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 REPLY IN SUPPORT OF 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 files this Reply in support of its Motion 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 this Reply, Great Western states as follows:

INTRODUCTION AND OBJECTION TO NEW ARGUMENTS

Nothing alleged in the Lambright Response to Great Western's Motion to Dismiss provides any factual or legal authority supporting the Commission's subject matter jurisdiction over the Lambrights' requested relief or a plausible claim for relief under the substantive law governing pooling in Colorado. For the reasons outlined herein, the Lambright Protest must be dismissed for lack of standing under C.R.C.P. 12(b)(1) and for failure to state a claim for relief under C.R.C.P. (12)(b)(5). Furthermore, the Lambright Response raises several new arguments challenging specific terms within the Oil and Gas Lease covering the Lambrights' mineral interest dated July 29, 1975, between 168th Company, a General Partnership (as Lessor) and Byron Oil Industries (as Lessee) (the "Byron Lease") and its associated Amendment and Ratification and, for the first time, new public policy and constitutional arguments alleging the Byron Lease and Ratification violate public policy, are inequitable, harsh, oppressive, unfair and unjust, and that a pooling order would result in the taking of the Lambrights' private property for the private use of Great Western in violation of the Lambrights' constitutional rights. Such allegations are not only outside of the Commission's jurisdiction, they were not raised in the Lambright Protest and the Lambrights have not sought leave from the Hearing Officer to amend their Protest. Therefore, Great Western hereby objects to the new arguments raised by the Lambrights in their Response, and any Reply contained herein does not waive Great Western's objection to the new arguments. Furthermore, the Lambright Response outlines the Lambrights' overall request to "see their mineral rights remain in the ground." Lambright Response, Page 5. To the extent the Lambright Protest is filed solely to obstruct or delay Great Western's development via the pooling process, Great Western respectfully requests summary dismissal under Rule 501.b.

REPLY CONCERNING FACTUAL BACKGROUND

1. Many of the statements of fact and law contained in the "Factual Background" section of the Lambright Response are unsupported, contrary to the record and invoke questions outside the Commission's jurisdiction. To clarify the record in this matter and to respond to the unsupported allegations set forth by the Lambrights in their Response, Great Western provides the following reply to the Factual Background outlined by the Lambrights.

2. In Paragraph 1 of the Lambright Response, the Lambrights allege they received a "package of information" from the Commission. To clarify the record with respect to the undefined "package of information", pursuant to Rule 507.a.(1), Jost Energy Law as counsel for Great Western mailed the Lambrights the Application and Notice of Hearing in the above-captioned docket. *See* Certificate of Service filed by Jost Energy Law in the above-captioned docket.

3. In Paragraph 3 of the Lambright Response, the Lambrights allege the Commission provided the Lambrights with a Great Western contact for questions regarding the Application. Again, pursuant to Rule 507.a.(1), Jost Energy Law mailed the Application and Notice of Hearing to the Lambrights and provided the contact information of a Great Western representative to answer questions regarding the Application and Notice of Hearing.

4. In Paragraph 4 of the Lambright Response, the characterization of the Lambrights' confusion as "understandable" departs from the factual basis of this section. That they were confused is an alleged fact. That they were "understandably" confused is not a fact.

5. In Paragraphs 7 and 8 of the Lambright Response, the Lambrights quote the allegations in their Protest that due diligence regarding mineral rights was not completed. This allegation is without merit, unsupported by any factual allegations in the Lambright Protest or Response and may not be used by the Commission to "halt" any decision regarding the subject pooling application as requested by the Lambrights.

