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ANYTHING NEW UNDER THE SUN? WHEN VOTERS DIRECTLY REGULATE ENERGY AND MINERAL DEVELOPMENT

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§ 2.01 Introduction*

Ballots for the 2018 midterm elections included a variety of measures to regulate energy and mineral development. Some measures dealt with the development of natural resources directly and others dealt with the impacts of such development. For example, in Colorado voters considered a new oil and gas setback requirement of 2,500 feet.¹ Montanans voted on a measure to prohibit the permitting of new hardrock mines unless their reclamation plans avoid the need for perpetual treatment.² Alaska voters considered new permitting requirements for development to increase protection of salmon,³ and in Florida, voters saw a proposed ban on offshore drilling.⁴ Voters in Washington State considered two natural resources-related measures: an advisory vote on whether to repeal an oil spill tax⁵ and an initiative to impose a carbon emissions fee.⁶

Almost all these measures failed to win voter approval. This chapter will review some of the statewide ballot measures. In so doing, it will consider the question of whether there are any new lessons to learn from this latest spate of initiatives or whether efforts simply plowed familiar ground. Section 2.02 briefly will address the origins of ballot measures in the United States, followed by a discussion of some of the common characteristics of natural resources-related measures. Section 2.03 will review key measures that voters rejected in the 2018 elections and highlight some of the reasons for their defeat. Section 2.04 will examine how measures in Colorado and Washington State moved from the ballot to the legislature, with mixed results. Section 2.05 will delve into the initiatives that succeeded. One was a direct and immediate limitation on oil and gas development in Florida,

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¹See § 2.04[1], *infra*.

²See § 2.03[3], *infra*.

³See § 2.03[2], *infra*.

⁴See § 2.05[1], *infra*.

⁵See League of Women Voters of Wash., “Washington Ballot Summary: Advisory Vote No. 19” (2018).

⁶See § 2.04[2], *infra*.

and one was an indirect and future limitation on fossil fuels in Nevada in favor of renewable energy. Section 2.06 describes some of industry's efforts to affect the outcomes of such measures by addressing the economic and environmental issues generally, rather than with respect to any specific initiative. It will also touch on some project-specific efforts to court the public. Finally, § 2.07 will offer some thoughts on what this latest round of measures may signal for the future.

§ 2.02 Background on Natural Resources Ballot Initiatives

Much has been written about citizens' abilities to legislate directly through both direct and indirect ballot initiatives. Voters in 24 states may avail themselves of this form of "direct democracy."⁷ These practices date back to the Populist and Progressive eras, with South Dakota being the first state to adopt such a provision in 1898.⁸ Debates about the pros and cons of initiatives abound.⁹ This chapter does not enter that fray, but instead surveys the natural resources landscape of the 2018 election cycle¹⁰ and offers some observations about how and why most measures failed, a few succeeded, and others lived to see another day.

With respect to initiatives regarding natural resources development, there are some familiar patterns. Industry far outspent proponents of measures seeking to restrict development and provide greater environmental protections. Researchers have disagreed about whether money can buy outcomes. Most research concludes that though money cannot buy victory, it does seem to help with defeat.¹¹ In other words, this "asymmetric effect of campaign spending may enable [business] groups to defend a status quo

⁷See Nat'l Conf. of State Legislatures, "Initiative and Referendum States," <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx>.

⁸See Matt Qvortrup, *Direct Democracy: A Comparative Study of the Theory and Practice of Government by the People* 28–31 (2013); Todd Donovan & Shaun Bowler, "An Overview of Direct Democracy in the American States," in *Citizens as Legislators: Direct Democracy in the United States* 1–3 (Shaun Bowler, Todd Donovan & Caroline J. Tolbert eds., 1998); David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 20–25 (1984).

⁹See, e.g., Joshua J. Dyck & Edward L. Lascher, Jr., *Initiatives without Engagement: A Realistic Appraisal of Direct Democracy* (2019); Marcilynn A. Burke, "The Emperor's New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box," 84 *Notre Dame L. Rev.* 1453 (2009); Daniel A. Smith & Caroline J. Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* (2004).

¹⁰For analysis of earlier natural resources-related measures, see generally James D. Linxwiler, "Voter Initiatives: Mineral Development and the Will of the People," 59 *Rocky Mt. Min. L. Inst.* 15-1 (2013); Burke, *supra* note 9.

¹¹E.g., Arthur Lupia & John G. Matsusaka, "Direct Democracy: New Approaches to Old Questions," 7 *Ann. Rev. of Pol. Sci.* 463, 470–72 (2004); David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* 86 (2001).

policy against an energetic challenge.”¹² At least one study, however, challenges the conventional wisdom that spending in support and in opposition have asymmetric effects on the outcomes of ballot initiatives.¹³ That is, the level of funding may influence both success and failure. Thus, it is important to continue to examine the spending patterns.

As is typical, proponents focused on clean air and clean water and holding industry accountable for the damage it inflicts on the environment and more generally the harm to the public’s health, safety, and welfare. Opponents focused on the value of development to the economy and the likelihood that increased regulation would lead to higher costs for consumers and job losses for employees. They also argued that existing laws were sufficiently protective of the environment and the public’s health, safety, and welfare. When asked to shift the existing balance between health, safety, and welfare and economic development, voters regularly decline. Overall, industry’s economic arguments consistently carry the day.

These victories for industry occur notwithstanding the fact that the economies in these states are much more diversified than industry would have the voting public believe. Even in Montana, where the state motto is “Gold and Silver,” mining accounts for no more than 6% of the state’s economy.¹⁴ This perception of the dominance of the energy and mineral industry—deemed “cowboy economics”—perpetuates the story that excessive environmental regulation is strangling the economies of the Mountain West, for example.¹⁵ Two researchers from the University of Montana instead tell a story of “post-cowboy economics” in which they “argue that not only is the story inaccurate in saying that environmental law detrimentally affects the region’s economy, but environmental law actually ‘enhances welfare and protects the very source of economic vitality that the Mountain West enjoys.’”¹⁶ Yet voters often are unwilling to take the risks that the economy and their own wallets will suffer.

Initiatives usually arise because voters have grown weary of waiting for legislators to make changes in existing laws. As one author describes

¹²John M. de Figueiredo, Chang Ho Ji & Thad Kousser, “Financing Direct Democracy: Revisiting the Research on Campaign Spending and Citizen Initiatives,” 27 *J.L. Econ. & Org.* 485, 486 (2011).

¹³*Id.*

¹⁴See § 2.03[3], *infra*.

¹⁵See Marcilynn A. Burke, “Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It (Still) Matters,” 14 *Duke Envtl. L. & Pol’y F.* 441, 480–82 (2004) (discussing the myths used to support weakening of the Endangered Species Act).

¹⁶*Id.* at 482 (quoting Thomas Michael Power & Richard N. Barrett, *Post-Cowboy Economics: Pay and Prosperity in the New American West* xix (2001)).

direct democracy, it is a system “[of] last resort: a democratic safety valve. It provides—as we shall argue—a means of rebooting the political hard disk. If all else fails, we turn off the computer and restart it. The same is true for politics.”¹⁷ Even though there may be enough political will to place issues on the ballot when voters are dissatisfied with their elected officials’ action or inaction, voters are still risk averse in terms of making what they view as complex decisions through ballot measures. Some would argue that most of these measures failed to receive voter approval because they would increase the cost of energy while at the same time reducing reliability. Others would say that these matters are just too complex to be tackled at the ballot box. Instead, the legislators are best suited to hammer out the details of climate policies, for example.¹⁸ Both of these rationales likely are true. Because these issues are complex, voters may be influenced by industry’s constant refrain that proponents have gone “too far.” Industry can bombard voters with its opposing messages, and “when voters are uncertain about the likely policy consequences of a ballot proposition, they tend to vote against it.”¹⁹ Confused voters choose the status quo rather than risk making a bad decision. Even when initiatives fail, however, they send powerful messages to regulators and elected officials and can lead them to act.²⁰ But as discussed below in § 2.04[1], industry may have been better off allowing the voters in Colorado to change the setback limits because the Colorado legislature far exceeded the reforms that proponents sought through the initiative.

