BEFORE THE OIL AND GAS CONSERVATION COMMISSION OF THE STATE OF COLORADO

IN THE MATTER OF THE PROMULGATION AND ESTABLISHMENT OF FIELD RULES TO GOVERN OPERATIONS FOR THE CODELL AND NIOBRARA FORMATIONS, WATTENBERG FIELD, ADAMS COUNTY, COLORADO	)))))	CAUSE NO. 407 DOCKET NO. 190900569 TYPE: POOLING

GREAT WESTERN OPERATING COMPANY, LLC'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) AND 12(b)(5)

COMES NOW Great Western Operating Company, LLC (Operator No. 10110) ("Great Western" or "Applicant") by and through its attorneys, Jost Energy Law, P.C., and respectfully moves to dismiss the "Amended Protest" filed by Stacy and Eric Lambright (the "Lambrights" or "Protestant") for lack of jurisdiction over the subject matter pursuant to C.R.C.P. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to C.R.C.P. 12(b)(5). In support of its Motion, Great Western states as follows:

C.R.C.P. 121 § 1-15 ¶ 8 CERTIFICATION

Prior to filing this Motion, the undersigned counsel for Great Western attempted to confer in good faith with the Lambrights on December 11, 2019 and on December 13, 2019 regarding the Lambrights' *pro se* status and retention of counsel and regarding the filing of this Motion pursuant to C.R.C.P. 121 § 1-15 ¶ 8. On December 16, 2019, Joseph Salazar for Colorado Rising for Communities[1] on behalf of the Lambrights filed a Notice of Entry of Appearance in this matter. On December 16, 2019, Mr. Salazar responded by letter indicating that the Lambrights object to this motion.

FACTUAL BACKGROUND

1. Great Western is a limited liability company duly authorized to do business in the State of Colorado and is a registered operator in good standing with the Commission.

2. The Lambrights are individual owners of mineral interest within the Application Lands described herein.

3. On July 29, 1975, 168th Company, a General Partnership (as Lessor) and Byron Oil Industries (as Lessee) entered into that certain Oil and Gas Lease recorded in the records of the Clerk and Recorder of Adams County, Colorado on August 25, 1975 in Book

[1] Colorado Rising for Communities is a Colorado §501(c)(3) nonprofit organization organized and operated exclusively for charitable, scientific, and/or educational purposes within the meaning of §501(c)(3) of the Internal Revenue Code. *See* Articles of Incorporation for a Nonprofit Corporation (https://www.sos.state.co.us/biz/ViewImage.do?masterFileId=20191048733&fileId=20191048733). Colorado Rising for Communities holds itself out as a law firm representing Stacy and Eric Lambright; however, Colorado Rising for Communities was not formed for the practice of law in Colorado.

2013, Page 325 (the "Byron Lease") which covers portions of the N½ of Section 2, Township 1 South, Range 68 West, 6th P.M. for development of the Niobrara and Codell Formations.

4. On August 4, 2004, JP Thornton LLC, a Colorado limited liability company as successor to Lessor and Starlight Resources, LLC as successor Lessee entered into that certain Lease Ratification and Amendment of the Byron Lease. The Ratification and Amendment was recorded in the records of the Clerk and Recorder of Adams County, Colorado on August 31, 2004 at Reception No. 20040831000842740.

5. On March 20, 2017, the Commission entered Order No. 407-1902 which, among other things, established an approximate 640-acre drilling and spacing unit for the E½ of Section 2 and 11, Township 1 South, Range 68 West, 6th P.M. (the "Application Lands") and authorized the drilling of up to 12 horizontal wells in such unit to the Codell and Niobrara Formations, with the producing interval of the wellbores to be located no closer than 460 feet from the unit boundaries and no closer than 150 feet from the productive interval of any other wellbore located in the unit without exception being granted by the Director of the Commission, and authorizing up to one multi-well pad within the Application Lands, subject to Rule 318A, unless the Director grants an exception.

6. The Byron Lease is held by production from at least two (2) producing wells within the Application Lands: the Standley 1-2 Well (API No. 05-001-09506) and the Standley 2-2 Well (API No. 05-001-09507).