6. In Paragraph 11 of the Lambright Response, the Lambrights allege that it was not until they received Great Western's Motion to Dismiss that they learned they own mineral interest in the Application Lands. The Oil and Gas Lease and associated Ratification and Amendment that govern the development of the Lambrights' mineral interest are of record in the offices of the clerk and recorder of Adams County, Colorado. It was the obligation of the Lambrights to make themselves aware of any preexisting burdens on their land when they acquired it, particularly when evidence of any such burden was in the public records. A purchaser of real property is charged with knowledge of any documents recorded in the public records that affect title to that property. *Ragsdale Bros. Roofing, Inc. v. United Bank of Denver, N.A.*, 744 P.2d 750, 753 (Colo. App. 1987); *Chateaux Condos v. Daniels*, 754 P.2d 425 (Colo. App. 1988). One who claims an interest in real property is bound to know the status of the record title to the property in which the interest is claimed. *Sender v. Cygan*

(In re Rivera), 2012 CO 43. Failure to search the records destroys the validity of a lack of notice claim. *Ingels v. Ingels*, 487 P.2d 812 (Colo. 1971).

7. In Paragraph 12 of the Lambright Response, the Lambrights allege the Byron Lease does not include the use of hydraulic fracturing of nontransient minerals. Whether or not "nontransient minerals" may be hydraulically fractured under the Byron Lease is irrelevant to Great Western's pooling application and Motion to Dismiss, and in any case addressing the allegation requires the Commission to interpret a private contract, which falls squarely outside of the Commission's jurisdiction. *See Chase v. Colorado Oil and Gas Conservation Commission*, 284 P.3d 161, 165 (Colo. App. 212); *see also Grynberg v. Colorado Oil and Gas Conservation Commission*, 7 P.3d 1060 (Colo. App. 1999). Notwithstanding the Commission's lack of jurisdiction to interpret the lease and adjudicate this allegation, Great Western objects to this allegation as a new argument that was never raised in the Lambright Protest. Furthermore, the Byron Lease is conceived as an oil and gas lease, not a mining lease. Any activities necessary to explore for, drill and produce oil and gas are covered under the lease grant. In short, nothing in the lease expressly prohibits hydraulic fracturing related to oil and gas drilling, development and production activities, all of which are expressly allowed under the Byron Lease.

8. In Paragraph 13 of the Lambright Response, the Lambrights allege the "Starlight" Lease requires Great Western to provide the Lambrights with information about the additional 12 wells. Again, such allegation was never raised in the Lambright Protest, is not at all relevant to Great Western's pooling application or Motion to Dismiss and requires the Commission to interpret a private contract which falls outside of the Commission's jurisdiction. *See Chase* at 165; *Grynberg* at 1060. Notwithstanding the Commission's lack of jurisdiction to interpret the lease and adjudicate this allegation, the Lambrights attach the "Starlight" lease as Exhibit 2 to the Lambright Response, which lease does not include any of the lands subject to Great Western's pooling application in the above-captioned docket and is irrelevant to this proceeding. Furthermore, the Lambrights do not reference the provision in either the Byron Lease or the "Starlight" Ratification where notice of additional wells would continue to be required before or after changes in the ownership of the leased lands. In fact, there is no provision in either lease that would require notice to the Lessor of the drilling of additional wells.

9. In Paragraphs 14, 15 and 16 of the Lambright Response, the Lambrights cite to the primary term and the royalty rates provided by both contracts and allege that such rates are not reasonable based on market conditions. Again, this allegation was never raised in the Lambright Protest, and the terms of the lease to which the Lambrights are subject are not relevant to the subject Motion to Dismiss. Any consideration of such terms would require the Commission to overstep its jurisdiction. *See Chase* at 165; *Grynberg* at 1060. Notwithstanding the Commission's lack of jurisdiction to interpret the lease and adjudicate this allegation, Great Western's Motion to Dismiss affirms that the Byron Lease is held by production. *See* Great Western Motion to Dismiss, Page 2, Paragraph 6. Furthermore, there is no COGCC Rule or statute requiring Great Western to provide another lease offer to the Lambrights when their interests are already under a valid lease. *See* Order Granting Kerr McGee Onshore LP's Motion to Dismiss Protest in Docket No. 1403-UP-56.

