Dear government, pay me for my losses. Inside Amendment 74, a ballot measure that has Colorado’s towns and cities scared

September 20, 2018

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Imagine you are a property owner. One day, you decide you want to use your land to develop a sand and gravel operation. You do your research, and you find out that your property is smack in the middle of a floodplain the county has designated. So the local authorities turn down your request for that sand and gravel operation. What do you do? You sue, arguing that the designation is causing you financial harm.

You will lose.

In fact, the Colorado Supreme Court sided with La Plata County in this very case in 2001.

Now, 17 years later, a constitutional amendment that appears on the ballot this November seeks to significantly strengthen a property owner’s rights in the event of a loss based on a government rule or regulation. It would also ease access to financial compensation in such cases. Critics argue that, if passed, the measure would lead to a flood of lawsuits that could bankrupt smaller and less affluent municipalities or have a chilling effect on proposing regulations in the first place.

The proposed amendment, which is backed by the oil and gas industry, is the latest salvo in the ongoing turf war between municipalities seeking local control to protect the safety and health of their communities and powerful industries and individuals alike seeking to benefit from the extraction of resources close to those communities.

Amendment 74, as it will appear on the Colorado ballot this fall, reads as follows: “Shall there be an amendment to the Colorado constitution requiring the government to award just compensation to owners of private property when a government law or regulation reduces the fair market value of the property?”

The Colorado Farm Bureau, a nearly 25,000-member-strong organization that represents the state’s farmers and ranchers as well as a variety of agriculture industry-related players, teamed up with the monetary muscle from the oil and gas sector and brought forward the initiative. The Bureau has also taken on the PR campaign to persuade voters, and it hails the measure as a leveling of the
playing field, allowing individuals to seek compensation for what legalese refers to as a “regulatory taking”—the impact of a government action on their property value.

“As farmers, we think of things in acres,” said Marc Arnusch, a family farmer in the southeast corner of Weld County and a member of the Farm Bureau’s board of directors. “And just because I have 10 acres, it shouldn’t have to take a government action to take 9.5 of those acres away from me before a takings claim can be made. This [amendment] gives me as a farmer the right to seek just compensation through the court process and through government negotiation to satisfy me and keep me whole. Because nothing is more important to a farmer than his land. It is his livelihood.”

While the proposed amendment does not specify which kinds of private property would be affected and leaves such interpretations up to the courts, among the examples will most certainly be mineral and water rights as well as oil and gas resources.

“For property rights advocates, this is sort of a dream come true, because they know the upshot is that government will in most cases stop regulating because it is simply too costly to do so,” said Justin Pidot, a law professor specializing in property rights and environmental and natural resources law at the University of Denver’s Sturm College of Law. “They are deeply anti-government, anti-regulatory measures that are very consciously designed to prevent environmental regulations, public health regulations, zoning and the like.”

**What does the law say right now?**

Before diving deeper into the pros and cons of Amendment 74’s potential effects, a brief overview of existing property rights law— as provided by Pidot, a former deputy solicitor for land resources for the Department of the Interior during the Obama administration—serves as helpful guidance to understand the contradicting arguments swirling around the measure.

Basically, there are a couple of different situations in which property rights law comes into play. First: In what’s called a “physical appropriation of property,” the government simply seizes an individual’s property for public use. In this case, current state law mandates the government to pay the owner based on the property’s fair market value.
But it is the second area of this type of law that cuts to the core of Amendment 74. When lawyers speak of a “regulatory taking,” the government has enacted some sort of rule or regulation that negatively affected someone’s property value. And in these cases, rarely does the owner actually get compensated monetarily.

Pidot explained that the courts developed a standard in which they look at existing research showing that government regulations as a whole have positive and negative impacts on property values and overall creating a healthy balance. Cherry-picking one “bad” regulation would throw the whole system out of balance, Pidot said.

The legal doctrine that has evolved over time would require that a property owner experience a “very high set of losses” before compensation is warranted, he said. “The way the courts have described it is we are looking for a regulation that is the functional equivalent of the government taking title to your property entirely.”

