Docket #0068 Date Filed: 10/4/2021

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	Case No. 20-11548 (CSS)
Reorganized Debtors.	(Jointly Administered)
ANNETTE LEAZER, *et al.*,	Adv. Proc. No. 20-50963 (CSS)
Plaintiffs,	Related to Docket Nos. 65 and 66
v.	Hearing Date: November 5, 2021 at 11:00 a.m. ET Obj. Deadline: October 20, 2021 at 4:00 p.m. ET
EXTRACTION OIL & GAS, INC.,	
Defendant.	

MOTION FOR RECONSIDERATION OF COURT'S SEPTEMBER 20, 2021 ORDER

The above-captioned plaintiffs (the "*Plaintiffs*") hereby move for reconsideration of the Court's September 20, 2021 Opinion [D.I. 65] ("*Opinion*") and Order [D.I. 66] ("*Order*") and in support, the Plaintiffs state as follows:

1. "[Plaintiffs] are parties to oil and gas leases (the "*Leases*") that govern the payment of royalties in connection with Extraction's production of oil and gas at various locations throughout Colorado. The Plaintiffs filed this adversary proceeding against debtor Extraction Oil & Gas, Inc. ("*Extraction*") asserting claims for underpaid royalties. Extraction

[1] The Reorganized Debtors in these chapter 11 cases, along with the last four digits of each Reorganized 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 Reorganized Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

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filed a motion to dismiss (the "*Motion*") asserting that the Court lacks subject matter over this action because the Plaintiffs failed to exhaust the administrative remedies available to them under Colorado law." Opinion at 2. The Court granted the Motion. Therein, the Court recognized under C.R.S. § 34-60-118.5(5) that "'[a]bsent a bona fide dispute over the interpretation of a contract for payment, [the Commission] shall have jurisdiction to determine . . . [t]he amount of the proceeds plus interest, if any, due a payee by a payer", and determined C.R.S. § 34-60-118.5(5.5) vests the Colorado Oil and Gas Conservation Commission ("Commission") with exclusive jurisdiction to determine whether a bona fide contractual dispute exists that would remove a royalty dispute from the Commission's jurisdiction. Opinion at 11-12.

2. The Court wrote that Colorado recognizes futility as an exception to the exhaustion doctrine. Opinion at 6. The Court determined futility did not apply. Opinion at 13. Plaintiffs respectfully request that the Court reconsider its Order and enter an order denying the Motion under the futility exception to exhaustion in consideration of new evidence confirming the Commission has denounced jurisdiction over this and all similar disputes and in recognition of the State of Colorado's application of the law, as evidenced and confirmed by an intervening Colorado decision.

3. "A motion for reconsideration may be granted where (i) there has been an intervening change in controlling law; (ii) new evidence has become available; or (iii) there is a need to prevent manifest injustice or to correct a clear error of law or fact." In re Conex Holdings, LLC, 524 B.R. 55, 58 (Bankr. D. Del. 2015); see also Lazaridis v. Wehmer, 591 F.3d 666, 669 (3d Cir. 2010).

4. On October 13, 2019, the Commission created a "Hearings and Applications Process Guidebook" (the "*Commission Guidebook*"), which it updated on January 14, 2021. A

copy of the Commission Guidebook is attached hereto as **Exhibit 1**. The updated Commission Guidebook made clear: "Even if there is a dispute regarding the proper payment of royalties, the Commission does not have jurisdiction to resolve the dispute if the dispute arises out of a contract. § 34-60-118.5(5.5), C.R.S." **Exhibit 1** at 7. Plaintiffs recently discovered the amendment to the Commission Guidebook and determined it is material to the Court's analysis and dispositive with respect to the futility exception. This Court found Plaintiffs and Extraction "are parties to oil and gas lease (the "Leases") that govern the payment of royalties[.]" Opinion at 2. Thereby, the Court determined this dispute involving Plaintiffs' "claims for underpaid royalties" (Opinion at 2) "arises out of a contract" (Commission Guidebook at 7). According to this Court's findings, therefore, this case involves a dispute the Commission has already determined it lacks jurisdiction over. This confirms, beyond a reasonable doubt, the Commission would dismiss this dispute for lack of jurisdiction, rendering exhaustion of administrative remedies futile. Opinion at 6 ("administrative exhaustion requirements are excused when it is 'clear beyond a reasonable doubt that further administrative review by the agency would be futile because the agency will not provide the relief requested.'") (quoting State v. Golden's Concrete Co., 962 P.2d 919, 923 (Colo.1998)).