§ 2.03 Representative Examples of Losing Battles

As has been the case in past elections, most statewide natural resources-related ballot measures failed in the 2018 election cycle. This discussion will examine statewide measures in Arizona, Alaska, and Montana. It will review arguments for and against the measures, spending on campaigns, and any aspects of the campaigns that distinguish them from other efforts.

[1] Arizonans Shooting for Higher Renewable Energy Standard

Arizona Proposition 127, a proposed constitutional amendment, would have required that 50% of the state’s electricity come from renewable sources by 2030.²¹ Arizona only derived 6% of its energy from solar power

¹⁷Qvortrup, *supra* note 8, at 8.

¹⁸See Brady Dennis & Dino Grandoni, “Voters Rejected Most Ballot Measures Aimed at Curbing Climate Change,” *Wash. Post* (Nov. 7, 2018).

¹⁹Lupia & Matsusaka, *supra* note 11, at 471.

²⁰See *id.*

²¹Arizona Proposition 127, “Renewable Energy Standards Initiative” (2018).

in 2018,²² making this goal a particularly ambitious one, even in the sunny state. Almost 70% of Arizona voters rejected the measure. This defeat is interesting primarily because it mirrors Nevada Question 6, discussed below in § 2.05[2], which was successful.

There are several notable differences in the contexts in which voters in Arizona and Nevada considered their renewable portfolio standards. Foremost is the fact that four industry-backed political action committees (PACs) opposed Proposition 127. Pinnacle West Capital Corporation, the parent of Arizona's largest utility, Arizona Public Service Company (APS), established the Arizonans for Affordable Electricity PAC. The three other industry-backed PACs formed in opposition were Vote No Arizona, Southern Arizonans for Responsible Energy, and Responsible Energy for Mohave County. The Navajo Nation's Save Native American Families also joined the opposition.²³ Together, these PACs raised almost \$42 million to oppose the measure.²⁴ NextGen Climate Action (NextGen) backed the Clean Energy for a Healthy Arizona campaign, which supported the proposition.²⁵ This PAC raised over \$24 million,²⁶ with most of the funds coming from NextGen.²⁷ NextGen raised a remarkable sum in favor of the proposition, yet industry's contributions still dwarfed the proponents' funds. Proposition 127 was the most expensive campaign for a ballot initiative in Arizona's history.²⁸

Another difference between Nevada and Arizona was that in Arizona, opponents said that the measure would increase the cost of electricity because the utilities would have to build new solar and wind farms and prematurely close the state's coal plants and its one nuclear plant.²⁹ Arizonans for Affordable Electricity claimed that the measure would cost

²²See Dennis & Grandoni, *supra* note 18; see also Burke, *supra* note 9, at 1476–86 (discussing deliberative and planning failures associated with ballot initiatives for land use decisions).

²³See Ryan Randazzo, "APS Parent Company Spent \$37.9M Fighting Clean-Energy Measure," *Ariz. Republic* (Jan. 17, 2019).

²⁴See Ariz. Sec'y of State, Campaign Finance Committee Search, <https://apps.azsos.gov/apps/election/cfs/search/CommitteeSearch.aspx>.

²⁵See Dennis & Grandoni, *supra* note 18.

²⁶See Ariz. Sec'y of State, *supra* note 24.

²⁷See Ryan Randazzo, "Arizona Voters Reject Clean-Energy Measure Proposition 127 by Large Margin," *Ariz. Republic* (Nov. 6, 2018).

²⁸See Ron Clutz, "Midterms: Voters Rejected Most Climate Energy Propositions," *Wordpress* (Nov. 7, 2018).

²⁹See Randazzo, *supra* note 27.

households an additional \$1,000 per year in energy expenses.³⁰ Opponents also unabashedly displayed their contempt for NextGen’s support of the initiative. NextGen’s founder is California billionaire Tom Steyer.³¹ As the leader of Arizonans for Affordable Electricity explained, “Arizonans prefer to choose our own energy future rather than have it dictated to us by out-of-state special interests.”³²

Another reason cited by opponents for not supporting the measure was that a constitutional amendment would remove the flexibility and discretion of the Arizona Corporation Commission (ACC) to adjust the standard over time.³³ The current standard requires 15% of the state’s power to come from renewable energy by 2025.³⁴ Commissioners of the ACC have proposed a standard of 50% by 2028 and also a standard of 80% by 2050.³⁵ Thus, this proposition may have been premature or it may have been what was needed to nudge the commissioners in the “right” direction. Environment Arizona, another supporter of Proposition 127, said it would keep working on these issues with elected officials, regulators, utilities, and the people of Arizona.³⁶

[2] Alaskans Aiming for Greater Protection for Salmon

Alaska Ballot Measure 1 was designed to create additional protection for the habitats of wild salmon and other fish and wildlife.³⁷ Ballot Measure 1 would have established new standards and requirements for any projects or activities affecting bodies of water related to the activity of anadromous fish.³⁸ The measure would have required public comment periods for major projects³⁹ and added other regulatory steps for the Alaska Department of Fish and Game before it could permit any activity that affected the habitat.⁴⁰

³⁰See “Political Action Committee Speaks Against Renewable Energy Initiative,” *Ariz. PBS* (Mar. 1, 2018).

³¹See Mark Shtrakhman, “NextGen Climate Action Committee,” *FactCheck.org* (Apr. 20, 2018).

³²Randazzo, *supra* note 27.

³³*Id.*

³⁴Ariz. Admin. Code § 14-2-1804(B).

³⁵See Tom Sylvia, “Arizona’s Got a New RPS Proposal and This One Might Be for Real,” *pv magazine* (Feb. 12, 2019).

³⁶See ABC15.com Staff, “Arizona Proposition 127 Fails, Keeping Renewable Energy Requirements,” *ABC15.com* (Nov. 6, 2018).

³⁷Alaska Ballot Measure 1, “Salmon Habitat Protections and Permits Initiative” (2018).

³⁸*Id.* § 3.

³⁹*Id.* § 4.

⁴⁰*E.g., id.* § 5.

Natural resources development dominates Alaska's economy, with fluid and solid minerals accounting for nearly 20% of the state's gross domestic product (GDP). Rounding out the top five industry sectors for nearly 68% of the state's GDP are government spending, transportation (mostly pipelines), real estate, and healthcare. Agriculture, forestry, fishing, and hunting represent just over 1% of the state's GDP. Interestingly, natural resources development amounts to only 4% of total employment in the state. That employment is still almost double the employment in agriculture, forestry, fishing, and hunting.⁴¹ It is against that backdrop that the voters rejected Ballot Measure 1.

Yes for Salmon—Yes on 1 was the primary PAC supporting the measure.⁴² Supporters cited the importance of the salmon fishing industry to Alaska's economy.⁴³ They hoped that this measure would block projects like the Pebble Mine.⁴⁴ The measure also would have created more regulatory hurdles for smaller projects.⁴⁵ Supporters said the current law was ambiguous and vulnerable to political manipulation, and thus these changes were necessary to provide adequate protection of habitat.⁴⁶

Shrewd marketing for the opposition's PAC led to the moniker, Stand for Alaska—Vote No on One.⁴⁷ Opponents of the measure said that it would create project delays, increase costs, and ultimately prevent some development—all to the detriment of the state.⁴⁸ They believed that the measure was designed to fix a nonexistent problem. The existing law and regulations were sufficiently protective of the environment, opponents argued, allowing responsible natural resource development to proceed.⁴⁹ The measure

⁴¹King Econ. Grp., "An Overview of Alaska's Economy," <https://kingeconomicsgroup.com/home/alaska-economy-overview/>.

⁴²See Alaska Pub. Offices Comm'n (APOC), "Campaign Disclosure Form: 2018 - Yes for Salmon—Yes on 1," <https://aws.state.ak.us/ApocReports/CampaignDisclosure/CDForms.aspx> (search "Yes for Salmon").

⁴³See Alaska Ctr., "Yes for Salmon," <https://akcenter.org/yes-for-salmon>.

