BEFORE THE COLORADO OIL AND GAS CONSERVATION COMMISSION

IN THE MATTER OF THE APPLICATION OF GREAT WESTERN OPERATING COMPANY, LLC FOR AN ORDER TO POOL ALL INTERESTS IN AN APPROXIMATE 640-ACRE DRILLING AND SPACING UNIT ESTABLISHED FOR THE E½ OF SECTIONS 2 AND 11, TOWNSHIP 1 SOUTH, RANGE 67 WEST, 6TH P.M., FOR THE CODELL AND NIOBARA FORMATIONS, WATTENBERG FIELD, ADAMS COUNTY, COLORADO	CAUSE NO. 407 DOCKET NOS.: 190900569 TYPE: POOLING

PROTESTANTS' EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED ORDER OF THE COMMISSION AND ORDER REGARDING GREAT WESTERN OPERATING COMPANY, LLC'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) and 12(b)(5)

Protestants Stacy S. Lambright and Eric C. Lambright (the "Lambrights"), by and through counsel, Joseph A. Salazar of Colorado Rising for Communities, hereby submits this Protestants' Exception to the Hearing Officer's Recommended Order of the Commission and Order Regarding Great Western Operating Company, LLC's ("Great Western") Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). In exception thereto, the Lambrights state the following:

FACTUAL BACKGROUND

1. On or about July 26, 2019, the Lambrights received a package of information from the Colorado Oil and Gas Conservation Commission (the "Commission") related to an application for pooling ("Application") filed by Great Western on June 25, 2019.

2. The package of information also included a Notice of Hearing advising that, "[A]ny interested party who wishes to participate formally must file a written protests or intervention with the Commission." The Lambright's protest was due by August 26, 2019.

3. The Commission provided Eric Eisenhardt's name from Great Western should the Lambrights have any questions.

4. The Lambrights were understandably confused by this information and contacted Mr. Eisenhardt.

5. On August 8, 2019, the Lambrights contacted Mr. Eisenhardt. This conversation with Mr. Eisenhardt did not prove fruitful as the Lambrights could not get an answer to their questions about mineral ownership or any information about a lease.

6. The Lambrights filed their protest on August 26, 2019, as required by the Commission.

7. In their protest, the Lambrights were very diligent in asking the Commission to halt any decision "regarding the site and the development of these minerals… until due diligence regarding mineral rights is completed and proper notice is received by all mineral owners and lessees."

8. The Lambrights further protested Great Western's "lack of due diligence in protecting their mineral rights and ensuring that residential oil and gas operations do not endanger the health, safety, and environmental resources of their neighborhood and community."

9. The Lambrights, as mineral owners, protested the Application on the basis that market conditions are not favorable to the owners of mineral interests nor do they find it economically beneficial to move forward with development of their mineral interests at this time.

10. The Lambrights protested the Application arguing that approval of the Application will lead to waste, will not protect correlative rights, and will endanger the health, safety, and welfare of the public and cause irreparable environmental damage.

11. It was not until the Lambrights received the instant Motion to Dismiss that they learned they hold mineral interests in the Application Lands due to a series of leases that were entered into by prior Lessors and Lessees related to the Application Lands.

12. A review of the Oil and Gas Lease ("Byron Lease") entered into on July 29, 1975, does not include the use of the hydraulic fracturing of nontransient minerals, such as shale. In fact, successor lease agreements (i.e. Starlight Lease – August 4, 2004) also fail to identify the use of hydraulic fracturing of nontransient minerals, such as shale. A copy of the Byron Lease and Starlight Lease were attached for the Hearing Officer's convenience as Exhibit 1 and Exhibit 2, respectively.

13. Although required by the Starlight Lease, Great Western has not provided any information to the Lambrights about the additional 12 wells, such as whether they are exploratory or why an additional 12 wells is needed. Ex. 2.

14. With respect to lease terms, the Byron Lease indicates that the Lessor will receive a royalty of 20 percent. Ex. 1.

15. The Starlight Lease, on the other hand, describes a proportionate share of a royalty of 12.5 percent. Ex. 2. The Starlight Lease, which to the Lambrights' knowledge, was only a five (5) year lease – ending in 2009. Ex. 2.

16. The Lambrights now realize that the lease offer negotiated in prior leases are not reasonable based on current market conditions.

17. Both the Byron Lease and Starlight Lease expressly state that the leases are subject to all applicable laws, rules, regulations, and orders. *Id*.

18. The leases do not contain language relevant to a change in the Colorado Oil and Gas Conservation Act (the "Act") or current public health, safety, welfare, or environmental conditions.