10. In Paragraphs 17, 18 and 19 of the Lambright Response, the Lambrights cite to specific language within the Byron Lease and associated Ratification and Amendment they seem to suggest fails to comport with current regulatory developments and market conditions. Yet again, any allegation regarding the terms of the existing contract between the Lambrights and Great Western are not relevant to Great Western's Motion to Dismiss and in any case would require the Commission to interpret a private contract outside of the Commission's jurisdiction. *See Chase* at 165; *Grynberg* at 1060.

REPLY CONCERNING STANDARD OF REVIEW

1. In Paragraph 1 of this Section, the Lambrights equate Great Western's service of the Application and Notice of Hearing on the Lambrights with standing to file a Protest. Great Western does not dispute the fact that, pursuant to Rule 507.b.(2), the Lambrights are entitled to notice of the pooling application as leased mineral owners within the Application Lands. However, as further addressed herein, the Lambrights cite no authority equating their entitlement to notice to their standing to challenge the application on the basis of the allegations contained within the Lambright Protest.

2. In Paragraph 3 of this Section, the Lambrights cite to the Administrative Procedures Act and standing to seek judicial review of a final agency action. The APA standards for judicial review cited by the Lambrights apply to a party that wishes to seek judicial review (i.e. in District Court) of a final agency action (i.e. a final Commission Order). The subject proceeding invokes the Recommended Order process outlined in Rule 532 in which the Commission is bound by its own jurisdiction. The APA standards of judicial review do not apply to the Hearing Officer's review of Great Western's Motion to Dismiss the Lambright Protest to the pooling application. The question before the Hearing Officer when determining Great Western's Motion to Dismiss is two-fold: (1) do the Lambrights allege an injury in fact to a legally protected interest such that the Commission has subject matter jurisdiction over the claims raised in the Lambright Protest, and, if so, (2) do the plausible factual allegations in the Lambright Protest support a claim for relief under the substantive law? If the answer to either of these questions is no, the Protest must be dismissed.

3. The Lambrights' position on C.R.C.P. 12(b)(1) standing ignores the fact that the Commission does not have subject matter jurisdiction to resolve the entire legal basis of the Lambright Protest, which is summarized in the Lambright Response as six (6) bulleted points. *See* Lambright Response, Argument, Section B, Page 7. The Commission is bound by its own subject matter jurisdiction over the pooling application, which is defined as its power to resolve a dispute in which it renders judgment. *Levine v. Katz*, 192 P.3d 1008, 1011 (Colo. App. Div.2 2006). The Lambrights do not challenge the fact that their mineral interest is subject to the Byron Lease, as amended. The Lambrights make several allegations challenging specific provisions within oil and gas leases including the Byron Lease. However, when a party has leased its interests, the Commission does not have subject matter jurisdiction to circumvent C.R.S. § 34-60-116 and Rule 530 and award a remedy to the Lambrights requiring Great Western to "re-offer" a new lease, to send election letters to the Lambrights, to require that Great Western inform the Lambrights of

their leased status, to determine whether market conditions support the development of the Lambrights leased interests, or to determine whether the pooling application will cause waste, will result in the drilling of unnecessary wells, will harm the Lambrights correlative rights, will endanger public health, safety, welfare and the environment, or will cause irreparable environmental damage. None of these allegations are within the Commission's subject matter jurisdiction with respect to pooling when the party making such allegations is leased. 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).

4. The Lambrights' allegation that C.R.C.P. 12(b)(5) does not apply to protestors is also unfounded. First, the Commission has dismissed multiple protests of Applications pursuant to C.R.C.P. 12(b)(5). *See e.g.* Order Granting Conoco's Motion to Dismiss in Docket Nos. 170300141, 170300142, 170300145, 170300146, 170300149 and 170300153; Order Granting Kerr McGee Onshore LPs Motion to Dismiss Protest in Docket No. 1403-UP-56. The Lambrights' position on the applicable standard of review suggests that anyone who does not have standing to protest can somehow conjure standing by filing a protest. Simply filing a protest would not give someone without standing the standing they need for their protest to survive. The purpose of a C.R.C.P. 12(b)(5) motion is meant to test the formal sufficiency of a complaint. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). Where the complaint is insufficient, as is the Lambright Protest, a C.R.C.P. 12(b)(5) motion serves to dispatch that complaint and unburden the tribunal for its meaningful work. As further addressed below, while Rule 507 entitles leased royalty owners to notice of pooling applications, entitlement to notice does not mean that such lessors can assert issues of contractual interpretation or alleged environmental harm in the context of determining a pooling application.