⁴⁴See Margaret Kriz Hobson, "Salmon Initiative Draws a Powerful Foe: Oil, Mining Money," *E&E News* (Oct. 26, 2018).

⁴⁵Alaska Ballot Measure 1, § 6.

⁴⁶See Maisie Thomas, "Ballot Measure Aiming to Protect Salmon Habitat Divides Alaskans," *Nome Nugget* (Aug. 3, 2018).

⁴⁷See APOC, "Campaign Disclosure Form: 2018 - Stand for Alaska—Vote No on One," <https://aws.state.ak.us/ApocReports/CampaignDisclosure/CDForms.aspx> (search "Stand for Alaska").

⁴⁸See Alex DeMarban, "Ballot Measure Meant to Boost Salmon Protections Loses Decisively," *Anchorage Daily News* (Nov. 6, 2018).

⁴⁹See Sophie Minich & Rex A. Rock, Sr., "Don't Sign the 'Stand for Salmon' Initiative," *Anchorage Daily News* (Oct. 18, 2017).

was not a “habitat protector”; it was a “job killer.”⁵⁰ The initiative came at a time when the mining and oil industries were planning bold new projects in Alaska. At a state legislative hearing one oil industry executive testified that this measure would slow development significantly and just lead to an abundance of litigation.⁵¹

On its way to the ballot, there was one significant legal challenge to the measure.⁵² The lieutenant governor refused to certify the proposed measure because he reasoned that the measure would affect appropriation of state assets in violation of the state constitution.⁵³ The Alaska Supreme Court agreed that some provisions unconstitutionally encroached upon the authority of the Alaska Department of Fish and Game as delegated to it by the state legislature.⁵⁴ The supreme court reversed the judgement of the superior court upholding the measure, but the supreme court found the offending provisions to be severable.⁵⁵ It thus remanded the matter to the superior court for it to direct the lieutenant governor to sever those provisions and place the remaining ones on the ballot.⁵⁶ Notwithstanding having survived a legal challenge before the election, the measure failed with 62% of the voters casting a ballot against it.

What factors led to the measure’s defeat? As explained above, natural resources account for a large percentage of Alaska’s economy. Also, Alaska consistently votes Republican,⁵⁷ and nationally in 2018 the mining and oil and gas industries gave around 90% of their political contributions to Republicans and their PACs.⁵⁸ Industry outspent proponents of Ballot Measure 1 by a ratio of 6 to 1, spending more than \$11.5 million on the campaign.⁵⁹ Six major oil and mining companies contributed \$1 million

⁵⁰Richard Mauer, “The Salmon Initiative: Habitat Protector [sic], or Job Killer?” *KTUU.com* (Oct. 5, 2018).

⁵¹See Hobson, *supra* note 44.

⁵²Mallott v. Stand for Salmon, 431 P.3d 159 (Alaska 2018).

⁵³*Id.* at 160.

⁵⁴*Id.* at 167.

⁵⁵*Id.* at 176–77.

⁵⁶*Id.* at 177.

⁵⁷See World Population Rev., “Red States 2019,” <http://worldpopulationreview.com/states/red-states/>.

⁵⁸See Ctr. for Responsive Politics, “Most Heavily Partisan Industries,” <https://www.opensecrets.org/overview/partisans.php>.

⁵⁹See APOC, “Campaign Disclosure: Forms,” <https://aws.state.ak.us/ApocReports/CampaignDisclosure/CDForms.aspx>.

each to defeat the measure.⁶⁰ Supporters raised almost \$2 million.⁶¹ Supporters said that even though they lost the battle, they had been successful in starting a statewide discussion about the need for stronger protections for salmon habitat. As one supporter cleverly said: “Salmon now have a seat at the table, they’re no longer just on the platter.”⁶²

[3] Montanans Trying to Block Mining with Perpetual Reclamation

Montanans considered Initiative No. 186 (I-186) to establish new requirements for permits and reclamation plans of new hardrock mines.⁶³ Perhaps the most significant part of this measure would have required the Montana Department of Environmental Quality “to deny a permit for any new hardrock mines in Montana unless the reclamation plan provides clear and convincing evidence that the mine will not require perpetual treatment of water polluted by acid mine drainage or other contaminants.”⁶⁴

The arguments here were familiar. Supporters sought greater environmental protection and financial assurances so that taxpayers would not have to pay for cleanups.⁶⁵ “[E]nvironmental analyses have determined with increasing certainty that many (and maybe most) new hardrock mines in sulfide rock will require continuous management to prevent perpetual water quality degradation.”⁶⁶ And treatment is expensive.⁶⁷ Montana has a well-documented case of a bankrupt mining company leaving federal and state taxpayers responsible for the cleanup. The Zortman-Landusky Mine in Montana began operations in the 1970s and went bankrupt in 1999.⁶⁸ The U.S. Government Accountability Office (GAO) estimated in 2004 that the cost of the mine cleanup would exceed the company’s

⁶⁰See DeMarban, *supra* note 48 (listing BP, Pebble Limited, ExxonMobil, Kinross Fort Knox, Teck Alaska, and ConocoPhillips).

⁶¹See APOC, “Campaign Disclosure: Forms,” <https://aws.state.ak.us/ApocReports/CampaignDisclosure/CDForms.aspx>.

⁶²DeMarban, *supra* note 48.

⁶³Mont. Initiative No. 186 (I-186), “Requirements for Permits and Reclamation Plans of New Hard Rock Mines Initiative” (2018).

⁶⁴*Id.*

⁶⁵See Michael Wright, “Mining Ballot Initiative Gets SOS Approval, Groups to Gather Signatures,” *Bozeman Daily Chron.* (May 4, 2018).

⁶⁶Houston Kempton et al., “Policy Guidance for Identifying and Effectively Managing Perpetual Environmental Impacts from New Hardrock Mines,” 13 *Envtl. Sci. & Pol’y* 558 (2010).

⁶⁷*Id.*

⁶⁸GAO, “Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs,” at 53 (GAO-05-377 June 2005).

financial assurances by \$27.4 million.⁶⁹ The Bureau of Land Management also estimated that an additional \$18 million would be needed for perpetual water treatment.⁷⁰ In 2018 it was reported that “state and federal agencies have poured \$77 million into healing this injured landscape. The state of Montana alone has contributed \$32 million to the effort.”⁷¹

Opponents argued that current laws and regulations are sufficiently protective of the environment⁷² and that the measure would mean loss of jobs and diversion of investments to other states.⁷³ Opponents cautioned against using examples such as the Zortman-Landusky Mine to justify the initiative. As one explained: “I-186 won’t fix any of the historic mining water pollution that has plagued our state. It may stop new well-regulated mines from opening.”⁷⁴

Montana’s motto is “Oro y Plata,” which means “Gold and Silver.”⁷⁵ Yet mining accounts for just over 6% of the state’s GDP, approximately 5% of wages, and 2% of employment.⁷⁶ Even so, Republican state legislators considered calling a special session to address the “flawed” I-186.⁷⁷ A special session of the legislature was not necessary to stop the measure, however, as 56% of the voters opposed it. As expected, industry opponents greatly outspent the supporters. The Stop I-186 to Protect Miners and Jobs PAC reported a total of almost \$5.3 million in cash contributions.⁷⁸ The YES for Responsible Mining PAC raised just over \$1.5 million.⁷⁹

What was somewhat unusual in Montana was the public rancor between the two camps. For example, supporters asked television stations to pull

⁶⁹*Id.* at 44 tbl.9.

⁷⁰*Id.* at 57.

⁷¹Karl Puckett, “Fort Belknap Backs State in Bad Actor Case over Zortman-Landsky Pollution,” *Great Falls Trib.* (Sept. 13, 2018).

⁷²*See, e.g.*, John Blodgett, “Commissioners Formally Oppose Mining Ballot Initiative,” *Western News* (May 22, 2018) (“The resolution notes that Montana already has ‘some of the most stringent mining permit requirements in the world.’”).

⁷³*See* Wright, *supra* note 65.