19. The Starlight Lease specifically notes that the Agreement will "remain in force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any materially adverse manner to either party." Ex. 2

STANDARD OF REVIEW

I. Notice Pleading Under Colorado Rules of Civil Procedure

Under the Commission's rules: "A person who may be adversely affected or aggrieved by an application may submit a petition to the Commission as an Affected Person to participate formally as a party in an adjudicatory proceeding. The petition will set forth a brief and plain statement of the facts which entitled a person to be admitted and the matters that the person claim should be decided." COGCC Rule 507.a.

Rule 507.a appears to be patterned off the Colorado Rules of Civil Procedure 8(a)(2), which states "that a complaint shall contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Grizzell v. Hartman Enterp., Inc.*, 68 P.3d 551, 553 (Colo. App. 2003)

Based on this language in the Commission's rules, the Lambrights were not required to provide Great Western or the Commission any more information than the factual or legal basis upon which they protested the application. *Id.* "A complainant need not express all facts that support a claim, but need only serve notice of the claim asserted." *Adams v. Corrections Corp. of America*, 187 P.3d 1190, 1198 (Colo. App. 2008).

That being said, at least four claims were raised by the Lambrights before the Commission that implicate the Commission's jurisdiction:

a. The operator has failed to offer unleased mineral owners in the Application Lands a "reasonable offer to lease" as required by state statute and COGCC rules;

b. The pooling application will result in waste, the drilling of unnecessary wells, the pooling application will not protect correlative rights, and the pooling 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.

c. The leases that affected the Lambrights' interests are not on the same level of current lease offers, and will affect their just and equitable shares;

d. The leases that affect the Lambright's interests also require that current laws be applied such as the application of the protections of SB 19-181.

Because of the notice pleading requirements under the rules of civil procedure and under the Commission's rules, the Lambrights were not required to go into great pains to further describe these claims.

II. Rule 12(b)(1) and Standing:

In considering a dismissal for lack of subject matter jurisdiction, the Commission is required to examine whether the constitutional or statutory provision on which a claim rests properly can be understood as granting persons a right to judicial relief. *State Bd. of Cmty. Colls. & Occupational Educ. V. Olson*, 687 P.2d 429, 434 (Colo. 1984). "The test for standing in Colorado has traditionally been 'relatively easy to satisfy.'" *Vicerky v. Evelyn V. Trumble Living Trust*, 277 P.3d 864, 868 (Colo. App. 2011), citing *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004).

Here, the predominate statutory provisions found in the Colorado Oil and Gas Conservation Act (the "Act") are found in the legislative declaration and emanate throughout the Act:

> (1)(a) It is declared to be in the public interest *and the Commission is directed* to:
>
> > (I) *Regulate* the development and production of the natural resources of oil and gas in the state of Colorado in a manner *that protects* public health, safety, and welfare, including protection of the environment and wildlife resources.
>
> § 34-60-102(1)(a)(I), C.R.S. (2021) (emphasis added).

The Lambrights also have a statutory interest in their correlative rights. The Commission is mandated to: "[S]afeguard protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production therefrom." § 34-60-102(1)(a)(III).

For the Hearing Officer to infer that the Lambrights, as leased mineral owners, are not entitled to these statutory protections is repugnant to the Act. Nowhere in the Act, whether in the pooling statute or in any other parts of the Act, is there language remotely suggesting that leased mineral owners are not afforded these statutory protections.

In administrative proceedings, such as the one here, Colorado's Administrative Procedures Act (the "APA") provides judicial review for parties that are "adversely affected or aggrieved" by "final agency action." *Weld Air & Water v. Colo. Oil and Gas Conservation Comm'n*, 457 P.3d 727, 731 (Colo. App. 2019). In fact, the Commission's own organic statute and rules contemplates that judicial review shall be governed by the APA. § 34-60-111; Rule 501.d.

Thus, to establish standing in this matter, the Lambrights protest included the following:

a. They identified an interest in the activity that would be adversely affected;
b. They alleged that such interest could be an injury-in-fact if the application is granted; and
c. They identified that the interest will affect them personally.

COGCC Rule 507.a.(3)A-C.

To have standing, a party must suffer an injury-in-fact to a legal protected interest; an "interest is legal protected if the constitution, common law, or a statute, rule, or regulation provides the plaintiff with a claim for relief." *Reeves v. City of Fort Collins*, 170 P.3d 850, 851 (Colo. App. 2007). While the injury-in-fact cannot be overly indirect, incidental, or a remote, future possibility, the injury may be intangible, such as an aesthetic injury. *Ainscough*, 90 P.3d at 856. "In the context of an administrative action, the injury in fact element of standing does not require that a party suffer actual injury, as long as the party can demonstrate that the administrative action threatens to cause injury." *Bd. of Cnty. Comm'nrs of LaPlata County v. Colo. Oil and Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003).