5. Additionally, on June 3, 2021, the Colorado Court of Appeals issued an opinion further confirming that the Commission lacks jurisdiction over royalty disputes involving oil and gas leases, including those at issue in this case. In Antero Res. Corp. v. Airport Land Partners Ltd., 2019CA1799 (a copy of which is attached hereto as **Exhibit 2**), the court explained the history and intent of C.R.S. § 34-60-118.5 and restated that the 1998 amendments thereto "'clarified that disputes involving a 'bona fide dispute over the interpretation of a contract for payment' should be brought in the district court.'" **Exhibit 2** at ¶ 16 (quoting Grant Bros. Ranch,

LLC v. Antero Res. Piceance Corp., 2016 COA 178, ¶ 30). This contravenes this Court's legal determination that C.R.S. § 34-60-118.5(5.5) vests the Commission with exclusive jurisdiction to determine whether a bona fide contractual dispute exists. This Court recognized that "cases hold that the Commission does not have exclusive jurisdiction to determine whether an exception to its jurisdiction applies" but did not apply the law here because "it is not clear from the face of the Complaint whether the Plaintiffs have raised a bona fide contract dispute." But in the same Opinion, this Court expressly recognized the existence of a bona fide contract dispute, stating "The Plaintiffs filed this adversary proceeding against [Extraction] asserting claims for underpaid royalties", and it is the Leases (contracts) "that govern the payment of royalties". Opinion at 2.

6. The Airport Land court also upheld and broadly applied Grynberg v. Colorado Oil and Gas Conservation Commission, 7 P.3d 1060 (Colo. App. 1999), a case heavily relied upon by Plaintiffs in their Response but left unanalyzed by the Opinion. **Exhibit 2** at 10-15. According to the Airport Land court, Grynberg correctly concluded the Commission "does not have jurisdiction to interpret any royalty agreement to determine the propriety of post-production deductions." **Exhibit 2** at 14. Plaintiffs' claims require interpretation of the Leases to determine the propriety of post-production deductions. See, e.g., D.I. 24 at ¶ 87 ("Defendant breached the Leases by failing to pay the full royalty amount owed due to […] allowing Deductions to be taken in the sale of oil and gas to third parties[.]"). "Deductions", as used in the Complaint, pertain to post-production cost deductions. The Airport Land decision further confirms that exhaustion before the Commission would be futile and the Commission does not have exclusive jurisdiction to determine whether a bona fide contract dispute exists.

7. Because leases are contracts that govern the payment of Plaintiffs' royalties, this case does not fall within the jurisdiction of the Commission. It was properly brought before this Court. Based on the additional material evidence brought to light herein and the intervening Colorado appellate decision, an order is appropriate denying Extraction's motion to dismiss and allowing this case to proceed before this Court.

WHEREFORE, for the foregoing reasons, the Plaintiffs respectfully request that this Court enter an order reconsidering its Order and denying Extraction's Motion.

Dated: October 4, 2021
Wilmington, Delaware

Respectfully submitted,

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EXHIBIT 1

COLORADO

Oil & Gas Conservation Commission

Hearings and Applications Process Guidebook

Created October 13, 2019

Updated January 14, 2021

INTRODUCTION

The Colorado Oil and Gas Conservation Commission ("Commission" or "COGCC") is an administrative agency responsible for implementing the Colorado Oil and Gas Conservation Act, § 34-60-101, C.R.S. *et seq*., as amended (the "Act"). The mission of the COGCC is to regulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, welfare, the environment, and wildlife resources.

Adherence to our mission results in:

- The protection of public health, safety, welfare, environment, and wildlife.
- The efficient exploration and production of oil and gas resources.
- Addressing cumulative impacts from oil and gas development.
- Cooperative relationships between COGCC and local governments as well as state and federal agencies with oversight of oil and gas operations.

The COGCC seeks to serve, solicit participation from, and maintain working relationships with all those having an interest in Colorado's oil and gas natural resources.

The Commission implements its mission through its various work units, including the Hearings Unit. This Guidebook is intended as a resource for members of the regulated community and the general public who have business before the Hearings Unit.

If you wish to participate in an application pending before the Commission, you are responsible for reviewing the relevant statutes and rules that apply to the process to make sure you understand your rights and responsibilities. The legal requirements for this process may be found in the Commission's Rules of Practice and Procedure, 2 CCR 404-1, the Act, § 34-60-101, C.R.S. *et seq.*, and the Colorado Administrative Procedure Act ("APA"), § 24-4-103, C.R.S. *et seq*. Additional information may also be found in the Statements of Basis and Purpose for the Commission's Rules adopted in the 2019 500 Series Rulemaking and the 2020 Mission Change Rulemaking. The Statements of Basis and Purpose may be found on the Commission's website: https://cogcc.state.co.us/sb19181.html#/overview.

The Commission hopes that this Guidebook will help facilitate public involvement and improve the understanding of the hearings process.

