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

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

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

THIS MATTER is before the Hearing Officer upon Great Western Operating Company, LLC's ("Great Western") Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) ("Motion"). Eric and Stacy Lambright ("Lambrights" or "Protesters"), through counsel, filed a Response to the Motion ("Response"), and Great Western filed a Reply. The Hearing Officer held Oral Arguments on the fully briefed motion. Upon review of the Motion, Response, Reply, and Oral Arguments, the Hearing Officer enters the following findings, conclusions of law, and order.

PROCEDURAL HISTORY

On June 25, 2019, Great Western Operating Company, LLC ("Great Western") filed an Application for an order to pool all interests within an approximate 640-acre drilling and spacing unit established for the below described lands ("Application Lands"), and to subject any non-consenting interests to the cost recovery provisions of § 34-60-116(7), C.R.S., for the drilling of the Ivey LC 02-033HC Well and Ivey LC 02-036HC Well ("Wells"), for the production of oil, gas, and associated hydrocarbons from the Niobrara and Codell Formations:

Township 1 South, Range 68 West, 6th P.M.
Section 2: E½
Section 11: E½

On August 26, 2019, Eric and Stacy Lambright filed a protest to the Application pursuant to Rule 509.[1] In their protest, the Lambrights argued that Great Western failed to provide them with a reasonable offer to lease or participate in the Wells. Protest, at 1-2. The Lambrights also alleged that the application will cause waste and result in the drilling of unnecessary wells, will not protect their correlative rights, will cause irreparable

[1] Effective January 15, 2021, Rule 509 was moved to Rule 507 and was substantially modified. Pertinent to this matter, the new Rule adopted new standards regarding standing in Commission Proceedings, broadening standing to all "affected persons." *Statement of Basis, Specific Statutory Authority, and Purpose: New Rules and Amendments to Current Rules of the Colorado Oil and Gas Conservation Commission*, 2 C.C.R. § 404-1 ("Mission Change SBP"), p. 186 (23 Nov. 2020). That broadened interpretation of standing is applied here, and the Hearing Officer does not consider Great Western's claims that the Lambrights are not "protestants" under former Rule 509.

environmental damage, and will endanger the health, safety, and welfare of residents in the area.[2] *Id*. at 2.

On December 17, 2019, Great Western filed a Motion to dismiss the Lambrights' protest pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). Great Western contended that the Lambrights were leased mineral owners and therefore their allegation that they did not receive a lease or offer to participate under the Oil and Gas Conservation Act (the "Act") and Commission Rules failed to state a claim for which relief can be granted. Motion, at 5-6. Furthermore, Great Western noted that the Commission has long lacked jurisdiction to address any disputes over leases, including those arising in this case. *Id*. Great Western also denied violation of any Commission rules or environmental laws in filing its pooling application, and again challenged the Lambrights' standing to bring those claims and the Commission's jurisdiction to adjudicate them. *Id*. at 7-8.

On January 7, 2020, the Lambrights filed their Response to Great Western's Motion to Dismiss ("Response"). The Lambrights argued that they have standing to file a protest as leased minerals owners. Furthermore, they argued that C.R.C.P. 12(b)(5) does not apply to protestors, and that even if it did apply, Commission Rules do not require specific pleadings.[3] Response, at 4, 7-8. The Lambrights reiterated their concerns of waste, environmental damage, and endangerment of the health, safety, and welfare of residents in the area. *Id*. at 5. Finally, the Lambrights raised the new argument that the leases entered into in 1974 (hereinafter the "Byron Lease") and 2004 (hereinafter the "Starlight Lease[4]") do not constitute "reasonable offers" under C.R.S. § 34-60-116(7), because the terms are less favorable than the currently prevailing terms in the area at the time the application for the order is made. *Id*. at 6. The Lambrights therefore contended that they are legally entitled to a new lease offer that better addresses these matters. *Id*.

