

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

EXTRACTION OIL & GAS, INC., *et al.*,¹

Reorganized Debtors.

ANNETTE LEAZER, TOM LEAZER; GORDON D. NISWENDER; JOY DEAN NISWENDER; H.L. WILLETT ESTATE; SAGLIO ENERGY LLC; OVERLAND OIL & GAS ADVISORY LLC; OVERLAND MINERALS AND ROYALTIES LLC; OVERLAND ENERGY PARTNERS FUND I LLC; OVERLAND ENERGY PARTNERS FUND II LLC; J A INVESTMENTS; BRIGHTON SOUTH, LLC; ATOMIC CAPITAL MINERALS, LLC; ACM FUND II LLC; TIMNATH LANDS LLC; RAWAH RESOURCES LLC; THUNDER RIDGE RESOURCES LLC; TRG OIL AND GAS; J MOODY; VAL MOODY; AND ALASKAN OIL AND RESOURCES, LLC,

Plaintiffs,

v.

EXTRACTION OIL & GAS, INC.

Defendant.

Chapter 11

Case No. 20-11548 CSS

(Jointly Administered)

Adv. Pro No. 20-50963
(CSS)

**Re: Docket Nos. 37
and 38**

**BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION**

¹ The Reorganized Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.



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Plaintiffs Annette and Tom Leazer, Gordon D. and Joy Dean Niswender, the H.L. Willett Estate, Saglio Energy LLC, Overland Oil & Gas Advisory LLC, Overland Minerals and Royalties LLC, Overland Energy Partners Fund I LLC, Overland Energy Partners Fund II LLC, J A Investments, Brighton South, LLC, Atomic Capital Minerals, LLC, ACM Fund II LLC, Timnath Lands LLC, Rawah Resources LLC, Thunder Ridge Resources LLC, TRG Oil and Gas, J Moody, Val Moody, and Alaskan Oil and Resources, LLC) (collectively, “*Plaintiffs*”) through undersigned counsel, file this Brief in Opposition to Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Brief in support thereof (“*12(b)(1) Motion*”) [A.D.I. 37, 38].

SUMMARY OF THE ARGUMENT

In its 12(b)(1) Motion, Defendant Extraction Oil & Gas, Inc. (“*Extraction*”) argues the Colorado Oil and Gas Conservation Commission (“*COGCC*”) has exclusive jurisdiction over Plaintiffs’ claims and asks the Court to dismiss the entire adversary proceeding for lack of subject matter jurisdiction for failure of Plaintiffs to first take their case to the COGCC.

When Extraction filed for bankruptcy, this Court acquired sole jurisdiction over any and all claims related to property in Extraction’s actual or constructive possession. Accordingly, Plaintiff brought claims related to their property – unpaid and underpaid royalties deriving from their oil and gas rights – before this Court. It is a legal fallacy to argue Plaintiffs could have raised their claims with the COGCC after Extraction filed for bankruptcy. This case involves unique issues that this Court alone is able to resolve, including whether the unpaid and underpaid royalties deriving from Plaintiffs’ oil and gas rights constitute Plaintiffs’ property held by Extraction or property of the bankruptcy estate.

This case also involves legal claims and issues that fall well beyond the jurisdiction and expertise of the COGCC. In submitting its 12(b)(1) Motion to this Court, Extraction ignored COGCC and Colorado Supreme Court precedent expressly confirming that the COGCC lacks jurisdiction to resolve Plaintiffs' claims. In fact, Extraction's *Sixth Amended Joint Plan for Reorganization* [Doc 1505] (the "*Plan*") concedes that an issue in this case is whether Plaintiffs are entitled to payment – an issue that COGCC and Colorado precedent expressly confirms is outside COGCC jurisdiction. Even the non-binding district court cases relied upon by Extraction are refuted by other district court decisions in Colorado.

LEGAL STANDARD

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits the dismissal of an action for lack of subject matter jurisdiction. "A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction." *Navarro v. Wal-Mart Assocs.*, Civ. No. 19-201-LPS (D. Del. Feb. 18, 2020) (citing *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3rd Cir. 2016)). "A facial attack contests the sufficiency of the pleadings, whereas a factual attack contests the sufficiency of jurisdictional facts." *Id.* (citing *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3rd Cir. 2015)). "When considering a facial attack, the court accepts the plaintiff's well-pleaded factual allegations as true and draws all reasonable inferences from those allegations in the plaintiff's favor." *Id.* (citing *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3rd Cir. 2017)). "When reviewing a factual attack, the court may weigh and consider evidence outside the pleadings." *Id.*

ARGUMENT

Extraction, one of the five largest operators in Colorado at the time, took the world by surprise when it filed for bankruptcy on June 14, 2020. At that time, Plaintiffs became legally precluded from filing claims before any tribunal, including the COGCC, absent an order from this Court granting relief from the automatic stay. Upon the filing of a bankruptcy petition, the Bankruptcy Code imposes an automatic stay on all claims against the debtor. The stay is applied to “the commencement or continuation [...] of a judicial, administrative or other action or proceeding against a debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title[.]” 11 U.S.C. § 362(a); *see also In re Montgomery Ward, LLC*, 292 B.R. 49, 53 (Bankr. D. Del. 2003) (discussing the breadth of claims to be resolved in bankruptcy).

Plaintiffs pored through their mineral rights records, lease records, royalty statements, and publicly available information to discover that Extraction, now a bankrupt company, had drilled, produced, and sold some of their oil and gas without permission, *i.e.* without a lease or without complying with the terms of a lease and/or Colorado law. Accordingly, Plaintiffs (out of an abundance of caution) submitted their proofs of claims to this Court, and filed this adversary proceeding in the bankruptcy case.

As discussed in Section I *infra*, this case involves bankruptcy-specific issues that cannot be resolved by another tribunal, rendering relief from stay or dismissal legally unavailable.

As discussed in Section II *infra*, the COGCC lacks jurisdiction over Plaintiffs’ legal, equitable, and tortious claims, rendering relief from stay or dismissal futile and judicially

inefficient. The COGCC would immediately dismiss Plaintiffs' claims, sending them right back here.

I. This Case Involves Issues That Can Only Be Resolved by This Court

The COGCC cannot resolve bankruptcy issues. A primary issue in dispute is whether Plaintiffs' royalties derived from their oil and gas rights constitute the Plaintiffs' property improperly held by Extraction or property of Extraction's bankruptcy estate. This Court recognized as much when it granted Plaintiffs' objection to the Plan and ordered that the amounts claimed by Plaintiffs be preserved in the disputed claims reserve pending the outcome of this adversary action:

As to certain disputed Royalty and Working Interests, until a court, arbiter, or other tribunal determines that the holder of a Royalty and Working Interest is entitled to payment, such Royalty and Working Interest shall be treated as a Disputed Claim, and the Debtors shall reserve the amount in dispute in the Disputed Claim Reserve. To the extent a court, arbiter, or other tribunal determines that the holder of the Royalty and Working Interest is entitled to recovery, such amount shall not be deemed property of the Estates.

Plan, at p. 38, ¶ 11; *see also Findings of Fact, Conclusions of Law, and Order Confirming the Sixth Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1509] (the "Confirmation Order"), at ¶ 22 (outlining the means for Plan implementation to include "the preservation of all Royalty and Working Interests in accordance with the terms of the Plan.").

Extraction cited no bankruptcy cases that expressly deal with the issues raised by the Complaint.² Indeed, the Third Circuit has already stated that "where there is an independent basis

² Extraction's reliance on *McDuffie v. Stewart Title Guar. Co.*, 897 F. Supp. 2d 294 (E.D. Pa. 2009) (which did not concern a bankruptcy, and has not been cited in opinions published by other courts) is misguided, as it overlooks that the *McDuffie* court's sole basis for jurisdiction was diversity of

for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.” *Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1074 (3d Cir. 1992). This conclusion “advances the congressionally-endorsed objective of the effective and expeditious resolution of all matters connected to the bankruptcy estate.” *Id.* And in similar cases, other courts have largely agreed. *Davis v. State of Cal. (In re Venoco, LLC)*, 596 B.R. 480, 491 (Bankr. D. Del. 2019), *aff’d*, 610 B.R. 239 (D. Del. 2020) (finding that “the Trustee was not required to exhaust state procedures.”); *PVI Assocs. v. The Redev. Auth. of Montgomery Cnty. (In re PVI Assocs.)*, 181 B.R. 210 (Bankr. E.D. Pa. 1995) (bankruptcy court had jurisdiction to consider a debtor’s “taking” claims, even without exhaustion of debtor’s administrative remedies under the Pennsylvania Eminent Domain Code); *Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.)*, 963 F.2d 1146, 1154 (9th Cir. 1991) (no requirement to exhaust administrative remedies provided by the FTCA).

Any exhaustion requirement imposed onto the Plaintiffs by Colorado law does not impact this Court’s jurisdiction to hear and resolve the issues raised by the Complaint. *See MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1109 (3d Cir. 1995) (“That a state simply has no power to divest a federal court of its constitutionally or congressionally conferred subject matter jurisdiction has been settled law for nearly a century.”). Moreover, the 12(b)(1) Motion fails to explain why this Court lacks jurisdiction over the Plaintiffs’ claims and requested remedies, which, as a result of the bankruptcy petition, *arise under federal law*. Under 28 U.S.C. § 1334,

citizenship pursuant to 28 U.S.C. § 1332, where only state substantive law would apply. As described herein, this Court has independent jurisdiction over the issues raised by the Complaint.

the United States District Courts have original and exclusive jurisdiction “of all cases under title 11” and “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334.³ Additionally, bankruptcy courts have subject matter jurisdiction to adjudicate all core proceedings arising in a case under title 11. 11 U.S.C. § 157(b)(1); *see also Stern v. Marshall*, 564 U.S. 462, 475–476 (2011). Of particular relevance here, matters concerning the administration of a bankruptcy estate, the allowance or disallowance of claims (including the determination of contingent claims), and proceedings affecting liquidation of property of the estate are all core proceedings that arise in a bankruptcy case. 28 U.S.C. § 157(b)(2); *accord Siegel v. Cal. Self-Insurers’ Sec. Fund (In re Cir. City Stores, Inc.)*, Case No. 08-35653, Adv. Case No. 15-03477, 2016 WL 1714515, at *4 (Bankr. E.D. Va. Apr. 26, 2016). Extraction’s bankruptcy estate, which was immediately created upon the commencement of this Chapter 11 case, is comprised of “all legal or equitable interests . . . of the [D]ebtor in property[.]” (11 U.S.C. § 541(a)(1)), over which this Court has jurisdiction “*wherever located and by whomever held[.]*” *Id.* (emphasis added). And it has been long settled the bankruptcy court has summary jurisdiction over property in actual or constructive possession of the debtor, and that the federal courts have exclusive jurisdiction to determine whether or not property held by the debtor constitutes property of the estate. *See, e.g., Johnson v. Bd. of Trade of City of Chi.*, 264 U.S. 1 (1924).

³ District courts widely refer “any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11” to their local bankruptcy courts. *See, e.g., Amended Standing Order of Reference*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, dated February 29, 2012.

Further, if Extraction is trying to argue that this Court’s jurisdiction terminated when the Plan became effective, it is, of course, incorrect. Pursuant to the Confirmation Order, “[this] Court properly retains jurisdiction over these Chapter 11 Cases *and all matters arising out of, or related to, these Chapter 11 Cases, the Plan, and th[e] Confirmation Order.*” Confirmation Order, at ¶ 154.

II. The COGCC Has No Jurisdiction Over Plaintiffs’ Claims

In support of its 12(b)(1) Motion, Extraction relies exclusively on non-binding district court decisions, specifically two that dismissed a putative class action brought by C&M Resources LLC and Winters Oil (the “*C&M/Winters Case*”).⁴ Extraction attempts to convince the Court the Plaintiffs in this case are the same or similar to the plaintiffs in that case and to accept those decisions as law. According to Extraction, this Court lacks jurisdiction over Plaintiffs’ claims because Plaintiffs could be future class members in a putative class action filed before Extraction filed its bankruptcy petition; a class action that was dismissed for lack of subject matter jurisdiction by Colorado state district courts. To clarify: Plaintiffs here are different from and unrelated to the C&M/Winters Case plaintiffs; classifying these Plaintiffs as future class members is entirely speculative; Plaintiffs’ claims extend well beyond the conduct complained of by C&M and Winters; the C&M/Winters Case was filed before Extraction filed for bankruptcy, when filing an administrative proceeding was still legally available; the C&M/Winters Case decisions are not

⁴ Extraction attempts to characterize this case as an extension of the C&M/Winters Case by stating Plaintiffs’ counsel, specifically Steven Louis-Prescott and Maria Sawczuk, also represent C&M and Winters. This is misleading. Steven Louis-Prescott has not represented C&M or Winters since August, 2019, nearly a year before Extraction filed its bankruptcy petition, and has no knowledge related to the status of their case. Maria Sawczuk was retained as local counsel for C&M and Winters in this bankruptcy proceeding. These tangential connections have no bearing on Plaintiffs’ claims in this adversary proceeding.

legally binding on this Court; and the C&M/Winters Case decisions are in direct conflict with binding Colorado precedent and the COGCC's own interpretation of its governing statutes.

A. The COGCC Lacks Requisite Expertise and Authority

Going to the crux of Extraction's 12(b)(1) Motion, Extraction argues the COGCC must resolve Plaintiffs' legal, equitable, and tortious claims for: declaratory relief, fraud and misrepresentation, breach of contract, breach of implied covenants, conversion, constructive and resulting trust, unjust enrichment, an accounting, and preliminary and mandatory injunction claims (the "*Claims*"). More specifically and by way of example, Plaintiffs' Claims state:

- "this Court has the power to declare and adjudicate the rights and obligations of the parties and to grant such other and further relief as may be necessary to enforce the rights and obligations of parties relative to the Plaintiffs' Leases. [...] Uncertainty and insecurity currently exist with respect to the rights, status, and other legal relations between the parties concerning the validity, scope and extent of Plaintiffs' Leases and the Defendant's produced but unsold oil and gas, prohibited Deductions, price determinations, title work, and royalty calculations with The COGCC cannot resolve any of these Claims" (Declaratory relief, Compl. ¶¶ 63-64);
- "Plaintiffs further seek a declaration that their royalties and any royalty underpayments are not property of the Defendant's bankruptcy estate and must be turned over to Plaintiffs" (Declaratory relief, Compl. ¶ 67);
- Extraction committed fraud and/or misrepresentation when it "knowingly made uniform misrepresentations and/or omissions on the Plaintiffs' monthly royalty statements" (Fraud, Compl. ¶ 80);
- "Defendant breached the Leases by failing to pay the full royalty amount owed due to failing to sell all Plaintiffs' oil and gas produced, allowing Deductions to be taken in the sale of oil and gas to third parties; and selling Plaintiffs' oil and gas interests at below market prices" (Breach of contract, Compl. ¶ 87);
- for some Plaintiffs "whose Leases expressly prohibit any deductions, including deductions for taxes, the Defendant breached their Leases by deducting taxes from their royalty payments" (Breach of contract, Compl. ¶ 90);
- "The Defendant breached its duties when it, by way of example, failed to adhere to Leases; failed to sell all oil and gas produced; allowed Deductions to be taken from the sale of Plaintiffs' oil and gas; failed to market and sell oil and

gas at market prices; failed to enter into Third Party Contracts that are customary and not injurious to the interests of Plaintiffs; failed to accurately determine Plaintiffs' mineral acreage; and failed to provide complete and accurate information in the royalty statements" (Breach of implied covenants, Compl. ¶ 98);

- "Defendant produced but failed to sell some of Plaintiffs' oil and gas interests. As a result, the Defendant took their oil and gas without permission or compensation" (Conversion, Compl. ¶ 101);
- For some Plaintiffs, "By making title errors and failing to enter into a lease for all of the mineral acreage owned by said Plaintiffs the Defendant has taken, produced, and sold their oil and gas without permission or compensation" (Conversion, Compl. ¶ 104);
- As a consequence of the fraudulent, wrongful, unlawful and inequitable conduct of the Defendants, they have obtained proceeds attributable to the Plaintiffs' oil and gas interests which belong to the Plaintiffs" (Trust, Compl. ¶ 109);
- "The Defendant's conduct resulted in their withholding or miscalculating of royalties owed to the Plaintiffs. The Defendant unfairly and improperly received a benefit to the detriment of the Plaintiffs" (Unjust enrichment, Compl. ¶ 113);
- "Plaintiffs request an accounting relating to any and all matters necessary to determine whether Plaintiffs have fully and fairly received their rightful share of royalties" (Accounting, Compl. ¶ 118); and
- "Plaintiffs will suffer irreparable harm if the Defendant is not enjoined during the pendency of this adversary from using royalty payments that belong to Plaintiffs" (Injunction, Compl. ¶ 122).

"Although it is a 'basic tenet' of administrative law that a plaintiff should timely exhaust all administrative remedies before seeking judicial relief, the purpose of this rule is practical . . . [and] meant to provide courts with the benefit of an agency's expertise, and serve judicial economy by having the administrative agency compile the factual record." *Anjelino v. New York Times Co.*, 200 F.3d 73, 87 (3d Cir. 1999) (quoting *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997)) (internal quotation marks omitted). The COGCC lacks the expertise related to Plaintiffs' Claims, removing any practical or other benefit derived from seeking its guidance. Similarly, the COGCC's governing statute grants no authority for resolving any of the Claims.

The COGCC is a creature of statute, governed by the Oil and Gas Conservation Act (C.R.S. §§ 34-60-101, *et seq.*) (the “Act”). It is tasked with regulating the development and production of oil and gas in Colorado in a manner that protects public health, safety, and welfare. C.R.S. § 34-60-102. The commission is made up of seven members: the executive director of the department of natural resources; the executive director of the department of public health and environment; and individuals with: oil and gas industry experience, planning or land use experience, environmental or wildlife protection experience, COGCC experience, and public health experience. C.R.S. § 34-60-104.3. No members are required to have legal expertise. The COGCC’s jurisdiction extends and is limited to enforcement of the Act. C.R.S. § 34-60-105(1)(a).

As Extraction notes, the Act contains the Payment of Proceeds section (C.R.S. § 34-60-118.5). However, Extraction massively overstates the COGCC’s jurisdiction thereunder. According to the COGCC and binding Colorado precedent, C.R.S. § 34-60-118.5 grants the COGCC jurisdiction over the timeliness of royalty payments, but not disputes involving the interpretation of contracts, the propriety of disputed post-production costs, or the legal entitlement to proceeds. *E.g., Grynberg v. Colo. Oil & Gas Conservation Comm’n*, 7 P.3d 1060 (Colo. App. 1999). Extraction’s focus on C.R.S. § 34-60-118.5(5.5)⁵ is a red herring. Courts have repeatedly interpreted Section 5.5 to be a procedural guideline for the COGCC to make sure it has jurisdiction before proceeding with a Payment of Proceeds action filed with the COGCC, not a mandate requiring all payees to ask the COGCC to determine whether it has jurisdiction before filing their

⁵ “Before hearing the merits of any proceeding regarding payment of proceeds pursuant to this section, the oil and gas conservation commission shall determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee. If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court.”

royalty claims in district court. *See, e.g., Retova Res., LP, et al. v. Bill Barrett Corp.*, Case No. 2015-CV-34351, Denver Dist. Ct. (March 11, 2016) (“The language of § 34-60-118.5(5.5) is directed at COGCC and dictates the procedures COGCC must follow if and when it hears a proceeding regarding payment of proceeds. Section 34-60-118.5(5.5) does not contain any mandatory language directed at a payee. Nowhere does the statute provide that COGCC is the only body that can determine jurisdiction or that a payee must bring an action with COGCC prior to seeking resolution of the matter in district court.”) (Order attached as **Exhibit 1**); *Crichton v. Augustus Energy Res., L.L.C.*, No. 15-CV-00835-KLM, 2017 WL 4838735, *4 (D. Colo. Oct. 26, 2017) (“the statute does not require that disputes may be filed in district court only after a COGCC determination that the dispute is contractual in nature.”).

Plaintiffs’ Claims expressly and exclusively involve disputes outside COGCC jurisdiction. The Claims are legal, equitable, and tortious and will require this Court to interpret contracts and apply Colorado case law.

B. The COGCC Has Determined It Lacks Jurisdiction Over Plaintiffs’ Claims

Extraction failed to advise the Court that as recently as 2018, the COGCC expressly confirmed in five separate cases involving claims substantially similar to Plaintiffs’ Claims that it lacks jurisdiction over such royalty payment disputes. *See* COGCC Order 1-205, ¶ 17 (“the Commission does not have the jurisdiction to interpret contracts.”), ¶ 22 (“The Commission does not have jurisdiction to decide whether a royalty owner is entitled to payment under a lease or other contract. [...] The statute demonstrates the General Assembly’s intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty

agreement.”) (**Exhibit 2**); COGCC Order 1-206 (**Exhibit 3**); COGCC Order 1-207 (**Exhibit 4**); COGCC Order 1-208 (**Exhibit 5**); COGCC Order 1-209 (**Exhibit 6**). This is the position the COGCC has always maintained.