7. The Lambrights own leased mineral interest underlying the N½ of Section 2, Township 1 South, Range 68 West, 6th P.M. within the Application Lands and are successors in interest as Lessors to the Byron Lease.

8. On or around May 30, 2019, Great Western mailed lease offers to all unleased mineral interest owners within the Application Lands in compliance with Rule 530. *See* Rule 511 testimony submitted in support of Docket No. 190900569.

9. The Lambrights did not receive a lease offer because their lands are leased.

10. On or around June 25, 2019, Great Western mailed offers to participate in the drilling and operation of the Ivey LC 02-033HC Well (API No. Pending) and the Ivey LC 02-036HC Well (API No. Pending) (the "Wells") from the Codell and Niobrara Formations to all unleased and leasehold owners within the Application Lands in compliance with Rule 530. *See* Rule 511 testimony submitted in support of Docket No. 190900569.

11. The Lambrights did not receive elections to participate in the Wells because they are leased royalty owners.

12. On June 25, 2019, Great Western filed the subject pooling application in Docket No. 190900569 with the COGCC (the "Pooling Application") which seeks to pool all interests, including but not limited to any non-consenting interests and any party failing to fulfill its election through the timely payment of joint interest billings, in the approximate 640-

acre drilling and spacing unit established for the Application Lands for the drilling of the Ivey LC 02-033HC Well (API No. Pending) and the Ivey LC 02-036HC Well (API No. Pending) for the development and operation of the Codell and Niobrara Formations.

13. On or before July 26, 2019, Great Western mailed a copy of the Pooling Application and Notice of Hearing to all interested parties, including the Lambrights as leased royalty owners, in compliance with Rule 507. *See* Certificate of Service in Docket No. 190900569.

14. On August 6 and August 7, 2019, Great Western caused the Notice of Hearing to be published in the Denver Daily Journal and the MetroWest Brighton Standard Blade in Adams County in compliance with Rule 507. *See* Affidavit of Publication in Docket No. 190900569.

15. The two (2) Wells subject to the Pooling Application are proposed to be developed from one surface location within the Application Lands. The Commission approved the surface location on August 18, 2018 via an approved Form 2A, Location ID No. 442411, Form 2A Document No. 401687493.

16. Adams County, the local government with jurisdiction over the siting of the oil and gas location, approved the surface location via an executed Adams County Use by Special Review Permit ("USR") on November 8, 2017, and recorded on November 21, 2017, following a public hearing.

17. Great Western owns approximately 54% of the leasehold interests to be pooled by the Pooling Application and therefore the Pooling Application complies with the requirements of § 34-60-116(6)(b)(I), C.R.S. *See* Rule 511 testimony submitted in support of Docket No. 190900569.

18. Great Western has tendered all unleased mineral interest owners within the Application Lands reasonable and good faith lease offers at least ninety (90) days prior to the originally scheduled September 25, 2019 hearing on the Pooling Application. *See* Rule 511 testimony submitted in support of Docket No. 190900569.

19. The lease offers were made in good faith and in accordance with the requirements of Rule 530 when taking into account: 1) the date of lease and primary term or offer with acreage in lease; 2) the annual rental per acre; 3) bonus payment or evidence of its non-availability; and 4) mineral interest royalty. *See* Rule 511 testimony submitted in support of Docket No. 190900569.

20. On August 26, 2019, the Lambrights filed an "Amended Protest" to the Pooling Application requesting that the Lambrights be allowed to protest the pooling of their minerals. The Lambright Protest alleges, among other things, that 1) Great Western did not give proper notice of the Pooling Application to the Lambrights; 2) Great Western did not complete proper due diligence in protecting the Lambrights mineral rights and ensuring that residential oil and gas operations do not endanger the health, safety, and environmental

resources of the Lambrights neighborhood and community; 3) Great Western failed to offer unleased mineral owners in the Application Lands a reasonable offer to lease as required by 34-60-116, C.R.S. and COGCC Rule 530.c; and 4) granting the Application will cause waste, the drilling of unnecessary wells, will not protect correlative rights, and will endanger the health, safety, and welfare of the many residents who live in the Application Lands and the surrounding area, and will cause irreparable environmental damage.