REPLY TO ARGUMENT

A. The Lambrights' Entitlement to Notice of the Pooling Application Does Not Automatically Vest the Commission with Subject Matter Jurisdiction to Determine the Claims Alleged in the Lambright Protest.

It is undisputed that the Lambrights were entitled to receive notice of the Pooling Application as royalty owners; however, notice does not equate to standing to protest nor does it automatically confer standing to bring a claim for relief that is not supported by rule or law. The Notice of Hearing for Great Western's pooling application in the above-captioned docket describes pooling as "the consolidation and combining of mineral interests so that all mineral interest owners receive payment for their just and equitable share of produced oil and gas." *See* Notice of Hearing in Docket No. 190900569. Great Western is not seeking statutory cost recovery penalties against the Lambrights because their interests are bound by the terms of the Byron Lease, as amended. The Lambrights are entitled to royalty payments of all oil, gas and associated hydrocarbons produced under the terms of the Byron Lease. A pooling application is not a drilling permit, nor does it determine the unit size or the number of wells to be developed. The Lambrights have not demonstrated, pursuant to Rule 509.a.(1), that they would be directly and adversely

affected or aggrieved by a Commission ruling approving a pooling order, and that any injury or threat of injury sustained would be entitled to legal protection under the Act. For the reasons set forth herein, the Lambright Protest must be dismissed under C.R.C.P. 12(b)(1).

The crux of the Lambrights' argument in response to Great Western's C.R.C.P. 12(b)(1) Motion to Dismiss is summarized as: 1) SB19-181 amended the Oil and Gas Act and purportedly conferred unto them a statutory right to raise their protest to the pooling application, and 2) Great Western has not tendered to the Lambrights reasonable offers to lease or participate. In the Lambright Response, the Lambrights raise the argument that they would rather see their minerals remain in the ground than contribute to alleged cumulative adverse impacts resulting from Great Western's development plan. Lambright Response, Page 5. The Lambrights further allege that, based on current market conditions, it is not just and equitable to "forcefully take their minerals." *Id.*, Page 6. However, the Commission does not have subject matter jurisdiction to award a remedy to the Lambrights to keep their minerals in the ground. The primary objective of pooling is to determine how proceeds are to be paid from a mineral owner's just and equitable share of production. C.R.S. § 34-60-116(6)(b)(II). SB19-181 did not amend the Oil and Gas Act with respect to pooling *leased* mineral interests other than to require the applicant own or otherwise secure the consent of the owners of more than 45% of the mineral interest to be pooled. C.R.S. § 34-60-116(6)(b)(I). Great Western has complied with this requirement. *See* Application and Rule 511 Testimony in the above-captioned docket.

In addition, the Lambrights argue the Byron Lease and Ratification are not "reasonable offers" and do not contain the owner's share of the estimated drilling and completion costs of the wells, the location and objective depth of the wells, and the estimated spud date for the wells or range of time within which spudding is to occur. Response, Page 6. The Lambrights further argue that Great Western has not proven that their royalty rate under the Byron Lease, as amended, comports with a favorable market. *Id.* The plain reading of C.R.S. § 34-60-116 and Rule 530 do not require that a pooling applicant tender a good faith lease and participation offer to *leased* parties. In fact, the Commission determined this issue on a very similar set of facts in Order No. 1403-UP-56. In the Order Granting Kerr McGee's Motion to Dismiss, the Hearing Officer ruled:

> The existence of the lease between Kerr McGee and Prominence is relevant because it establishes that as a leased party, Prominence is not a nonconsenting owner and as such, the cost recovery penalty provisions do not apply against it. Because of the existence of the lease, Commission Rule 530 **does not** apply against Prominence. There is no requirement that Kerr McGee provide another lease to Prominence to meet the jurisdictional requirements for the Commission to enter a pooling order.
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> Order No. 1403-UP-56, Page 2.