For example, in COGCC Docket No. 170300096, a royalty owner filed a proceeding under C.R.S. § 34-60-118.5, complaining it was owed royalties on gas that was flared and not sold. One of Plaintiffs’ breach of contract claims in this case is the same. Compl., ¶¶ 28, 32 (“Defendant allowed Plaintiffs’ gas to be used or lost in the production and transportation thereof,” and “Defendant does not pay Plaintiffs on the produced by unsold oil and gas, in violation of the Leases and Colorado law.”). The COGCC stated “The primary issue here is whether [operator] has obligations under the contract (lease) to pay [royalty owner] for gas that has been produced and flared as opposed to gas that has been produced and sold,” and dismissed the case for lack of jurisdiction, finding “There is no dispute regarding the date payment would be due, whether there is justifiable delay, or the amount of proceeds due to [royalty owner.]” COGCC Order, May 9, 2017 (**Exhibit 7**).

Previously, in 1997, the COGCC provided the legislative history behind Section 118.5, explaining it was enacted in response to problems with operators making payments in a timely manner. COGCC Order 1-73, ¶ 31 (**Exhibit 8**). Plaintiffs do not claim Extraction failed to timely pay royalties. Plaintiffs claim Extraction failed to comply with their leases and Colorado law, which resulted in miscalculations, nonpayments, and underpayments.

Clearly, the COGCC would dismiss Plaintiffs’ Claims if brought before it under C.R.S. § 34-60-118.5. Thus, even if Plaintiffs could have exhausted their remedies, such exhaustion would have been futile. *Crichton*, 2017 WL 4838735, at *4 (“[...] exhaustion before the COGCC would

likely have been futile. Pursuant to Colorado law, futility is an exception to the exhaustion doctrine.”) (citing *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998)).

C. Binding Colorado Precedent Confirms the COGCC Lacks Jurisdiction

In 1994, the Colorado Supreme Court decided *Garman v. Conoco Inc.*, 886 P.2d 652 (Colo. 1994) in response to a certified question from the Federal District Court which asked when an overriding royalty interest owner must bear its proportionate share of post-production costs expended to process oil and gas if the instrument creating the interest is silent on this issue. *Garman*, 886 P.2d at 653. The COGCC has relied on *Garman* to ascertain the limits of jurisdiction, and explained in Order 1-73 (**Exhibit 8**):

36. The *Garman* decision has resulted in a proliferation of lawsuits brought by payees asking courts to review and determine whether operators have been properly deducting post-production costs. Similar suits have been filed with the Commission under section 118.5 asking the Commission to determine whether deductions are proper under lease agreements, operating agreements or other private party contracts governing the legal rights between operating and non-operating mineral interest owners.

[...]

38. While the Commission recognizes that ensuring timely payment of proceeds falls within its jurisdiction, that obligation is limited to those instances when the Payee is legally entitled to the proceeds. When a dispute regarding the propriety of deductions arises it requires interpretation of the contract(s) creating the interest. This determination may also require the application of principles relating to marketability set forth in *Garman*. *Garman*, 886 P.2d at 559.

In addition to *Garman*, appellate courts have consistently and universally held that the COGCC lacks jurisdiction over royalty underpayment disputes such as this. In *Grynberg*, a dispute (like the one at hand) arose with respect to whether the operator (like Extraction) was entitled under the terms of the lease to deduct certain post-production expenses in computing the royalties due to royalty owners (like Plaintiffs). 7 P.3d at 1062. The *Grynberg* court analyzed C.R.S. § 34-60-

118.5 and held that the COGCC does not have exclusive jurisdiction to resolve the dispute. *Id.* It determined that C.R.S. § 34-60-118.5 is ambiguous where it fails to make clear whether the COGCC or courts determine whether there is legal entitlement to payment in any specific instance, and agreed with the COGCC’s interpretation that “the statute demonstrates the General Assembly’s intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.” *Id.* The court stated, in no uncertain terms:

Section 34–60–118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs.

Id. at 1064; *see also Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 2000, 226 F.3d 1138, 1157 (10th Cir. 2000) (“By its terms, § 34–60–118.5 only governs enforcement proceedings before the Commission and is inapplicable to claims for breach of contract. [...] [T]herefore, a Colorado litigant alleging a breach of an oil and gas royalty agreement cannot select among different fora. Instead, that litigant must assert his claim in a court of law[.]”); *Chase v. Colo. Oil & Gas Conservation Comm’n*, 284 P.3d 161 (Colo. App. 2012) (COGCC lacks jurisdiction to interpret oil and gas lease).

The exact issues resolved in *Garman*, *Grynberg*, and other binding precedent held to be outside COGCC jurisdiction are issues raised by Plaintiffs, such as: whether Extraction breached the leases and/or its implied covenants when it took or allowed “Deductions” (i.e., “post-production costs expended to process oil and gas,” *Garman*, 886 P.2d at 653) without paying

Plaintiffs thereon. *See e.g.*, Compl., ¶ 2. Indeed, Plaintiffs ask this Court to interpret their leases and determine whether they are entitled to royalties from their oil and gas that Extraction failed to pay. To the extent the leases are silent, unclear, or nonexistent, Plaintiffs ask this Court to apply Colorado law with respect to implied covenants, equity, and tortious conduct to determine whether and how much of their property Extraction has taken without permission and failed to pay them back for.

D. The Plan Expressly Confirms the COGCC Lacks Jurisdiction

Binding Colorado precedent confirmed “the courts [have] the authority to decide contractual disputes, such as a determination of a potential payee’s legal entitlement to proceeds.”

Grynberg, 7 P.3d at 1064 (emphasis added). The Plan itself states:

As to certain disputed Royalty and Working Interests, until a court, arbiter, or other tribunal determines that the holder of a Royalty and Working Interest is entitled to payment, such Royalty and Working Interest shall be treated as a Disputed Claim, and the Debtors shall reserve the amount in dispute in the Disputed Claim Reserve. To the extent a court, arbiter, or other tribunal determines that the holder of the Royalty and Working Interest is entitled to recovery, such amount shall not be deemed property of the Estates.

Plan, at p. 38 (emphasis added).

According to Extraction, an issue in this case is whether Plaintiffs are legally “entitled to recovery” of royalties derived from this oil and gas rights. According to Colorado precedent, legal entitlement is not within COGCC jurisdiction and falls within the Court’s jurisdiction.

E. Cases Relied Upon By Extraction Are Non-Binding and Disputed

The district court discussions upon which Extraction wholly relies have no binding effect. The Colorado law this Court is bound to apply is sound and requires denial of Extraction’s Motion to Dismiss. *See* Sec. II.B., *supra*.

Further, Extraction failed to provide this Court with additional district court decisions considering the same 12(b)(1) motions that reached a different conclusion and denied them. *See, e.g., Crichton*, 2017 WL 4838735; *Retova*, Case No. 2015-CV-34351; *Salgado, et al. v. Ursa Operating Co., LLC*, Case No. 15-CV-30057, Garfield Cnty. Dist. Ct. (Sept 23, 2015) (**Exhibit 9**).

CONCLUSION

This Court has exclusive jurisdiction over Plaintiffs' pre-petition Claims raised during the pendency of Extraction's bankruptcy proceeding that involve issues far beyond the COGCC's jurisdiction. Plaintiffs had no obligation to raise their claims with the COGCC before filing this adversary proceeding and doing so would have been futile. Plaintiffs respectfully request this Court DENY Extraction's 12(b)(1) Motion.

Respectfully submitted this 26th day of March, 2021.

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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, Colorado 80202	DATE FILED: March 11, 2016 8:49 AM CASE NUMBER: 2015CV34351
Plaintiff(s): RETOVA RESOURCES, LP, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED v. Defendant(s): BILL BARRETT CORPORATION	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No: 2015CV34351 Courtroom: 259
<p style="text-align: center;">ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT</p>	

THIS MATTER is before the Court on Bill Barrett Corporation's ("BBC") motion to dismiss Plaintiff Retova Resource, LP's ("Retova") Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Colorado Rules of Civil Procedure, or in the event the motion is denied, for a more definite statement of Retova's claims pursuant to Rule 12(e) of the Colorado Rules of Civil Procedure (the "Motion"). The Court has reviewed the Motion and all pertinent pleadings and authority and, being otherwise fully advised in the premises, finds and orders as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. Bill Barrett Corporation is an oil and natural gas exploration and production company and is registered with the Colorado Oil and Gas Conservation Commission ("COGCC") as an "Operator." BBC's Motion to Dismiss at 2.
2. BBC has been the operator of certain wells in Colorado and has paid royalties to Retova pursuant to a lease agreement. *Id.*
3. Retova served BBC with its Class Action Complaint and Demand for Jury Trial on December 14, 2015, setting forth claims arising from BBC's alleged underpayment of royalties on natural gas production by improperly deducting post-production costs. *Id.*

4. On January 4, 2016 BBC filed the instant Motion, arguing that Retova failed to exhaust administrative remedies available to it before the Colorado Oil and Gas Conservation Commission (“COGCC”) pursuant to the Colorado Oil and Gas Conservation Act, C.R.S. § 34-60-101, *et seq.*, (the “Act”). In the alternative, BBC’s Motion requested a more definitive statement pursuant to Rule 12(e).

5. On January 19, 2016 Retova filed a Memorandum in Opposition to BBC’s Motion to Dismiss and Alternative Motion for More Definite Statement.

6. On January 26, 2016 BBC filed a Reply in support of its Motion.

APPLICABLE LEGAL STANDARD

A C.R.C.P. 12(b)(1) motion is properly granted when the Court lacks subject matter jurisdiction. In this case, the Act is the primary means of regulating development, production, and utilization of gas and oil in Colorado. The Act gives the Colorado Oil and Gas Conservation Commission (“COGCC”) authority to make rules, regulations, and orders necessary to enforce the Act. In particular, C.R.S. § 34-60-118.5(5) provides:

Absent a bona fide dispute over the interpretation of a contract for payment, the oil and gas conservation commission shall have jurisdiction to determine the following:

- (a) The date on which payment of proceeds is due a payee under subsection (2) of this section;
- (b) The existence or nonexistence of an occurrence pursuant to subsection (3) of this section which would justifiably cause a delay in payment; and
- (c) The amount of the proceeds plus interest, if any, due a payee by a payer.

Section 34-60-118.5(5.5) provides:

Before hearing the merits of any proceeding regarding payment of proceeds pursuant to this section, the oil and gas conservation commission shall determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee. If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court.

A court’s primary task when construing a statute is to ascertain and give effect to the legislature’s intent. *Springer v. City & Cnty. of Denver*, 13 P.3d 794, 799 (Colo. 2000); *see also State v. Nieto*, 993 P.2d 493, 502 (Colo. 2000) (“Legislative intent is the polestar of statutory construction.”). A court looks first to the language of the statute, giving words their plain and

ordinary meaning; if the plain language of the statute demonstrates a clear legislative intent, the court looks no further. *Springer*, 13 P.3d at 799.

DISCUSSION

I. Whether the COGCC is the Only Entity That Can Determine Whether a Bona Fide Dispute Exists

BBC argues that only COGCC can determine whether a bona fide dispute exists regarding the interpretation of a contract pursuant to § 34-60-118.5(5.5). Stated another way, BBC contends that § 34-60-118.5(5.5) prescribes a mandatory procedure that requires a payee, such as Retova, to bring an action with COGCC prior to seeking resolution of the matter in court. The Court is not persuaded.

The language of § 34-60-118.5(5.5) is directed at COGCC and dictates the procedures COGCC must follow if and when it hears a proceeding regarding payment of proceeds. Section 34-60-118.5(5.5) does not contain any mandatory language directed at a payee. Nowhere does the statute provide that COGCC is the only body that can determine jurisdiction or that a payee must bring an action with COGCC prior to seeking resolution of the matter in district court. As such, this Court may determine whether there is a bona fide dispute over the interpretation of the contract.

II. Whether There is a Bona Fide Dispute Over the Interpretation of the Royalty Agreements

Pursuant to section 34-60-118.5(5), C.R.S., the COGCC has the authority to adjudicate private disputes regarding the payment of royalties and determine “the amount of the proceeds plus interest, if any, due a payee by a payer” “absent a bona fide dispute over the interpretation of a contract for payment.” Based on this language, Retova contends that the COGCC does not have jurisdiction over this dispute under the holding in *Grynberg v. Colorado Oil & Gas Conservation Com’n*, 7 P.3d 1060 (Colo. App. 1999), where the Colorado Court of Appeals held that COGCC properly declined to assert jurisdiction over a royalty dispute that involved the interpretation of the parties’ royalty agreement. BBC argues that “[Retova] alleges nothing showing that BBC disagrees with it about what the lease means” and that Retova must show that “an interpretive dispute underlies its claim for relief,” otherwise the Commission retains jurisdiction to determine the payment of proceeds. The Court is not persuaded.

In this case, Retova argues that the royalty agreements do not authorize BBC to make deductions for post-production costs. Retova argues that BBC made such deductions despite the fact that the Royalty Agreements “do not expressly authorize the deduction of post-production costs[.]” Complaint at 4. Based on those claims, the Court finds that Retova has properly pled a bona fide dispute over the interpretation of the royalty and lease agreements and that COGCC therefore does not have jurisdiction over the subject matter of this dispute. Therefore, the Court denies BBC’s Motion to Dismiss for failure to exhaust administrative remedies.

III. Whether Retova Must Provide a More Definite Statement Pursuant to Rule 12(e)

BBC argues that Retova’s Complaint contains insufficient information to allow BBC to prepare its responsive pleading. BBC’s primary issue is that Retova’s Complaint covers the entire state of Colorado, which they argue is too uncertain, indefinite, and vague to put BBC on notice as to the place where the class members were injured.

It has long been held that Colorado is a “notice pleading” state. “The purpose of a complaint is to provide the defendant with reasonable notice of the general nature of the matter presented, and it is sufficient if the pleader identifies the transaction which forms the basis of the claim.” *Middlemist v. BDO Seidman, LLP*, 958 P.2d 486, 490 (Colo. App. 1997). “A complaint need not express a complete recitation of all facts that support the claim, but need only serve notice of the claim asserted.” *Story v. Bly*, 217 P.3d 872, 876 (Colo. App. 2008).

In this case, Retova provided the time period and geographic scope of BBC’s alleged breaches. Those alleged breaches started on December 10, 2009 and cover all of BBC’s wells in Colorado that are subject to the parties’ royalty agreements. Because Retova’s pleading identifies the transaction and is sufficient to put BBC on notice of the general nature of the claim asserted, the Court denies BBC’s Motion for a More Definite Statement.

CONCLUSION

WHEREFORE, as set forth above, the Court DENIES Defendant Bill Barrett Corporation's Motion to Dismiss and Motion for More Definite Statement.

Dated this 11th day of March, 2016.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Michael A. Martinez", written over a horizontal line.

MICHAEL A. MARTINEZ
District Court Chief Judge

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

IN THE MATTER OF THE PAYMENT OF)	CAUSE NO. 1
PROCEEDS TO AIRPORT LAND PARTNERS, LTD.)	
FROM PRODUCTION OF OIL AND GAS AS)	DOCKET NO. 171200788
ESTABLISHED BY SECTION 34-60-118.5, C.R.S.,)	
MAMM CREEK FIELD, WILLIAMS FORK)	TYPE: GENERAL
FORMATION, GARFIELD COUNTY, COLORADO)	ADMINISTRATIVE
)	
)	ORDER NO. 1-205
)	CORRECTED

REPORT OF THE COMMISSION

The Commission heard this matter on July 30, 2018, at the Colorado Oil and Gas Conservation Commission ("Commission" or "COGCC"), 1120 Lincoln Street, Suite 801, Denver, Colorado, upon application for a hearing on the Commission's jurisdiction over a payment of proceeds dispute between Airport Land Partners, as Applicant, and Antero Resources Corporation and Ursa Operating Company LLC, as Protestants.

FINDINGS

The Commission finds as follows:

1. Airport Land Partners ("Airport" or "Applicant"), as the applicant herein, is an interested party in the subject matter of the above-referenced hearing.
2. Antero Resources Corporation ("Antero") and Ursa Operating Company LLC (Operator No. 10447) ("Ursa") (collectively "Protestants"), as the protestants herein, are interested parties in the subject matter of the above-referenced hearing.
3. Due notice of time, place, and purpose of the hearing has been given in all respects as required by law.
4. As a threshold issue, the Commission is required by § 34-60-118.5(5.5), C.R.S. to first determine if it has jurisdiction over this matter. The Commission has authority to promulgate the hereinafter prescribed order pursuant to the Oil and Gas Conservation Act ("Act"), §34-60-101, *et seq.*

PROCEDURAL AND FACTUAL HISTORY

5. This matter is a payment of proceeds dispute. Airport claims that Protestants have not properly paid royalties to Airport.

6. This matter did not begin in front of the Commission. Airport first filed a complaint alleging royalty underpayments in Garfield County District Court (16CV30259). Protestants filed a motion to dismiss for failure to exhaust administrative remedies, which the District Court granted without prejudice on July 31, 2017.

7. Airport's Amended Application, filed on April 2, 2018, requests that the Commission enter an order finding that the Commission does not have jurisdiction over the instant dispute. Protestants request that the Commission deny Airport's request and decide this matter on the merits.

8. On June 18, 2018, the Hearing Officer required the submission of Expanded Prehearing Statements ("EPS") from each party, in order to clarify the specific arguments, and the legal bases relied upon for same. Airport submitted its EPS on June 25, 2018, and the Protestants' Response was filed on July 2, 2018. No reply was authorized.

9. A Final Prehearing Conference ("Final PHC") was held at the Commission on July 16, 2018. All parties were present and represented by legal counsel.

10. Following the Final PHC, the Hearing Officer issued a Final Prehearing Order which, among other things, set forth stipulated facts, identified the disputed issue, and provided the parties with 15 minutes each to argue the disputed issue.

11. The Stipulated Facts in the Final Prehearing Order identified a 1994 Lease Agreement, an amendment thereto, and a 2007 Overriding Royalty Agreement as the applicable agreements in this matter. See Stipulated Fact No. 6, Final Prehearing Order.

12. The parties also stipulated that Ursa is successor-in-interest to the 1994 Lease Agreement, the amendment thereto, and the 2007 Overriding Royalty Agreement ("Airport Agreements"). *Id.*

13. The parties stipulated that the Airport Agreements provide for payment of royalties based on the following royalty clause:

[t]o pay lessor one-eighth (1/8) of the gross proceeds each year, payable quarterly, for the gas from each well where gas only is found, while the same is being used off the premises, and if used in the manufacture of gasoline a royalty of one-eighth (1/8), payable monthly at the prevailing market rate for gas.

Id., at Stipulated Fact No. 7.

14. The parties stipulated the first paragraph of the Addendum to the 1994 Lease Agreement states that "[a]nything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty." Stipulated Fact No. 8, Final Prehearing Order.

15. The parties stipulated the 2007 Overriding Royalty Agreement states that the royalties payable "shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the [Overriding Royalty Interest] burden is calculated and paid, and as part of that calculation, the [Overriding Royalty Interest] shall bear the same costs and

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expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease." Stipulated Fact No. 9, Final Prehearing Order.

16. On July 17, 2018, the Hearing Officer issued a Recommendation recommending that the Commission dismiss Airport's Amended Application without prejudice for lack of jurisdiction.

APPLICABLE LAW

17. Generally, the Commission does not have the jurisdiction to interpret contracts. *Chase v. Colorado Oil and Gas Conservation Comm'n.*, 284 P.3d 161, 168 (Colo. App. 2012) (holding that the Act does not specifically provide the Commission has an express or implied power to interpret a lease, and that the Commission's determination that it lacked jurisdiction to interpret a lease was reasonable).

18. Section 34-60-118.5 of the Act defines the Commission's jurisdiction over disputes regarding the payment of royalties. The Commission has jurisdiction to decide: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. However, before the Commission may decide any of the above three issues, it must "determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." §34-60-118.5(5.5), C.R.S. "If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court." *Id.*

19. The Commission has discretion to interpret the Act. *See Colorado State Personnel Bd. v. Department of Corr.*, 988 P.2d 1147, 1151 (Colo.1999) (deference is given to an agency's reasonable interpretation of its statute when it "lighten[s] the agency's workload and mak[es] its decision-making process more efficient" as long as it is consistent with the intent and purpose of the statute).

20. The interpretation of a contract is a question of law. *Fed. Deposit Ins. Corp. v. Fisher*, 292 P.3d 934, 937 (Colo. 2013). The primary goal in contract interpretation is to ascertain and implement the intent of the parties. *Id.* Black's Law Dictionary defines interpretation as "the ascertainment of a text's meaning; specif., the determination of how a text most fittingly applies to particular facts." *Black's Law Dictionary* (10th ed. 2014).

21. Under Section 118.5(5.5), the Commission must not only determine if a dispute regarding the interpretation of a contract exists, the Commission must also decide if the dispute is "bona fide." *Black's Law Dictionary* (10th ed. 2014), defines "bona fide" as follows: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud. . . . Real, actual, genuine, and not feigned."