21. Since the filing of the Lambrights "Amended Protest", representatives of Great Western have attempted outreach to the Lambrights to discuss their leased status and Great Western's development plans for the Application Lands. As of the date of this Motion, representatives from Great Western have not received any response from the Lambrights to their offers to discuss the Lambrights concerns and Great Western's development plans.

22. On August 28, 2019, the Hearing Officer entered an Order Regarding Motions in the above-captioned docket.

23. On September 26, 2019, LMB Capital Partners, LLC as both a surface and mineral owner within the Application Lands submitted a Rule 510 Statement in support of the Pooling Application to the COGCC on the basis, among other things, that Great Western's overall development plan for the Application Lands provides for efficient and economic development, prevents increased surface impacts, protects against adverse impacts to public health and the environment, serves to prevent waste and protects LMB Capital Partners, LLC correlative rights in accordance with the Oil and Gas Act.

24. On September 30, 2019, counsel for Great Western sent an email to the COGCC Hearing Staff and the Lambrights respectfully requesting that the Hearing Officer set an initial Prehearing Conference to discuss the *pro se* status of Mr. and Mrs. Lambright and to confirm the filing and hearing dates before the Hearing Officer. As of the date of this Motion, no response has been received from either the Lambrights or the COGCC Hearing Staff to the September 30, 2019 request to set a Prehearing Conference.

25. On December 16, 2019, Joseph A. Salazar for Colorado Rising for Communities filed a Notice of Entry of Appearance in this matter as counsel for the Lambrights.

26. As of the date of this Motion, the Pooling Application has not yet been scheduled for hearing.

STANDARD OF REVIEW

1. Pursuant to Commission Rule 519, "[t]he Colorado Rules of Civil Procedure apply to Commission proceedings unless they are inconsistent with Commission Rules or the Oil and Gas Conservation Act." Commission Rule 519.a.

2. A motion to dismiss for lack of standing is governed by C.R.C.P. 12(b)(1). "Subject matter jurisdiction is defined as a court's power to resolve a dispute in which it

renders judgment." *Levine v. Katz*, 192 P.3d 1008, 1011 (Colo. App. Div.2 2006). A protestant must have standing to assert a claim for the Commission to have jurisdiction over the dispute. Thus, "[s]tanding is a threshold issue that must be satisfied in order to decide a case on the merits." *Ainscough v. Owens,* 90 P.3d 851, 855 (Colo. 2004). "A plaintiff has standing if he or she has an injury in fact and that injury is to a legally protected interest." *First Horizon Merchant Services, Inc. v. Wellspring Capital Management, LLC,* 166 P.3d 166, 179-80 (Colo. App. Div. 2 2007) (quoting *Durdin v. Cheyenne Mountain Bank,* 98 P.3d 899, 902 (Colo. App. 2004)).

3. The Protestant has the burden of proving that the Commission has jurisdiction to hear the case. *Lee v. Banner Health,* 214 P.3d 589, 594 (Colo. App. Div. 1 2009). A motion to dismiss is properly granted when plaintiffs lack standing because the complaint does not show actual injury to a legally protected right. *Kreft v. Adolph Coors Co.*, 170 P.3d 854, 858 (Colo. App. Div. 1 2007). A Hearing Officer may consider any competent evidence pertaining to a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction without converting the motion to a summary judgment motion. *Lee, supra* at 593.

4. The purpose of a motion to dismiss under C.R.C.P. Rule 12(b)(5) is "to test the formal sufficiency of the complaint." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). A claim is insufficient if the substantive law does not support the claims asserted, or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). Factual allegations of the complaint must be enough to raise a right to relief "above the speculative level." *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). The court is not required to accept as true legal conclusions couched as factual allegations. *Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. Div. 1 2008). In ruling on a Rule 12(b)(5) motion, the Commission may consider plausible facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice, such as records of a public agency and real property records, without converting the motion into one for summary judgment. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. Div. 6 2006).