Finally, the Lambright Response raises new public policy and constitutional arguments alleging that the Byron Lease and Ratification violate public policy, are inequitable, harsh, oppressive, unfair and unjust, and that a pooling order would result in the taking of the Lambrights' private property for the private use of Great Western in violation of the Lambrights' constitutional rights. Lambright Response, Pages 6-7. Great Western objects to the Lambrights' public policy and constitutional allegations as new arguments not contained within the Lambright Protest. An argument not submitted in an original protest or complaint may not be raised in a reply pleading. *Flagstaff Enterprises Const. Inc. v. Snow*, 908 P.2d 1183, 1184 (Colo. App. 1994); *see also Knappenberger v. Shea*, 874 P.2d 498 (Colo. App. 1994) (issues not presented in an opening brief generally are not considered by the court). When an argument is not raised in an opening brief, the issue is not properly before the tribunal and will not be addressed. *People v. Czemerynski,* 786 P.2d 1100 (Colo. 1990), citing 9 Wright and Miller, Federal Practice and Procedure § 3974 (1977) (issues not raised in appellant's initial brief will normally not be considered by the court); *see also Zink v. Fry*, 209 P. 510 (1922); *Davis v. Pursel*, 134 P. 107 (1913) (issues not raised in an appellant's original brief will not be considered when raised for the first time in the reply brief). Furthermore, the Lambrights' constitutional claims, raised for the first time in the Lambright Response, are undeveloped as legitimate arguments. Arguments rendered in broad strokes and set forth in a perfunctory manner do not merit the tribunal's address. *See Maralex Resources, Inc. v. Colorado Oil and Gas Conservation Commission*, 428 P.3d 657, 666 (Colo.App.Div. 1 2018), citing *People v. Mershon,* 874 P.2d 1025, 1034 n.13 (Colo. 1994) (declining to address constitutional arguments that were only raised in a cursory fashion before the trial court), *Wagner v. Georgetown Univ. Med. Ctr.,* 768 A.2d 546, 554 n.9 (D.C. 2001) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *United States v. Zannino*, 895 F.2d 1, 16 (1st Cir. 1990))).

Notwithstanding Great Western's objection, the Commission does not have subject matter jurisdiction to determine whether the Byron Lease and Ratification violate public policy or amount to a violation of the Lambrights' constitutional rights under C.R.S. § 34-60-116 and Rule 530.

When the Commission does not have authority to grant the relief requested by the Lambrights, and the available administrative remedies are ill-suited for providing the relief requested, administrative exhaustion is not required. *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*, 409 P.3d 637, 642 (quoting *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995)). In determining whether a court has subject matter jurisdiction over a claim where a party did not exhaust administrative remedies available to it, courts examine whether: (1) the claim was filed pursuant to the relevant statute; (2) this statute provides a remedy for the claim asserted; and (3) the legislature intended this statute to provide a "comprehensive scheme" addressing the issues underlying the claim. *Id.* (quoting *Grant Bros. Ranch, LLC* at 68-71). There is no simply no Commission Rule or provision of the Oil and Gas Act conferring jurisdictional authority on the Commission to determine whether the Byron Lease and Ratification violate public policy or amount to a violation of the Lambrights' constitutional rights. Furthermore, determination of these allegations falls outside the Commission's expertise. The Commission has jurisdiction to

resolve matters within its "area of expertise." *Grant Bros. Ranch, LLC*, 409 P.3d 637, 642 (quoting *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998)); *Great W. Sugar Co. v. N. Nat. Gas Co.,* 661 P.2d 684, 690 (Colo. App. 1982) (explaining that primary jurisdiction allows an agency to decide "in the first instance…technical questions of fact uniquely within the agency's expertise and experience"). For these reasons, the Commission must dismiss the Lambright Protest for lack of standing under C.R.C.P. 12(b)(1).