22. The Commission does not have jurisdiction to decide whether a royalty owner is entitled to payment under a lease or other contract. *Grynberg v. Colorado Oil & Gas Conservation Comm'n*, 7 P.3d 1060 at 1063 (Colo. App. 1999) held:

Section 34–60–118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment. The statute demonstrates the General Assembly's intent to grant to the Commission

jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.

23. The legislature removed disputes that require the interpretation of a contract from the Commission's jurisdiction in order to preserve the state's interest in consistent resolution of complex legal questions. In *Grynberg*, the Court of Appeals discussed purpose of Section 118.5:

Section 34–60–118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34–60–118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions.

7 P.3d at 1064.

24. The Commission has jurisdiction to decide if and when payment is due where there is no contract between the parties. In *Grant Brothers Ranch, LLC v. Antero Resources Piceance Corporation, et al.*, the Colorado Court of Appeals found that the Commission had jurisdiction over a royalty payment dispute because, as the plaintiff had been statutorily pooled, there was no contract between the parties to interpret. 409 P.3d 637 (Colo. App. 2016). In reaching its conclusion, the Court found that the Commission has “primary jurisdiction over disputes for the payment of proceeds such as the one before us.” *Id.* at 644.

25. The Colorado Supreme Court has defined “marketability” for purposes of calculating royalties when a lease is silent and held that the determination of whether gas is marketable is a question of fact. In *Garman v. Conoco, Inc.*, the Colorado Supreme Court ruled that the implied covenant of marketability is included in every oil and gas lease. 886 P.2d 652 (Colo. 1994). When a lease is silent as to the deduction of costs from a royalty, the implied covenant of marketability requires “the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market.” *Id.* at 659.

26. In *Rogers v. Westerman Farm Co.*, the Colorado Supreme Court defined “marketability”:

In sum, in defining marketability under the implied covenant to market, we look to the first-marketable product rule for guidance. Gas is marketable when it is in the physical condition such that it is acceptable to be bought and sold in a commercial marketplace, and in the location of a commercial marketplace, such that it is commercially saleable in

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the oil and gas marketplace. The determination of whether gas is marketable is a question of fact, to be resolved by a fact finder.

29 P.3d 887, 904 (Colo. 2001)

SUMMARY OF THE PARTIES' POSITIONS

27. In its EPS, Airport alleges the following: 1) the Protestants failed to pay royalties based upon the prices received for marketable residue gas, natural gas liquid products, and marketable condensate; 2) the Protestants improperly deducted post-production costs incurred in order to place the residue gas and natural gas liquid products into marketable condition; and 3) the Protestants improperly made excessive severance and ad valorem tax deductions. *See* Airport EPS, at 1, ¶¶ 1-3; at 2, ¶¶ 4-5.

28. As support for these allegations, Airport states that the above-quoted sections of the Lease and Assignment are applicable. *Id.* at 2, ¶¶ 1-2; *see also* Paragraphs 13-15, *supra*. Airport further argues that because these two documents do not contain express provisions regarding the allocation of post-production costs, the implied covenant to market applies, which requires the Protestants to bear all costs necessary to place the raw gas in a marketable condition pursuant to *Rogers*, 29 P.3d 887. *Id.* at 3, ¶ 3. Airport further relies on *Crichton v. Augustus Energy Resources, LLC*, 2017WL4838735 (D. Colo. Oct. 2017) for the proposition that in order for the Commission to determine marketability in this case, it would require an interpretation of the Protestant's obligations under the governing documents to calculate and pay royalties consistent with the implied covenant to market. *Id.* Finally, Airport asserts that the excessive taxes withheld were in violation of C.R.S. §§ 39-7-102 and 39-29-111(1)(a). *Id.*, ¶ 4.

29. In their Response, Protestants assert that under *Rogers*, the "point of marketability" is a question of fact. *See* Response at 1, ¶ 4. According to the Protestants, the "point of marketability" is a factual determination with which the Colorado legislature has tasked the Commission the duty to decide. *Id.* at 2, ¶ 1. The Protestants state that *Augustus Energy Resources* misstates the test set out in Section 118.5(5.5), because in order for the Commission to decline jurisdiction, it must find the existence of a bona fide contractual dispute over the interpretation of a contract for payment, not just any case that "arises out of" a contract or contractual term. *Id.*, ¶ 5. The Commission clearly has jurisdiction here, the Protestants assert, as "there is no dispute over the meaning of the words in [the] Lease, [therefore] there is no bona fide dispute over the interpretation of a contract[.]" *Id.* at 3, ¶ 1.

HEARING

30. On July 30, 2018, the Commission heard oral argument on the Commission's jurisdiction over this matter.

31. Prior to the argument, Commissioner Jolley disclosed that he had previously been a plaintiff in two royalty payment suits. He stated that those lawsuits had been resolved and that Protestants were not parties to those lawsuits. Commissioner Jolley stated that he could be impartial and that he intended to participate in these matters. No Commissioner, party, or member of the public objected to Commissioner Jolley's participation.

32. Airport summarized its position, arguing that for residue gas, the location of the first commercial market is the delivery point to long-distance transportation pipelines where the Protestants sold the residue gas to third-party purchasers. For the natural gas liquids ("NGLs"), the location of the first commercial market is where the NGLs were fractionated and sold to third-party purchasers for prices based on market index prices.

33. Airport also summarized the Protestants' position based on the Protestants' response to Airport's demand for payment. Airport argued Protestants took the position that the royalties were based on the fair and reasonable value of the residue gas or NGLs at the place where sold or used, and that the value of the gas was calculated based on the sale of gas pursuant to a gas purchase contract. See Commission Portfolio, Bates Nos. 1075-76. Airport also argued that Protestants took the position that the point of first marketability is at the wellhead or the inlet of the first processing facility, known as the Meeker Plant. See Bates No. 1075. Finally, Airport argued that the Protestants were improperly deducting the fee they paid to reserve space in interstate pipelines, and that the Protestants claimed this deduction was allowed.

34. Protestants argued consistent with their Response, as summarized above.

35. The parties agreed the Airport Agreements were silent on the issue of what costs may be deducted from royalty payments. The parties also agreed that the implied covenant of marketability applied.

36. Upon inquiries from the Commission, Airport stated that, in order to prove the point of marketability, Airport would need to put on its own witnesses for factual testimony, as well as expert witnesses to testify to the location of the commercial market, the method of marketing natural gas, when NGLs are first marketable, and accounting practices. Protestants stated that the presentation would be less complex, and would only require an expert on marketability, an accountant to explain accounting practices, and lay witness to explain how payments were actually made.

37. Upon inquiries from the Commission, Airport asserted that discovery in this matter would be necessary, could take up to a year, and would involve thousands of pages of documents. Protestants claimed that discovery would be much less involved.

38. The Commission closed the record and deliberated.

COMMISSION DELIBERATIONS

39. Co-Vice Chair Boigon commented that this matter was a highly contested case likely to involve significant discovery and that the Commission does not have the expertise, process, or resources to be immersed in these type of royalty disputes.

40. Commissioner Hawkins stated that he would be hard-pressed to provide the Commission with expertise in the midstream issues raised in this case.

41. Co-Vice Chair Holton stated that this matter was too complex for the Commission to resolve.

42. Chairman Benton stated that he required explanations from counsel to the Commission to understand the import of the Colorado Supreme Court decisions in *Rogers* and *Garman*.

43. Following deliberations, the Commission voted ~~unanimously~~ **6-1** to dismiss the Airport Amended Application due to lack of jurisdiction. **Chairman Benton was the lone**

may vote.

COMMISSION CONCLUSIONS

44. Based on the statements and descriptions of the dispute from the parties at hearing, the Commission finds that the parties have a bona fide dispute over the location of a commercial marketplace for produced gas.

45. The parties agree that the Airport Agreements are silent as to the deduction of costs, and that the implied covenant of marketability applies. *Garman* and *Rogers* make the implied covenant of marketability and the definition of marketability terms in the Airport Agreements. Resolution of this dispute would require the Commission to interpret these decisions in order to define these agreement terms. These opinions leave terms like “commercial marketplace” and “commercially saleable” undefined, and require legal analysis.

46. The Commission further concludes the rationale of the court in *Crichton* persuasive. “Although the point of marketability is a question of fact pursuant to *Rogers*, this dispute is contractual in nature. . . . Although *Rogers* held that marketability is a question of fact, the factual inquiry regarding when a gas product became ‘marketable’ is fundamentally an interpretation of an undefined contractual term affecting each party’s obligations under the disputed lease agreement. Because the COGCC may not resolve bona fide disputes regarding contract interpretation pursuant to Colo. Rev. Stat. § 34–60–118.5(5.5), and this dispute arises out of an undefined contractual term, the Court concludes that the COGCC lacked jurisdiction over the claim[.]” *Crichton* at pp. 3-4.

47. Here, there is no dispute that contracts between these parties exist. Further, there is no dispute that these contracts are silent with respect to the allocation of post-production costs. Because the contracts are silent, and the parties disagree over the point at which the various forms of gases became marketable, the Commission would be forced to interpret an undefined contractual term affecting the parties’ rights and obligations under the Airport Agreements. Accordingly, a bona fide contract dispute exists, and the Commission must decline jurisdiction pursuant to Section 118.5(5.5). (“If the commission finds that [a bona fide dispute regarding the interpretation of a contract defining the rights and obligations of the payer and payee] exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court.”) (emphasis supplied).

48. The Commission also concludes that the applicability of *Rogers* to a question of Commission jurisdiction is not certain. While the Commission recognizes that the Colorado Supreme Court has held that marketability is a question of fact in *Rogers*, the Commission’s jurisdiction over payment of proceeds disputes as set forth in Section 118.5 was not at issue in *Rogers*.

49. Further, the Commission concludes that the legislature did not intend for the Commission to have jurisdiction over royalty disputes where the rights and obligations of the parties are determined by a contract, particularly where resolving the dispute would involve the application and interpretation of complex legal principals. “These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34–60–118.5 promotes the state’s legitimate interest in ensuring the proper and consistent resolution of complex legal questions.” *Grynberg*, 7 P.3d at 1063.

50. The purpose of Section 118.5 was to provide royalty owners with a simple and easy process to obtain payment when an operator delays payment. See Commission Order No. 1-73 (“[Section 118.5] is intended to prevent unscrupulous operators from delaying the payment of proceeds and wrongfully withholding or using funds that are attributable to a Payee’s

interest.”) (Citing testimony by Representative Jerkey on House Bill 1113 before the House Agricultural Committee, January 25, 1989).

51. Section 118.5 originally provided that the Commission had “exclusive” jurisdiction over payment of proceeds, but was amended in 1998 to remove the word “exclusive” and clarify the Commission’s jurisdiction. “The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction, only ‘[a]bsent a bona fide dispute over the interpretation of a contract for payment,’” *Grynberg*, 7 P.3d at 1063. “Indeed, as originally enacted and the amendment both provide evidence of the General Assembly’s intent to exclude the resolution of contractual disputes from the jurisdiction of the Commission.” *Id.* (emphasis supplied). The Commission thus does not have exclusive or primary jurisdiction over this dispute. *Grant Bros.* only holds that the Commission has primary jurisdiction over royalty disputes where there is no contract between the parties.

52. The Commission’s jurisdiction over payment of proceeds disputes is narrow. The Commission only has jurisdiction to make three types of decisions: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. The Commission interprets these three decisions to be only related to calculation of a royalty amount, and not to include a determination of how the royalty amount is to be calculated.

53. Further, Protestants admitted at hearing that their interpretation of the Commission’s jurisdiction could lead to a situation where a court would submit factual questions on royalty disputes to the Commission, while the court retained decision-making authority over legal issues or issues of contract interpretation. The Commission concludes the legislature did not intend to for Section 118.5 to result in such a complex procedure. As stated above, the purpose of Section 118.5 is to provide royalty owners with a simple process to obtain payment.

54. The Commission finds that resolving this matter would require significant discovery and hearing time and concludes that the Commission does not have the process or resources to conduct such complex and involved royalty disputes. The Commission meets approximately eight times a year, and meetings have historically lasted for one or two days. Seven of the nine Commissioners are volunteers and the other two are the Executive Directors of the Department of Natural Resources and Department of Public Health and Environment. §34-60-104(2)(a)(I), C.R.S.

55. The Commission further finds it does not have the expertise necessary to resolve this dispute. The Act does not require that any of the Commissioners have a legal background, or have a background in midstream operations. The Commission’s expertise is in the technical and scientific aspects of the production of oil and gas. While three members of the Commission are required to have “substantial experience in the oil and gas industry,” two of those Commissioner must have a “college degree in petroleum geology or petroleum engineering.” *Id.* Further, only one Commissioner is required to be a royalty owner, and that Commissioner must also be involved in agriculture. *Id.*

ORDER

IT IS HEREBY ORDERED:

1. Airport’s Amended Application is DISMISSED WITHOUT PREJUDICE as the Commission lacks jurisdiction to hear the dispute.

2. The Commission hereby ADOPTS the Hearing Officer's Recommendation.

IT IS FURTHER ORDERED:

1. The provisions contained in the above order shall become effective immediately.
2. The Commission expressly reserves its right, after notice and hearing, to alter, amend or repeal any and/or all of the above orders.
3. Under the State Administrative Procedure Act the Commission considers this Order to be final agency action for purposes of judicial review within 35 days after the date this Order is mailed by the Commission.
4. An application for reconsideration by the Commission of this Order is not required prior to the filing for judicial review.

ENTERED this 29th day of August, 2018, as of July 30, 2018.

CORRECTED this 4th day of September, 2018, as of July 30, 2018.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By _____
Julie Spence Prine, Secretary

CERTIFICATE OF SERVICE

On September 5, 2018, a true and correct copy of the foregoing was sent by electronic mail to the following:

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Ursa Operating Company LLC

Margaret Humecki, Hearings Assistant

3/25/2021

1-206

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

IN THE MATTER OF THE PAYMENT OF)	CAUSE NO. 1
PROCEEDS TO RICHARD N. CASEY FROM)	
PRODUCTION OF OIL AND GAS AS ESTABLISHED)	DOCKET NO. 171200789
BY SECTION 34-60-118.5, C.R.S., MAMM CREEK)	
FIELD, WILLIAMS FORK FORMATION, GARFIELD)	TYPE: GENERAL
COUNTY, COLORADO)	ADMINISTRATIVE
)	
)	ORDER NO. 1-206

REPORT OF THE COMMISSION

The Commission heard this matter on July 30, 2018, at the Colorado Oil and Gas Conservation Commission ("Commission" or "COGCC"), 1120 Lincoln Street, Suite 801, Denver, Colorado, upon application for a hearing on the Commission's jurisdiction over a payment of proceeds dispute between Richard N. Casey, as Applicant, and Antero Resources Corporation and Ursa Operating Company LLC, as Protestants.

FINDINGS

The Commission finds as follows:

1. Mr. Richard N. Casey ("Casey" or "Applicant"), as the applicant herein, is an interested party in the subject matter of the above-referenced hearing.
2. Antero Resources Corporation ("Antero") and Ursa Operating Company LLC (Operator No. 10447) ("Ursa") (collectively "Protestants"), as the protestants herein, are interested parties in the subject matter of the above-referenced hearing.
3. Due notice of time, place, and purpose of the hearing has been given in all respects as required by law.
4. As a threshold issue, the Commission is required by § 34-60-118.5(5.5), C.R.S. to first determine if it has jurisdiction over this matter. The Commission has authority to promulgate the hereinafter prescribed order pursuant to the Oil and Gas Conservation Act ("Act"), §34-60-101, *et seq.*

PROCEDURAL AND FACTUAL HISTORY

5. This matter is a payment of proceeds dispute. Casey claims that Antero and Ursa have not properly paid royalties due to Casey.

6. This matter did not begin in front of the Commission. Casey first filed a complaint alleging royalty underpayments in Garfield County District Court (17CV30071). Protestants filed a motion to dismiss for failure to exhaust administrative remedies, which the District Court granted without prejudice on August 17, 2017.

7. Casey's Application, filed on October 5, 2017, requests that the Commission enter an order finding that the Commission does not have jurisdiction over the instant dispute. Protestants request that the Commission deny Casey's request and decide this issue on the merits.

8. On June 18, 2018, the Hearing Officer required the submission of Expanded Prehearing Statements ("EPS") from each party, in order to clarify the specific arguments, and the legal basis relied upon for same. Casey submitted his EPS on June 25, 2018, and the Protestants' Response was filed on July 2, 2018. No reply was authorized.

9. A Final Prehearing Conference ("Final PHC") was held at the Commission on July 16, 2018. All parties were present and represented by legal counsel.

10. Following the Final PHC, the Hearing Officer issued a Final Prehearing Order which, among other things, set forth stipulated facts, identified the disputed issue and provided the parties with 15 minutes each to argue the disputed issue.

11. The Stipulated Facts in the Final Prehearing Order identified a lease, the Casey Lease, between Casey and Antero as the applicable agreement in this matter. Stipulated Fact No. 5, Final Prehearing Order.

12. The parties also stipulated that Ursa is successor-in-interest to the Casey Lease. *Id.*, at Stipulated Fact No. 4.

13. The parties stipulated that the Casey Lease provides for payment of royalties based on the following provision:

Lessee shall pay royalties to Lessor...twenty percent (20%) of all gas and oil, including coal-bed methane gas, casinghead gas, hydrocarbons and other gas products or gaseous substances of whatever kind or nature, produced and saved from the Land, at the then prevailing market price for the product, whether or not such product is sold by Lessee and whether sold at the wellhead, in the pipeline or otherwise, free of production costs, gathering costs, dehydration costs, compression costs, manufacturing costs, processing and treating costs, marketing costs, transportation costs and free of any and all other costs, except taxes and conservation charges assessable to Lessor by law. Accrued royalties shall be paid not less often than quarterly. The market price as stated above shall be either the fair and reasonable value thereof at the place where sold or used or the selling price if sold under bona fide contracts of sale with third persons, third persons being defined as any person or entity, not a subsidiary or affiliate of Lessee, with whom Lessee deals at arms' length and with whom Lessee has no processing contract involving production from the Land or any other arrangement involving an exchange of production from the Land for other production, or any reciprocal allowance for discount on such production, or any reciprocal advantage, direct or indirect resulting from any contract or arrangement[.]

Id., at Stipulated Fact Nos. 5 and 6.

14. On July 18, 2018, the Hearing Officer issued a Recommendation recommending that the Commission dismiss Casey's Application without prejudice, for lack of jurisdiction.

APPLICABLE LAW

15. Generally, the Commission does not have the jurisdiction to interpret contracts. *Chase v. Colorado Oil and Gas Conservation Comm'n.*, 284 P.3d 161, 168 (Colo. App. 2012) (holding that the Act does not specifically provide the Commission has an express or implied power to interpret a lease, and that the Commission's determination that it lacked jurisdiction to interpret a lease was reasonable).

16. Section 34-60-118.5 of the Act defines the Commission's jurisdiction over disputes regarding the payment of royalties. The Commission has jurisdiction to decide: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. However, before the Commission may decide any of the above three issues, it must "determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." §34-60-118.5(5.5), C.R.S. "If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court." *Id.*

17. The Commission has discretion to interpret the Act. See *Colorado State Personnel Bd. v. Department of Corr.*, 988 P.2d 1147, 1151 (Colo.1999) (deference is given to an agency's reasonable interpretation of its statute when it "lighten[s] the agency's workload and mak[es] its decision-making process more efficient" as long as it is consistent with the intent and purpose of the statute).

18. The interpretation of a contract is a question of law. *Fed. Deposit Ins. Corp. v. Fisher*, 292 P.3d 934, 937 (Colo. 2013). The primary goal in contract interpretation is to ascertain and implement the intent of the parties. *Id.* Black's Law Dictionary defines interpretation as "the ascertainment of a text's meaning; specif., the determination of how a text most fittingly applies to particular facts." *Black's Law Dictionary* (10th ed. 2014).

19. Under Section 118.5(5.5), the Commission must not only determine if a dispute regarding the interpretation of a contract exists, the Commission must also decide if the dispute is "bona fide." *Black's Law Dictionary* (10th ed. 2014), defines "bona fide" as follows: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud. . . . Real, actual, genuine, and not feigned."

20. The Commission does not have jurisdiction to decide whether a royalty owner is entitled to payment under a lease or other contract. *Grynberg v. Colorado Oil & Gas Conservation Comm'n*, 7 P.3d 1060 at 1063 (Colo. App. 1999) held:

Section 34–60–118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment. The statute demonstrates the General Assembly's intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.

21. The legislature removed disputes that require the interpretation of a contract from the Commission's jurisdiction in order to preserve the state's interest in consistent resolution of complex legal questions. In *Grynberg*, the Court of Appeals discussed purpose of Section 118.5:

Section 34–60–118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34–60–118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions.