ARGUMENT

A. Great Western was not required to provide the Lambrights with either lease offers or offers to participate.

The Lambrights' allegation that Great Western failed to provide them with reasonable offers to lease or participate as required by C.R.S. § 34-60-116 and Commission Rule 530 does not, as a matter of law, support the Lambrights' claim to deny the Pooling Application and therefore must be dismissed. That is because, as existing lessors, they do not as a matter of law have the right to the relief they request.

The Lambrights are successors in interest to 168th Company and JP Thornton LLC as Lessors under the Byron Lease. Great Western is the successor to Byron Oil Industries

and Starlight Resources, LLC and is the current Lessee under the Byron Lease. The Byron Lease has been held by continuous production under its terms since the date of the expiration of its primary term until the present date. The Lambrights' Amended Protest requests that Great Western be required to conduct due diligence in discerning and correcting all mineral ownership and leasing rights, and further requests that any hearing or Commission decision regarding the development of its minerals be halted until due diligence regarding mineral rights is completed and proper notice is received by all mineral owners and lessees. Based on the leased status of the Lambrights, the Lambrights fail to state a claim for relief regarding Great Western's alleged lack of due diligence with respect to the Pooling Application, and further fail to acknowledge that such requested relief falls outside of the COGCC's jurisdiction.

The COGCC is precluded from exercising jurisdiction over any controversy involving a bona fide dispute regarding contract interpretation. *Crichton v. Augustus Energy Res.*, L.L.C., 2017 U.S. Dist. LEXIS 177684, *5, 2017 WL 4838735. It is well established precedent that the Commission lacks jurisdiction to interpret contracts. *Chase v. Colo. Oil & Gas Conservation Comm'n. 284 P.3d 161, 167-168 (Colo. Ct. App. 2012)* ("[W]e conclude the COGCC's determination that it lacked jurisdiction to interpret the contract was reasonable…"). An oil and gas lease is considered a contact under Colorado law. *See generally, Hill v. Stanolind Oil & Gas Co.*, 205 P.2d 643 (Colo. 1949), *Kugel v. Young*, 291 P.2d 695 (Colo. 1955), *Brice v. Pugh*, 354 P.2d 1024 (Colo. 1960).

Notwithstanding the Commission's limited jurisdiction over contractual interpretation, the construction of an unambiguous lease is an issue of law. *Bain v. Pioneer Plaza Shopping Ctr. LLC*, 894 P.2d 47, 49 (Colo. App. 1995). The court must construe a lease according to the general rules applicable to written instruments. *Id.* Generally, an unambiguous provision of a lease will generally be enforced as written. *Dinnerware Plus Holdings, Inc. v. Silverthorne Factory Stores, LLC*, 128 P.3d 245, 247 (Colo. App. Div. 2 2004). Paragraph 12 of the Byron Lease and Paragraph 5 of the Lease Ratification and Amendment unambiguously grant the Lessee the right to pool the lease with other leases in the same general area without any further consent or approval of the Lessor, which is fatal to their claim. *Page v. Fees-Krey, Inc.*, 617 P.2d 1188, 1191 (Colo. 1980) (a purchaser is bound by recitals in conveyances or other instruments of transfer in his chain of title).

Under C.R.S. § 34-60-116(6), the owners of separately owned interests in all or part of a drilling and spacing unit established by COGCC may pool their interests for the development and operation of the drilling unit. In the absence of voluntary pooling, Commission Rule 530 allows an application for involuntary pooling pursuant to C.R.S. § 34-60-116 to be filed at any time by an owner within a drilling and spacing unit established by Commission. Unleased mineral owners within the unit may be nonconsenting owners, while leased owners bound by the pooling provisions of their leases may be voluntarily pooled by their lessees.