⁷⁴Larry Mayer, “Gazette Opinion: Montana Doesn’t Need I-186,” *Billings Gazette* (Sept. 23, 2018).

⁷⁵Montana.gov, “About Montana,” <https://mt.gov/>.

⁷⁶Montana.gov, “Economy,” https://mslservices.mt.gov/legislative_snapshot/Economy/Default.aspx.

⁷⁷Corin Cates-Carney, “Montana Republicans Consider Special Legislative Session over Ballot Initiatives,” *Mont. Pub. Radio* (June 26, 2018).

⁷⁸*See* Mont. Campaign Electronic Reporting Sys., <https://camptrackext.mt.gov/CampaignTracker/dashboard> (select “Search Committee”).

⁷⁹*Id.*

one of the ads in opposition. They argued that the ad falsely stated that the initiative would mean “zero future mines.”⁸⁰ Opponents said the ad was not false. They said it was clear that what they deemed ambiguous language would allow proponents of the measure and their allies to stop future mining in Montana.⁸¹ A few weeks before voting began supporters of the initiative also filed a complaint with the Federal Election Commission, charging that Sandfire Resources Inc., a non-U.S. company, was illegally financing the opposition. The next day opponents filed a complaint with the Montana Commissioner of Political Practices alleging that supporters sent illegal text messages with false information.⁸² Nothing came of either complaint.⁸³

§ 2.04 If at First You Don’t Succeed, Should You Try Again . . . in the Legislature?

Though most ballot measures concerning natural resources development have failed, some are revived in future election cycles and some find their way to state lawmakers. While ballot initiatives often arise because elected officials have not been responsive, elected bodies change and those changes can be accompanied by the will to move these measures through the legislatures. Such was the case in Colorado and Washington after the 2018 elections. As discussed below, Colorado passed legislation, while Washington’s legislation has stalled.

[1] Coloradans Establishing Setback Requirements for Oil and Gas Development

In November 2018, 55% of Colorado voters rejected Proposition 112, an initiative to set new minimum distance requirements for new oil and gas development.⁸⁴ This measure primarily would have established a new setback requirement of at least 2,500 feet for oil and gas development from occupied structures or any location designated as a “vulnerable area.”⁸⁵ Local governments and the state also would have had the authority to increase the distance from occupied structures or vulnerable areas.⁸⁶

⁸⁰Mike Dennison, “Battle over I-186, the Mining/Water-Treatment Measure, Hits \$3 Million,” *KBZK.com* (Oct. 3, 2018).

⁸¹*Id.*

⁸²See Ted McDermott, “I-186 Rejected, Denying Effort to Bolster Environmental Regulation of Mining,” *Mont. Standard* (Nov. 7, 2018).

⁸³*Id.*

⁸⁴Colo. Proposition 112, “Minimum Distance Requirements for New Oil, Gas, and Fracking Projects” (2018).

⁸⁵*Id.* (adding Colo. Rev. Stat. § 34-60-131(3)).

⁸⁶*Id.* (adding Colo. Rev. Stat. § 34-60-131(4)).

Vulnerable areas included playgrounds, sports fields, amphitheatres, parks, open space, drinking water sources, waterways, and “any additional vulnerable areas designated by the state or a local government.”⁸⁷

Proposition 112 represents an apparent clash between development of oil and gas and residential development. Colorado is among the top five natural gas producing states in the country. It is also home to the fourth-largest U.S. oil field based on proved reserves—the Wattenberg Field. Wattenberg is located mostly in Weld County,⁸⁸ which is just north of Denver, and 89% of Colorado’s oil production in 2018 occurred in that county.⁸⁹ Population growth in the Denver area has led to more residential development in Weld County and increasing complaints about noise and pollution.⁹⁰ Residents were also concerned about possible explosions⁹¹ following a 2017 fatal explosion in a residential area of Weld County that was caused by a leak from a nearby gas well.⁹²

It is in this context that Colorado Rising led the campaign in support of Proposition 112. The campaign took aim at both the industry and the regulator. It was critical of industry for what it characterized as “blatant disregard for public health and safety.” The group also criticized the Colorado Oil and Gas Conservation Commission (COGCC) for not providing appropriate oversight of the industry.⁹³ Supporters said the initiative would “bring long-sought sanity to neighborhoods throughout the state, bolstering the health and safety of thousands living above or on the edge of Colorado’s increasingly industrialized energy landscape.”⁹⁴ Colorado Rising raised \$1.2 million for the campaign.⁹⁵

⁸⁷*Id.* (adding Colo. Rev. Stat. § 34-60-131(2)(c)).

⁸⁸U.S. Energy Info. Admin., “Colorado State Profile and Energy Estimates—Profile Analysis,” <https://www.eia.gov/state/analysis.php?sid=CO>.

⁸⁹See James Rodriguez, “List Extra: See Where Colorado’s Oil and Gas Production Has Boomed in the Past 5 Years,” *Denv. Bus. J.* (Mar. 22, 2019).

⁹⁰See Assoc. Press, “Colorado Governor Signs Overhaul of Oil and Gas Rules with Focus on Safety and Environment,” *L.A. Times* (Apr. 16, 2019).

⁹¹*Id.*

⁹²Assoc. Press, “NTSB Releases Report on Fatal Explosion Linked to Pipelines,” *AP News* (Oct. 29, 2019).

⁹³Colo. Rising, “About Colorado Rising and Proposition 112,” <https://corising.org/about-us/#initiative>.

⁹⁴John Aguilar, “Colorado’s Economy vs. Residents’ Health? Sides Battle over What’s at Stake with Oil and Gas Well Setbacks,” *Denv. Post* (Sept. 13, 2018).

⁹⁵See Colo. Sec’y of State, Campaign Financial Summary for Colorado Rising (2018), <http://tracer.sos.colorado.gov/PublicSite/SearchPages/CommitteeSearch.aspx> (search “Colorado Rising”).

Not surprisingly, the oil and gas industry waged a substantial campaign against the measure, dwarfing the financial contributions of the supporters. Protect Colorado led the campaign in opposition and raised \$37.8 million in 2018.⁹⁶ Its stated mission is to support responsible development and oppose initiatives to limit or ban development, including hydraulic fracturing. Opponents described the measure as “a job-gutting attack on Colorado’s economy It will deprive cities and towns of millions of dollars in tax revenues and rob thousands of mineral rights owners access to their underground property.”⁹⁷ Yet even though Colorado is a leader in the oil and gas industry, energy and mineral development account for only 3.5% of Colorado’s GDP.⁹⁸

What is somewhat surprising, however, is what happened after the voters rejected the measure in November 2018. In December 2018 the COGCC made certain changes that effectively increased setback limits for schools and child care centers. Though the minimum setback remained 1,000 feet,⁹⁹ the COGCC changed the definition of “school facility” to include the grounds and those grounds over which the school has control.¹⁰⁰ It also added child care centers, which include their grounds,¹⁰¹ to the setback rule.¹⁰²

The Colorado Supreme Court then decided *COGCC v. Martinez* in January 2019,¹⁰³ which undoubtedly reinvigorated the legislative efforts of environmental groups, including supporters of Proposition 112.¹⁰⁴ This

⁹⁶See Colo. Sec’y of State, Campaign Financial Summary for Protect Colorado (2018), <http://tracer.sos.colorado.gov/PublicSite/SearchPages/CommitteeSearch.aspx> (search “Protecting Colorado”). Note that Protect Colorado also made contributions to other PACs, so it did not use all these funds to oppose Proposition 112.

⁹⁷Aguilar, *supra* note 94.

⁹⁸See Bureau of Econ. Analysis, <https://www.bea.gov/data/gdp>.

⁹⁹2 Colo. Code Regs. § 404-1:604(a)(6).

¹⁰⁰*Id.* § 404-1:100 (“SCHOOL FACILITY means any discrete facility or area, whether indoor or outdoor, associated with a school, that students use commonly as part of their curriculum or extracurricular activities. A school facility is either adjacent to or owned by the school or school governing body, and the school or school governing body has the legal right to use the school facility at its discretion.”).