Not only did the Lambrights identifying their interests and injury-in-fact should the pooling application be granted, the Commission was required to do a further analysis based on enumerated factors. The Hearing Officer was required to consider the following factors:

d. Whether the interest claimed is one protected or adversely affected by the application;

e. Whether a reasonable relationship exists between the interest claimed and the activity regulated;

f. Likely impacts and magnitude of impacts of the regulated activity on the health, safety, welfare, or use of property of the person; or

g. Likely impacts of the regulated activity on the impacted natural resources or wildlife used or enjoyed by the person;

COGCC Rules 507.a.(4)A-D.

Also, the statute and rules give leased mineral owners standing to challenge pooling applications. "For purposes of involuntary pooling orders made pursuant to § 34-60-116, C.R.S., the application and notice will be served on those persons who own any interest in the mineral estate, **whether leased or unleased**…" Rule 507.b(2) (emphasis added).

The Hearing Officer cannot get around the statute or the rules. As such, the Hearing Officer claimed that the Lambrights raised "conclusory allegations and a mere recitation of

statutory language." The Hearing Officer then concluded that the Lambrights were required to assert factual allegations of the harm granting the application might cause.

The Hearing Officer's conclusion is erroneous for a host of reasons. First, as stated above, the Lambright's were not required, under notice pleading, to state anything more than just their claims. The Commission's rules further support the Lambrights' position:

> *All petitions will include:*
>
> *(2) A general statement of the factual **or** legal basis for the petition based on the application.*

COGCC Rule 507.f.(2) (emphasis added).

The Commission's rules make clear that the Lambrights were allowed to provide a general statement of the legal basis for their petition, which they did. The Hearing Officer is attempting to create his own rules and ignore the rules he is obligated to follow. Creating rules out of thin air is an arbitrary and capricious act that is clearly outside the authority of the Hearing Officer. § 24-4-106(7)(b), C.R.S. (2020).

In sum, the Lambrights precisely followed the statute and the rules designed to protect their health, safety, welfare, and correlative rights to ensure that they receive their just and equitable shares. They were not required to write paragraphs, pages, or a book laying out the factual allegations of their harm. By the rules of civil procedure and the Commission's own rules, they appropriately expressed how the application would affect their legal rights. They were required to do nothing more to achieve standing in this matter.

The Commission must reverse the Hearing Officer's determination on standing, and find that the Lambrights have standing to file their protest.

III. Rule 12(b)(5) Does Not Apply to Protestors:

Contrary to Great Western's argument, a C.R.C.P. 12(b)(5) motion does not apply to Protestors in this administrative proceeding. In the context of an administrative proceeding, Great Western is the proponent (i.e. plaintiff/applicant) of this application. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 706 (Colo. 1994). The proponent is the person who brings forward a matter for litigation or action. *Id.*; *Velasquez v. Dep't of Higher Educ.*, 93 P.3d 540, 542 (Colo. App. 2004); § 24-4-105(7). The proponent of an order has the burden of proof in an administrative hearing. *Kinchen*, at 706; § 24-4-105(7); COGCC Rule 510.a. Thus, the Lambrights and all other Protestants should not be treated as a "plaintiff" in the context of a C.R.C.P. 12(b)(5) motion who have to prove their defense against this Application.

Just as importantly, because the Lambrights' property rights are at question in this administrative hearing, due process requires, at a minimum, notice and an opportunity to be heard in a meaningful manner. *Nichols v. DeStefano*, 70 P.3d 505, 507 (Colo. App. 2003). In the administrative context, due process requires that the parties be apprised of all the evidence to be

submitted and considered, and that they be afforded a reasonable opportunity in which to confront adverse witnesses and to present evidence and argument in support of their position. *Hendricks v. Indus. Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990). This is particularly true where a fundamental property interest is threatened. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

The Hearing Officer's granting of Great Western's 12(b)(5) motion to dismiss based on a stretched reading of C.R.C.P. 12(b)(5) fundamentally denies the Lambrights the opportunity to be heard in a meaningful manner. This is particularly true where Colorado courts view 12(b)(5) motions with disfavor and such motions are rarely granted where notice pleading is the standard. *Grizzell*, 68 P.3d at 53.