7 P.3d at 1064.

22. The Commission has jurisdiction to decide if and when payment is due where there is no contract between the parties. In *Grant Brothers Ranch, LLC v. Antero Resources Piceance Corporation, et al.*, the Colorado Court of Appeals found that the Commission had jurisdiction over a royalty payment dispute because, as the plaintiff had been statutorily pooled, there was no contract between the parties to interpret. 409 P.3d 637 (Colo. App. 2016). In reaching its conclusion, the Court found that the Commission has “primary jurisdiction over disputes for the payment of proceeds such as the one before us.” *Id.* at 644.

23. The Colorado Supreme Court has defined “marketability” for purposes of calculating royalties when a lease is silent and held that the determination of whether gas is marketable is a question of fact. In *Garman v. Conoco, Inc.*, the Colorado Supreme Court ruled that the implied covenant of marketability is included in every oil and gas lease. 886 P.2d 652 (Colo. 1994). When a lease is silent as to the deduction of costs from a royalty, the implied covenant of marketability requires “the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market.” *Id.* at 659.

24. In *Rogers v. Westerman Farm Co.*, the Colorado Supreme Court defined “marketability”:

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In sum, in defining marketability under the implied covenant to market, we look to the first-marketable product rule for guidance. Gas is marketable when it is in the physical condition such that it is acceptable to be bought and sold in a commercial marketplace, and in the location of a commercial marketplace, such that it is commercially saleable in the oil and gas marketplace. The determination of whether gas is marketable is a question of fact, to be resolved by a fact finder.

29 P.3d 887, 904 (Colo. 2001)

SUMMARY OF THE PARTIES' POSITIONS

25. Casey asserts the following allegations in his EPS: 1) the Protestants failed to pay royalties based upon the prices received for the then prevailing market prices for residue gas, and five natural gas liquid products; 2) as to the condensate, Casey appears to argue that the Protestants breached the lease by failing to pay royalties on same, and instead have transferred the condensate to outside parties who perform the gathering and processing; and 3) the Protestants improperly made excessive severance and ad valorem tax deductions. *See* Casey EPS, at 1, ¶¶ 1-2; at 2, ¶¶ 4-5.

26. As support for these assertions, Casey states that the above-quoted section of the Lease is controlling. *Id.* at 3, ¶¶ 1-2. *See* ¶ 13, *supra*. Casey relies on the Protestants' written response to his notice of failure to make timely payments, which response stated the royalties were calculated on the fair and reasonable value of the hydrocarbons where they were sold or used. *Id.* at 4, ¶ 3. Finally, Casey asserts that the excessive taxes withheld were in violation of C.R.S. §§ 39-7-102 and 39-29-111(1)(a). *Id.* at 4, ¶ 4.

The Protestants argue that Casey failed to identify a contractual dispute, and instead has raised an allegation that the Protestants have failed to comply with the terms of the Lease by not paying royalties based on market price. *Id.* at 2, ¶¶ 2-3. According to the Protestants, "[m]arket price is a defined contract term[,] [t]herefore, it is a factual question within the Commission's jurisdiction as to what the prevailing market price is in this case." *Id.*, ¶ 4. "In summary, Applicant does not point to any terms in the 2005 Lease that it claims raises a "bona fide dispute...regarding the interpretation of a contract." *Id.*, ¶ 7.

HEARING

27. On July 30, 2018, the Commission heard oral argument on the Commission's jurisdiction over this matter.

28. The parties agreed that, in the interests of time, all arguments made in Docket No. 171200788 would be treated as though they were made in full in this matter.

29. Prior to the argument in Docket No. 171200788, Commissioner Jolley disclosed that he had previously been a plaintiff in two royalty payment suits against operators. He stated that those lawsuits had been resolved and that the Protestants were not parties to those lawsuits. Commissioner Jolley stated that he could be impartial and that he intended to

participate in these matters. No Commissioner, party, or member of the public objected to Commissioner Jolley's participation in Docket No. 171200789.

30. Casey argued that under Paragraph 3 of the Casey Lease, royalties for the sale of gas must be paid on the market price, and free of all costs. Paragraph 3 also defined "market price" as the fair and reasonable value, or the selling price if sold under bona fide contracts of sale with third persons. Paragraph 3 also defined third persons. Casey's position as stated at hearing is that no costs may be deducted from royalty payments and the royalty must be based on the market price for all gas products.

31. Casey summarized the Protestant's position based on statements made in response to Casey's demand for payment. Casey alleged the Protestant's position is that they have paid on fair and reasonable value of the gas at the place where sold or used, and that the Casey Lease allows for limited deductions for processing and transportation taken after gas was marketable and for purposes otherwise permissible under the lease. Casey cited to Bates Nos. 231-232.

32. Protestants argued that the "market price" is a factual issue based on a contract term that is clear. Protestants further argued that Casey is not disputing the meaning of any of the terms of the Casey Lease, but Casey is only disputing how the language of the Casey Lease applies to the facts.

33. Casey responded that their position is that the specific terms of the Casey Lease, such as the no cost provisions, must control over the more general "fair and reasonable" language. Casey also argued that Paragraph 3 provides that no costs may be deducted until the gas is at the market, and the term "market" is undefined in the Casey Lease. Casey further argued that no matter what price is used, no costs may be deducted under Paragraph 3.

34. Co-Vice Chair Boigon asked the parties about the definition of market price in the Casey Lease. The Casey Lease provides that "[t]he market price as state above shall be either the fair and reasonable value thereof at the place where sold or used or the selling price if sold under bona fide contracts of sale with third persons,..." Paragraph 3 of the Casey Lease. Co-Vice Chair Boigon asked which of these prices were to be used since the Lease does not appear to provide for a way to decide between the two. Protestants responded that if there was a sale to a third party, then that is the price that must be used under the Casey Lease.

35. Chairman Benton asked Casey if there was an issue with the gas sale contract under which Protestants sold gas. Casey's counsel responded that there was an issue as the gas sale contract transfers gas from Protestants to the purchaser without any payment for that gas. Casey argued that this transfer without payment was a cost that was not permitted under the lease.

36. The parties agreed that Paragraph 3 of the Casey Lease was applicable and controlled the issue of royalty payments.

37. Upon inquiries from the Commission in Docket No. 171200788, counsel for Airport stated that, in order prove the point of marketability, Airport would need to put on its own witnesses for factual testimony, as well as expert witnesses on the location of the commercial market, the method of marketing natural gas, when NGLs are first marketable, and accounting practices. Protestants stated that the presentation would be less complex, and would only require an expert on marketability, an accountant to explain accounting practices, and lay witness to explain how payments were actually made.

38. Upon inquiries from the Commission in Docket No. 171200788, counsel for Airport asserted that discovery would be necessary, could take up to a year, and would involve

thousands of pages of documents. Protestants claimed that discovery would be much less involved.

39. The Commission closed the record and deliberated.

COMMISSION DELIBERATIONS

40. The Commissioners applied their comments from Docket No. 171200788 to this matter.

41. In Docket No. 171200788, Co-Vice Chair Boigon stated that this matter was a highly contested case that was likely to involve significant discovery and that the Commission does not have the expertise, process, or resources to be immersed in these type of royalty disputes.

42. In Docket No. 171200788, Commissioner Hawkins stated that he would be hard-pressed to provide the Commission with expertise in the midstream issues raised in this case.

43. In Docket No. 171200788, Co-Vice Chair Holton stated that this matter was too complex for the Commission to resolve.

44. Following deliberations, the Commission voted unanimously to dismiss Casey's Application for lack of jurisdiction.

COMMISSION CONCLUSIONS

45. Based on the statements and descriptions of the dispute from the parties at hearing, the Commission finds that the parties have a bona fide dispute regarding the interpretation of Paragraph 3 of the Casey Lease. Specifically, it appears that Casey believes the language of Paragraph 3 prohibits all deductions of costs, no matter what price is used to calculate the royalty. Protestants, on the other hand, appear to take the position that costs may be deducted if the royalty is calculated based on the sale price for a sale to a third party.

46. Further, Applicants allege that the Protestants are transferring gas to a third party in exchange for services, rather than selling the gas. Applicants allege this is a cost that is prohibited under the Casey Lease. Protestants appear to allege that if they are paying on the sale price, then they have complied with the Lease.

47. Finally, the Commission finds that the Casey Lease is ambiguous as to which price, the fair and reasonable price, or the sale price to a third party, should apply. Paragraph 3 of the Casey Lease only provides that either may apply.

48. The Commission thus concludes that there is a bona fide dispute regarding the interpretation of a contract. Specifically, Casey claims that no costs may be deducted under Paragraph 3, while Protestants claim that as long as the royalty is paid based on the sale price, costs may be deducted. To resolve this dispute, the Commission would be required to interpret the Casey Lease and decide if the no cost provisions controlled over the requirement that the royalty be paid based on the market price for the gas. Accordingly, a bona fide contract dispute exists, and the Commission must decline jurisdiction pursuant to C.R.S. 34-60-118.5(5.5).

49. Further, the Commission concludes that the legislature did not intend for the Commission to have jurisdiction over royalty disputes where the rights and obligations of the parties are determined by a contract, particularly where resolving the dispute would involve the application and interpretation of complex legal principals. "These types of disputes may involve

not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34-60-118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions." *Grynberg*, 7 P.3d at 1063.

50. The purpose of Section 118.5 was to provide royalty owners with a simple and easy process to obtain payment when an operator delays payment. See Commission Order No. 1-73 ("[Section 118.5] is intended to prevent unscrupulous operators from delaying the payment of proceeds and wrongfully withholding or using funds that are attributable to a Payee's interest.") (Citing testimony by Representative Jerkey on House Bill 1113 before the House Agricultural Committee, January 25, 1989).

51. Section 118.5 originally provided that the Commission had "exclusive" jurisdiction over payment of proceeds, but was amended in 1998 to remove the word "exclusive" and clarify the Commission's jurisdiction. "The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction, only '[a]bsent a bona fide dispute over the interpretation of a contract for payment,'" *Grynberg*, 7 P.3d at 1063. "Indeed, as originally enacted and the amendment both provide evidence of the General Assembly's intent to exclude the resolution of contractual disputes from the jurisdiction of the Commission." *Id.* (emphasis supplied). The Commission thus does not have exclusive or primary jurisdiction over this dispute. *Grant Bros.* only holds that the Commission has primary jurisdiction over royalty disputes where there is no contract between the parties.

52. The Commission's jurisdiction over payment of proceeds disputes is narrow. The Commission only has jurisdiction to make three types of decisions: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. The Commission interprets these three decisions to be only related to calculation of a royalty amount, and not to include a determination of how the royalty amount is to be calculated.

53. Further, Protestants admitted at hearing that their interpretation of the Commission's jurisdiction could lead to a situation where a court would submit factual questions on royalty disputes to the Commission, while the court retained decision-making authority over legal issues or issues of contract interpretation. The Commission concludes the legislature did not intend to for Section 118.5 to result in such a complex procedure. As stated above, the purpose of Section 118.5 is to provide royalty owners with a simple process to obtain payment.

54. The Commission finds that resolving this matter would require significant discovery and hearing time and concludes that the Commission does not have the process or resources to conduct such complex and involved royalty disputes. The Commission meets approximately eight times a year, and meetings have historically lasted for one or two days. Seven of the nine Commissioners are volunteers and the other two are the Executive Directors of the Colorado Department of Natural Resources and Colorado Department of Public Health and Environment. §34-60-104(2)(a)(I), C.R.S.

55. The Commission further finds it does not have the expertise necessary to resolve this dispute. The Act does not require that any of the Commissioners have a legal background, or have a background in midstream operations. The Commission's expertise is in the technical and scientific aspects of the production of oil and gas. While three members of the Commission are required to have "substantial experience in the oil and gas industry," two of those Commissioner must have a "college degree in petroleum geology or petroleum engineering." *Id.* Further, only one Commissioner is required to be a royalty owner, and that Commissioner must also be involved in agriculture. *Id.*

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ORDER

IT IS HEREBY ORDERED:

1. Casey's Amended Application is DISMISSED WITHOUT PREJUDICE as the Commission lacks jurisdiction to hear the dispute.

2. The Commission also hereby ADOPTS the Hearing Officer's Recommendation.

IT IS FURTHER ORDERED:

1. The provisions contained in the above order shall become effective immediately.

2. The Commission expressly reserves its right, after notice and hearing, to alter, amend or repeal any and/or all of the above orders.

3. Under the State Administrative Procedure Act the Commission considers this Order to be final agency action for purposes of judicial review within 35 days after the date this Order is mailed by the Commission.

4. An application for reconsideration by the Commission of this Order is not required prior to the filing for judicial review.

ENTERED this 29th day of August, 2018, as of July 30, 2018.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By _____
Julie Spence Prine, Secretary

CERTIFICATE OF SERVICE

On August 29, 2018, a true and correct copy of the foregoing was sent by electronic mail to the following:

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Attorneys for Antero Resources Corporation and
Ursa Operating Company LLC

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-
-

Margaret Humecki, Hearings Assistant

3/25/2021

1-207

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

IN THE MATTER OF THE PAYMENT OF	)	CAUSE NO. 1
PROCEEDS TO PAUL LIMBACH, Nanci LIMBACH,)	
AND FRED LIMBACH FROM PRODUCTION OF OIL	)	DOCKET NO. 171200790
AND GAS AS ESTABLISHED BY SECTION 34-60-)	
118.5, C.R.S., MAMM CREEK FIELD, WILLIAMS	)	TYPE: GENERAL
FORK FORMATION, GARFIELD COUNTY,	)	ADMINISTRATIVE
COLORADO)	
	)	ORDER NO. 1-207

REPORT OF THE COMMISSION

The Commission heard this matter on July 30, 2018, at the Colorado Oil and Gas Conservation Commission ("Commission" or "COGCC"), 1120 Lincoln Street, Suite 801, Denver, Colorado, upon application for a hearing on the Commission's jurisdiction over a payment of proceeds dispute between Paul Limbach, Nanci Limbach, and Fred Limbach, as Applicants, and Antero Resources Corporation and Ursa Operating Company LLC, as Protestants.

FINDINGS

The Commission finds as follows:

1. Mr. Paul Limbach, Ms. Nanci Limbach, and Mr. Fred Limbach (collectively "Limbach" or "Applicants"), as the applicants herein, are interested parties in the subject matter of the above-referenced hearing.
2. Antero Resources Corporation ("Antero") and Ursa Operating Company LLC (Operator No. 10447) ("Ursa") (collectively "Protestants"), as the protestants herein, are interested parties in the subject matter of the above-referenced hearing.
3. Due notice of time, place, and purpose of the hearing has been given in all respects as required by law.
4. As a threshold issue, the Commission is required by § 34-60-118.5(5.5), C.R.S. to first determine if it has jurisdiction over this matter. The Commission has authority to promulgate the hereinafter prescribed order pursuant to the Oil and Gas Conservation Act ("Act"), §34-60-101, *et seq.*

PROCEDURAL AND FACTUAL HISTORY

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5. This matter presents a payment of proceeds dispute. Limbach claims that Antero and Ursa have not properly paid royalties due to Limbach.

6. This matter did not begin in front of the Commission. Limbach first filed a complaint alleging royalty underpayments in Garfield County District Court (16CV30263). Protestants filed a motion to dismiss for failure to exhaust administrative remedies, which the District Court granted without prejudice on July 31, 2017.

7. Limbach's Amended Application, filed in April 2018, requests that the Commission enter an order finding that the Commission does not have jurisdiction over the instant dispute. Protestants request that the Commission deny Limbach's request and decide this matter on the merits.

8. On June 18, 2018, the Hearing Officer required the submission of Expanded Prehearing Statements ("EPS") from each party, in order to clarify the specific arguments, and the legal basis relied upon for same. Limbach submitted its EPS on June 25, 2018, and the Protestants' Response was filed on July 2, 2018. No reply was authorized.

9. A Final Prehearing Conference ("Final PHC") was held at the Commission on July 16, 2018. All parties were present and represented by legal counsel.

10. Following the Final PHC, the Hearing Officer issued a Final Prehearing Order which, among other things, set forth stipulated facts, identified the disputed issue, consolidated this matter with Docket Nos. 171200791 and 171200792 for purposes of hearing, and provided each side with 15 minutes to argue the disputed issue.

11. The Stipulated Facts in the Final Prehearing Order identified two leases, the September 2007 Lease by and between Paul and Nanci Limbach, as Lessors, and Antero as Lessee, and the September 2007 Lease by and between Genevieve C. Limbach, as Trustee of the Genevieve C. Limbach Trust, as Lessor, and Antero, as Lessee as the applicable agreements in this matter (the "Limbach Leases" or "Leases"). See Stipulated Fact No. 6, Final Prehearing Order.

12. The parties also stipulated that Ursa is successor-in-interest to the Limbach Leases. *Id.*

13. The parties stipulated that the applicable royalty provisions in the Limbach Leases are as follows:

4.1.2 **Gas.** On all hydrocarbon gas, including casinghead gas and all other hydrocarbon gaseous substance, and hydrogen sulphide produced from the Leased Premises, as follows:

[t]he "value" (as determined hereafter) of eighteen percent (18%) of all liquid or gaseous hydrocarbons extracted or obtained from such gas by any method, on or off the Leased Premises;

As set forth at Paragraph 4.2 of the Lease Agreements, relating to the determination of "Value" of the Royalty under Paragraph 4.1.2 on gas and gaseous substance and products therefrom produced from the Leased Premises, "Value" shall be determined as follows:

4.2.1 **"Value" for purposes of 4.1.2 (i) and (ii).** The "value" of all liquid and gaseous hydrocarbons and other Minerals under which the Royalty is determined under Paragraph 4.1.2(i) and (ii) shall be:

(a) Their selling price, if sold under bona fide contracts of sale with Third Persons, or

(b) If they are not so sold to Third Persons, the fair and reasonable value thereof at the place where sold or used.

The term “**Third Person**,” as used in Paragraph 4.2.1(a), is defined, at Paragraph 1.1.9 of the Lease Agreements, to mean:

any person, firm or corporation not a subsidiary or affiliate of Lessee, with whom Lessee deals in arms-length and with whom Lessee has no processing contract involving production from the leased premises or other arrangement involving an exchange of production from the Leased Premises for other production, or a reciprocal allowance or discount on such production, or any reciprocal advantage, direct or indirect, resulting from any contract or arrangement. Any sale of production pursuant to any contract, or arrangement, or other commitment existing as of the date of this Lease shall not be deemed a sale to a Third Person. An ‘affiliate’ includes any individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, firm or other entity or person directly controlling, controlled by or under common control with Lessee. For purposes of this paragraph “control” means ownership of fifty percent (50%) or more of the voting securities or equivalent voting rights.

An additional royalty provision is set forth in Paragraph 4.5 of the Lease Agreements, states:

No Reduction for Costs. Lessee shall pay to Lessor the royalties free of all costs of any kind, including, but not limited to, costs of gathering, production, transportation, treating, compression, dehydration, processing, marketing, truck or other expense, directly incurred by Lessee, whether as direct charge or a reduced price or otherwise. In this regard, Lessee agrees to bear one hundred percent (100%) of all costs and expenses incurred in rendering hydrocarbons produced on or from the leased premises marketable and delivering the same into the first interstate pipeline. Additionally, said royalties shall never bear, either directly or indirectly, under any circumstances, the costs or expenses (including depreciation) to construct, repair, renovate or operate any pipeline, plant or other facilities or equipment used in connection with the treating, separation, extraction, gathering, processing, refining, compression, manufacturing or marketing of hydrocarbons produced from the leased premises or land pooled therewith.

See Stipulated Fact Nos. 17-18, Final Prehearing Order.

14. None of the parties dispute the existence or applicability of the Limbach Leases. At the Final Prehearing Conference on July 16, 2018, all parties confirmed on the record that the Leases are not

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silent regarding the allocation of post-production costs.

15. On July 18, 2018, the Hearing Officer issued a Recommendation recommending that the Commission dismiss Limbach's Amended Application without prejudice, for lack of jurisdiction.

APPLICABLE LAW

16. Generally, the Commission does not have the jurisdiction to interpret contracts. *Chase v. Colorado Oil and Gas Conservation Comm'n.*, 284 P.3d 161, 168 (Colo. App. 2012) (holding that the Act does not specifically provide the Commission has an express or implied power to interpret a lease, and that the Commission's determination that it lacked jurisdiction to interpret a lease was reasonable).

17. Section 34-60-118.5 of the Act defines the Commission's jurisdiction over disputes regarding the payment of royalties. The Commission has jurisdiction to decide: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. However, before the Commission may decide any of the above three issues, it must "determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." §34-60-118.5(5.5), C.R.S. "If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court." *Id.*

18. The Commission has discretion to interpret the Act. See *Colorado State Personnel Bd. v. Department of Corr.*, 988 P.2d 1147, 1151 (Colo.1999) (deference is given to an agency's reasonable interpretation of its statute when it "lighten[s] the agency's workload and mak[es] its decision-making process more efficient" as long as it is consistent with the intent and purpose of the statute).

19. The interpretation of a contract is a question of law. *Fed. Deposit Ins. Corp. v. Fisher*, 292 P.3d 934, 937 (Colo. 2013). The primary goal in contract interpretation is to ascertain and implement the intent of the parties. *Id.* Black's Law Dictionary defines interpretation as "the ascertainment of a text's meaning; specif., the determination of how a text most fittingly applies to particular facts." *Black's Law Dictionary* (10th ed. 2014).