B. None of the Legal Bases for the Lambright Protest Amount to a Claim for Relief under Rule or Statute.

In alleging that the Commission does not have the authority to dismiss the Lambright Protest under C.R.C.P. 12(b)(5), the Lambright Response summarizes the general statements of their legal bases for the Protest. *See* Lambright Response, Argument, Section B, Page 7. Each and every one of the legal bases for Protest, as summarized in the Lambright Response, not only falls outside of the Commission's subject matter jurisdiction for a pooling application but fails to state a claim for relief to deny the pooling application and must be dismissed under C.R.C.P. 12(b)(5). Each of the Lambrights' legal bases for Protest is outlined below, followed by the reason why dismissal under C.R.C.P. 12(b)(5) is appropriate.

1. *Lambright Basis for Protest*: "The operator has 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."

a. Basis for Dismissal Under C.R.C.P. 12(b)(5): The Lambrights do not dispute the fact that their interests are subject to the Byron Oil and Gas Lease, as amended. Neither § 34-60-116, C.R.S. nor Rule 530.c. require a pooling applicant to "re-offer" a new oil and gas lease to a leased party. The Commission has ordered that no such obligation exists under statue or Rules when the mineral owner is leased. *See* Order Dismissing Protest in Docket No. 1403-UP-56.

2. *Lambright Basis for Protest*: "Great Western purported to send forced pooling election letters to the Lambrights, but no letters or leasing offers were received."

b. Basis for Dismissal Under C.R.C.P. 12(b)(5): Great Western never purported to send "forced pooling election letters to the Lambrights". Great Western has affirmed that it did not send election letters or lease offers to the Lambrights because they are leased. *See* Great Western Motion to Dismiss, Page 2, Paragraphs 9 and 11. The Lambrights do not dispute the fact that their interests are subject to the Byron Oil and Gas Lease, as amended. Neither § 34-60-116, C.R.S. nor Rule 530.c. require a pooling applicant to send election letters or lease offers to leased parties. The Commission has ordered that no such obligation exists under statue or Rules when the mineral owner is leased. *See* Order Dismissing Protest in Docket No. 1403-UP-56.

3. *Lambright Basis for Protest*: "Based on receiving Docket No. 190900569, the Lambrights assume they have unleased minerals within the Application Lands. Lambrights have documented conversations with Great Western employee, who indicated they were mineral owners but then indicated he "wasn't sure" and would have their Layman contact them. Great Western did not follow up."

c. *Basis for Dismissal Under C.R.C.P. 12(b)(5)*: The leases covering the mineral interest acquired by the Lambrights are of record. It is not the burden of Great Western to maintain the title of an interested party to its pooling application. A purchaser of real property is charged with knowledge of any documents recorded in the public records that affect title to that property. *Ragsdale Bros. Roofing, Inc. v. United Bank of Denver, N.A.,* 744 P.2d 750, 753 (Colo. App. 1987); *Chateaux Condos v. Daniels*, 754 P.2d 425 (Colo. App. 1988). One who claims an interest in real property is bound to know the status of the record title to the property in which the interest is claimed. *Sender v. Cygan (In re Rivera)*, 2012 CO 43. Failure to search the records destroys the validity of a lack of notice claim. *Ingels v. Ingels*, 487 P.2d 812 (Colo. 1971). Great Western complied with all applicable COGCC Rules and statutes by mailing a copy of the Application and Notice of Hearing to the Lambrights as leased parties. The Lambrights' allegation that they did not know they were leased does not state a plausible claim for relief.