But for farmer Arnusch, talk of a steady tide of regulations lifting all boats doesn’t count. He is staunchly opposed to governments taking away value from land in the first place.

Arnusch illustrated his point with a hypothetical scenario.

“For example, on my farm, if I wanted to put up a grain elevator…” he said. “If I had started down the pathway, defined the facility, it fit the code, I have my blueprints, I have hired a contractor, and then the government comes out and changes the code for my general vicinity, they have impacted me directly, because I was already so far down the track.”

And for that loss, the inability to reap maximum value from his land, Arnusch argued, he should be compensated.

**Who’s to blame: zealous bureaucrats or faceless corporations?**

Critics of Amendment 74 point out that other states have tried similar laws. Comparable efforts in Florida led municipalities – afraid of a flood of compensation claims – to severely dial back much of their regulatory prowess. Oregon voters in 2004 approved a similar amendment to the state’s constitution. Three years later, after angry property owners filed over
7000 claims totaling nearly $20 billion and local governments had to pay out $4.5 billion, voters amended the state constitution again, effectively retuning the bar for takings’ claims back to where it was before 2004.

And neither of these two states crafted as broad an amendment as the one the Farm Bureau and their allies in the oil and gas sector are now proposing, said Colorado Municipal League Executive Director Sam Mamet, a critic of the measure.

“It is the whole gamut of local government decision making and policy making that could be called into question here,” he said. “There was no care in drafting this, there was no thought to being more narrow, articulating certain exemptions, putting in some ability for the legislature to perhaps implement the measure by statute — and that is of major concern.”

Whether it is a liquor or marijuana license, street improvements or affordable housing, Mamet said local governments could come to a screeching halt because their prime worry would have to be about an individual or industry group depleting city coffers with a regulatory takings claim.

It is Mamet’s latter point that rings the alarm bells for Aurora City Councilwoman Nicole Johnston.

“If this passed, a whole new system of courts resolving property disputes could be required,” she cautioned. “There is no leveling of the playing field for the little guy or the small community, it’s basically those with deep pockets and resources can spend years in litigation to protect their interests. That puts the little guy and the smaller city and any municipality at a disadvantage.”

**The elephant in the room: oil and gas fighting drilling setback measure**

Councilwoman Johnston has a specific worry: that behind the farmers stands a mighty phalanx of oil and gas industry lawyers, just waiting to take down City Halls across Colorado that dare to wield local control to limit development of resources within their boundaries.
A brief flashback: In 2016, the Colorado Supreme Court ruled that municipalities do not have the power to impose fracking bans — as for example the cities of Fort Collins and Longmont did — but that it is up to the state to regulate such drilling. Various municipalities have continued to try to impose limits since.

Enter Proposition 112. Also on the ballot this fall, this measure asks Coloradans to enforce a 2,500-foot buffer zone between new oil and gas drilling operations and any occupied structure a municipality deems vulnerable.

Eric Sondermann, an independent political analyst in the state, called Amendment 74 “a bit of an insurance policy” for oil and gas and related agricultural groups against Proposition 112.

“The people who have most to risk on a new massive setback of oil and gas development is obviously the industry itself, but it is also the holders of mineral rights,” he said. “And the holders of those mineral rights are often farmers and ranchers.”

It comes as little surprise, then, that campaign finance filings show a multi-million dollar effort spearheaded by an oil and gas interest group called Protect Colorado to support the Farm Bureau. The issue committee invested more than $4 million into the signature-gathering process and has also spent money on pro-industry television ads. The result: The Farm Bureau earlier this year dropped a record 209,000 signatures on the Secretary of State’s desk, more than twice what was needed — which made Amendment 74 only the second such ballot measure since voters in 2016 approved an amendment that placed much stricter laws governing the signature-gathering process. Back then, the oil and gas industry and its allies contributed more than $3 million to proponents of that amendment — known as Raise the Bar — hoping that a higher bar for efforts to change the constitution would shield them from at least some citizen initiatives seeking to reign in drilling in the state.