20. Under Section 118.5(5.5), the Commission must not only determine if a dispute regarding the interpretation of a contract exists, the Commission must also decide if the dispute is "bona fide." *Black's Law Dictionary* (10th ed. 2014), defines "bona fide" as follows: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud. . . . Real, actual, genuine, and not feigned."

21. The Commission does not have jurisdiction to decide whether a royalty owner is entitled to payment under a lease or other contract. *Grynberg v. Colorado Oil & Gas Conservation Comm'n*, 7 P.3d 1060 at 1063 (Colo. App. 1999) held:

Section 34–60–118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment. The statute demonstrates the General Assembly's intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.

22. The legislature removed disputes that require the interpretation of a contract from the Commission's jurisdiction in order to preserve the state's interest in consistent resolution of complex legal questions. In *Grynberg*, the Court of Appeals discussed purpose of Section 118.5:

Section 34–60–118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34–60–118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions.

7 P.3d at 1064.

23. The Commission has jurisdiction to decide if and when payment is due where there is no contract between the parties. In *Grant Brothers Ranch, LLC v. Antero Resources Piceance Corporation, et al.*, the Colorado Court of Appeals found that the Commission had jurisdiction over a royalty payment dispute because, as the plaintiff had been statutorily pooled, there was no contract between the parties to interpret. 409 P.3d 637 (Colo. App. 2016). In reaching its conclusion, the Court found that the Commission has “primary jurisdiction over disputes for the payment of proceeds such as the one before us.” *Id.* at 644.

24. The Colorado Supreme Court has defined “marketability” for purposes of calculating royalties when a lease is silent and held that the determination of whether gas is marketable is a question of fact. In *Garman v. Conoco, Inc.*, the Colorado Supreme Court ruled that the implied covenant of marketability is included in every oil and gas lease. 886 P.2d 652 (Colo. 1994). When a lease is silent as to the deduction of costs from a royalty, the implied covenant of marketability requires “the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market.” *Id.* at 659.

25. In *Rogers v. Westerman Farm Co.*, the Colorado Supreme Court defined “marketability”:

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In sum, in defining marketability under the implied covenant to market, we look to the first-marketable product rule for guidance. Gas is marketable when it is in the physical condition such that it is acceptable to be bought and sold in a commercial marketplace, and in the location of a commercial marketplace, such that it is commercially saleable in the oil and gas marketplace. The determination of whether gas is marketable is a question of fact, to be resolved by a fact finder.

29 P.3d 887, 904 (Colo. 2001)

SUMMARY OF THE PARTIES' POSITIONS

26. In their EPS, Limbach asserts: 1) the Protestants paid royalties based upon sale prices that were lower than those actually realized to third persons for residue gas; 2) the royalty calculations for the five natural gas liquid products were based on artificially low sales prices; 3) as to the condensate, Limbach appears to argue that the Protestants breached the lease by failing to pay royalties on same, and instead have transferred the condensate to outside parties who perform the gathering and processing; and 4) the Protestants improperly made excessive severance and ad valorem tax deductions. See EPS, at 1-3.

27. As support for these assertions, Limbach states that several sections of the Limbach Leases are controlling. *Id.* at 3-5. Limbach also relies on the Protestants' written responses to their notice of failure to make timely payments, which response that stated the royalties were calculated on the fair and reasonable value of the hydrocarbons where they were sold or used. *Id.* at 6-7. Finally, Limbach asserts that the excessive taxes withheld were in violation of C.R.S. §§ 39-7-102 and 39-29-111(1)(a). *Id.*

28. In the Responses, the Protestants state: "without citing to any section of the leases that is in dispute, [the Applicants] make the general assertion that there is a bona fide issue of contract interpretation." See Response at 1, ¶ 3.

29. The Protestants argue that the factual determinations of whether post-production costs were or were not taken and whether those deductions were taken prior to the point of marketability are factual determinations well within the jurisdiction of the Commission. *Id.* at 2, ¶ 2. "In summary, Applicants do not point to one word in the...Leases to which they claim a "bona fide dispute exists regarding the interpretation of a contract." *Id.* at 3, ¶ 1.

HEARING

30. On July 30, 2018, the Commission heard oral argument on the Commission's jurisdiction over this matter.

31. The parties agreed that, in the interests of time, all arguments made in Docket Nos. 171200788 and 171200789 would be treated as though they were made in full in this matter.

32. Prior to the argument in Docket No. 171200788, Commissioner Jolley disclosed that he had previously been a plaintiff in two royalty payment suits against operators. He stated that those lawsuits had been resolved and that the Protestants were not parties to the lawsuits. Commissioner Jolley stated that he could be impartial and that he intended to participate in these matters. No Commissioner, party, or member of the public objected to Commissioner Jolley's participation in Docket No. 171200790.

33. Limbach argued that the Limbach Leases specifically prohibit the Protestants from deducting any post-production costs. Limbach argued that, for the residue and natural gas liquid products, the Protestants failed to pay royalties based on the sales price to "Third Persons," at the delivery points where such products were sold to "Third Persons." Limbach argued that the Protestants deducted transportation, processing, and treating costs from the selling price, which is prohibited by the Limbach Leases.

34. Limbach summarized the Protestants' position based on statements made in response to Limbach's notice of failure to make timely payments. Limbach alleged the Protestant's position is that they have paid on fair and reasonable value of the gas at the place where sold or used, and that the Limbach Leases allowed Protestants to charge the reservation fee to guarantee access to interstate pipelines. Limbach cited to Bates Nos. 000326 for its summary of Protestant's position.

35. Protestants argued that the meaning of language in the Limbach Leases is clear and there is no dispute as to the meaning of the language. Therefore, Protestants argued, there is no dispute over the interpretation of a contract and the Commission has jurisdiction. Protestants also argued that Limbach's arguments only involve applying facts to the clear terms of the Leases. Protestants argued the determination of "market value" is a factual determination.

36. Co-Vice Chair Boigon asked the parties if there was a dispute over the meaning of the term "Third Person" in the Limbach Lease. Limbach responded that they disputed that Protestants first sale of gas was a sale to a Third Person as defined by the Limbach Leases. Protestants responded that Paragraph 1.1.9 of the Limbach Lease clearly defined "Third Person," and the dispute was a question of fact for the Commission.

37. Chairman Benton asked the parties if the natural gas liquids were actually sold. Protestants responded that the question was not relevant to the issue of jurisdiction because the Limbach Leases are clear. Limbach responded that the Protestants claimed they were appropriately paying under a prior sale contract, which was not to a Third Person. Limbach further responded that its position was the Protestants must pay royalties based on the sales price to a Third Person, but that Protestants took the position that they could deduct certain costs under the Leases. Protestants reiterated that Limbach was not challenging the meaning of a single term in the Leases.

38. Chairman Benton asked if reviewing the no-cost provisions of the Leases to determine whether costs may be charged was interpretation of the contract. Protestants responded that it was still simply an issue of applying facts to clear contractual language. Limbach responded that if the Commission cannot decide the rights and obligations of the parties under contract without interpreting the contract.

39. Commissioner Hawkins asked Protestants if there is clear language in the Lease that allows Protestants to charge a reservation fee to Limbach's royalties. Protestants responded that Commissioner Hawkins' question was a factual issue that only involved applying facts to the clear terms of the Leases.

40. Commissioner Jolley asked if Limbach was asserting that it was not paid royalties at all for natural gas liquids. Limbach asserted that previously they received no payment for natural gas liquids as Antero transferred those natural gas liquids in exchange for service. Limbach asserted that subsequently, they were paid for the natural gas liquids, but the Protestants deducted transportation and other costs from that royalty amount.

41. Upon inquiries from the Commission in Docket No. 171200788, counsel for Airport stated that, in order prove the point of marketability, royalty owners would need to put on its own witnesses for factual testimony, as well as expert witnesses on the location of the commercial market, the method of marketing natural gas, when NGLs are first marketable, and

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accounting practices. Protestants stated that the presentation would be less complex, and would only require an expert on marketability, an accountant to explain accounting practices, and lay witness to explain how payments were actually made.

42. Upon inquiries from the Commission in Docket No. 171200788, counsel for Airport asserted that discovery in this matter would be necessary, could take up to a year, and would involve thousands of pages of documents. Protestants claimed that discovery would be much less involved.

43. The Commission closed the record and deliberated.

COMMISSION DELIBERATIONS

44. The Commissioners stated that their comments from Docket Nos. 171200788 and 171200789 would apply to this matter as well.

45. In Docket No. 171200788, Co-Vice Chair Boigon stated that this matter was a highly contested case that was likely to involve significant discovery and that Commission does not have the expertise, process, or resources to be immersed in these type of royalty disputes.

46. In Docket No. 171200788, Commissioner Hawkins stated that he would be hard-pressed to provide with Commission with any expertise in the midstream issues raised in this case.

47. In Docket No. 171200788, Co-Vice Chair Holton stated that this matter was too complex for the Commission to resolve.

48. Co-Vice Chair Boigon stated that the Commission has never heard these types of contractual disputes.

49. Following deliberations, the Commission voted unanimously to dismiss Limbach's Amended Application for lack of jurisdiction.

COMMISSION CONCLUSIONS

50. Based on the statements and descriptions of the dispute from the parties at hearing, the Commission finds that the parties have a bona fide dispute regarding the interpretation of a contract. Limbach's position is that the Lease prohibits the deduction of any costs. Protestants are deducting certain costs and allege that such deductions are allowed under the lease. To resolve this dispute, the Commission would be required to determine how the cost prohibition in Paragraph 4.5 interacts with the provisions of Paragraph 4.2.1, which provide that the value upon which a royalty is to be paid is based on the selling price. In effect, the Commission would be required to determine if Paragraph 4.5's prohibition on the deduction of costs overcomes Paragraph 4.2.1's definition of value.

51. Applicants allege that the Protestants at one point transferred gas to a third party in exchange for services, rather than selling the gas. The Commission would be required to interpret the Leases to determine whether a royalty must be paid when gas is not sold.

52. Applicants allege that certain sale of gas are not sales to "Third Persons" under the Leases. To resolve this allegation, the Commission would be required to interpret Paragraph 1.1.9.

53. Finally, Applicants allege that Protestants are deducting a reservation fee from their royalty payments. Paragraph 4.5 of the Lease provides that the royalties are to be "free of

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all costs of any kind." Paragraph 4.5 lists certain types of costs, but does not mention reservation fees. To resolve this claim, the Commission would be required to interpret Paragraph 4.5, and other provisions, of the Leases to determine if reservation fees are included the categories of costs that may not be deducted from Limbach's royalty.

54. As a bona fide dispute regarding the interpretation of a contract exists, the Commission must decline jurisdiction under §34-60-118.5(5.5).

55. Further, the Commission concludes that the legislature did not intend for the Commission to have jurisdiction over royalty disputes where the rights and obligations of the parties are determined by a contract, particularly where resolving the dispute would involve the application and interpretation of complex legal principals. "These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34-60-118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions." *Grynberg*, 7 P.3d at 1063.

56. The purpose of Section 118.5 was to provide royalty owners with a simple and easy process to obtain payment when an operator delays payment. See Commission Order No. 1-73 ("[Section 118.5] is intended to prevent unscrupulous operators from delaying the payment of proceeds and wrongfully withholding or using funds that are attributable to a Payee's interest.") (Citing testimony by Representative Jerkey on House Bill 1113 before the House Agricultural Committee, January 25, 1989).

57. Section 118.5 originally provided that the Commission had "exclusive" jurisdiction over payment of proceeds, but was amended in 1998 to remove the word "exclusive" and clarify the Commission's jurisdiction. "The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction, only '[a]bsent a bona fide dispute over the interpretation of a contract for payment,'" *Grynberg*, 7 P.3d at 1063. "Indeed, as originally enacted and the amendment both provide evidence of the General Assembly's intent to exclude the resolution of contractual disputes from the jurisdiction of the Commission." *Id.* (emphasis supplied). The Commission thus does not have exclusive or primary jurisdiction over this dispute. *Grant Bros* only holds that the Commission has primary jurisdiction over royalty disputes where there is no contract between the parties.

58. The Commission's jurisdiction over payment of proceeds disputes is narrow. The Commission only has jurisdiction to make three types of decisions: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. The Commission interprets these three decisions to be only related to calculation of a royalty amount, and not to include a determination of how the royalty amount is to be calculated.

59. Protestants admitted at hearing that their interpretation of the Commission's jurisdiction could lead to a situation where a court would submit factual questions on royalty disputes to the Commission, while the court retained decision-making authority over legal issues or issues of contract interpretation. The Commission concludes the legislature did not intend for Section 118.5 to result in such a complex and lengthy procedure. As stated above, the purpose of Section 118.5 is to provide royalty owners with a simple process to obtain payment. Protestants cite to *Lake Durango Water Co. v. Pub. Utilities Comm'n of State of Colorado*, 67 P.3d 12, 21 (Colo. 2003), *as modified on denial of reh'g* (Apr. 28, 2003) for the proposition that courts may decide legal questions while an agency decides factual questions. *Lake Durango Water Co.* however, did not interpret the Commission's jurisdiction under Section 118.5 and does not compel a different conclusion.

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60. The Commission finds that resolving this matter would require significant discovery and hearing time and concludes that the Commission does not have the process or resources to conduct such complex and involved disputes. The Commission meets approximately eight times a year, and meetings have historically lasted for one or two days. Seven of the nine Commissioners are volunteers and the remaining two Commissioners are the Executive Directors of the Colorado Department of Natural Resources and the Colorado Department of Public Health and Environment. §34-60-104(2)(a)(I), C.R.S.

61. The Commission further finds it does not have the expertise necessary to resolve this dispute. The Act does not require that any of the Commissioners have a legal background, or have a background in midstream operations. The Commission's expertise is in the technical and scientific aspects of the production of oil and gas. While three members of the Commission are required to have "substantial experience in the oil and gas industry," two of those Commissioner must have a "college degree in petroleum geology or petroleum engineering." *Id.* Further, only one Commissioner is required to be a royalty owner, and that Commissioner must also be involved in agriculture. *Id.*

62. The Commission further concludes that it does not have exclusive or primary jurisdiction over this dispute. The legislature removed the word "exclusive" when it amended Section 118.5. See *Grynberg*, 7 P.3d at 1063 ("The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction.") Further, the Commission concludes that *Grant Bros* only states that the Commission has primary jurisdiction over royalty disputes where there is no contract between the parties. See 409 P.3d at 644.

ORDER

IT IS HEREBY ORDERED:

1. Limbach's Amended Application is DISMISSED WITHOUT PREJUDICE as the Commission lacks jurisdiction to hear the dispute.

2. The Commission also hereby ADOPTS the Hearing Officer's Recommendation.

IT IS FURTHER ORDERED:

1. The provisions contained in the above order shall become effective immediately.
2. The Commission expressly reserves its right, after notice and hearing, to alter, amend or repeal any and/or all of the above orders.
3. Under the State Administrative Procedure Act the Commission considers this Order to be final agency action for purposes of judicial review within 35 days after the date this Order is mailed by the Commission.
4. An application for reconsideration by the Commission of this Order is not required prior to the filing for judicial review.

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ENTERED this 29th day of August, 2018, as of July 30, 2018.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By _____
Julie Spence Prine, Secretary

CERTIFICATE OF SERVICE

On August 29, 2018, a true and correct copy of the foregoing was sent by electronic mail to the following:

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Ursa Operating Company LLC

Margaret Humecki, Hearings Assistant

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

IN THE MATTER OF THE PAYMENT OF PROCEEDS)	CAUSE NO. 1
TO SHIDELEROSA, LLLP AND SHIDELER ENERGY)	
COMPANY, LLC FROM PRODUCTION OF OIL AND	)	DOCKET NO. 171200791
GAS AS ESTABLISHED BY SECTION 34-60-118.5,)	
C.R.S., MAMM CREEK FIELD, WILLIAMS FORK	)	TYPE: GENERAL
FORMATION, GARFIELD COUNTY, COLORADO	)	ADMINISTRATIVE
)	
	)	ORDER NO. 1-208

REPORT OF THE COMMISSION

The Commission heard this matter on July 30, 2018, at the Colorado Oil and Gas Conservation Commission ("Commission" or "COGCC"), 1120 Lincoln Street, Suite 801, Denver, Colorado, upon application for a hearing on the Commission's jurisdiction over a payment of proceeds dispute between Shidelerosa, LLLP and Shideler Energy Company, LLC, as Applicants, and Antero Resources Corporation and Ursa Operating Company LLC, as Protestants.

FINDINGS

The Commission finds as follows:

1. Shidelerosa, LLLP and Shideler Energy Company, LLC (collectively "Applicants"), as the applicants herein, are interested parties in the subject matter of the above-referenced hearing.
2. Antero Resources Corporation ("Antero") and Ursa Operating Company LLC (Operator No. 10447) ("Ursa") (collectively "Protestants"), as the protestants herein, are interested parties in the subject matter of the above-referenced hearing.
3. Due notice of time, place, and purpose of the hearing has been given in all respects as required by law.
4. As a threshold issue, the Commission is required by § 34-60-118.5(5.5), C.R.S. to first determine if it has jurisdiction over this matter. The Commission has authority to promulgate the hereinafter prescribed order pursuant to the Oil and Gas Conservation Act ("Act"), §34-60-101, *et seq.*

PROCEDURAL AND FACTUAL HISTORY

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5. This matter presents a payment of proceeds dispute. Applicants claim that Antero and Ursa have not properly paid royalties due to Applicants.

6. This matter did not begin in front of the Commission. Applicants first filed a complaint alleging royalty underpayments in Garfield County District Court (16CV30280). Protestants filed a motion to dismiss for failure to exhaust administrative remedies, which the District Court granted without prejudice on August 16, 2017.

7. Applicants' Amended Application, filed in April 2018, requests that the Commission enter an order finding that the Commission does not have jurisdiction over the instant dispute. Protestants request that the Commission deny Applicants' request and decide this matter on the merits.

8. On June 18, 2018, the Hearing Officer required the submission of Expanded Prehearing Statements ("EPS") from each party, in order to clarify the specific arguments, and the legal basis relied upon for same. Applicants submitted their EPS on June 25, 2018, and the Protestants' Response was filed on July 2, 2018. No reply was authorized.

9. A Final Prehearing Conference ("Final PHC") was held at the Commission on July 16, 2018. All parties were present and represented by legal counsel.

10. Following the Final PHC, the Hearing Officer issued a Final Prehearing Order which, among other things, set forth stipulated facts, identified the disputed issue, consolidated this matter with Docket Nos. 171200790 and 171200792 for purposes of hearing, and provided each side with 15 minutes to argue the disputed issue.

11. The Stipulated Facts in the Final Prehearing Order identified two leases, the July 15, 2006 Lease by and between Shidelerosa, LLLP, as Lessors, and Antero as Lessee and the July 15, 2006 Lease by and between Shideler Energy Company, LLC, as Lessors, and Antero as Lessee. See Stipulated Fact No. 11, Final Prehearing Order.

12. The parties also stipulated that Ursa is successor-in-interest to the Leases. *Id.*

13. The parties stipulated that the applicable royalty provisions in the Leases are as follows:

4.1.2 **Gas.** On all hydrocarbon gas, including casinghead gas and all other hydrocarbon gaseous substance, and hydrogen sulphide produced from the Leased Premises, as follows:

[t]he "value" (as determined hereafter) of twenty percent (20%) of all liquid or gaseous hydrocarbons extracted or obtained from such gas by any method, on or off the Leased Premises;

As set forth at Paragraph 4.2 of the Lease Agreements, relating to the determination of "Value" of the Royalty under Paragraph 4.1.2 on gas and gaseous substance and products therefrom produced from the Leased Premises, "Value" shall be determined as follows:

4.2.1 **"Value" for purposes of 4.1.2 (i) and (ii).** The "value" of all liquid and gaseous hydrocarbons and other Minerals under which the Royalty is determined under Paragraph 4.1.2(i) and (ii) shall be:

(a) Their selling price, if sold under bona fide contracts of sale with Third Persons, or

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(b) If they are not so sold to Third Persons, the fair and reasonable value thereof at the place where sold or used.

The term "**Third Person**," as used in Paragraph 4.2.1(a), is defined, at Paragraph 1.1.9 of the Lease Agreements, to mean:

any person, firm or corporation not a subsidiary or affiliate of Lessee, with whom Lessee deals in arms-length and with whom Lessee has no processing contract involving production from the leased premises or other arrangement involving an exchange of production from the Leased Premises for other production, or a reciprocal allowance or discount on such production, or any reciprocal advantage, direct or indirect, resulting from any contract or arrangement. Any sale of production pursuant to any contract, or arrangement, or other commitment existing as of the date of this Lease shall not be deemed a sale to a Third Person. An 'affiliate' includes any individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, firm or other entity or person directly controlling, controlled by or under common contract with Lessee. For purposes of this paragraph "control" means ownership of fifty percent (50%) or more of the voting securities or equivalent voting rights.