Under the Byron Lease, Great Western has the authority to voluntarily pool the Lambrights' mineral interests without the Lambrights' further consent. Thus, the

Lambrights are not unleased mineral owners within the meaning of C.R.S. § 34-60-116 and Commission Rule 530. This is true even according to the Lambrights' cited authority, which requires reasonable offers to lease or participate be provided *only* to unleased owners. Therefore, under the plan language and requirements of C.R.S. § 34-60-116 and Commission Rule 530, Great Western had no obligation to provide reasonable offers to lease or participate to the Lambrights, the Lambrights' allegation as to this issue is not supported by law or regulation and should be dismissed.

B. Great Western provided the Lambrights with adequate Notice of the Pooling Application hearing.

The Lambrights Amended Protest requests that "any hearing or Commission decision regarding this site and the development of these minerals be halted until due diligence regarding mineral rights is completed and proper notice is received by all mineral owners and lessees." *See* Lambright Protest Section I.1. The Lambrights further request that any hearing on the Application be held in Adams County or Denver no earlier than 30 days after any pre-hearing processes have been completed. *See* Lambright Protest Section III.15. The Lambrights statements regarding Great Western's alleged improper notice of the Pooling Application are also not supported by substantive law and must be dismissed.

On or before July 26, 2019, Great Western mailed a copy of the Pooling Application and Notice of Hearing to all interested parties, including the Lambrights, in compliance with Commission Rule 507. Commission Rule 530.a allows an application for involuntary pooling pursuant to C.R.S. § 34-60-116, to be filed at any time by an owner within a drilling and spacing unit established by Commission order prior to or after drilling of a well, but no later than ninety (90) days in advance of the hearing date for which the applicant proposes the matter be heard by the Commission, as per Rule 506.a. Rule 530 further provides that an owner will be deemed a "nonconsenting owner" if the owner either refuses to elect in writing to participate in a well within 60 days after receiving an offer to participate or refuses a reasonable offer to lease within 60 days after receiving the offer. A "nonconsenting owner" is identified in C.R.S. § 34-60-116 as an owner of interests in the pooled unit who "refuses to agree to bear a proportionate share of the costs and risks of drilling and operating the wells," or an owner of interests in the unit who "is not subject to any lease or other contract for the development thereof for oil and gas."

The required offer to participate and/or offer to lease is necessary for the Commission to determine whether the offeree will be deemed "nonconsenting" for any payment or penalty provisions in the prospective pooling order. Neither offer is required for an interested party who either voluntarily participates in the pool or is bound by the pooling provision of his or her mineral lease. Owners under a valid lease—i.e. the Lambrights—are not entitled to further explanation of well plans, prevailing lease terms at the time of the application or the continuing viability of prior mineral leases where, as here, Great Western provided notice of its Pooling Application and Notice of Hearing to the Lambrights in compliance with all COGCC Rules. For these reasons, the Lambrights

fail to state a claim for relief under the requirements of Rule 530 and C.R.S. § 34-60-116 and the Lambrights claims on these issues must be dismissed.

C. Great Western has not violated any COGCC Rules or environmental laws in filings its Pooling Application.

The Lambrights allegations regarding the creation of waste, drilling of unnecessary wells, failure protect correlative rights, endangerment of the health, safety, and welfare "of the many residents who live in the drilling and spacing unit and the surrounding area" and the "cause irreparable environmental damage" not only fail to state a claim for relief to deny the Pooling Application, but must be denied for lack of standing and ripeness. *See* Lambright Protest Section II.9. Indeed, the Lambrights allegations regarding their "belief" of environmental harm are not implicated by the pooling process, are not ripe and must be dismissed.

Courts do not have subject matter jurisdiction over cases that are not yet ripe. *DiCocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. Div. 4 2006). "[T]o be ripe, the issue must be 'real, immediate, and fit for adjudication.'" *Id.* Ripeness requires "an actual case or controversy between the parties." *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002) (modified on other grounds by *Lance v. Dennis*, 546 U.S. 459 (2006)). In other words, a court only has jurisdiction to hear a case with "an existing legal controversy, rather than the mere possibility of a future claim." *Bd. of Cnty. Comm'rs v. Park Cnty. Sportsmen's Ranch*, 45 P.3d 693, 698 (Colo. 2002). The Lambrights assertion as to potential violations of COGCC Rules and other laws ignores the findings of the COGCC in Order No. 407-1902 that the establishment of an approximate 640-acre drilling and spacing unit for the Application Lands and the approval of the drilling of up to 12 horizontal wells protects correlative rights and prevents waste. Such assertions by the Lambrights are speculative in nature meaning that there is no current case or controversy that is ripe for adjudication.