Once the Lambrights submitted their protest of the pooling application under the notice pleading requirements, the Hearing Officer had one duty – to ensure that the Lambrights had met the requirements under Rule 507.f.(1)-(8). Had he conducted the proper analysis, the Hearing Officer would have been obligated to find that the Lambrights notice pleading was sufficient. If the Hearing Officer wanted more information, he had the power to "require any additional information." COGCC Rule 507.g. He did not issue such a requirement to the Lambrights at any time during these proceedings.

Accordingly, because a Rule 12(b)(5) motion cannot be used against a defendant/petitioner/respondent filing an answer/petition against an application, the Commission must reverse the Hearing Officer's Order granting Great Western's 12(b)(5) motion to dismiss.

IV. The Lambrights Have A Statutory Right to Raise Public Health, Safety, Welfare, the Environment, and Wildlife Resources As. Defense

Even if the Commission were to turn the rules of civil procedure on its head and allow for Great Western's groundless motion, the Hearing Officer erred in finding that the Lambrights did not raise claims upon which relief can be granted. For example, as mineral owners, the Lambrights have a right to challenge whether Great Western can prove that all unleased mineral owners received lease offers. § 34-60-116(7)(d)(I); COGCC Rule 506.c.(1) and (3).[1] By Commission rule, the Lambrights had a right to present this defense by oral and documentary evidence, submit rebuttal evidence, and to conduct cross examination "required for the full and true disclosure of the facts." COGCC Rule 510.a. Such a right is important as the Commission cannot hear any application "until the Applicant has complied with all notice, evidentiary, and other application requirements set forth in the Commission's Rules." COGCC Rule 510.b.

The Hearing Officer not only denied the Lambrights the ability to have this defense heard, but he simply rubber stamped Great Western's motion to dismiss without conducting any analysis or requiring Great Western to show that it met this statutory and regulatory obligation. § 34-60-116(7)(d)(I); COGCC Rule 506.c.(1) and (3). Again, Great Western holds the burden of proof with this Application, not the Lambrights.

[1] As was held in COGCC Docket No. 190600458, those protestants were able to present evidence that the oil and gas operator failed to show that unleased mineral owners received lease offers.

With respect to the Lambright's claim involving public health, safety, welfare, the environment, and wildlife resources both the Act and the rules allow them to raise these issues as a defense against a pooling application. § 34-60-102(1)(a)(I); § 34-60-102(1)(a)(III).

In a narrow and isolated analysis of the pooling statute, the Hearing Officer erroneous ruled that the Commission's statutory mandates to protect public health, safety, welfare, the environment do not apply in pooling proceedings. This is a groundless reading of the law, particularly since administrative rules are not to be read in isolation, but viewed in connection with other rules, so that the rule itself may be interpreted as a whole. *Safeway v. Indust. Claims Appeals Ofc.*, 186 P.3d 103, 105 (Colo. App. 2008). Courts must construe "the whole of the regulation to give consistent, harmonious, and sensible effect to all of its parts. *Adams v. Colo. Dep't of Soc. Srvcs.*, 824 P.2d 83 (Colo. App. 1991).

Protecting public health, safety, welfare, and the environment is the central feature of the Act, as amended by SB 19-181. That statutorily mandated obligation is also found in the Commission's rules. For example, as stated above, the Hearing Officer was required to make findings about: "Likely impacts and magnitude of the regulated activity on the health, safety, welfare or use of property of the person; Likely impacts of the regulated activity on the impacted natural resources or wildlife used or enjoyed by the person." COGCC Rule 507.a.(4)C-D.

Obviously, the Hearing Officer made no such findings, instead summarily claiming the public health, safety, and welfare are not relevant to pooling applications. While such an analysis might have been acceptable under pre-181 rules, such a conclusion cannot square with the statute or the rules post-181. In fact, Rule 201.a specifically states:

> *The Commission's Rules are promulgated to regulate Oil and Gas Operations in a manner to protect and minimize adverse impacts to public health, safety, welfare, the environment, and wildlife resources, and to protect against adverse environmental impacts on any air, water, soil, or biological recourse resulting from Oil and Gas Operations. Except as set forth in Rule 201.d, the Commission's Rules are effective throughout the State of Colorado, and are in force in all pools and fields, unless the Commission amends, modifies, alters, or enlarges them through orders or Rules that apply to specific individual Pools or Fields.*

The Commission must find that the Lambrights state claims upon which relief can be granted. Health, safety, welfare, the environment, and wildlife resources are matters that must be considered by a Hearing Officer in **any** application.

V. The Lambrights Have A Statutory Right to Raise Correlative Rights As Defense

By statute, the Commission is required to:"[S]afeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production therefrom." § 34-60-102(1)(a)(III).