An additional royalty provision is set forth in Paragraph 4.5 of the Lease Agreements, states:

No Reduction for Costs. Lessee shall pay to Lessor the royalties free of all costs of any kind, including, but no limited to, costs of gathering, production, transportation, treating, compression, dehydration, processing, marketing, truck or other expense, directly incurred by Lessee, whether as direct charge or a reduced price or otherwise. In this regard, Lessee agrees to bear one hundred percent (100%) of all costs and expenses incurred in rendering hydrocarbons produced on or from the leased premises marketable and delivering the same into the first interstate pipeline. Additionally, said royalties shall never bear, either directly or indirectly, under any circumstances, the costs or expenses (including depreciation) to construct, repair, renovate or operate any pipeline, plant or other facilities or equipment used in connection with the treating, separation, extraction, gathering, processing, refining, compression, manufacturing or marketing of hydrocarbons produced from the leased premises or land pooled therewith.

See Stipulated Fact Nos. 17-18, Final Prehearing Order.

14. None of the parties dispute the existence or applicability of the Leases. At the Final Prehearing Conference on July 16, 2018, all parties confirmed on the record that the Leases are not silent regarding the allocation of post-production costs.

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15. On July 18, 2018, the Hearing Officer issued a Recommendation recommending that the Commission dismiss Applicants' Amended Application without prejudice, for lack of jurisdiction.

APPLICABLE LAW

16. Generally, the Commission does not have the jurisdiction to interpret contracts. *Chase v. Colorado Oil and Gas Conservation Comm'n.*, 284 P.3d 161, 168 (Colo. App. 2012) (holding that the Act does not specifically provide the Commission has an express or implied power to interpret a lease, and that the Commission's determination that it lacked jurisdiction to interpret a lease was reasonable).

17. Section 34-60-118.5 of the Act defines the Commission's jurisdiction over disputes regarding the payment of royalties. The Commission has jurisdiction to decide: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. However, before the Commission may decide any of the above three issues, it must "determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." §34-60-118.5(5.5), C.R.S. "If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court." *Id.*

18. The Commission has discretion to interpret the Act. See *Colorado State Personnel Bd. v. Department of Corr.*, 988 P.2d 1147, 1151 (Colo.1999) (deference is given to an agency's reasonable interpretation of its statute when it "lighten[s] the agency's workload and mak[es] its decision-making process more efficient" as long as it is consistent with the intent and purpose of the statute).

19. The interpretation of a contract is a question of law. *Fed. Deposit Ins. Corp. v. Fisher*, 292 P.3d 934, 937 (Colo. 2013). The primary goal in contract interpretation is to ascertain and implement the intent of the parties. *Id.* Black's Law Dictionary defines interpretation as "the ascertainment of a text's meaning; specif., the determination of how a text most fittingly applies to particular facts." *Black's Law Dictionary* (10th ed. 2014).

20. Under Section 118.5(5.5), the Commission must not only determine if a dispute regarding the interpretation of a contract exists, the Commission must also decide if the dispute is "bona fide." *Black's Law Dictionary* (10th ed. 2014), defines "bona fide" as follows: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud. . . . Real, actual, genuine, and not feigned."

21. The Commission does not have jurisdiction to decide whether a royalty owner is entitled to payment under a lease or other contract. *Grynberg v. Colorado Oil & Gas Conservation Comm'n*, 7 P.3d 1060 at 1063 (Colo. App. 1999) held:

Section 34–60–118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment. The statute demonstrates the General Assembly's intent to grant to the Commission

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jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.

22. The legislature removed disputes that require the interpretation of a contract from the Commission's jurisdiction in order to preserve the state's interest in consistent resolution of complex legal questions. In *Grynberg*, the Court of Appeals discussed purpose of Section 118.5:

Section 34–60–118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34–60–118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions.

7 P.3d at 1064.

23. The Commission has jurisdiction to decide if and when payment is due where there is no contract between the parties. In *Grant Brothers Ranch, LLC v. Antero Resources Piceance Corporation, et al.*, the Colorado Court of Appeals found that the Commission had jurisdiction over a royalty payment dispute because, as the plaintiff had been statutorily pooled, there was no contract between the parties to interpret. 409 P.3d 637 (Colo. App. 2016). In reaching its conclusion, the Court found that the Commission has “primary jurisdiction over disputes for the payment of proceeds such as the one before us.” *Id.* at 644.

24. The Colorado Supreme Court has defined “marketability” for purposes of calculating royalties when a lease is silent and held that the determination of whether gas is marketable is a question of fact. In *Garman v. Conoco, Inc.*, the Colorado Supreme Court ruled that the implied covenant of marketability is included in every oil and gas lease. 886 P.2d 652 (Colo. 1994). When a lease is silent as to the deduction of costs from a royalty, the implied covenant of marketability requires “the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market.” *Id.* at 659.

25. In *Rogers v. Westerman Farm Co.*, the Colorado Supreme Court defined “marketability”:

In sum, in defining marketability under the implied covenant to market, we look to the first-marketable product rule for guidance. Gas is marketable when it is in the physical condition such that it is acceptable to be bought and sold in a commercial marketplace, and in the location of a commercial marketplace, such that it is commercially saleable in

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the oil and gas marketplace. The determination of whether gas is marketable is a question of fact, to be resolved by a fact finder.

29 P.3d 887, 904 (Colo. 2001)

SUMMARY OF THE PARTIES' POSITIONS

26. In their EPS, Applicants assert: 1) the Protestants paid royalties based upon sale prices that were lower than those actually realized to third persons for residue gas; 2) the royalty calculations for the five natural gas liquid products were based on artificially low sales prices; 3) as to the condensate, Applicants appear to argue that the Protestants breached the lease by failing to pay royalties on same, and instead have transferred the condensate to outside parties who perform the gathering and processing; and 4) the Protestants improperly made excessive severance and ad valorem tax deductions. See EPS, at 1-3.

27. As support for these assertions, Applicants state that several sections of the Leases are controlling. *Id.* at 3-5. Applicants also rely on the Protestants' written responses to the Applicants notice of failure to make timely payments, which response stated the royalties were calculated on the fair and reasonable value of the hydrocarbons where they were sold or used. *Id.* at 6-7. Finally, Applicants assert that the excessive taxes withheld were in violation of C.R.S. §§ 39-7-102 and 39-29-111(1)(a). *Id.*

28. In the Responses, the Protestants state: "without citing to any section of the leases that is in dispute, [the Applicants] make the general assertion that there is a bona fide issue of contract interpretation." See Response at 1, ¶ 3.

29. The Protestants argue that the factual determinations of whether post-production costs were or were not taken and whether those deductions were taken prior to the point of marketability are factual determinations well within the jurisdiction of the Commission. *Id.* at 2, ¶ 2. "In summary, Applicants do not point to one word in the...Leases to which they claim a "bona fide dispute exists regarding the interpretation of a contract."" *Id.* at 3, ¶ 1.

HEARING

30. On July 30, 2018, the Commission heard oral argument on the Commission's jurisdiction over this matter.

31. The parties agreed that, in the interests of time, all arguments made in Docket Nos. 171200788 and 171200789 would be treated as though they were made in full in this matter.

32. Prior to the argument in Docket No. 171200788, Commissioner Jolley disclosed that he had previously been a plaintiff in two royalty payment suits against operators. He stated that those lawsuits had been resolved and that the Protestants were not parties to the lawsuits. Commissioner Jolley stated that he could be impartial and that he intended to participate in these matters. No Commissioner, party, or member of the public objected to Commissioner Jolley's participation in Docket No. 171200791.

33. Applicants argued that the Leases specifically prohibit the Protestants from deducting any post-production costs. Applicants argued that, for the residue and natural gas liquid products, the Protestants failed to pay royalties based on the sales price to "Third Persons," at the delivery points where such products were sold to "Third Persons." Applicants

argued that the Protestants deducted transportation, processing, and treating costs from the selling price, which is prohibited by the Leases.

34. Applicants summarized the Protestants' position based on statements made in response to Applicants' notice of failure to make timely payments. Applicants alleged the Protestant's position is that they have paid on fair and reasonable value of the gas at the place where sold or used, and that the Leases allowed Protestants to charge the reservation fee to guarantee access to interstate pipelines. Applicants cited to Bates Nos. 001466 for its summary of Protestant's position.

35. Protestants argued that the meaning of the language in the Leases is clear and there is no dispute as to the meaning of the language. Therefore, Protestants argued, there is no dispute over the interpretation of a contract and the Commission has jurisdiction. Protestants also argued that Applicants' arguments only involve applying facts to the clear terms of the Leases. Protestants argued the determination of "market value" is a factual determination.

36. Co-Vice Chair Boigon asked the parties if there was a dispute over the meaning of the term "Third Person" in the Lease. Applicants responded that they disputed that Protestants first sale of gas was a sale to a Third Person as defined by the Leases. Protestants responded that Paragraph 1.1.9 of the Leases clearly defined "Third Person," and the dispute was a question of fact for the Commission.

37. Chairman Benton asked the parties if the natural gas liquids were actually sold. Protestants responded that the question was not relevant to the issue of jurisdiction because the Leases are clear. Applicants responded that the Protestants claimed they were appropriately paying under a prior sale contract, which was not to a Third Person. Applicants further responded that its position was the Protestants must pay royalties based on the sales price to a Third Person, but that Protestants took the position that they could deduct certain costs under the Leases. Protestants reiterated that Applicants were not challenging the meaning of a single term in the Leases.

38. Chairman Benton asked if reviewing the no-cost provisions of the Leases to determine whether costs may be charged was interpretation of the contract. Protestants responded that it was still simply an issue of applying facts to clear contractual language. Applicants responded that if the Commission cannot decide the rights and obligations of the parties under contract without interpreting the contract.

39. Commissioner Hawkins asked Protestants if there is clear language in the Lease that allows Protestants to charge a reservation fee to Applicants' royalties. Protestants responded that Commissioner Hawkins' question was a factual issue that only involved applying facts to the clear terms of the Leases.

40. Commissioner Jolley asked if Applicants were asserting that it was not paid royalties at all for natural gas liquids. Applicants asserted that previously they received no payment for natural gas liquids as Antero transferred those natural gas liquids in exchange for service. Applicants asserted that subsequently, they were paid for the natural gas liquids, but the Protestants deducted transportation and other costs from that royalty amount.

41. Upon inquiries from the Commission in Docket No. 171200788, counsel for Airport stated that, in order prove the point of marketability, royalty owners would need to put on its own witnesses for factual testimony, as well as expert witnesses on the location of the commercial market, the method of marketing natural gas, when NGLs are first marketable, and accounting practices. Protestants stated that the presentation would be less complex, and would only require an expert on marketability, an accountant to explain accounting practices, and lay witness to explain how payments were actually made.

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42. Upon inquiries from the Commission in Docket No. 171200788, counsel for Airport asserted that discovery in this matter would be necessary, could take up to a year, and would involve thousands of pages of documents. Protestants claimed that discovery would be much less involved.

43. The Commission closed the record and deliberated.

COMMISSION DELIBERATIONS

44. The Commissioners stated that their comments from Docket Nos. 171200788 and 171200789 would apply to this matter as well.

45. In Docket No. 171200788, Co-Vice Chair Boigon stated that this matter was a highly contested case that was likely to involve significant discovery and that Commission does not have the expertise, process, or resources to be immersed in these type of royalty disputes.

46. In Docket No. 171200788, Commissioner Hawkins stated that he would be hard-pressed to provide with Commission with any expertise in the midstream issues raised in this case.

47. In Docket No. 171200788, Co-Vice Chair Holton stated that this matter was too complex for the Commission to resolve.

48. Co-Vice Chair Boigon stated that the Commission has never heard these types of contractual disputes.

49. Following deliberations, the Commission voted unanimously to dismiss the Application for lack of jurisdiction.

COMMISSION CONCLUSIONS

50. Based on the statements and descriptions of the dispute from the parties at hearing, the Commission finds that the parties have a bona fide dispute regarding the interpretation of a contract. Applicants' position is that the Lease prohibits the deduction of any costs. Protestants are deducting certain costs and allege that such deductions are allowed under the lease. To resolve this dispute, the Commission would be required to determine how the cost prohibition in Paragraph 4.5 interacts with the provisions of Paragraph 4.2.1, which provide that the value upon which a royalty is to be paid is based on the selling price. In effect, the Commission would be required to determine if Paragraph 4.5's prohibition on the deduction of costs overcomes Paragraph 4.2.1's definition of value.

51. Applicants allege that the Protestants at one point transferred gas to a third party in exchange for services, rather than selling the gas. The Commission would be required to interpret the Leases to determine whether a royalty must be paid when gas is not sold.

52. Applicants allege that certain sale of gas are not sales to "Third Persons" under the Leases. To resolve this allegation, the Commission would be required to interpret Paragraph 1.1.9.

53. Finally, Applicants allege that Protestants are deducting a reservation fee from their royalty payments. Paragraph 4.5 of the Lease provides that the royalties are to be "free of all costs of any kind." Paragraph 4.5 lists certain types of costs, but does not mention reservation fees. To resolve this claim, the Commission would be required to interpret Paragraph 4.5, and other provisions, of the Leases to determine if reservation fees are included the categories of costs that may not be deducted from Applicants' royalty.

54. As a bona fide dispute regarding the interpretation of a contract exists, the Commission must decline jurisdiction under §34-60-118.5(5.5).

55. Further, the Commission concludes that the legislature did not intend for the Commission to have jurisdiction over royalty disputes where the rights and obligations of the parties are determined by a contract, particularly where resolving the dispute would involve the application and interpretation of complex legal principals. "These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34-60-118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions." *Grynberg*, 7 P.3d at 1063.

56. The purpose of Section 118.5 was to provide royalty owners with a simple and easy process to obtain payment when an operator delays payment. See Commission Order No. 1-73 ("[Section 118.5] is intended to prevent unscrupulous operators from delaying the payment of proceeds and wrongfully withholding or using funds that are attributable to a Payee's interest.") (Citing testimony by Representative Jerkey on House Bill 1113 before the House Agricultural Committee, January 25, 1989).

57. Section 118.5 originally provided that the Commission had "exclusive" jurisdiction over payment of proceeds, but was amended in 1998 to remove the word "exclusive" and clarify the Commission's jurisdiction. "The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction, only '[a]bsent a bona fide dispute over the interpretation of a contract for payment,'" *Grynberg*, 7 P.3d at 1063. "Indeed, as originally enacted and the amendment both provide evidence of the General Assembly's intent to exclude the resolution of contractual disputes from the jurisdiction of the Commission." *Id.* (emphasis supplied). The Commission thus does not have exclusive or primary jurisdiction over this dispute. *Grant Bros* only holds that the Commission has primary jurisdiction over royalty disputes where there is no contract between the parties.

58. The Commission's jurisdiction over payment of proceeds disputes is narrow. The Commission only has jurisdiction to make three types of decisions: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. The Commission interprets these three decisions to be only related to calculation of a royalty amount, and not to include a determination of how the royalty amount is to be calculated.

59. Protestants admitted at hearing that their interpretation of the Commission's jurisdiction could lead to a situation where a court would submit factual questions on royalty disputes to the Commission, while the court retained decision-making authority over legal issues or issues of contract interpretation. The Commission concludes the legislature did not intend for Section 118.5 to result in such a complex procedure. As stated above, the purpose of Section 118.5 is to provide royalty owners with a simple process to obtain payment. Protestants cite to *Lake Durango Water Co. v. Pub. Utilities Comm'n of State of Colorado*, 67 P.3d 12, 21 (Colo. 2003), as modified on denial of reh'g (Apr. 28, 2003) for the proposition that courts may decide legal questions while an agency decides factual questions. *Lake Durango Water Co.* however, did not interpret the Commission's jurisdiction under Section 118.5 and does not compel a different conclusion.

60. The Commission finds that resolving this matter would require significant discovery and hearing time and concludes that the Commission does not have the process or resources to conduct such complex and involved disputes. The Commission meets approximately eight times a year, and meetings have historically lasted for one or two days.

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Seven of the nine Commissioners are volunteers and the remaining two Commissioners are the Executive Directors of the Colorado Department of Natural Resources and the Colorado Department of Public Health and Environment. §34-60-104(2)(a)(I), C.R.S.

61. The Commission further finds it does not have the expertise necessary to resolve this dispute. The Act does not require that any of the Commissioners have a legal background, or have a background in midstream operations. The Commission's expertise is in the technical and scientific aspects of the production of oil and gas. While three members of the Commission are required to have "substantial experience in the oil and gas industry," two of those Commissioner must have a "college degree in petroleum geology or petroleum engineering." *Id.* Further, only one Commissioner is required to be a royalty owner, and that Commissioner must also be involved in agriculture. *Id.*

ORDER

IT IS HEREBY ORDERED:

1. Applicants' Amended Application is DISMISSED WITHOUT PREJUDICE as the Commission lacks jurisdiction to hear the dispute.

2. The Commission also hereby ADOPTS the Hearing Officer's Recommendation.

IT IS FURTHER ORDERED:

1. The provisions contained in the above order shall become effective immediately.

2. The Commission expressly reserves its right, after notice and hearing, to alter, amend or repeal any and/or all of the above orders.

3. Under the State Administrative Procedure Act the Commission considers this Order to be final agency action for purposes of judicial review within 35 days after the date this Order is mailed by the Commission.

4. An application for reconsideration by the Commission of this Order is not required prior to the filing for judicial review.

ENTERED this 29th day of August, 2018, as of July 30, 2018.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By _____
Julie Spence Prine, Secretary

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CERTIFICATE OF SERVICE

On August 29, 2018, a true and correct copy of the foregoing was sent by electronic mail to the following:

George Barton
Stacy Burrows
Rob Titus
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Attorneys for Antero Resources Corporation and
Ursa Operating Company LLC

Margaret Humecki, Hearings Assistant

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

IN THE MATTER OF THE PAYMENT OF)	CAUSE NO. 1
PROCEEDS TO PATRICK L. SHUSTER AND TONI)	
M. SHUSTER FROM PRODUCTION OF OIL AND	)	DOCKET NO. 171200792
GAS AS ESTABLISHED BY SECTION 34-60-118.5,)	
C.R.S., MAMM CREEK FIELD, WILLIAMS FORK	)	TYPE: GENERAL
FORMATION, GARFIELD COUNTY, COLORADO	)	ADMINISTRATIVE
)	
	)	ORDER NO. 1-209

REPORT OF THE COMMISSION

The Commission heard this matter on July 30, 2018, at the Colorado Oil and Gas Conservation Commission ("Commission" or "COGCC"), 1120 Lincoln Street, Suite 801, Denver, Colorado, upon application for a hearing on the Commission's jurisdiction over a payment of proceeds dispute between Patrick L. Shuster and Toni M. Shuster, as Applicants, and Antero Resources Corporation and Ursa Operating Company LLC, as Protestants.

FINDINGS

The Commission finds as follows:

1. Patrick L. Shuster and Toni M. Shuster (collectively "Applicants"), as the applicants herein, are interested parties in the subject matter of the above-referenced hearing.
2. Antero Resources Corporation ("Antero") and Ursa Operating Company LLC (Operator No. 10447) ("Ursa") (collectively "Protestants"), as the protestants herein, are interested parties in the subject matter of the above-referenced hearing.
3. Due notice of time, place, and purpose of the hearing has been given in all respects as required by law.
4. As a threshold issue, the Commission is required by § 34-60-118.5(5.5), C.R.S. to first determine if it has jurisdiction over this matter. The Commission has authority to promulgate the hereinafter prescribed order pursuant to the Oil and Gas Conservation Act ("Act"), §34-60-101, *et seq.*

PROCEDURAL AND FACTUAL HISTORY

5. This matter presents a payment of proceeds dispute. Applicants claim that Antero and Ursa have not properly paid royalties due to Applicants.

6. This matter did not begin in front of the Commission. Applicants first filed a complaint alleging royalty underpayments in Garfield County District Court (16CV30049). Protestants filed a motion to dismiss for failure to exhaust administrative remedies, which the District Court granted without prejudice on August 16, 2017.

7. Applicants' Amended Application, filed in April 2018, requests that the Commission enter an order finding that the Commission does not have jurisdiction over the instant dispute. Protestants request that the Commission deny Applicants' request and decide this matter on the merits.

8. On June 18, 2018, the Hearing Officer required the submission of Expanded Prehearing Statements ("EPS") from each party, in order to clarify the specific arguments, and the legal basis relied upon for same. Applicants submitted their EPS on June 25, 2018, and the Protestants' Response was filed on July 2, 2018. No reply was authorized.

9. A Final Prehearing Conference ("Final PHC") was held at the Commission on July 16, 2018. All parties were present and represented by legal counsel.

10. Following the Final PHC, the Hearing Officer issued a Final Prehearing Order which, among other things, set forth stipulated facts, identified the disputed issue, consolidated this matter with Docket Nos. 171200790 and 171200791 for purposes of hearing, and provided each side with 15 minutes to argue the disputed issue.

11. The Stipulated Facts in the Final Prehearing Order identified a September 24, 2005 Lease ("Lease"). See Stipulated Fact No. 16, Final Prehearing Order.