The Lambrights do not have standing to bring claims that are not ripe for adjudication. A plaintiff has standing if (1) the plaintiff was injured in fact; and (2) the injury was to a legally protected interest. *Romer v. Colo. Gen. Assembly,* 810 P.2d 215, 218 (Colo. 1991). Injury in fact exists if the action complained of has caused or has threatened to cause injury." *Colo. Gen. Assembly v. Lamm,* 700 P.2d 508, 516 (Colo. 1985). However, the injury must be "direct and palpable," not indirect, remote, or uncertain. *O'Bryant v. Pub. Utils. Comm'n,* 778 P.2d 648, 653 (Colo. 1989). A claimed injury that, as here, is presently speculative and that cannot be determined until a remote time in the future, is not sufficiently direct and palpable to support a finding of injury in fact. *Olson v. City of Golden*, 53 P.3d 747, 749 (Colo. App. 2002). It is well established in Colorado that a "controversy presented must be current rather than one that may rise at some future time." *Burkett v. Amoco Production Co.*, 85 P.3d 576, 578 (Colo. App. 2003) (citing *Burcham v. Burcham*, 1 P.3d 756, 757 (Colo. App. 2000)); *see also Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164 (Colo. 1988). Because the Lambrights have suffered no injury in fact, their allegations are without merit and should be dismissed.

D. The Lambrights are not "protestants" under the definition in Commission Rule 509 and lack standing to bring this Protest.

Commission Rule 509.a allows "persons who have filed with the Commission a timely and proper protest or intervention pursuant to this rule" to participate formally in any adjudicatory proceeding. A party will be considered a "Protestant" if they have demonstrated "they would be directly and adversely affected or aggrieved by a Commission ruling, and that any injury or threat of injury sustained would be entitled to legal protection under the Act." Commission Rule 509.a(1)A. The Lambrights' participation in the hearing "will be limited to those issues that reasonably relate to the interests that the protestant or intervenor seeks to protect, and which may be adversely affected by an order of the Commission, as determined by the Hearing Officer." Commission Rule 509.f(2). The Lambrights have failed to demonstrate they have legally protected rights that will be adversely affected or aggrieved by the approval of the Pooling Application. Where it is clear that plaintiffs have no standing to assert a claim upon which relief can be granted, the action is properly dismissed. *Clark v. City of Colo. Springs*, 162 Colo. 593, 428 P.2d 359 (1967).

Stated simply, the Commission does not have subject matter jurisdiction over the Lambrights as individual leased mineral owners with respect to the Lambrights' request to deny the Pooling Application. Their protest fails accordingly.

CONCLUSION

Contrary to the Lambrights' allegations, Great Western's Pooling Application complies with the Act and COGCC Rules. The Lambrights have failed to state a claim for which relief can be granted under the Act and COGCC Rules and have failed to show injury in fact to a legally protected interest necessary to establish standing to bring a Protest. Further, to the extent a protest without merit is made for reasons of obstruction and delay, Commission Rule 501.b allows for summary dismissal of the Lambrights' protest.

For the foregoing reasons, Great Western respectfully requests that the Commission dismiss the Lambrights Protest with prejudice and grand such further relief as necessary and required in this matter.

DATED this 17th day of December, 2019.

Respectfully submitted,

Great Western Operating Company, LLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2019, Jost Energy Law, P.C. caused Great Western Operating Company, LLC's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) in Colorado Oil and Gas Conservation Commission Docket No. 190900569 to be served via electronic mail to the Commission and to counsel for Eric and Stacy Lambright at the addresses listed below.

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