4. *Lambright Basis for Protest*: "The Lambrights never received a leasing offer; therefore, the Lambrights did not receive an application to lease 90 days before the stated hearing. The packet was received on July 26, 2019, and the hearing is set for September 25-26, 2019."

d. Basis for Dismissal Under C.R.C.P. 12(b)(5): Again, Great Western did not send election letters or lease offers to the Lambrights because they are leased. *See* Great Western Motion to Dismiss, Page 2, Paragraphs 9 and 11. The Lambrights do not dispute the fact that their interests are subject to the Byron Oil and Gas Lease, as amended. Neither § 34-60-116, C.R.S. nor Rule 530.c. require a pooling applicant to lease offers to leased parties. The Commission has ordered that no such obligation exists under statue or Rules when the mineral owner is leased. *See* Order Dismissing Protest in Docket No. 1403-UP-56. Furthermore, Great Western complied with the requirements of Rule 507.a.(1) by mailing a copy of the Application and Notice of Hearing to the Lambrights at least sixty (60) days in advance of the noticed hearing date.

5. *Lambright Basis for Protest*: "It is widely recognized that current market conditions are not favorable to the owner of mineral interests. The Lambrights do not find it economically beneficial to move forward with development of its mineral interests at this time."

e. *Basis for Dismissal Under C.R.C.P. 12(b)(5)*: There is no COGCC Rule or provision in the Oil and Gas Act that provides a leased mineral owner with a

claim for relief on the basis of unfavorable market conditions. Furthermore, any consideration of whether the existing oil and gas lease covering the Lambrights' mineral interest is "favorable" would require the Commission to overstep its jurisdiction. *See Chase* at 165; *Grynberg* at 1060. Notwithstanding the Commission's lack of jurisdiction to interpret the lease and adjudicate this allegation, Great Western's Motion to Dismiss affirms that the Byron Lease is held by production. *See* Great Western Motion to Dismiss, Page 2, Paragraph 6.

6. *Lambright Basis for Protest*: "The Lambrights believe granting the Application will cause waste, as well as 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 drilling and spacing unit and the surrounding area, and cause irreparable environmental damage."

f. *Basis for Dismissal Under C.R.C.P. 12(b)(5)*: Pooling is "the consolidation and combining of mineral interests so that all mineral interest owners receive payment for their just and equitable share of produced oil and gas." *See* Notice of Hearing in Docket No. 190900569; *see* C.R.S. § 34-60-116(6)(b). The Application Lands subject to Great Western's pooling application have already been spaced by Order No. 407-1902, which established the approximate 640-acre drilling and spacing unit for the Application Lands and approved the drilling of up to 12 horizontal wells based on a finding that the development of 12 horizontal wells within the Application Lands will protect correlative rights and prevent waste. *See* Order No. 407-1902. The Lambrights allegations regarding their "belief" of environmental harm are not implicated by the pooling process, are speculative, do not state a plausible claim for relief under the pooling process, and must be dismissed. 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). A claimed injury that 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).

SUMMARY DISMISSAL UNDER RULE 501.B.

Great Western's Motion to Dismiss cites Rule 501.b., which allows for summary dismissal of the Lambrights' Protest upon the motion of Great Western, the Commission, Director, Administrative Law Judge or Hearing Officer to prohibit or terminate any abuse of process by a protestant. Grounds for such action may include, but are not limited to, the use of the Commission's procedures for reasons of obstruction and delay, misrepresentation in pleadings or testimony or other inappropriate or outrageous conduct that is deemed by the Commission, Director, or Administrative Law Judge or Hearing Officer to be an abuse of process. To the extent that the Lambright Protest is without merit and made for reasons of obstruction and delay of Great Western's development of the

Application Lands, Great Western respectfully requests summary dismissal under Commission Rule 501.b.

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

DATED this 14th day of January, 2020.

Respectfully submitted,

Great Western Operating Company, LLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2020, Jost Energy Law, P.C. caused Great Western Operating Company, LLC's Reply in Support of 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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