¹⁰¹*Id.* (“CHILD CARE CENTER means a child care center as defined in § 26-6-102(5), C.R.S., that is in operation at the time of the pre-application notice pursuant to Rule 305.a.(4). A child care center will include any associated outdoor play areas adjacent to or directly accessible from the center and is fenced or has natural barriers, such as hedges or stationary walls, at least four (4) feet high demarcating its boundary.”).

¹⁰²*Id.* § 404-1:604(a)(6).

¹⁰³2019 CO 3, 433 P.3d 22.

¹⁰⁴See Judith Kohler, “Ruling a Win for Oil and Gas,” *Denv. Post* (Jan. 15, 2019).

case arose when youth activists petitioned the COGCC to promulgate a rule that

would have precluded the [COGCC] from issuing any permits for the drilling of an oil and gas well “unless the best available science demonstrates, and an independent, third-party organization confirms, 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.”¹⁰⁵

The COGCC declined to engage in the proposed rulemaking, reasoning in part that doing so would exceed its authority under the Colorado Oil and Gas Conservation Act.¹⁰⁶ The supreme court upheld the COGCC’s decision, finding that it could not adopt such a rule under the Act.¹⁰⁷ The court determined that the Act does not authorize the COGCC “to condition one legislative priority (here, oil and gas development) on another (here, the protection of public health and the environment).”¹⁰⁸ Thus, even if the COGCC wanted to make regulatory changes to be more protective of the environment and the public’s health, safety, and welfare, the Act constrained its ability to do so. Statutory changes would be necessary to empower and direct the COGCC to achieve such goals.

Following the supreme court’s decision, the Colorado legislature took its cue and acted swiftly. With the 2018 election, Democrats regained control of the Colorado Senate and maintained control of the House and the gubernatorial seat.¹⁰⁹ Thus, the Democrats had the opportunity to bring back measures from the Democrat-led House that the Republican-led Senate had killed in recent years, such as efforts to give local governments more control over oil and gas development.¹¹⁰

Accordingly, in April 2019, the legislature passed, and the governor signed into law, Senate Bill 19-181.¹¹¹ The legislation fundamentally changes the mission of the COGCC. Rather than “foster” development “in a manner consistent with” protecting the environment, the COGCC is now to “regulate” development “in a manner that protects” the environment.¹¹² The environment is now the COGCC’s chief concern in regulating oil and

¹⁰⁵ *COGCC v. Martinez*, 2019 CO 3, ¶ 2.

¹⁰⁶ *Id.* ¶ 9; see Colo. Rev. Stat. §§ 34-60-101 to -131.

¹⁰⁷ *COGCC v. Martinez*, 2019 CO 3, ¶ 50.

¹⁰⁸ *Id.*

¹⁰⁹ See Ed Sealover, “Democrats Recapture Colorado Senate, Now Hold Complete Power at Capitol,” *Denv. Bus. J.* (Nov. 7, 2018).

¹¹⁰ *Id.*

¹¹¹ 2019 Colo. Legis. Serv. ch. 120 (effective Apr. 16, 2019).

¹¹² *Id.* § 6 (amending Colo. Rev. Stat. § 34-60-102(1)(a)(I)).

gas development. The law also imposes new requirements for oil and gas development,¹¹³ revamps the permitting process,¹¹⁴ and grants new powers to local governments.¹¹⁵ It will take some time for the COGCC to promulgate regulations to implement the changes; they are comprehensive.¹¹⁶

An ad hoc group of opponents of the new law submitted Initiatives 64–67 to the Colorado Legislative Council before the law even passed.¹¹⁷ One current and one former official from the two counties with the highest oil and gas production in Colorado—Arapahoe and Weld—led the offensive.¹¹⁸ These initiatives were designed to repeal the new law.¹¹⁹ The Legislative Council denied the petitions for all four initiatives in April 2019 on the grounds that each of them did not constitute a “single subject.”¹²⁰ Thus, they are not on the ballot for 2019. This group has decided not to pursue further efforts to overturn the law in 2019.¹²¹ One of the sponsors said, however, that he was “fairly confident” that regulators and local governments would not act reasonably or rationally, and thus the group would be forced to file an initiative again.¹²²

[2] Washingtonians Aspiring to Set a Carbon Fee

Washington State’s Initiative Measure No. 1631 (I-1631),¹²³ the carbon emissions fee measure, is the second consecutive attempt in the state to levy a fee on carbon emissions. In 2016, 59% of the voters rejected a similar measure, Initiative Measure No. 732. After the measure was defeated in 2016, the state legislature took up the matter. The House bill died in March

¹¹³*E.g., id.* § 3 (amending Colo. Rev. Stat. § 25-7-109 to direct the COGCC to adopt emissions control regulations for oil and gas activities).

¹¹⁴*E.g., id.* § 12 (amending Colo. Rev. Stat. § 34-60-106 to require proof in all applications for permits to drill that the operator also has filed an application with the appropriate local government).

¹¹⁵*Id.* § 4 (amending Colo. Rev. Stat. § 29-20-104).

¹¹⁶*See* COGCC, “SB 19-181 Rulemaking Update” (Aug. 1, 2019).

¹¹⁷*See* Colo. Sec’y of State, “2019-2020 Initiative Filings, Agendas & Results,” <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html> (Initiative 2019-2020 #64–67: Oil and Gas Regulation (received Mar. 21, 2019)).

¹¹⁸*See* Richard Nemec, “Efforts to Repeal New Colorado Oil, Gas Law Halted,” *Shale Daily* (May 1, 2019).

¹¹⁹*See* Richard Nemec, “Proposed Colorado Ballot Measure Designed to Repeal Expected Oil, Gas Reform Bill,” *Shale Daily* (Mar. 27, 2019).

¹²⁰*See* Colo. Sec’y of State, *supra* note 117.

¹²¹*See* Nemec, *supra* note 118.

¹²²*Id.*

¹²³Wash. Initiative 1631 (I-1631), “Carbon Emissions Fee Measure” (2018).

2018 after the Senate rejected it.¹²⁴ Some may have thought that the third time would be the charm with the initiative on the ballot in 2018. In 2018, the percentage voting “no” on the ballot measure was down to 57%, but it was still a resounding “no.”

The primary PAC that supported the measure was Clean Air Clean Energy. The measure would have created a tax of \$15 per metric ton of carbon, beginning in 2020.¹²⁵ The tax would have increased \$2 per year until 2035 when it would have reached \$45 per metric ton, adjusted for inflation.¹²⁶ The revenue would have been used for three types of investments: 70% for clean air and clean energy, 25% for clean water and healthy forest, and 5% for healthy communities.¹²⁷ The Western States Petroleum Association opposed the measure through its PAC, No on 1631. The PAC leaned on arguments about economic harm to families, farmers, and small businesses:

The risks posed by climate change are real, but I-1631’s new, unfair energy tax is a deeply flawed approach to climate policy for our state. It would force Washington families, farmers, small businesses and consumers to pay billions in higher energy costs – while exempting many of our state’s largest polluters, and providing no specific plan or accountability for spending billions in taxpayer dollars.¹²⁸

The *Seattle Times* estimated that for a family with two cars in Bellevue, Washington, for example, the tax would have been \$240 in 2020 and increased each year through 2035.¹²⁹ The campaign against I-1631 raised almost \$32 million; proponents raised more than \$16 million.¹³⁰

The director of the Nature Conservancy in Washington, a major backer of the measure, said that the battle over the carbon fee was not over. He said that there were champions in the legislature who would keep working on the issue.¹³¹ In February 2019 Democratic Senator Steve Hobbs introduced a transportation measure, Senate Bill 5971, which included a carbon

¹²⁴See Assoc. Press & *Seattle Times* Staff, “Washington State’s Carbon-Tax Bill Dies in Legislature,” *Seattle Times* (Mar. 1, 2018).

¹²⁵I-1631, § 8(3).

¹²⁶*Id.*

¹²⁷*Id.* § 3(2).

¹²⁸No on 1631, <https://voteno1631.com/>.