The definition of "just and equitable" means "dealing fairly and equally with everyone." https://www.merriam-webster.com/dictionary/equitable. A reasonable offer to lease is made in "good faith, to lease upon terms no less favorable than those **currently** prevailing in the area at the time application for the order is made." § 34-60-116(7)(d).

As leased mineral owners, the Lambrights had the right to raise a defense to the pooling application raising concerns about correlative rights, and that their just and equitable shares are at risk with this pooling application. § 34-60-102(1)(a)(III). Nowhere in the statute or in the rules is there a prohibition for leased mineral owners to raise these statutory rights in defense against a pooling application.

The Lambrights specifically mentioned that prior lease terms are not just or equitable, which will affect their correlative rights. The Commission was required to review the lease terms that go back 50 years to determine if the Lambrights' correlative rights are sufficiently protected under the lease terms. By COGCC rule, the Commission has the ability to consider lease terms such as mineral interest royalties and other terms as may be relevant to protect correlative rights, and to ensure just and equitable shares are protected under the lease terms. COGCC Rule 506.c.(3)D-E.

Claiming, as the Hearing Officer did, that the Commission cannot interpret private contracts then begs the question about how will the Commission safeguard, protect, or enforce correlative rights if it refuses to review contract language that dates back decades? Literally, how can shares be just and equitable if the Commission refuses to examine lease terms where leased mineral owners receive less than the statutorily required amount for nonconsenting owners? § 34-60-116(c)(I)(A) and (B). And, if the Commission were to buy into the Hearing Officer's rationale, then why did the Commission enact a rule that allows the Commission to examine lease language? COGCC Rule 506.c.(3)E. Surely, the Commission simply cannot defend taking such inconsistent positions, particularly where its statutory mandate is crystal clear. § 34-60-102(1)(a)(III).

Simply put, the Lambright lease violates public policy. *Rademacher v. Becker*, 374 P.3d 499 (Colo. App. 2015). "This rule does not exist for the benefit of the party seeking to avoid contractual obligations, but instead serves to protect the public from contract that are detrimental to the public good." *Id*. While the Commission, generally, does not have jurisdiction to interpret contracts, the Act does confer jurisdiction upon the Commission to determine whether 12½ percent royalty is reasonable in the current prevailing area, and to determine public health, safety, welfare, and environmental concerns. *Grynberg v. Colo. Oil and Gas Conservation Comm'n*, 7 P.3d 1060, 1064 (Colo. App. 1999).

As there is no rule that says leased mineral owners are prohibited from challenging their leases for violating the Act with respect to their correlative rights and receiving their just and equitable shares, the Lambrights have a statutory right to raise these defenses. Should the Commission uphold the Hearing Officer's Order recommending dismissal of this defense, it would be a complete abdication of the Commission's statutory obligations to protect mineral owners such as the Lambrights.

CONCLUSION

The Lambrights are afforded standing in this case via the Colorado Constitution, statute, and through the Commission's own rules. As mineral owners, the Lambrights are in danger of suffering an actual injury should this Application be approved by the Commission. Just as importantly, because the Lambrights have received notice of the Application, due process mandates that they have the opportunity to respond to the Application, review the evidence, and examine witnesses. Affirming the Hearing Officer's decision granting Great Western's motion to dismiss based on standing will deny the Lambrights their right to due process in this administrative forum and will result in injury to the Lambrights.

The Commission also must reverse the Hearing Officer's granting of Great Western's C.R.C.P. 12(b)(5) motion. Simply put, such a motion does not apply to protestants no more than what it would apply to a defendant. Great Western's attempt to stretch C.R.C.P. 12(b)(5) is an attempt to avoid an administrative process to which the Lambrights are entitled. Nonetheless, even if the Commission believes that C.R.C.P. 12(b)(5) can be applied to the Lambrights, the motion must be denied as the Lambrights have provided the Commission a general statement of the legal basis of their claims, which are grounded in statute. Nothing more is required by statute or the rules.

WHEREFORE, the Lambrights request that the Commission REVERSE the Hearing Officer's granting of Great Western's motion to dismiss in its entirety and allow the Lambrights to move forward in this administrative process. Further, based on the foregoing, the Commission must reject the Hearing Officer's Recommended Order of the Commission.

Dated this 27th day of November, 2021,

Respectfully Submitted,

/s/ Joseph A. Salazar
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2021, a true and correct copy of the Protestants' Exception to the Hearing Officer's Recommended Order of the Commission and Order Regarding Great Western Operating Company, LLC's ("Great Western") Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) was served on the following parties.

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