This Guidebook is only intended to provide general information regarding the Commission's hearings process. Many of the processes discussed below are conducted at the discretion of the Commission, and may be modified, as circumstances require. Further, this Guidebook is not intended to be, nor is it, legal advice.

For further information regarding any of the topics addressed in the Guidebook, please contact the Commission Office at:

Colorado Oil and Gas Conservation Commission
1120 Lincoln Street, STE 801
Denver, Colorado 80203

Email: cogcc.hearings_unit@state.co.us

Web: https://cogcc.state.co.us

Thank you.

PROCESS SUMMARY

As noted in the Introduction, the Commission is the administrative agency responsible for regulating the development of oil and gas natural resources in Colorado. The Commission is comprised of several work units, each of which is responsible for a facet of the Commission's oil and gas regulatory system. The Hearings Unit is charged with receiving and processing applications for activities related to the conduct of oil and gas operations in Colorado. These applications include: requests to approve oil and gas development (Oil and Gas Development Plans or Comprehensive Area Plans); requests to identify and group mineral acreage for oil and gas development (Drilling and Spacing Unit Applications); requests to facilitate or require payment to mineral owners for the development of their minerals (Pooling Applications); the prosecution by Commission staff of oil and gas operators when a Commission rule or the Act have been violated (Enforcement Applications); and all other applications allowed under the Commission's rules.

The Hearings Unit is comprised of Hearing Officers, Commission administrative staff, and the Commissioners themselves. When the Hearing Officers and the Commissioners review and recommend decisions on hearing applications, they are acting in a quasi-judicial capacity. This means that the Hearing Officers and Commissioners are conducting hearing processes similar to how a judge conducts a court proceeding, though with some specific and important differences applicable to administrative proceedings.

The rules that govern the hearings process are found in the Commission's 500 Series Rules. The 500 Series Rules were updated as of January 15, 2021, by the Commission. This Guidebook addresses this January 15, 2021 version of the 500 Series Rules.

I. Types of Applications Filed with the Commission

Rule 503 identifies the types of applications that may be filed with the Commission. The most frequently filed applications are:

A. Oil and Gas Development Plans
B. Comprehensive Area Plans
C. Pooling Applications
D. Enforcement Applications
E. Payment of Proceeds Applications
F. Variances

A. Oil and Gas Development Plans.

Before an oil and gas operator can drill and produce minerals from a well, it is required to obtain a Commission-approved Oil and Gas Development Plan ("OGDP"). *See* Rule 303.a. An OGDP application consists of a hearings application, which may include a drilling and spacing unit ("DSU") application, one or more Form 2As, and a Form 2B, and a Form 2C. *See* Rule 303.a.

The OGDP application should follow the format operators used under previous versions of COGCC Rules when filing a DSU application, pooling application, or other general hearings application.

An OGDP application may not require a DSU application if there is an existing Commission order establishing a DSU, a DSU application is pending before the Hearings Unit, or a DSU is not required to access the targeted minerals. If an operator is refiling a Form 2A for lands that are subject to an existing DSU order, the operator will explain that in its hearings application, and a new DSU application will not be required.

Information required in support of a Hearings OGDP application.

All OGDP applications must comply with Rule 505. If an OGDP application includes a new DSU application, the operator must comply with the information requirements set forth in Rules 305, 503.c, and 505. If the lands for which the oil and gas operations are proposed are already subject to a DSU order, or do not require a DSU order to access the targeted minerals, a new DSU application is not required.

If an OGDP application consists only of a Form 2A, a Form 2B and a Form 2C, the application must still comply with Rule 503.c and all of Rule 505, including Rule 505.a. Even if the OGDP application does not include a new DSU application, the operator must still submit testimony with its application that provides factual support for avoiding, minimizing, and mitigating public health, safety, welfare, environmental, and wildlife impacts, as well as other facts or testimony necessary to support the OGDP application.

If there is a pending DSU application associated with an OGDP application, the Hearing Officer will determine on a case-by-case basis whether additional information is necessary to support the DSU application.

The OGDP must also include the eForm document numbers for the

Forms 2A, 2B, and 2C.

What is a DSU?

Spacing of lands for oil and gas development is critical to preventing overdrilling and protecting mineral owner rights. Before the Commission was authorized to regulate oil and gas development through spacing, individual mineral owners were forced to drill wells to protect their right to produce. As a result, hundreds, if not thousands, of individual wells were drilled unnecessarily, and there was no thought put into how the wells should be spaced or how the land was to be protected.

Spacing prevents overdevelopment by identifying a designated area of land for future development of oil and gas resources, limiting the number of wells that may be drilled in the DSU, and limiting the number of surface locations from which the wells may be drilled.

