder argued that since there was no actual extraction and marketing of hydrocarbons during the temporary cessation of production (122 days) during the pipeline's maintenance, the leases terminated.

While the COA found Boulder's acceptance of royalties for 5 years prior to filing the lawsuit suspect, it determined that if Boulder's argument prevailed the shut-in clauses in the leases would be rendered meaningless; i.e., if there is no extraction of hydrocarbons from a well and no re-working or drilling of a new well within 90 days so the lease terminates, then the lessee would never get to utilize the shut-in provision which requires the shut-in payment be made annually after being shut-in. The COA found Boulder's argument anathema to the rule of contract interpretation in which the Court must give effect to all terms in the parties' agreement.

Thus, the COA upheld the trial court's grant of summary judgment in favor of Crestone Peak that its leases did not terminate in 2014 during the temporary pause in extraction of hydrocarbons when Anadarko shut down its pipeline for maintenance. Crestone Peak's wells never ceased production in paying quantities, even though there was a temporary pause in extraction, because production of these wells was "satisfied by discovery [of hydrocarbons] in commercial quantities."

As rationale for its decision, the COA discussed the implied covenant to market which is found in every oil and gas lease in Colorado, which protects lessors, such as Boulder, from a lessee holding leases for speculative purposes. Conversely, the commercial discovery rule protects lessees who

¹ There was no dispute among the parties that the wells produced in paying or commercial quantities at the time each was temporarily shut-in in 2014 for pipeline maintenance, and at all times thereafter when producing.

have expended millions of dollars for oil and gas development who are then faced with a temporary pause in extraction and marketing, like the situation that confronted Crestone Peak here.

Despite the logical conclusion reached by both the trial court and COA, Boulder recently filed its petition for writ of certiorari with the Colorado Supreme Court.

Please contact [Karen Spaulding](#) with any questions about the issues raised in this case.