On January 14, 2020, Great Western filed its Reply in Support of Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) ("Reply"). Great Western objected to the new arguments raised by the Lambrights in their Response because they were not raised in the initial protest and leave was not sought to amend the protest. Reply, at 1. Great Western also objected to numerous factual claims and the standard of review outlined by Protestants. *Id*. at 2-5. Substantively, Great Western argued that the Lambrights' entitlement to notice of the Application does not give the Commission subject matter jurisdiction to adjudicate the Lambrights' protest arguments regarding the validity of the

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[2] The Lambrights also alleged that they did not receive proper notice. Protest, at 2. However, at oral arguments counsel for the Lambrights clarified that the Lambrights did receive the notice of hearing and application in compliance with the Act and Commission Rules. Oral Argument, at 38:00. Thus, the Hearing Officer need not address whether the Lambrights received proper notice of the hearing.

[3] In Commission Order No. 1-240, the Commission found that C.R.C.P. 12(b) does apply to Commission proceedings. Order No. 1-240 was entered after the Lambrights filed their Response. As such, the Hearing Officer does not further address this argument in this Order.

[4] There is dispute regarding the applicability of the 2004 Starlight Lease and/or Ratification and whether it is applicable to this matter. *See* Oral Arguments, at 10:00. For reasons discussed in detail, *infra*, the Hearing Officer does not have jurisdiction to resolve that matter.

lease or their requested relief to "keep their minerals in the ground." *Id*. at 6-7. Finally, in light of the Response, Great Western further requested summary dismissal under the protest pursuant to Commission Rule 501.b, for abuse of process, citing that the Lambright protest is without merit and made for reasons of obstruction and delay of Great Western's application. *Id*. at 10-11.

On March 12, 2020, the new Hearing Officer assigned to the matter held oral arguments on the issues raised in the Motion. The matter was thereafter continued on multiple occasions pending disposition of the Motion and pending the passing and implementation of Senate Bill 19-181 ("SB 19-181).

On December 8, 2020, the Lambrights filed a Motion for Emergency Hearing ("Emergency Hearing Motion") seeking clarification on the effective date of the Mission Change Rulemaking and its potential impact on the Application, Protest, and Motion as related to statutory pooling and the instant application. Motion for Emergency Hearing, p. 1-2. Furthermore, the Lambrights noted that Great Western had begun preparing to drill on the Application Lands, and reiterated an argument raised in its Response and at oral arguments regarding whether the Act requires an operator to obtain a Commission pooling order before drilling wells. *Id*.

The Motion for Emergency Hearing was fully briefed by the parties, and on December 21, 2020, the Hearing Officer issued an Order denying the Motion. In the order, the Hearing Officer noted that the Mission Change Rules did not go into effect until January 15, 2021, and therefore the Lambrights' request for clarification on the application of those Rules to the instant Application and Protest was unripe. Since that Order, the Mission Change Rules have gone into effect, and their applicability to this matter are discussed below.

The matter remained continued pending review and pending litigation in the Adams County District Court regarding the Ivey wells at issue in this docket and related Docket No. 210400286.

STANDARD OF REVIEW

Commission Rule 519.a[5] provides that:

> The Colorado Rules of Civil Procedure apply to Commission proceedings, unless they are inconsistent with Commission Rules or the Colorado Oil and Gas Conservation Act, or as the Hearing Officer may direct on the record during prehearing proceedings.

Neither Commission Rules nor the Act address the filing of motions to dismiss applications. That said, the Commission has held that C.R.C.P. 12(b) and case law interpreting C.R.C.P. 12(b) is not inconsistent with the Commission Rules or the Act, and

[5] Effective January 15, 2021, Rule 519 was moved to Rule 517. No changes were made to the rule.

therefore may apply to Commission proceedings. *See* Commission Order 1-240 (27 Mar. 2020).

"A motion to dismiss for lack of subject matter jurisdiction is governed by C.R.C.P. 12(b)(1)." *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). Under C.R.C.P. 12(b)(1), a court determines subject matter jurisdiction by examining the substance of the claim based on the facts alleged and relief requested. *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006). The plaintiff bears the burden of proving jurisdiction. *Jim Hutton Educ. Found. v. Rein*, 418 P.3d 1156, 1161 (Colo. 2018). To determine whether the plaintiff has met that burden in this context, the court must look to the statutory authority of the Commission and any precedent interpreting that authority. *Id*.