12. The parties also stipulated that Ursa is successor-in-interest to the Lease. *Id.*

13. The parties stipulated that the applicable royalty provisions in the Lease are as follows:

4.1.2 **Gas.** On all hydrocarbon gas, including casinghead gas and all other hydrocarbon gaseous substance, and hydrogen sulphide produced from the Leased Premises, as follows:

[t]he "value" (as determined hereafter) of eighteen and one-half percent (18.5%) of all liquid or gaseous hydrocarbons extracted or obtained from such gas by any method, on or off the Leased Premises;

As set forth at Paragraph 4.2 of the Lease Agreements, relating to the determination of "Value" of the Royalty under Paragraph 4.1.2 on gas and gaseous substance and products therefrom produced from the Leased Premises, "Value" shall be determined as follows:

4.2.1 **"Value" for purposes of 4.1.2 (i) and (ii).** The "value" of all liquid and gaseous hydrocarbons and other Minerals under which the Royalty is determined under Paragraph 4.1.2(i) and (ii) shall be:

(a) Their selling price, if sold under bona fide contracts of sale with Third Persons, or

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(b) If they are not so sold to Third Persons, the fair and reasonable value thereof at the place where sold or used.

The term "**Third Person**," as used in Paragraph 4.2.1(a), is defined, at Paragraph 1.1.9 of the Lease Agreements, to mean:

any person, firm or corporation not a subsidiary or affiliate of Lessee, with whom Lessee deals in arms-length and with whom Lessee has no processing contract involving production from the leased premises or other arrangement involving an exchange of production from the Leased Premises for other production, or a reciprocal allowance or discount on such production, or any reciprocal advantage, direct or indirect, resulting from any contract or arrangement. Any sale of production pursuant to any contract, or arrangement, or other commitment existing as of the date of this Lease shall not be deemed a sale to a Third Person. An 'affiliate' includes any individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, firm or other entity or person directly controlling, controlled by or under common contract with Lessee. For purposes of this paragraph "control" means ownership of fifty percent (50%) or more of the voting securities or equivalent voting rights.

An additional royalty provision is set forth in Paragraph 4.5 of the Lease Agreements, states:

No Reduction for Costs. Lessee shall pay to Lessor the royalties free of all costs of any kind, including, but no limited to, costs of gathering, production, transportation, treating, compression, dehydration, processing, marketing, truck or other expense, directly incurred by Lessee, whether as direct charge or a reduced price or otherwise. In this regard, Lessee agrees to bear one hundred percent (100%) of all costs and expenses incurred in rendering hydrocarbons produced on or from the leased premises marketable and delivering the same into the first interstate pipeline. Additionally, said royalties shall never bear, either directly or indirectly, under any circumstances, the costs or expenses (including depreciation) to construct, repair, renovate or operate any pipeline, plant or other facilities or equipment used in connection with the treating, separation, extraction, gathering, processing, refining, compression, manufacturing or marketing of hydrocarbons produced from the leased premises or land pooled therewith.

See Stipulated Fact Nos. 17-18, Final Prehearing Order.

14. None of the parties dispute the existence or applicability of the Lease. At the Final Prehearing Conference on July 16, 2018, all parties confirmed on the record that the Lease is not silent regarding the allocation of post-production costs.

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15. On July 18, 2018, the Hearing Officer issued a Recommendation recommending that the Commission dismiss Applicants' Amended Application without prejudice, for lack of jurisdiction.

APPLICABLE LAW

16. Generally, the Commission does not have the jurisdiction to interpret contracts. *Chase v. Colorado Oil and Gas Conservation Comm'n.*, 284 P.3d 161, 168 (Colo. App. 2012) (holding that the Act does not specifically provide the Commission has an express or implied power to interpret a lease, and that the Commission's determination that it lacked jurisdiction to interpret a lease was reasonable).

17. Section 34-60-118.5 of the Act defines the Commission's jurisdiction over disputes regarding the payment of royalties. The Commission has jurisdiction to decide: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. However, before the Commission may decide any of the above three issues, it must "determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." §34-60-118.5(5.5), C.R.S. "If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court." *Id.*

18. The Commission has discretion to interpret the Act. See *Colorado State Personnel Bd. v. Department of Corr.*, 988 P.2d 1147, 1151 (Colo.1999) (deference is given to an agency's reasonable interpretation of its statute when it "lighten[s] the agency's workload and mak[es] its decision-making process more efficient" as long as it is consistent with the intent and purpose of the statute).

19. The interpretation of a contract is a question of law. *Fed. Deposit Ins. Corp. v. Fisher*, 292 P.3d 934, 937 (Colo. 2013). The primary goal in contract interpretation is to ascertain and implement the intent of the parties. *Id.* Black's Law Dictionary defines interpretation as "the ascertainment of a text's meaning; specif., the determination of how a text most fittingly applies to particular facts." *Black's Law Dictionary* (10th ed. 2014).

20. Under Section 118.5(5.5), the Commission must not only determine if a dispute regarding the interpretation of a contract exists, the Commission must also decide if the dispute is "bona fide." *Black's Law Dictionary* (10th ed. 2014), defines "bona fide" as follows: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud. . . . Real, actual, genuine, and not feigned."

21. The Commission does not have jurisdiction to decide whether a royalty owner is entitled to payment under a lease or other contract. *Grynberg v. Colorado Oil & Gas Conservation Comm'n*, 7 P.3d 1060 at 1063 (Colo. App. 1999) held:

Section 34–60–118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment. The statute demonstrates the General Assembly's intent to grant to the Commission

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jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.

22. The legislature removed disputes that require the interpretation of a contract from the Commission's jurisdiction in order to preserve the state's interest in consistent resolution of complex legal questions. In *Grynberg*, the Court of Appeals discussed purpose of Section 118.5:

Section 34–60–118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34–60–118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions.

7 P.3d at 1064.

23. The Commission has jurisdiction to decide if and when payment is due where there is no contract between the parties. In *Grant Brothers Ranch, LLC v. Antero Resources Piceance Corporation, et al.*, the Colorado Court of Appeals found that the Commission had jurisdiction over a royalty payment dispute because, as the plaintiff had been statutorily pooled, there was no contract between the parties to interpret. 409 P.3d 637 (Colo. App. 2016). In reaching its conclusion, the Court found that the Commission has “primary jurisdiction over disputes for the payment of proceeds such as the one before us.” *Id.* at 644.

24. The Colorado Supreme Court has defined “marketability” for purposes of calculating royalties when a lease is silent and held that the determination of whether gas is marketable is a question of fact. In *Garman v. Conoco, Inc.*, the Colorado Supreme Court ruled that the implied covenant of marketability is included in every oil and gas lease. 886 P.2d 652 (Colo. 1994). When a lease is silent as to the deduction of costs from a royalty, the implied covenant of marketability requires “the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market.” *Id.* at 659.

25. In *Rogers v. Westerman Farm Co.*, the Colorado Supreme Court defined “marketability”:

In sum, in defining marketability under the implied covenant to market, we look to the first-marketable product rule for guidance. Gas is marketable when it is in the physical condition such that it is acceptable to be bought and sold in a commercial marketplace, and in the location of a commercial marketplace, such that it is commercially saleable in

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the oil and gas marketplace. The determination of whether gas is marketable is a question of fact, to be resolved by a fact finder.

29 P.3d 887, 904 (Colo. 2001)

SUMMARY OF THE PARTIES' POSITIONS

26. In their EPS, Applicants assert: 1) the Protestants paid royalties based upon sale prices that were lower than those actually realized to third persons for residue gas; 2) the royalty calculations for the five natural gas liquid products were based on artificially low sales prices; 3) as to the condensate, Applicants appear to argue that the Protestants breached the lease by failing to pay royalties on same, and instead have transferred the condensate to outside parties who perform the gathering and processing; and 4) the Protestants improperly made excessive severance and ad valorem tax deductions. See EPS, at 1-3.

27. As support for these assertions, Applicants state that several sections of the Lease control. *Id.* at 3-5. Applicants also rely on the Protestants' written responses to the Applicants notices of failure to make timely payments, which response that stated the royalties were calculated on the fair and reasonable value of the hydrocarbons where they were sold or used. *Id.* at 6-7. Finally, Applicants assert that the excessive taxes withheld were in violation of C.R.S. §§ 39-7-102 and 39-29-111(1)(a). *Id.*

28. In the Responses, the Protestants state: "without citing to any section of the leases that is in dispute, [the Applicants] make the general assertion that there is a bona fide issue of contract interpretation." See Response at 1, ¶ 3.

29. The Protestants argue that the factual determinations of whether post-production costs were or were not taken and whether those deductions were taken prior to the point of marketability are factual determinations well within the jurisdiction of the Commission. *Id.* at 2, ¶ 2. "In summary, Applicants do not point to one word in the...Leases to which they claim a "bona fide dispute exists regarding the interpretation of a contract."" *Id.* at 3, ¶ 1.

HEARING

30. On July 30, 2018, the Commission heard oral argument on the Commission's jurisdiction over this matter.

31. The parties agreed that, in the interests of time, all arguments made in Docket Nos. 171200788 and 171200789 would be treated as though they were made in full in this matter.

32. Prior to the argument in Docket No. 171200788, Commissioner Jolley disclosed that he had previously been a plaintiff in two royalty payment suits against operators. He stated that those lawsuits had been resolved and that the Protestants were not parties to the lawsuits. Commissioner Jolley stated that he could be impartial and that he intended to participate in these matters. No Commissioner, party, or member of the public objected to Commissioner Jolley's participation in Docket No. 171200792.

33. Applicants argued that the Lease specifically prohibits the Protestants from deducting any post-production costs. Applicants argued that, for the residue and natural gas liquid products, the Protestants failed to pay royalties based on the sales price to "Third Persons," at the delivery points where such products were sold to "Third Persons." Applicants

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argued that the Protestants deducted transportation, processing, and treating costs from the selling price, which is prohibited by the Lease.

34. Applicants summarized the Protestants' position based on statements made in response to Applicants' notice of failure to make timely payments. Applicants alleged the Protestant's position is that they have paid on fair and reasonable value of the gas at the place where sold or used, and that the Lease allowed Protestants to charge the reservation fee to guarantee access to interstate pipelines. Applicants cited to Bates Nos. 002634 for its summary of Protestant's position.

35. Protestants argued that the meaning of language in the Lease is clear and there is no dispute as to the meaning of the language. Therefore, Protestants argued, there is no dispute over the interpretation of a contract and the Commission has jurisdiction. Protestants also argued that Applicants' arguments only involve applying facts to the clear terms of the Lease. Protestants argued the determination of "market value" is a factual determination.

36. Co-Vice Chair Boigon asked the parties if there was a dispute over the meaning of the term "Third Person" in the Lease. Applicants responded that they disputed that Protestants first sale of gas was a sale to a Third Person as defined by the Lease. Protestants responded that Paragraph 1.1.9 of the Lease clearly defined "Third Person," and the dispute was a question of fact for the Commission.

37. Chairman Benton asked the parties if the natural gas liquids were actually sold. Protestants responded that the question was not relevant to the issue of jurisdiction because the Lease is clear. Applicants responded that the Protestants claimed they were appropriately paying under a prior sale contract, which was not to a Third Person. Applicants further responded that its position was the Protestants must pay royalties based on the sales price to a Third Person, but that Protestants took the position that they could deduct certain costs under the Lease. Protestants reiterated that Applicants were not challenging the meaning of a single term in the Lease.

38. Chairman Benton asked if reviewing the no-cost provisions of the Lease to determine whether costs may be charged was interpretation of the contract. Protestants responded that it was still simply an issue of applying facts to clear contractual language. Applicants responded that if the Commission cannot decide the rights and obligations of the parties under contract without interpreting the contract.

39. Commissioner Hawkins asked Protestants if there is clear language in the Lease that allows Protestants to charge a reservation fee to Applicants' royalties. Protestants responded that Commissioner Hawkins' question was a factual issue that only involved applying facts to the clear terms of the Lease.

40. Commissioner Jolley asked if Applicants were asserting that it was not paid royalties at all for natural gas liquids. Applicants asserted that previously they received no payment for natural gas liquids as Antero transferred those natural gas liquids in exchange for service. Applicants asserted that subsequently, they were paid for the natural gas liquids, but the Protestants deducted transportation and other costs from that royalty amount.

41. Upon inquiries from the Commission in Docket No. 171200788, counsel for Airport stated that, in order prove the point of marketability, royalty owners would need to put on its own witnesses for factual testimony, as well as expert witnesses on the location of the commercial market, the method of marketing natural gas, when NGLs are first marketable, and accounting practices. Protestants stated that the presentation would be less complex, and would only require an expert on marketability, an accountant to explain accounting practices, and lay witness to explain how payments were actually made.

42. Upon inquiries from the Commission in Docket No. 171200788, counsel for Airport asserted that discovery would be necessary, could take up to a year, and would involve thousands of pages of documents. Protestants claimed that discovery would be much less involved.

43. The Commission closed the record and deliberated.

COMMISSION DELIBERATIONS

44. The Commissioners stated that their comments from Docket Nos. 171200788 and 171200789 would apply to this matter as well.

45. In Docket No. 171200788, Co-Vice Chair Boigon stated that this matter was a highly contested case that was likely to involve significant discovery and that Commission does not have the expertise, process, or resources to be immersed in these type of royalty disputes.

46. In Docket No. 171200788, Commissioner Hawkins stated that he would be hard-pressed to provide with Commission with any expertise in the midstream issues raised in this case.

47. In Docket No. 171200788, Co-Vice Chair Holton stated that this matter was too complex for the Commission to resolve.

48. Co-Vice Chair Boigon stated that the Commission has never heard these types of contractual disputes.

49. Following deliberations, the Commission voted unanimously to dismiss the Amended Application for lack of jurisdiction.

COMMISSION CONCLUSIONS

50. Based on the statements and descriptions of the dispute from the parties at hearing, the Commission finds that the parties have a bona fide dispute regarding the interpretation of a contract. Applicants' position is that the Lease prohibits the deduction of any costs. Protestants are deducting certain costs and allege that such deductions are allowed under the lease. To resolve this dispute, the Commission would be required to determine how the cost prohibition in Paragraph 4.5 interacts with the provisions of Paragraph 4.2.1, which provide that the value upon which a royalty is to be paid is based on the selling price. In effect, the Commission would be required to determine if Paragraph 4.5's prohibition on the deduction of costs overcomes Paragraph 4.2.1's definition of value.

51. Applicants allege that the Protestants at one point transferred gas to a third party in exchange for services, rather than selling the gas. The Commission would be required to interpret the Leases to determine whether a royalty must be paid when gas is not sold.

52. Applicants allege that certain sale of gas are not sales to "Third Persons" under the Lease. To resolve this allegation, the Commission would be required to interpret Paragraph 1.1.9.

53. Finally, Applicants allege that Protestants deducted a reservation fee from their royalty payments. Paragraph 4.5 of the Lease provides that the royalties are to be "free of all costs of any kind." Paragraph 4.5 lists certain types of costs, but does not mention reservation fees. To resolve this claim, the Commission would be required to interpret Paragraph 4.5, and

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other provisions, of the Lease to determine if reservation fees are included the categories of costs that may not be deducted from Applicants' royalty.

54. As a bona fide dispute regarding the interpretation of a contract exists, the Commission must decline jurisdiction under §34-60-118.5(5.5).

55. Further, the Commission concludes that the legislature did not intend for the Commission to have jurisdiction over royalty disputes where the rights and obligations of the parties are determined by a contract, particularly where resolving the dispute would involve the application and interpretation of complex legal principals. "These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. Thus, by reserving the determination of contractual disputes for the courts, § 34-60-118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions." *Grynberg*, 7 P.3d at 1063.

56. The purpose of Section 118.5 was to provide royalty owners with a simple and easy process to obtain payment when an operator delays payment. See Commission Order No. 1-73 ("[Section 118.5] is intended to prevent unscrupulous operators from delaying the payment of proceeds and wrongfully withholding or using funds that are attributable to a Payee's interest.") (Citing testimony by Representative Jerkey on House Bill 1113 before the House Agricultural Committee, January 25, 1989).

57. Section 118.5 originally provided that the Commission had "exclusive" jurisdiction over payment of proceeds, but was amended in 1998 to remove the word "exclusive" and clarify the Commission's jurisdiction. "The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction, only '[a]bsent a bona fide dispute over the interpretation of a contract for payment,'" *Grynberg*, 7 P.3d at 1063. "Indeed, as originally enacted and the amendment both provide evidence of the General Assembly's intent to exclude the resolution of contractual disputes from the jurisdiction of the Commission." *Id.* (emphasis supplied). The Commission thus does not have exclusive or primary jurisdiction over this dispute. *Grant Bros* only holds that the Commission has primary jurisdiction over royalty disputes where there is no contract between the parties.

58. The Commission's jurisdiction over payment of proceeds disputes is narrow. The Commission only has jurisdiction to make three types of decisions: 1) the date upon which payment is due to a payee; 2) whether there is a justifiable delay in payment; and 3) the amount of proceeds due to a payee from a payor. §34-60-118.5(5)(a) – (c), C.R.S. The Commission interprets these three decisions to be only related to calculation of a royalty amount, and not to include a determination of how the royalty amount is to be calculated.

59. Protestants admitted at hearing that their interpretation of the Commission's jurisdiction could lead to a situation where a court would submit factual questions on royalty disputes to the Commission, while the court retained decision-making authority over legal issues or issues of contract interpretation. The Commission concludes the legislature did not intend for Section 118.5 to result in such a complex and lengthy procedure. As stated above, the purpose of Section 118.5 is to provide royalty owners with a simple process to obtain payment. Protestants cite to *Lake Durango Water Co. v. Pub. Utilities Comm'n of State of Colorado*, 67 P.3d 12, 21 (Colo. 2003), as modified on denial of reh'g (Apr. 28, 2003) for the proposition that courts may decide legal questions while an agency decides factual questions. *Lake Durango Water Co.* however, did not interpret the Commission's jurisdiction under Section 118.5 and does not compel a different conclusion.

60. The Commission finds that resolving this matter would require significant discovery and hearing time and concludes that the Commission does not have the process or

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resources to conduct such complex and involved disputes. The Commission meets approximately eight times a year, and meetings have historically lasted for one or two days. Seven of the nine Commissioners are volunteers and the remaining two Commissioners are the Executive Directors of the Colorado Department of Natural Resources and the Colorado Department of Public Health and Environment. §34-60-104(2)(a)(I), C.R.S.

61. The Commission further finds it does not have the expertise necessary to resolve this dispute. The Act does not require that any of the Commissioners have a legal background, or have a background in midstream operations. The Commission's expertise is in the technical and scientific aspects of the production of oil and gas. While three members of the Commission are required to have "substantial experience in the oil and gas industry," two of those Commissioner must have a "college degree in petroleum geology or petroleum engineering." *Id.* Further, only one Commissioner is required to be a royalty owner, and that Commissioner must also be involved in agriculture. *Id.*

ORDER

IT IS HEREBY ORDERED:

1. Applicants' Amended Application is DISMISSED WITHOUT PREJUDICE as the Commission lacks jurisdiction to hear the dispute.

2. The Commission also hereby ADOPTS the Hearing Officer's Recommendation.

IT IS FURTHER ORDERED:

1. The provisions contained in the above order shall become effective immediately.

2. The Commission expressly reserves its right, after notice and hearing, to alter, amend or repeal any and/or all of the above orders.

3. Under the State Administrative Procedure Act the Commission considers this Order to be final agency action for purposes of judicial review within 35 days after the date this Order is mailed by the Commission.

4. An application for reconsideration by the Commission of this Order is not required prior to the filing for judicial review.

ENTERED this 29th day of August, 2018, as of July 30, 2018.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By _____
Julie Spence Prine, Secretary

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CERTIFICATE OF SERVICE

On August 29, 2018, a true and correct copy of the foregoing was sent by electronic mail to the following:

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Ursa Operating Company LLC

Margaret Humecki, Hearings Assistant

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

IN THE MATTER OF THE PAYMENT OF PROCEEDS	)	CAUSE NO. 1
FROM THE PRODUCTION OF OIL AND GAS AS)	
ESTABLISHED BY SECTION 34-60-118.5, C.R.S.,	)	DOCKET NO. 170300096
WATTENBERG FIELD, WELD COUNTY, COLORADO)	
	)	TYPE: GENERAL ADMINISTRATIVE

ORDER

On December 19, 2016, Byron Hunter Dixon ("Dixon" or "Applicant"), by his attorneys, filed a Form 38 Request for Hearing pursuant to §34-60-118.5, C.R.S., and Rule 503.b.(10), for an order to award payment of proceeds and interest due from Noble Energy Inc., Operator No. 100322 ("Noble" or "Payor") for production attributable to the Wells Ranch 18-65-11HN Well (API No. 05-123-35647) located in Weld County, Colorado, and to award relief for all associated costs and attorney's fees due to Dixon attributable to the payment due from Noble. A prehearing conference was held on March 24, 2017.