¹²⁹Hal Bernton, “How Much Would I-1631’s Carbon Fee Cost You at the Gas Pump and to Heat Your Home?” *Seattle Times* (Oct. 29, 2018).

¹³⁰See Wash. Pub. Disclosure Comm’n, 2018 Initiative Committees, <https://www.pdc.wa.gov/browse/> (search “2018 Initiative Committees (Statewide)”).

¹³¹See Hal Bernton, “Washington State Voters Reject Carbon-Fee Initiative,” *Seattle Times* (Nov. 6, 2018).

fee.¹³² That bill stalled in spring 2019 after a committee hearing. The legislature did pass Senate Bill 5116, the “clean energy” measure, however.¹³³ The governor signed into law the requirement that the state’s energy supply be carbon-neutral by 2030 and carbon-free by 2045.¹³⁴

However, the multiple failures at the ballot box and in the legislature to establish a carbon fee “underscore the difficulties in mustering enough political support—even in Washington, a stronghold of the environmental movement where Gov. Jay Inslee has made the issue a priority”¹³⁵ There is no indication if or when supporters will revive their efforts for a carbon tax in Washington. Will the fifth time be the charm?

§ 2.05 Two Outright Winners

Only two statewide natural resources-related ballot measures in the 2018 election cycle were successful, one in Florida and one in Nevada. Florida voters decided to ban offshore drilling, and voters in Nevada decided to increase the state’s renewable energy standard. Questions arise with these victories. Are these unicorns; that is, unique circumstances? Are they canaries in the veritable coal mine—a sign of things to come? Are they hope for a future in which supporters deliver persuasive messages despite being outspent many times over by industry? This section discusses several factors that made the winning outcomes more probable.

[1] Floridians Banning Offshore Drilling

Florida voters approved by almost 70% Amendment 9,¹³⁶ a constitutional ban on offshore oil and gas drilling, as well as a ban on vaping in enclosed indoor workplaces. The path to the ballot in Florida is unique. The state of Florida has a 37-member Constitution Revision Commission (CRC), which meets every 20 years to consider changes to the state’s constitution.¹³⁷ The CRC voted to place the measure on the ballot.¹³⁸ Under Florida law, the CRC directly proposes to the voters its recommended changes to the constitution.¹³⁹ In other states with constitutional revision

¹³²S. 5971, 66th Leg., Reg. Sess. (Wash. 2019).

¹³³S. 5116, 2019 Wash. Legis. Serv. ch. 288 (effective May 7, 2019).

¹³⁴*Id.* § 1(2) (codified at Wash. Rev. Code § 19.405.010(2)).

¹³⁵Hal Bernton, “After I-1631, What’s Next for Trying to Put a Price on Fossil Fuels in Washington State?” *Seattle Times* (Nov. 9, 2018).

¹³⁶Fla. Amendment 9, “Ban Offshore Oil and Gas Drilling and Ban Vaping in Enclosed Indoor Workplaces Amendment” (2018).

¹³⁷See CRC, “About the CRC,” <https://crc.law.fsu.edu/about-2.html>.

¹³⁸See Press Release, CRC, “CRC Approves Eight Revisions for the 2018 General Election Ballot” (Apr. 17, 2018).

¹³⁹Fla. Const. art. XI, § 2(c).

committees, the commission makes its recommendations to the legislature, not the voters.¹⁴⁰

Interestingly, there were no PACs registered as either opposing or supporting the amendment, though there was opposition. Opponents did not challenge the substance but rather the form of the proposed amendment. The amendment drew two types of criticism. First, critics argued that the two issues proposed together represented an absurd combination and that they should have been addressed separately. The argument for the combination was that they were both issues concerning the environment. Others were critical of the amendment because they did not believe that the measures should become a part of the state's constitution; instead they believed that the legislature should address the issue.¹⁴¹ Interestingly, this measure has led to renewed effort to abolish the CRC. Criticisms of the body include that its members are not elected and that they are deciding legislative rather than constitutional matters.¹⁴² Nonetheless, support for banning offshore oil and gas drilling was widespread. This support for the ban comes in the context of a long history of opposition to drilling off the coast of Florida.¹⁴³ And Florida already had statutory provisions banning drilling in state waters.¹⁴⁴ This amendment also arose against the backdrop of somewhat mercurial federal policy.

In 2017, President Donald Trump signed an executive order directing the U.S. Department of the Interior (DOI) to revisit the Obama administration's 2017–2022 leasing program for offshore oil and gas drilling in the Arctic, Atlantic, and Pacific Oceans.¹⁴⁵ The Obama administration's plan did not include sales for the Pacific or Atlantic Outer Continental Shelf (OCS). Following Trump's order, then-Secretary of the Interior Ryan Zinke directed the Bureau of Ocean Energy Management (BOEM) to develop a new national OCS program for 2019–2024.¹⁴⁶

Notwithstanding his directive to BOEM, when Zinke met with Florida Governor Rick Scott he stated: "I support the governor's position that

¹⁴⁰See, e.g., N.M. Const. art. XIX, § 1.

¹⁴¹See Maureen Kenyon, "Vote Yes or No on Amendment 9? Here's What 6 Florida Newspapers Recommend," *Treasure Coast Palm* (Oct. 24, 2019).

¹⁴²See James Call, "Bipartisan Group of Florida Senators Vote to Abolish Constitution Revision Commission 'Star Chamber,'" *Tallahassee Dem.* (Sept. 17, 2019).

¹⁴³See Edward A. Fitzgerald, "The Seaweed Rebellion: Florida's Experience with Offshore Energy Development," 18 *J. Land Use & Envtl. L.* 1 (2002) (chronicling the controversy from the presidency of Franklin D. Roosevelt through that of George W. Bush).

¹⁴⁴Fla. Stat. § 377.242(1)(a).

¹⁴⁵Exec. Order No. 13,795, § 3(a), 82 Fed. Reg. 20,815 (Apr. 28, 2017).

¹⁴⁶Secretarial Order No. 3350, § 4(a)(1) (May 1, 2017).

Florida is unique and its coasts are heavily reliant on tourism as an economic driver.”¹⁴⁷ But less than three months later during a discussion with the U.S. Senate Committee on Energy and Natural Resources, Zinke said that though Florida was not included in the draft program, a final decision had not been made. BOEM would release the final proposal in fall 2018, according to Zinke.¹⁴⁸

In the face of federal regulatory uncertainty, Floridians got to work and amended their constitution to cement the prohibition on drilling in state waters. On the federal level, some of Florida’s congressional delegation also are fighting to keep development out of federal waters off the coast of Florida. Democratic Representatives Darren Soto and Kathy Castor and Republican Representatives Vern Buchanan and Francis Rooney, and then-Senator Bill Nelson (a Democrat), have all voiced opposition to development off the coast of Florida.¹⁴⁹ Moreover, House members representing coastal states introduced seven bills at the beginning of 2019 to prohibit offshore drilling and seismic testing in the waters of the Atlantic, Pacific, and Gulf of Mexico.¹⁵⁰

In April 2019, Joe Balash, Assistant Secretary for Land and Minerals Management at DOI, said that the agency still had not decided whether to have any lease sales off the coast of Florida.¹⁵¹ The comment period on the proposed program ended in March 2018.¹⁵² BOEM received over two million comments. Balash said that he hoped the next iteration of the national OCS program for 2019–2024 would be released in 2019.¹⁵³ As of this writing, BOEM has not released a new program.

¹⁴⁷Hiroko Tabuchi, “Trump Administration Drops Florida from Offshore Drilling Plan,” *N.Y. Times* (Jan. 9, 2018).

¹⁴⁸See Kellie Lunney, “Zinke Trades Barbs with Democrats in Heated Hearing,” *E&E News* (Mar. 13, 2018).

¹⁴⁹See Rob Hotakainen, “House Democrats Take Aim at Ocean Oil,” *E&E Daily* (Apr. 3, 2019); Kellie Lunney, “Lawmakers Push Bipartisan Anti-Drilling Measures,” *E&E News PM* (Jan. 8, 2019); Kellie Lunney, “Coastal Senators Decry ‘Dumb’ Proposal, Plot Response,” *E&E Daily* (Feb. 7, 2018).