Unlike a motion to dismiss pursuant to C.R.C.P. 12(b)(5), the court resolving issues of subject matter jurisdiction "need not treat all of the facts alleged by the non-moving party as true." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Rather, the court must weigh the evidence, may allow limited discovery, review submitted affidavits or documents, and even hold a limited evidentiary hearing to resolve disputed facts. *Young v. Brighton Sch. Dist. 27J*, 325 P.3d 571, 575 (Colo. 2014) (citations omitted). The court will base all conclusions of law on the facts found. *Medina*, 35 P.3d at 452. A court may consider any competent evidence pertaining to a motion to dismiss for lack of subject matter jurisdiction without converting the motion to a summary judgment motion. *Lee v. Banner Health*, 214 P.3d 589, 593 (Colo. App. 2009).

The current standard in Colorado for ruling on C.R.C.P. 12(b)(5) motions to dismiss for failure to state a claim upon which relief can be granted is set out in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

In *Warne*, the Colorado Supreme Court adopted the "plausible claim for relief" standard originally adopted by the United States Supreme Court in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *Warne*, at 591, 595. The tenet that a Hearing Officer must accept as true all of the allegations contained in the Protest is inapplicable to legal conclusions and only a Protest that alleges facts sufficient to show a plausible claim for relief survives a motion to dismiss. *Id*. at 591. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. *Id*. at 595. Conclusory allegations are not entitled to an assumption that they are true. *Id*. at 596.

While the *Warne* opinion resulted in a "heightened pleading standard", motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are still disfavored in Colorado. *Belinda A. Begley &* Robert *K. Hirsch Revocable Trust* v. *Ireson*, 399 P.3d 777, 779, (Colo. App. 2017); *Rector v. City & County of Denver*, 122 P.3d 1010, 1013 (Colo. App. 2005). "A complaint need not express all facts that support the claim but need only serve notice of the claim asserted." *Adams v. Corrections Corp. of Am.*, 187 P.3d 1190, 1198 (Colo. App. 2008). Accordingly, motions to dismiss are "rarely granted under our notice

pleadings." *Id.* In considering whether dismissal is appropriate, all factual allegations in a complaint must be accepted as true and viewed in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In evaluating a C.R.C.P. 12(b)(5) motion, a court "may consider only those matters stated in the complaint." *Lambert v. Ritter Inaugural Committee, Inc.*, 218 P.3d 1115, 1119 (Colo. App. 2009) (citing *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999)).

Finally, pursuant to Rule 532.a, this Order is an Interim Decision that is not subject to the exception process until the Hearing Officer serves a recommended order disposing of the underlying Application. *See* Rule 532.a.(1)-(3).

SB 19-181 AND APPLICABILITY OF THE MISSION CHANGE RULEMAKING

On April 16, 2019, SB 19-181 was signed into law and applied to all pending permits and applications.[6] On January 15, 2021, the Commission's Mission Change Rulemaking Rules became effective, implementing the Commission's changed mission to regulate the development and production of the natural resources of oil and gas in the state in Colorado in a manner that protects public health, safety, welfare, the environment, and wildlife resources. C.R.S. § 34-60-102(1)(a)(1). With a few express exceptions, the new rules and amendments became effective on January 15, 2021. *Statement of Basis, Specific Statutory Authority, and Purpose: New Rules and Amendments to Current Rules of the Colorado Oil and Gas Conservation Commission*, 2 C.C.R. § 404-1 ("Mission Change SBP"), p. 1 (23 Nov. 2020). As such, the Hearing Officer considers all arguments and claims in the fully-briefed Motion in the context of SB 19-181 and the Mission Change Rules, and all Rule references have been changed to match current rule citations, with footnotes explaining changes when necessary and appropriate.