At the prehearing conference, there was a dispute regarding whether discovery should be ordered. Dixon alleged that Noble had produced gas from the Well which it had sold but had not paid Dixon. Noble contended that the gas had been flared and not sold and as such, there was no payment due to Dixon. Noble's position was that this was a contractual issue outside of Commission's jurisdiction.

Section 34-60-118.5, C.R.S. (2017) provides the Colorado Oil and Gas Conservation Commission with exclusive jurisdiction concerning the payment of proceeds derived from the sale of oil, gas or associated products from a well in Colorado including the following:

- (a) The date on which payment of proceeds is due a payee under section (2) of the section;
- (b) The existence or nonexistence of an occurrence pursuant to subsection (3) of this section which would justifiably cause a delay in payment; and
- (c) The amount of the proceeds plus interest, if any due a payee or payor.

After a review of §34-60-118.5, C.R.S and a review of the pleadings filed, it is the Hearing Officer's position that the dispute as to whether Noble is responsible for payment to the Dixon falls outside of the Commission's jurisdiction under the payment of proceeds statute.

Section 34-60-118.5 (5.5), C.R.S provides that:

Before hearing the merits of any proceeding regarding payment of proceeds pursuant to this section, the oil and gas conservation commission shall determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee. If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court.

The Colorado Court of Appeals has interpreted this provision to mean that the Commission does not have jurisdiction over contractual disputes regarding entitlement to proceeds. "Section 34-60-118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment. The statute demonstrates the General Assembly's intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement." See *Grynberg v. Colorado Oil & Gas Conservation Comm'n*, 7 P.3d 1060, 1063, (Colo. Ct. App. 1999). The Commission does not have jurisdiction to interpret any agreement to determine the propriety of disputed post-production deductions. The Commission's jurisdiction is limited to deciding only those issues stated in §34-60-118.5(5), C.R.S.

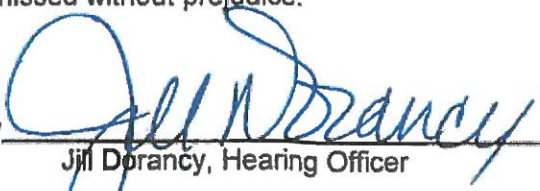
Before hearing the merits of any proceeding regarding payment of proceeds pursuant to this section, the oil and gas conservation commission shall determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payor and payee. If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court.

The primary issue here is whether Noble has obligations under the contract (lease) to pay Dixon for gas that has been produced and flared as opposed to gas that has been produced and sold. Dixon refers in its response to an implied duty to market, which includes the duty to sell gas produced. Dixon further contends that the dispute here is based on a breach of an oil and gas lease. There is no dispute regarding the date payment would be due, whether there is justifiable delay, or the amount of proceeds due to Dixon. Ultimately, the dispute is whether there is an agreement under which the terms or arrangements have changed the obligations of the parties.

Dismissal here is not based on the lack of a case or controversy. Instead, the dispute raised by the parties falls squarely under §34-60-118.5(5.5), C.R.S., and the Commission must decline jurisdiction. As such, this matter is dismissed without prejudice.

Dated: May 8, 2017

By


Jiff Dorancy, Hearing Officer

CERTIFICATE OF SERVICE

On May 8, 2017, a true and correct copy of the foregoing Order was distributed by electronic mail upon the following:

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

IN THE MATTER TO GOVERN OPERATIONS IN THE
BLUE GRAVEL FIELD, MOFFAT COUNTY, COLORADO

)
) CAUSE NO. 1
ORDER NO. 1-73

REPORT OF THE COMMISSION

This cause came on for hearing before the Commission at 8:30 a.m. on October 21, 1997, in Suite 801, the Chancery Building, 1120 Lincoln Street, Denver, Colorado, pursuant to an application filed in accordance with §34-60-118.5, C.R.S. by Marilyn B. Bateman and R.K. Cramer, (collectively the "Applicants"). The Applicants have requested that the Commission issue an order determining and awarding proceeds, interest and attorney's fees attributable to overriding royalty interests Applicants own in various wells located in Blue Gravel Field, Moffat County, Colorado. The Application states that Jack J. Grynberg, Jack Grynberg & Associates, Grynberg Petroleum Company and Celeste C. Grynberg have failed to timely and properly pay the proceeds attributable to the Applicants' overriding royalty interests. Specifically, the Applicants seek a full accounting of all proceeds and permissible deductions attributable to the overriding royalty interests and full payment of all proceeds and interest thereon.

FINDINGS

The Commission finds as follows:

1. That Marilyn B. Bateman and R.K. Cramer, as applicants herein, are interested parties in the subject matter of the above-referenced hearing.
2. That Jack J. Grynberg ("Grynberg"), as protestant herein, is an interested party in the subject matter of the above-referenced hearing.
3. On November 25, 1996, Marilyn B. Bateman and R.K. Cramer, through counsel, filed an application with the Commission pursuant to §34-60-118.5, C.R.S., (the "Application"), seeking an order to determine the proceeds, interest and attorney's fees due the Applicants from production attributable to Applicants' overriding royalty interests in certain wells located in the Blue Gravel Field, Moffat County, Colorado described on Exhibit "A" attached hereto and made a part hereof (the "Blue Gravel Wells").
4. The Applicants claimed that Jack J. Grynberg, Jack Grynberg & Associates, Grynberg Petroleum Company and Celeste C. Grynberg have failed to timely and properly tender proceeds attributed to Applicants' overriding royalty interest in the Blue Gravel Wells. Specifically, the Applicants requested that the Grynbergs provide a full accounting of all proceeds and permissible deductions attributable to the overriding royalty interests and payment of proceeds and interest.
5. On December 31, 1996, Grynberg filed with the Commission a protest and intervention to the Application.
6. On January 3, 1997, the Applicants submitted a written request to continue the Application on a month-to-month basis while Applicants gathered data. The Secretary declined continuing the matter month-to-month, and instead granted the Applicants' request for continuance to the April hearing pursuant to Rule 506 of the Rules and Regulations of the Oil and Gas Conservation Commission (the "Rules").
7. By letter dated March 11, 1997, the Applicants requested a continuance to the April hearing.
8. At the March 19, 1997, hearing the Commission considered evidence and arguments of both parties and found good cause pursuant to Rule 506 to continue the matter. After polling counsel on availability for potential hearing dates and reviewing the data provided, the Commission set the matter for the October hearing.
9. By Order No. 1-67 dated May 9, 1997, effective April 21, 1997, the Commission denied Grynberg's pro se motion to reconsider hearing date.
10. By Order dated September 23, 1997, the Commission ordered Grynberg to produce certain non-privileged documents in response to the Subpoena Duces Tecum issued by the Commission on April 21, 1997.
11. The Applicants have filed with Arapahoe County District Court an action seeking similar relief, 95 CV 2246, Division 5 (the "Civil Matter"). By Order dated April 16, 1997, the District Court Judge stayed further discovery in the Civil Matter pending resolution of the Application filed before the Commission.

Motion to Recuse Commissioner Williams

12. On September 12, 1997, the Applicants filed a motion to recuse Commissioner Marla Williams because Commissioner Williams "represented Mr. Grynberg in the past and because her law firm presently represents Mr. Grynberg's interests"

13. On September 18, 1997, Grynberg filed a Response to Applicants' Motion to Recuse Commissioner Marla Williams stating that Commissioner Williams has not represented Grynberg in litigation, but instead has represented a party opposing Grynberg in an unrelated litigation matter. The Response also stated that Commissioner Williams' law firm represents Kinross Aginskoe Gold Company, LLC, a company in which Grynberg's children's trusts own an interest with Celeste Grynberg as the sole trustee.

14. On September 26, 1997, Applicants filed a Reply in Support of the Applicants' Motion to Recuse.

15. The matter of Commissioner Williams' recusal was fully briefed and considered by the Commission at the October 20 hearing. The Commission's conclusions are set forth below.

Prehearing Conference and Prehearing Order

16. On October 9, 1997, Chairman Heinle conducted a prehearing conference attended by Applicant R.K. Cramer and Brad Okerland, Applicants' counsel John K. Shunk, Gynberg's counsel Phillip D. Barber and Lisa A. Lee, Technical Secretary and Manager of Environmental Affairs for the Commission, Tricia Beaver and Cynthia McNeill from the Attorney General's Office. The parties resolved procedural issues, identified controverted legal issues and determined the time necessary for legal argument and factual testimony. Commissioner Heinle set the Commission's October docket to hear legal argument on the controverted legal issues. Because the October docket was full the parties agreed, after client consultation, to take up the evidentiary matters at the November hearing. Chairman Heinle instructed the parties to submit a Hearing Order to document the Prehearing Conference.

17. On October 15, 1997, the parties submitted a joint Hearing Management Order identifying the following controverted legal issues for briefing and argument to the full Commission at the October hearing:

- A. Whether Commissioner Marla Williams must be recused from participation in this matter.
- B. Whether, and to what extent, the Commission has jurisdiction to decide legal and factual issues in this matter.
- C. Whether § 34-60-115, C.R.S. limits the scope of this hearing to proceeds accruing after August 1, 1995.
- D. Whether Respondent Celeste C. Grynberg should be relieved of any liability for payment of proceeds to Applicants in this matter.

18. On October 20, 1997, the Commission heard oral argument from counsel on whether Commissioner Williams should be recused and whether the Commission can properly exercise jurisdiction over Applicants' claims pursuant to the statutory authority granted in § 34-60-118.5, C.R.S., Payment of Proceeds.

19. At the October 20, 1997, hearing the Commission allowed testimony of Mr. Kenneth Wonstolen, a member of the legislative committee that drafted section 118.5. Mr. Wonstolen offered testimony pursuant to Rule 510. He made statements under oath and was subject to cross-examination.

CONCLUSIONS

Motion to Recuse Commissioner Williams

20. Rule 516. provides as pertinent:

A conflict of interest exists in circumstances where a Commissioner has a personal or financial interest that prejudices that Commissioner's ability to participate objectively in an official act. A Commissioner shall disclose the basis for a potential conflict of interest to the Commission and others in attendance at the hearing before any discussion begins or as soon thereafter as the conflict is perceived. . . . In response to an assertion of a conflict of interest, a Commissioner may withdraw. If the Commissioner does not agree to withdraw, the other Commissioners, after discussion and comments from any member of the public, shall vote on whether a conflict of interest exists. Such vote shall be binding on the Commissioner disclosing the conflict.

21. The Standards of Conduct for Commission members contained in § 24-18-108.5 (2), C.R.S., state:

A member of a board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses shall not perform an official act which may have a direct economic benefit on a business or other undertaking in which such member has a direct or substantial financial interest.

22. Commissioner Williams is an attorney licensed to practice in the state of Colorado and subject to the Colorado Rules of Professional Conduct, including Rule 1.7, Conflict of Interest: General Rule. Rule 1.7 of the Rules of Professional Conduct prohibits lawyers from representing clients with directly adverse interests or when the lawyer's representation may be materially limited by responsibilities to another client, the lawyer's own interests or a third parties.

23. Commissioner Williams disclosed her contacts with Grynberg as follows:

A. Commissioner Williams was adverse to Grynberg in a litigation settled last year.

B. Commissioner Williams' law firm represents the principals of a limited liability company owned, in part, by trusts created for the benefit of the Grynberg children and managed by Celeste Gynberg. Commissioner Williams performs no work on behalf of the trusts and has no involvement through her law firm with the trusts.

24. Commissioner Williams stated that she has no relationship with Grynberg nor is she involved with any work that her law firm conducts on behalf of entities connected with Grynberg.

25. Commissioner Williams stated she believed that she could participate objectively in the hearing.

26. The Commission considered Commissioner Williams' contacts with Grynberg and concluded that no direct relationship existed between the parties, and that Commissioner Williams will derive no personal benefit from any Commission ruling in this hearing. The Commission also considered the value of Commissioner Williams' expertise in deciding complex legal issues.

27. After deliberation the Commission voted unanimously to deny the Applicants' motion to recuse Commissioner Williams.

Commission Subject Matter Jurisdiction Over Contested Issues

28. The Applicants filed the Application pursuant to § 34-60-118.5, C.R.S., Payment of proceeds, seeking a Commission order directing Grynberg to:

A. account to the applicants for all proceeds (e.g. monies, property, credits or other economic benefits) received by Grynberg from the marketing of Oil and Gas from the Subject Lease and Subject Lands;

B. account to the Applicants for all Permissible Deductions;

C. deliver to Applicant Cramer, on a monthly basis, a cash payment equal to two percent (2.0%) of the gross proceeds from the marketing of Oil and Gas produced from the Subject Lease and Subject Lands, less permissible deductions (the "Net Proceeds");

D. deliver to Applicant Bateman, on a monthly basis, a cash payment equal to one half percent (0.5%) of the Net Proceeds; and to

E. pay to Applicants interest and penalties on delinquent or unpaid Net Proceeds payments as required under § 34-60-118.5, C.R.S.

29. In addition to an order establishing proceeds due, the Applicants requested in the Prehearing Order that the Commission enter an order determining and establishing future monthly payments, including increases in payments of proceeds from successful litigation brought by Jack J. Gynberg against K.N. Energy.

30. The General Assembly adopted § 34-60-118.5, C.R.S. in 1989 amending the Oil and Gas Conservation Act to provide the Commission with the authority to order Payors, as defined by statute, to make timely payments of proceeds from oil and gas operations to Payees, as defined by statute.

31. Section 118.5 was enacted in response to "problems that some individuals ha[d] had in the past number of years receiving their royalty payments on time in a regular manner." Testimony by Representative Jerkey on House Bill 1113 before the House Agricultural Committee January 25, 1989 (hereinafter "Agricultural Hearings"). The statute requires that Payors make proceeds payments no later than six months after the end of the month in which production is first sold. § 34-60-118.5 (2), C.R.S. The statute is intended to prevent unscrupulous operators from delaying the payment of proceeds and

wrongfully withholding or using funds that are attributable to a Payee's interest. Testimony of Representative Jerkey at Agricultural Hearings.

32. Section 118.5 defines Payee as any "person or persons legally entitled to payment from proceeds derived from the sale of oil, gas or associated productions from a well in Colorado." § 34-60-118.5(1)(b), C.R.S. (emphasis supplied).

33. The statute allows for the suspension of payment deadlines under certain limited circumstances including the Payee's failure to confirm in writing its fractional interest; reasonable doubt by the Payor of the Payee's identity; questions whether title is clear; or where litigation would affect the distribution of payments to a Payee. § 34-60-118.5(3)(a), C.R.S.

34. Section 118.5 further provides that the Commission has exclusive jurisdiction to determine:

The date on which payment of proceeds is due a payee under section (2) of this section;

The existence or nonexistence of an occurrence pursuant to subsection (3) which would justifiably cause a delay in payment; and

The amount of the proceeds plus interest, if any due a payee by a payor. § 34-60-118.5 (5) (a)-(c), C.R.S.

35. In 1994, the Colorado Supreme Court decided Garman v. Conoco Inc., 886 P.2d 652 (Colo. 1994) in response to a certified question from the Federal District Court which asked when an overriding royalty interest owner must bear its proportionate share of post-production costs expended to process oil and gas if the instrument creating the interest is silent on this issue. Garman, 886 P.2d at 653.

36. The Garman decision has resulted in a proliferation of lawsuits brought by payees asking courts to review and determine whether operators have been properly deducting post-production costs. Similar suits have been filed with the Commission under section 118.5 asking the Commission to determine whether deductions are proper under lease agreements, operating agreements or other private party contracts governing the legal rights between operating and non-operating mineral interest owners.

37. Historically, the Commission has interpreted its statutory authority to include the regulation of oil and gas to protect against resource waste, to protect correlative rights and to protect the public health safety and welfare in oil and gas operations. § 34-60-102, C.R.S. The Commission has not interpreted this authority to grant the Commission authority to decide private party contractual disputes.

38. While the Commission recognizes that ensuring timely payment of proceeds falls within its jurisdiction, that obligation is limited to those instances when the Payee is legally entitled to the proceeds. When a dispute regarding the propriety of deductions arises it requires interpretation of the contract(s) creating the interest. This determination may also require the application of principles relating to marketability set forth in Garman. Garman, 886 P.2d at 559.

39. The nature of this dispute first will first require a determination of permissible deductions applicable to Applicants' overriding royalty interests, involving an interpretation of the instruments creating the interest(s).

40. Because section 118.5 is intended to ensure timely payment of proceeds due to payees who are legally entitled to payment, and does not create in the Commission authority to adjudicate private disputes related to the legality of specific deductions, the Commission will not exercise jurisdiction over the Application.

41. The Applicants' request for a determination of their entitlement to proceeds attributable to potential settlement of collateral litigation falls outside of the scope of section 118.5, and the Commission has no jurisdiction to adjudicate this portion of the Applicants' claim.

42. The Commission's resolution of its subject matter jurisdiction moots the remaining legal issues regarding the applicability of § 34-60-115, C.R.S. to the Application, and the related issue of whether Celeste Grynberg is a proper party to the Application.

43. If the legal entitlement to proceeds is resolved through a stipulation of the parties or by order of the Court the Commission may then properly exercise its jurisdiction under section 118.5, provided the remaining statutory prerequisites have been met.

ORDER

NOW, THEREFORE, the Colorado Oil and Gas Conservation Commission hereby enters an order dismissing without prejudice the application of Marilyn B. Bateman and R.K. Cramer, to determine and award proceeds, interest and attorney's fees due the Applicants for production attributable to the overriding royalty interests due from Jack J. Grynberg, Jack

Grynberg & Associates, Grynberg Petroleum Company and Celeste C. Grynberg ("Grynbergs") for various wells located in Blue Gravel Field, Moffat County, because the jurisdictional prerequisites of §34-60-118.5(5)(c), C.R.S. have not been met.

IT IS FURTHER ORDERED that the provisions contained in the above order shall become effective on the date the order is entered.

IT IS FURTHER ORDERED, that the Commission expressly reserves its right, after notice and hearing, to alter, amend or repeal any and/or all of the above orders.

ENTERED this _____ day of November 1997.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By _____
Patricia C. Beaver, Secretary

Dated at Suite 801
1120 Lincoln Street
Denver, Colorado 80203
November 20, 1997

EXHIBIT "A"

Order 1-73 dated November 20, 1997

Blue Gravel #1-24
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: NE $\frac{1}{4}$ SW $\frac{1}{4}$

#2-24 USA C-1727
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$

#4-24 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$

#5-24 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$

#6-24 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$

#1-25 Stauffer Federal or #1-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: NE $\frac{1}{4}$ NW $\frac{1}{4}$

#2-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$

#4-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$

#5-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$

#6-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$

#7-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$

DISTRICT COURT, COUNTY OF GARFIELD, STATE OF COLORADO 109 8th Street, Suite 104 Glenwood Springs, Co. 81601	DATE FILED: September 23, 2015 10:05 AM CASE NUMBER: 2015CV30057
SHARON SALGADO, et al., Plaintiffs, v. URSA OPERATING COMPANY, LLC, et al., Defendants.	COURT USE ONLY
	Case Number: 15CV30057 Ctrm:
ORDER RE: DEFENDANTS' RULE 12(B)(1) MOTION TO DISMISS	

This matter is before the Court on the above entitled motion. For the reasons below, the motion is denied.

Plaintiffs have filed suit for recovery of unpaid oil and gas royalties. As alleged in the complaint, Defendant Ursa has improperly withheld deductions for post-production costs from the royalties owed to Plaintiffs. In essence, Plaintiffs contend that the royalty and lease agreements do not authorize Ursa to make deductions for post-production costs. Ursa has moved to dismiss this action for lack of subject matter jurisdiction on the ground that Plaintiffs have failed to exhaust their administrative remedies by failing to file an administrative claim with the Colorado Oil & Gas Conservation Commission ("COGCC").

Under section 34-60-118.5(5), C.R.S., the COGCC has jurisdiction to determine the amounts of royalties owed to a royalty owner “absent a bona fide dispute over the interpretation of a contract for payment[.]” The statute does not grant jurisdiction to the COGCC “with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.” *Grynberg v. Colo. Oil & Gas Conserv. Comm’n*, 7 P.3d 1060, 1063 (Colo. App. 1999).

In this matter, Plaintiffs allege that the lease and royalty agreements do not authorize Ursa to make deductions for post-production costs. Thus, to decide whether there is a bona fide dispute over the interpretation of the written agreements the Court must determine whether Ursa’s authority to make the challenged deductions is governed by principles of contract law or is governed by the applicable statutes and regulations. At this point, the Court has not seen any regulations or statutory provisions that directly govern the authority of an oil and gas producer to make deductions for post-production costs. Rather, it appears that the issue is most properly decided under contract law. Therefore, the Court finds under the facts alleged in the complaint that there is a bona fide dispute over the interpretation of the royalty and lease agreements. Accordingly, the Court finds that the COGCC does not have jurisdiction over the subject matter and that the complaint cannot be dismissed for failure to exhaust administrative remedies.

Based on the foregoing, IT IS ORDERED that Defendants’ Motion to Dismiss is denied.

DATED this 23rd day of September, 2015.

BY THE COURT



District Court Judge