¹⁵⁰See Lunney, “Lawmakers Push Bipartisan Anti-Drilling Measures,” *supra* note 149.

¹⁵¹See Kellie Lunney, “Lawmakers Demand Assurances as Offshore Drilling Plan Stalls,” *E&E Daily* (Apr. 5, 2019).

¹⁵²See Notice of Availability of the 2019–2024 Draft Proposed OCS Oil and Gas Leasing Program and Notice of Intent to Prepare a Programmatic Environmental Impact Statement, 83 Fed. Reg. 829 (Jan. 8, 2018).

¹⁵³Lunney, *supra* note 151.

[2] Nevadans Boosting Renewable Energy Standard

Over 59% of the voters in Nevada approved Question 6¹⁵⁴ to amend its constitution and require the state to obtain half of its electricity from renewable sources by 2030. The state's standard at that time required it to obtain 25% of its electricity from renewable sources by 2025.¹⁵⁵ Under the Nevada Constitution, the voters must approve any proposed constitutional amendment twice,¹⁵⁶ so they normally would have had to approve the measure again in 2020 before it became law. However, in April 2019 the Nevada legislature passed, and Democratic Governor Steve Sisolak signed, Senate Bill 358 to require the state to obtain 50% of its electricity from renewable sources by 2030, giving effect to Question 6.¹⁵⁷

This victory for proponents is interesting for several reasons. For one, Nevada's largest utility, NV Energy, did not oppose the measure.¹⁵⁸ It had already committed to expanding its renewable energy capacity.¹⁵⁹ The Coalition of Energy Users led the opposition, stressing loss of jobs and increased energy costs.¹⁶⁰ Its campaign was anemic, however. Also notable is the fact that this win comes after then-Governor Brian Sandoval, a Republican, vetoed a bill in 2017, Assembly Bill 206 (AB 206). AB 206 would have required the state to obtain only 40% of its electricity through renewable energy by 2030.¹⁶¹ "In vetoing the higher renewable standard, Sandoval said he would support the measure under different circumstances. 'Although the promise of AB206 is commendable, its adoption is premature in the face of evolving energy policy in Nevada,' he said."¹⁶² Also worthy of note is the fact that an almost identical measure failed in

¹⁵⁴Nev. Question 6, "Renewable Energy Standards Initiative" (2018).

¹⁵⁵Nev. Rev. Stat. § 704.7821(1)(h) (2018).

¹⁵⁶Nev. Const. art. 19, § 2, cl. 4.

¹⁵⁷See S. 358, § 22, 2019 Nev. Laws ch. 3 (effective Apr. 22, 2019) (amending Nev. Rev. Stat. § 704.7821); see also Press Release, Nev. Governor Steve Sisolak, "Governor Sisolak Signs Bill to Raise Nevada's Renewable Portfolio Standard to 50% by 2030" (Apr. 22, 2019).

¹⁵⁸See InsideClimate News Staff, "Election 2018: Florida's Drilling Ban, Washington's Carbon Fee and Other Climate Initiatives," *InsideClimate News* (Nov. 7, 2018).

¹⁵⁹See Press Release, NV Energy, "NV Energy Exceeds Nevada's Renewable Requirement for Eighth Straight Year" (Apr. 2, 2018).

¹⁶⁰See NOon6, "Question 6 Will Cause Energy Costs to Skyrocket and Harm Nevada's Economy," <https://noquestion6.com/> (paid for by Coalition of Energy Users).

¹⁶¹See A. 206, 79th Leg., Reg. Sess. (Nev. vetoed June 16, 2017). It should also be noted that Assembly Bill 206 was reintroduced in the 2019 legislative session, but no action was taken. See A. 206*, 80th Leg., Reg. Sess. (Nev. 2019).

¹⁶²Yvonne Gonzalez, "Sandoval Vetoes Community Solar, Higher Clean-Energy Standard," *Las Vegas Sun* (June 16, 2017).

another sunny state: Arizona.¹⁶³ NextGen poured millions of dollars into both campaigns,¹⁶⁴ yet only Nevada's succeeded, having faced no industry opposition.

§ 2.06 Industry's Proactive Approach

This section will provide examples of some of industry's proactive approaches to educate the public on the value of natural resources development. It also will examine the approaches of specific projects to sway public opinion. Several studies of the public's perception of the natural gas industry in Texas confirm what could be considered two paradoxical phenomena.¹⁶⁵ The first conclusion is that the public mistrusts the industry and dislikes certain social and environmental consequences believed to be associated with development.¹⁶⁶ At the same time, the public appreciates and views "less negatively" the economic and other benefits associated with development.¹⁶⁷ The researchers made the following recommendations based upon their study:

[T]he energy industry must do a better job of recognizing and addressing earnestly the perceived negative social and environmental consequences associated with development. Concomitantly, the energy industry must do a better job of educating the general public about its low-impact technologies and other environmentally friendly drilling systems which substantially reduce adverse impacts in the social and environmental arenas. Funding and promoting informational and educational programs at the local level on the advances in environmentally friendly drilling practices may be an effective strategy for operators to address some of the public (mis)perceptions about the energy industry.¹⁶⁸

This study also highlights the importance of transparency between industry and all relevant stakeholders. The researchers argue that industry must inform stakeholders about the potentially negative social and environmental impacts of development. At the same time, stakeholders must communicate their fears and anxiety with each other and with industry.

¹⁶³See § 2.03[1], *supra*.

¹⁶⁴See Assoc. Press, "California Billionaire Roils Arizona Utilities with Push for Renewable Energy," *L.A. Times* (July 4, 2018).

¹⁶⁵See Gene L. Theodori & Douglas Jackson-Smith, "Public Perception of the Oil and Gas Industry: The Good, the Bad, and the Ugly" (Soc'y of Petroleum Eng'rs 134253, 2010); Gene L. Theodori, "Paradoxical Perceptions of Problems Associated with Unconventional Natural Gas Development," 24 *Southern Rural Soc.* 97 (2009); Gene L. Theodori, "Public Perception of the Natural Gas Industry: Insights from Two Barnett Shale Counties" (Soc'y of Petroleum Eng'rs 115917-PP, 2008).

¹⁶⁶Theodori & Jackson-Smith, *supra* note 165, at 5.

¹⁶⁷*Id.*

¹⁶⁸*Id.* (citation omitted).

Government officials then must work with industry to minimize the objective—as opposed to perceived—negative social and environmental consequences of development.¹⁶⁹ The following discussion examines some of ways in which industry may be aligned with these research findings and recommendations. While industry expended great effort to extol the virtues of natural resources development, discussions of the risks and associated negative impacts has yet to materialize.

[1] General Outreach

Perhaps no industry efforts to influence the regulatory, political, and cultural landscape have been greater, more successful, or more widely written about than those of brothers David and Charles Koch of Koch Industries.¹⁷⁰ They have influenced the country's attitudes towards fossil fuels through lobbying, think tanks, university centers, PACs, and political donations. The focus of these efforts has been carbon and climate change.¹⁷¹ Koch Industries sponsors Americans for Prosperity, which spreads its message through grassroots outreach.¹⁷² It also finances a public relations group for fossil fuels, Fueling U.S. Forward. This group has sponsored and sent delegates to events for black audiences—such as a gospel music concert, the National Black Political Convention, and Blacks in Government in Atlanta—to influence them as voters.¹⁷³

Though perhaps the most influential of industry players, the Koch brothers are not alone in their efforts to win in the court of public opinion. Harold Hamm and his company, Continental Resources, Inc. (Continental), also have enjoyed some success in shaping how the public views fossil fuels. Continental led a successful public relations campaign entitled “Miracle of American Oil,” with Congress and the media as the target audiences.¹⁷⁴ The campaign had three objectives:

¹⁶⁹ *Id.*

¹⁷⁰ *E.g.*, Graham Readfearn, “Conservative Groups Pushing Trump to Exit Paris Climate Deal Have Taken Millions from Koch Brothers, Exxon,” *DESMOG* (May 10, 2017); David Sassoon, “Koch Brothers Positioned to Be Big Winners if Keystone XL Pipeline Is Approved,” *Reuters* (Feb. 10, 2011); Jane Mayer, “Covert Operations,” *New Yorker* (Aug. 23, 2010).