Despite its substantial monetary support for Amendment 74 this year, Protect Colorado representatives were tight-lipped about the amendment, referring most questions about it to the Farm Bureau, and saying only that it is “a fair measure” for which they helped gather signatures.
Dan Haley, president of the Colorado Oil & Gas Association, in a statement hailed Amendment 74 as a “good government measure that makes sense for all of us.”

The fight over what rights property owners should have not only encompasses the PR arena, though. Court documents show that opponents of the amendment mounted a legal challenge, against it, saying the amendment was overly broad and violated the single subject rule for such measures. But the bid ultimately failed. The lawyer the Farm Bureau hired to defend its position was Jason Dunn, a Republican who works for Denver-based political power player firm Brownstein Hyatt Farber Schreck — and President Donald Trump’s nominee to become the next U.S. attorney for the state of Colorado. Dunn was also involved in finalizing the language of the proposed amendment.

The same court documents name Michelle Smith as a co-respondent beside the Farm Bureau’s executive vice president, Chad Vorthmann. Smith is an oil and gas operative with more than 35 years in the industry under her belt who has worked for organizations including the Colorado Chapter of the National Association of Royalty Owners as well as Denver-based Davis Oil Company and Anderman Oil Company. In 2015, the Denver Business Journal selected her to its “Top Women in Energy” class. Smith is an outspoken property rights advocate and a mineral rights owner herself.

Asked if Amendment 74 was in any way related to the proposed drilling setback measure, she said: “Not related, but property rights are property rights.” Smith then added that it would “only make sense” for a mineral owner to bring forward a case if you took away his or her right to drill.

Newspaper editorial boards across the state are chiming in, with the Grand Junction Daily Sentinel going as far as likening the fight over Amendment 74 to a “nuclear escalation hitting the initiative process.”

Such drastic language didn’t go unnoticed in the Capitol, either. Gov. John Hickenlooper’s office made what one of his advisors, speaking on the condition of anonymity, told The Colorado Independent were “a handful of calls” to see if a truce could be brokered and both measures would be withdrawn. The effort ultimately failed, and the mandated deadline to do so has since passed. The governor’s office declined to publicly comment on the issue.
Democratic gubernatorial candidate Jared Polis is opposed to Amendment 74. His Republican opponent Walker Stapleton’s spokesman has said the candidate supports the concept behind the measure, and his campaign website lauds Colorado’s farmers and ranchers, noting that many “use their property or mineral rights to produce energy” and so are able to benefit from a “diversified revenue stream.”

And so it will be up to Colorado voters this fall to decide the fate of Amendment 74 in this newest edition of property rights v. local control. Given the new Raise the Bar requirement that a constitutional amendment needs to gather at least 55 percent instead of a simple majority of yes votes, the measure still has a steep climb ahead, independent analyst Sondermann said.

But the war for the interpretative prerogative is well under way.

The Farm Bureau’s Vice President of Advocacy, Shawn Martini, cautioned against castigating the amendment in apocalyptical terms when really, he said, there was no reason to believe the courts would severely alter the historically narrow view they have taken when it comes to regulatory takings.

“For our members, this is much more broad than just mineral rights,” he said. “It cuts to the core of what makes agriculture successful, what makes most businesses in this country successful, and that is strong protections for private property. The government per the constitution is allowed to take away private property, but they are also required to provide just compensation for people who are impacted by this policy. And our members would like to see that right strengthened and push the court a little bit more to the center and to take a slightly more broad view of who can be compensated for a regulatory taking.”

DU law professor Pidot is having none of that no-big-deal argument.

“It seems quite odd to me for the proponents of a constitutional amendment to say, well it is not going to do very much,” he said. “The point of amending the constitution is people believe there is a severe problem that needs a severe response. We should take the measure seriously. It’s proponents believe that this will reshape our law in significant ways — and the question for us is, ‘Are those beliefs that we want to be reshaped?’”