With regard to statutory pooling under C.R.S. § 34-60-116, Senate Bill 19-181 required that any statutory pooling application must provide that the applicant "owns, or has secured the consent of the owners of, more than forty-five percent of the mineral interests to be pooled." C.R.S. § 34-60-116(6)(b)(I). SB 19-181 also mandated that the Commission may not enter a pooling order unless it has been demonstrated that any lease offer was made in "good faith." C.R.S § 34-60-116(7)(d)(I). The initial 500 Series Rulemaking in response to SB 19-181, effective July 31, 2019, included language in what was then Rule 530.c.(2) to provide that the Commission has the discretion to consider leases from cornering and contiguous units as may be necessary to obtain a representative sample of the market.

The Mission Change Rulemaking made additional changes to the involuntary pooling Rule. The Rulemaking moved Rule 530 to Rule 506, and made two minor changes to wording. In Rule 506.a, the Commission clarified that the Commission, not the Applicant, sets the Hearing Date. In Rule 506.c.(1).B, the Commission clarified that the total sum of drilling and completion costs, including both the total cost and owner's

[6] In the instant matter, the drilling and spacing unit for the Application Lands was established on March 20, 2017 in Order No. 407-1902, and the Form 2A, Oil and Gas Location Assessment was approved on August 18, 2018. As such, neither were active or pending at the time of SB 19-181's passage.

share, must be provided in dollar amounts. Mission Change SBP, at 185. Aside from these clarifications, the Mission Change Rulemaking did not alter the involuntary pooling process under Commission Rules.

Finally, the Mission Change Rulemaking substantially broadened standing requirements for "affected persons" to participate in Commission proceedings, consolidated under Rule 507. *See* SBP, at 185-86. Pertinent to this case, determination of standing will consider: 1) whether the interest claimed is one protected or adversely affected by the application; 2) whether a reasonable relationship exists between the interest claimed and the activity regulated; 3) Likely impacts and magnitude of impacts of the regulated activity on the health, safety, welfare, or use of property of the person; and 4) likely impacts of the regulated act. Rule 507.a.(4).

ANALYSIS

Upon review, the Lambrights' Protest must be dismissed. The Lambrights' allegations regarding Great Western's failure to provide them with new lease offers or pooling election letters fail to state a claim for which relief can be granted, and the Lambrights' supplemental arguments regarding the Byron and Starlight Leases, aside from not being raised in the initial Protest, fall outside of the Commission's jurisdiction. The Lambrights' allegations pertaining to unfavorable market conditions, waste, unnecessary wells, and the violation of correlative rights fail to state a claim for which relief can be granted. Finally, the Lambrights' issues regarding public health, safety, the environment, and wildlife resources do not state a claim for which relief can be granted under a protest to an involuntary pooling application.

The Lambrights are leased mineral owners and therefore not entitled to a new lease offer to lease, or election letter under the Act and Commission Rules.

The Lambrights first allege that 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." Protest, at 1. The Lambrights note that based on receiving a packet related to Docket No. 190900569, the Lambrights assume they have unleased minerals within the Application Lands." *Id*. at 2. The Lambrights contend that Great Western failed to provide them with an application to lease or election letter 90 days before the stated hearing and request that Great Western be required to conduct due diligence on in discerning and correcting all mineral ownership and leasing rights, and that the Application ultimately be denied. *Id*. at 1-2.

Although the Lambrights' initially expressed some uncertainty in their initial protest regarding whether they are leased mineral owners, they acknowledge in their Response to the motion that they "hold mineral interests in the Application Lands due to a series of leases." Response, at 2, 6. Furthermore, the Lambrights supplemented their initial argument by disputing the validity of the leases because neither lease "include the use of hydraulic fracturing of nontransient minerals, such as shale," and therefore the prior leases "are not reasonable based on current market conditions." *Id*. Finally, the

Lambrights attached both Leases, which are of public record, to its Response. *See* Response. As such, the Hearing Officer will accept all of the Lambrights' allegations as true in resolving the motion, with the exception of the Lambrights' initial assumption that they are unleased mineral owners. *See Walker v. Laningham*, 148 P.3d 391, 394 (Colo. App. 2006) (Noting that Court need not accept as true facts alleged in the complaint that run counter to facts of which court can take judicial notice).