¹⁷¹ *See* Christopher Leonard, “David Koch Was the Ultimate Climate Change Denier,” *N.Y. Times* (Aug. 23, 2019).

¹⁷² *See* Americans for Prosperity, “About,” <https://americansforprosperity.org/about>.

¹⁷³ *See* Hiroko Tabuchi, “Sensing Gains Ahead Under Trump, the Kochs Court Minorities,” *N.Y. Times* (Jan. 5, 2017).

¹⁷⁴ *See* Pub. Relations Soc’y of Am., “The Miracle of American Oil: Drilling Our Way to Freedom from Foreign Oil” (Jan. 1, 2014).

- Showcase the benefits of America's oil and natural gas renaissance.
- Change the vernacular from fracking to horizontal drilling.
- Propel crude oil exports to the top of the U.S. policy agenda.¹⁷⁵

Hamm launched this campaign in 2013 at a kick-off dinner in Washington, D.C., with oil industry executives and journalists.¹⁷⁶ The campaign won the Public Relations Society of America's "Silver Anvil Award" in 2014.¹⁷⁷ More significantly, in 2015 Congress voted to lift the ban on oil exports, and President Barack Obama signed the legislation into law, 40 years after the ban was enacted.¹⁷⁸

[2] Project-Specific Campaigns

In addition to industry's general campaigns to try to influence the public outside of the voting context, companies have developed comprehensive project-specific campaigns. Two examples include campaigns for the Pebble Mine in Alaska and the Jordan Cove Project in Oregon. Several ballot initiatives have targeted the Pebble Mine over the years.¹⁷⁹ Pebble Limited Partnership has had an extensive public relations campaign and yet the project has been controversial since the initial proposal more than a decade ago. The company has produced numerous videos,¹⁸⁰ podcasts,¹⁸¹ and newsletters¹⁸² in attempts to educate the public and dampen opposition to the project. Despite these efforts, regulatory hurdles remain, and opposition remains fierce.¹⁸³ In 2014, the U.S. Environmental Protection Agency (EPA) issued a "proposed determination" to restrict dredged or fill material from the Pebble Mine.¹⁸⁴ While the U.S. Army Corps of Engineers (Corps) is the permitting authority for the discharge of dredged or fill

¹⁷⁵*Id.*

¹⁷⁶See Amy Harder & Christian Berthelsen, "End of Oil-Export Ban Provides Blueprint for Bipartisan Compromise," *Wall St. J. Online* (Dec. 21, 2015).

¹⁷⁷Pub. Relations Soc'y of Am., *supra* note 174.

¹⁷⁸See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. O, tit. I, § 101, 129 Stat. 2242 (2015) (repealing 42 U.S.C. § 6212); *see also* Harder & Berthelsen, *supra* note 176.

¹⁷⁹See Linxwiler, *supra* note 10, at 15-10 to 15-20 (analyzing five "anti-Pebble" initiatives).

¹⁸⁰Pebble Ltd. P'ship, "Scoping Videos," <https://pebblepartnership.com/videos>.

¹⁸¹Pebble Ltd. P'ship, "Podcasts," <https://pebblepartnership.com/podcasts>.

¹⁸²Pebble Ltd. P'ship, "Newsletters," <https://pebblepartnership.com/newsletters>.

¹⁸³See Joel Reynolds, "Pebble Mine Environmental Review Falls Flat," *NRDC Expert Blog* (Aug. 21, 2019); Ben Hohenstatt, "Pebble Mine Opposition: Wrong Mine for the Wrong Place," *Juneau Empire* (June 25, 2019).

¹⁸⁴See Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska, 79 Fed. Reg. 42,314 (July 21, 2014) (notice of availability and public hearing).

material,¹⁸⁵ EPA effectively has “veto” power under the Clean Water Act.¹⁸⁶ In July 2019, EPA withdrew that proposed determination at the direction of its general counsel.¹⁸⁷ Environmental groups sued, arguing that the withdrawal was arbitrary and capricious.¹⁸⁸ EPA then sought and obtained an extension from the Corps until February 2020 to make its determination.¹⁸⁹ Both EPA and DOI have found the Corps’ environmental analysis to be materially flawed.¹⁹⁰

Jordan Cove is a proposed LNG export terminal and pipeline in southern Oregon. The proponent of this project is trying to tell a compelling story about the terminal and pipeline¹⁹¹ and has 49 videos on YouTube.¹⁹² But these efforts may not be enough to sway the citizens of Oregon. One commentator deemed the proponent’s public relations efforts as “malpractice.”¹⁹³ He wrote: “The Jordan Cove Pipeline faces widespread opposition. They didn’t give people a reason to support the Pipeline, and they ran smack into NIMBY. Now they are playing catch up.”¹⁹⁴ The State of Oregon is not yet a fan of the project either. It filed 250 pages of comments in response the Federal Energy Regulatory Commission’s draft environmental impact statement.¹⁹⁵

It is difficult to assess whether these campaigns have been successful given the opposition that remains. One cannot determine how ardent or widespread the opposition would be in the absence of such efforts. They

¹⁸⁵33 U.S.C. § 1344(a).

¹⁸⁶*Id.* § 1344(c); 40 C.F.R. § 231.1(a).

¹⁸⁷See News Release, “EPA Withdraws Outdated, Preemptive Proposed Determination to Restrict Use of the Pebble Deposit Area as a Disposal Site” (July 30, 2019); *see also* 84 Fed. Reg. 45,749 (Aug. 30, 2019).

¹⁸⁸See *SalmonState v. Hladick*, No. 3:19-cv-00267 (D. Alaska filed Oct. 9, 2019); *see also* Dylan Brown, “Pebble Foes Sue EPA for Dropping Veto Threat,” *E&E News PM* (Oct. 8, 2019).

¹⁸⁹See Ariel Wittenberg, “EPA Punts Key Pebble Decision—Again,” *Greenwire* (Oct. 25, 2019).

¹⁹⁰See Letter from Chris Hladick, EPA Reg’l Adm’r, to Shane McCoy, Program Mgr., Reg. Div., Corps, Alaska Dist. (July 1, 2019); Letter from Philip Johnson, DOI Reg’l E envtl. Officer for Alaska, to Shane McCoy, Program Mgr., Reg. Div., Corps, Alaska Dist. (July 1, 2019).

¹⁹¹*E.g.*, Jordan Cove LNG, “Media,” <https://www.jordancovelng.com/media>; Jordan Cove LNG, “Jordan Cove Project Video,” <https://www.jordancovelng.com/video>.

¹⁹²See <https://www.youtube.com/> (search “Jordan Cove Project”).

¹⁹³Peter Sage, “Jordan Cove Pipeline: Public Relations Malpractice,” *Up Close, with Peter Sage* (June 27, 2019).

¹⁹⁴*Id.*

¹⁹⁵See Jes Burns, “Jordan Cove LNG Plans Not Good Enough for People or Environment, Oregon Says,” *Or. Pub. Broadcasting* (July 12, 2019).

may be necessary—yet not sufficient—conditions for extinguishing public outcries over development of natural resources projects.

§ 2.07 Conclusion

The major ballot initiatives in 2018 related to energy and mineral development presented mixed results. Some followed well-developed themes, leading to typical outcomes, while others deviated from the usual path. Many of the campaigns set new fundraising records in their respective states. Proponents have yet to even approach the amounts raised by opponents. Even though most of these measures failed at the ballot box, they have succeeded in bringing important issues into public discourse. They also have influenced state regulators and legislatures, as well as industry. Thus, while it may appear that there is very little that is new under the sun, there may be something old we do not know or understand.¹⁹⁶

¹⁹⁶See Juanita Rose Violini, *Almanac of the Infamous, the Incredible, and the Ignored* 278 (2009) (quoting Ambrose Bierce, “There is nothing new under the sun but there are lots of old things we don’t know.”).