Accepting the Lambrights' remaining allegations as true, the Lambrights fail to state a claim for which relief can be granted. Leased mineral owners are not entitled to a new offer to lease or participate under the Act and Commission Rules. The Act and Rules repeatedly and expressly state that operators are required, among other things, to send lease offers and election letters to *unleased* mineral owners. C.R.S. § 34-60-116(7)(d)(I) ("The commission shall not enter an order pooling an *unleased* nonconsenting mineral owner under subsection (6) of this section over the protest of the owner unless the Commission has received evidence that that the *unleased* owner…has been tendered, no less than 60 days before the hearing, a reasonable offer, made in good faith, to lease…and that the unleased owner, has been furnished in writing the owner's share the estimated drilling and completion cost 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") (emphasis added); *see also* Commission Rule 506.c.

Implementation of SB 19-181 and the Mission Change Rules did not alter the obligations of involuntary pooling applicants to leased mineral owners. Section 34-60-116 and Rule 506 do not create any new obligations on the part of operators to leased mineral owners or eliminate any distinctions made between unleased and leased mineral owners in the context of involuntary pooling. *See* Mission Change SBP, p. 185. Leased mineral owners are mentioned only one time in the Commission 500 Series Rules, in Rule 504.b.(3), which specifically entitles both unleased and leased mineral owners to notice of hearing for involuntary pooling applications. The absence of any other express reference to leased mineral owners related to involuntary pooling stresses the distinction in the obligations due to each group and unequivocally indicates that applicants are not required to provide leased owners with the same materials as unleased mineral owners. It follows that leased mineral owners' only valid claim for relief in this context is to allege that the operator failed to provide the leased mineral owner with the application and notice of hearing.

Here, the Lambrights acknowledge that they are leased mineral owners and that they did receive the notice of hearing and application. *See* Protest, at 2; Response, at 2. Accepting these allegations as true, the Lambrights were not entitled to receive a lease offer or offer to participate, therefore failed to state a plausible claim for which relief can be granted. The Lambrights' allegations regarding Great Western's failure to provide them with a lease or offer to participate must therefore be dismissed.

The Commission does not retain jurisdiction to enforce or interpret the terms of a private lease or otherwise adjudicate any controversy involving a bona fide dispute regarding contract interpretation.

In its Response to the Motion and at oral arguments, the Lambrights contend that, even as successors to the Byron and Starlight Leases, the Leases are no longer reasonable under current market conditions. Response at 2, 6. In support of this argument, the Lambrights' point to a number of specific terms within the leases, and also note that neither lease includes "the use of hydraulic fracturing of nontransient minerals, such as shale," or "language relevant to a change in the Act or current public health, safety, welfare, and environmental conditions." Response, at 2-3. The Lambrights conclude that the Leases violate public policy. *Id*. at 6. Therefore, the Lambrights believe they are entitled to a reasonable offer to lease as a matter of law.[7] *Id*.

The Lambrights' claim must be dismissed pursuant to C.R.C.P. 12(b)(1) because the Colorado Oil and Gas Conservation Commission lacks jurisdiction to enforce or interpret a private contract or to exercise jurisdiction over any controversy involving a bona fide dispute regarding contract interpretation. *See Chase v. Colo. Oil & Gas Conservation Comm'n*, 284 P.3d 161-167-68 (Colo. App. 2012); *Grynberg v. Colo. Oil & Gas Conservation Comm'n*, 7 P.3d 1060, 1063 (Colo. App. 1999). An oil and gas lease is considered a contract under Colorado law. *See generally*, *Brice v. Pugh*, 354 P.2d 1024 (Colo. 1960); *Kugel v. Young*, 291 P.2d 695 (Colo. 1955); *Hill v. Stanolind Oil & Gas Co.*, 205 P.2d 643 (Colo. 1949).

Here, to accept the Lambrights' claim and move to the merits of its response would ask the Hearing Officer to interpret the contested terms of the Byron and Starlight Leases to determine whether it is fair or reasonable under current circumstances, and if not, unilaterally invalidate the leases and require Great Western to make a new offer. The Commission has never asserted such authority over a private lease or contrract, and the Lambrights point to no language that expressly or implicitly overrides longstanding precedent limiting the Commission's jurisdiction over interpretation and adjudication of terms of private leases or contracts. As such, the Lambrights' argument regarding the validity and reasonableness of the leases must be dismissed for lack of jurisdiction.

Even if the Commission retained jurisdiction to interpret the Byron and Starlight Leases, the Lambrights' allegation would nonetheless be dismissed because it does not allege facts that warrant relief under the Act or Rules. As an initial matter, the Hearing Officer notes that the Lambrights' did not raise the argument of the validity of the Byron and Starlight Lease in its initial Protest, and thus in the context of a motion to dismiss for failure to state a claim for which relief can be granted, the argument cannot be considered. In evaluating a C.R.C.P. 12(b)(5) motion, a court "may consider only those matters stated

[7] The Hearing Officer notes that in their Response, the Lambrights also contend that forced pooling is unconstitutional. Response at 7. This matter is not properly before the Hearing Officer or the Commission and must be dismissed for lack of jurisdiction. It is longstanding precedent that administrative agencies do not have authority to pass on the constitutionality of statutes or ordinances. *Arapahoe Roofing and Sheet Metal, Inc. v. City & Cnty. of Denver*, 831 P.2d 451, 454 (Colo. 1992) (collecting cases).

in the complaint." *Lambert v. Ritter Inaugural Committee, Inc.*, 218 P.3d 1115, 1119 (Colo. App. 2009) (citing *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999)). Even considering the arguments in the Lambrights' Response, the above statements amount to no more than conclusory statements that the Lambrights take issue with certain lease terms, that the lease is no longer fair or reasonable, and that the lease violates public policy. The Hearing Officer is not required to assume the truth of such facts. *Warne*, *supra*, at 591; *Scott v. Scott*, 428 P.3d 626, 632-33 (Colo. App. 2018) ("The plausibility standard emphasizes that facts pleaded as legal conclusions (i.e., conclusory statements) are not entitled to the assumption that they are true."). The Hearing Officer need not assume that conclusory allegations are true. *Campaign Integrity Watchdog, LLC v. Colorado Republican Party Independent Expenditure Committee*, 395 P.3d 1192, 1195 (Colo. App. 2017). As such, even assuming the Commission retained jurisdiction to entertain the Lambrights' allegations, their claims regarding the lease do not change their status as leased mineral owners and do not state a claim for which relief can be granted.

The Lambrights' claims regarding the validity of the Byron and Starlight Lease are dismissed.

The Lambrights' claim that current market conditions are not favorable to the owner of mineral interests fails to state a claim for which relief can be granted.

The Lambrights next allege that "[i]t 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." Protest, at 2.

The Lambrights' argument is a conclusory allegation not supported by specific facts. The Hearing Officer is not required to assume the truth of such facts. *Warne*, at 591; *Scott v. Scott*, 428 P.3d 626, 632-33 (Colo. App. 2018) ("The plausibility standard emphasizes that facts pleaded as legal conclusions (i.e., conclusory statements) are not entitled to the assumption that they are true."). The Hearing Officer need not assume that conclusory allegations are true. *Campaign Integrity Watchdog, LLC v. Colorado Republican Party Independent Expenditure Committee*, 395 P.3d 1192, 1195 (Colo. App. 2017).

Even accepting these allegations as true, the Lambrights' argument does not state a plausible claim for relief as permitted by the Act or Rules. The pooling statute provides, in relevant part:

> [w]hen two or more separately owned tracts are embraced within a drilling unit, or when there are separately owned interests in all or a part of the drilling unit, then persons owning such interests may pool their interests for the development and operation of the drilling unit.
>
> In the absence of voluntary pooling, the commission, upon the application of a person who owns, or has secured the consent of the owners of, more than

> forty-five percent of the mineral interests to be pooled, may enter an order pooling all interests in the drilling unit for the development and operation of the drilling unit. Mineral interests that are owned by a person who cannot be located through reasonable diligence are excluded from the calculation.

C.R.S. § 34-60-116(6)(a)-(b)(I).

Commission Rule 506 elaborates on the Act, and provides that "[t]he Commission must receive evidence that owners were tendered a good faith, reasonable offer to lease or participate no less than ninety (90) days prior to an involuntary pooling hearing." Rule 506.b. Rule 506 lays out the informational requirements for a pooling election letter, defines "good faith," and establishes the elements for consideration of the "reasonableness" of the lease offer. Rule 506.c.(1); Rule 506.b.(1) ("[f]or purposes of this Rule 506, 'good faith' means a state of mind consisting in observance of reasonable commercial standards of fair dealing in oil and gas operations, and absence of intent to defraud or seek unconscionable advantage"); Rule 506.c.(2) (the Commission shall consider date of lease and term, rental, bonus, royalty, and such other lease terms as may be relevant when weighing "reasonableness").

No express or implied language in the Act or Rules suggests that leased mineral owners may challenge a pooling application on the grounds of unfavorable market conditions, and no changes made by SB 19-181 or the Mission Change Rulemaking provide grounds for a protest on this basis. Simply put, denial of the application would not affect the Lambrights' status as leased mineral owners. This claim is dismissed.

The Lambrights' claims that the pooling application will cause waste and the drilling of unnecessary wells, and will not protect correlative rights, all fail to state a claim for which relief can be granted.

The Lambrights next allege that "granting the Application will cause waste, as well as the drilling of unnecessary wells, and will not protect correlative rights." Protest, at 2.

For the same reasons discussed above, the Lambrights fail to state a claim for which relief can be granted. The Lambrights' allegations are conclusory allegations and a mere recitation of statutory language couched as facts, and need not be assumed to be true. *Warne*, at 591; *Scott v. Scott*, 428 P.3d 626, 632-33 (Colo. App. 2018). To sustain a protest, the protestant must plead more than a mere recitation of the Commission's Rules. There must be factual allegations of what harm plausibly might be caused by the granting of an application for involuntary pooling.

Here, the Lambrights merely state that granting Great Western's application will result in these harms. The Protest contains no specific, factual allegations in support of these claims, and the Hearing Officer need not assume their truth. Therefore, the Lambrights' allegation of waste, unnecessary wells, and violation of correlative rights is dismissed for failure to state a claim for which relief can be granted.

The Lambrights' allegations that the pooling application will endanger the health, safety, and welfare of the many residents who live in the drilling and spacing unit cannot be redressed through denial of an involuntary pooling application.

The Lambrights next allege that the Application 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."

Again, the Lambrights' allegation is conclusory and a mere recitation of statutory language. The Hearing Officer is not required to assume the truth of such a statement. *See Warne*, at 591; *Scott v. Scott*, 428 P.3d 626, 632-33 (Colo. App. 2018).

Even accepting the allegation as true, the Lambrights' claims are not plausible grounds for denial of Great Western's application, as they are outside of the scope of an involuntary pooling application. No language in the Act expressly states or implies that pooling applications impact public health, safety, welfare, the environment or wildlife resources, and no changes made by SB 19-181 or the Mission Change Rulemaking provide grounds for a protest of a pooling application based on those claims.[8] The General Assembly clearly and specifically included the protection of public health, safety, welfare, the environment and wildlife resources as a mandatory requirement of spacing orders in C.R.S. § 34-60-116(3), but did not add it C.R.S. § 34-60-116(7)(a), governing pooling orders.

This omission ensures that public health, safety, welfare, environment and wildlife resource issues have already been resolved by the Commission by the time a pooling application is filed with the Commission, and this intent is further supported by the plain language of the Act and the Rules. Operators are not required to file an application for pooling or obtain a pooling order from the Commission in order to obtain a Form 2A or drill a well, and it is commonplace for an Oil and Gas Location to be built and wells to be drilled, completed, and producing, by the time a pooling application appears before the Commission. The Act and Rules do not contemplate the requirement of a pooling application prior to drilling or operating wells. *See* § 34-60-116(7)(a)(I), C.R.S. ("[Each pooling order must:] make provision for the drilling of one or more wells on the drilling unit, *if not already drilled*…"); Rule 506.a ("An application for involuntary pooling…may be filed at any time by an Owner who owns, or has secured the consent of more than 45% of the mineral interests to be pooled within a drilling and spacing unit established by the Commission, *prior to or after* the drilling of a Well") (emphasis added). Since an operator may file an application for involuntary pooling after drilling the wells to be pooled, denial of an involuntary pooling application does not affect permits already granted or wells already drilled, does not prohibit continued operations of Oil and Gas Locations, and does not require operators to remedy alleged violations of Commission Rules or alleged violations of public health, safety, welfare, the environment and wildlife resources.

[8] Although the Commission amended its rules to require that that pooling applicants attest to protection of public health, safety, welfare, the environment, and wildlife resources in a pooling application, this is not required by C.R.S. § 34-60-116(7)(a).

Here, the Commission has already approved a drilling and spacing unit for the Application Lands in Order No. 407-1902. Application, at 1; Motion at 2. The Commission also approved a Form 2A for the Location on August 18, 2018. Motion at 3. Great Western need not and did not need to file a pooling application to begin conducting oil and gas operations. Indeed, Great Western's pooling application simply requests that the Commission order to pool all interests within an approximate 640-acre drilling and spacing unit established for the Application Lands, and to subject any non-consenting interests to the cost recovery provisions of C.R.S. § 34-60-116(7), for the drilling of the Ivey wells. Application, at 1. As such, even accepting the Lambrights' allegations of endangerment of health, safety, welfare, and irreparable environmental damage as true, denial of Great Western's pooling application would do nothing to remedy those issues, nor would denial prevent Great Western from continuing permitted operations at the Ivey Pad. Rather, those claims are properly addressed through the Commission's permitting, complaint, and inspection processes.[9] These claims must therefore be dismissed.

CONCLUSION

For the reasons described above, the Lambrights' allegations that Great Western failed to provide a lease or offer to lease pursuant to Rule 506, that current market conditions are not favorable to the owner of mineral interests, and that the pooling application will cause waste and the drilling of unnecessary wells, and will not protect correlative rights, and allegations that the pooling application will endanger the health, safety, and welfare of the many residents who live in the drilling and spacing unit all fail to state a claim for which relief can be granted. The Lambrights' additional claims regarding the validity of the Byron and Starlight Leases and the constitutionality of the pooling statute must be dismissed for lack of jurisdiction. As such, the protest must be dismissed.[10]

ORDER

THEREFORE it is hereby

ORDERED that Great Western's "Motion to Dismiss" is GRANTED. The Lambrights' Protest is DISMISSED.

IT IS FURTHER ORDERED that pursuant to Rule 532.a.(1)-(3), this Order is an Interim Decision, which is not subject to the Commission's exception process. The aggrieved party may only file an exception to this Order once the Hearing Officer serves a recommended order disposing of the underlying application.

[9] The above ruling does not mean that the Lambrights' allegations regarding alleged health, safety, and environmental violations are not proper in other administrative avenues, such as the Commission's permitting, complaint, and inspection processes.

[10] Because the Lambrights' Protest is dismissed pursuant to C.R.C.P. 12(b)(1) and 12(b)(5), the Hearing Officer declines address Great Western's request for dismissal pursuant to Commission Rule 501.b.

Dated: October 29, 2021

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO,

Elias Thomas, Hearing Officer

CERTIFICATE OF SERVICE

On October 29, 2021, a true and correct copy of the foregoing Hearing Officer Recommendation was sent by electronic mail to the following:

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