As explained above, OGDPs may or may not include a DSU application. Moreover, there may be instances when an operator files a DSU application without an OGDP. One reason an operator may file a DSU application without an OGDP application is to amend an existing DSU order. However, if an operator files a DSU application and intends to conduct oil and gas operations within the proposed DSU lands that require a Form 2A (*See* Rule 304.a), it must file an OGDP application. Failure to file an OGDP application with a proposed DSU application may result in the rejection of the DSU application.

B. Comprehensive Area Plans.

Comprehensive Area Plans ("CAP(s)") are plans for oil and gas development on a much larger scale than OGDPs. *See* Rule 314. Because CAPs are an important tool to address cumulative impacts at a landscape scale, the Commission encourages CAPs. Therefore, the Commission created incentives for operators to apply for CAPs, such as the exclusive right to develop oil and gas resources and the opportunity for a streamlined OGDP review. While CAPs may include the Commission's preliminary approval of oil and gas locations, CAPs are not OGDPs. *See* Rule 314.b. An applicant with an approved CAP must still obtain all otherwise necessary approvals from the Commission, including OGDPs, DSUs, or Form 2s. Rule 314.b.(6). Approved CAPs expire 6 years after approval, unless the Commission approves a longer duration or grants an extension. Rule 314.c.

To submit a complete application for a CAP, applicants must submit all information pursuant to Rule 314.e. An applicant may coordinate with the Director before submitting an application to ensure that all information necessary for the Director to make a recommendation on a CAP is in the application. An applicant who intends to request preliminary siting approval must also submit information required by Rule 314.e.(11).

Applicants may also request that the Commission stay consideration of OGDP applications for minerals in the proposed CAP while the Director and Commission consider the CAP application. Rule 314.d.(5). The Commission will review a request for a stay at hearing. Rule 314 intentionally does not provide for a time when a hearing on a requested stay will occur, though the Commission anticipates that a hearing will not occur until after the Director makes a completeness determination pursuant to Rule 314.d.(4).

C. Pooling Applications.

Pooling is the necessary complement to the benefits of spacing. Pooling joins together mineral interests in a DSU in order to set the terms of payment for the minerals developed. Since a DSU may include hundreds of acres of mineral interests and many different mineral owners, pooling ensures that each mineral owner shares proportionately in the costs and proceeds from oil and gas development from a pooled unit, without requiring each mineral owner to drill his or her own well.

The pooling process can be done voluntarily through private contract, or it can be done through the Commission administrative hearing application process. The Commission's administrative process is only necessary where one or more unleased mineral owners in a DSU refuse to lease or otherwise consent to development. The administrative pooling process is frequently called "statutory pooling," "involuntary pooling," or "forced pooling." Rule 506 addresses pooling applications.

To file a pooling application, the applicant must either own, lease, or have the consent of owners of 45% or more of the minerals to be pooled. § 34-60-116(6)(b)(I), C.R.S. and Rule 506.a.

D. Enforcement Applications.

Enforcement Officers are charged with prosecuting oil and gas operators who are alleged to have violated the Act, Commission Rules, Commission order, or a permit. The enforcement process

begins when the Enforcement Unit is notified by a member of the Commission Staff of an alleged violation. The Enforcement Unit may then issue a Notice of Alleged Violation ("NOAV"), which identifies the alleged violations. Once the NOAV is issued, the Enforcement Officer will serve the NOAV on the operator and file an enforcement application with the Commission. Only Enforcement Officers on behalf of the COGCC Director may file an enforcement application. Rule 523 addresses the enforcement process.

E. Payment of Proceeds Applications.

Mineral owners and operators may disagree whether the proper royalty amount on mineral production was paid. When such disputes arise, mineral owners have the option of filing an application for payment of proceeds with the Commission. *See* 503.g.(5). Rules 429.h and 430.f address payment of proceeds claims and the forms that must be filed to initiate a Commission review of the claim. Even if there is a dispute regarding the proper payment of royalties, the Commission does not have jurisdiction to resolve the dispute if the dispute arises out of a contract. § 34-60-118.5(5.5), C.R.S.

F. Variance Applications.

A variance to a Commission Rule or order may only be approved by the Commission. *See* Rule 502.a. A variance to a Commission Rule or order may be recommended for approval by the Director if the variance seeks relief from the ministerial application of the Rule or order. *See* Rule 502.b. Ministerial matters are generally procedural or paperwork requirements. Ministerial matters are not substantive matters that may have material impacts to public health, safety, welfare, the environment, and wildlife resources. If the variance request is recommended by the Director and not objected to by a petitioner, it may be considered an uncontested hearing application pursuant to Rule 508, and approved on the Commission's Consent Agenda. *See* Rule 519.

If a variance application is for a non-ministerial matter or implicates public health, safety, welfare, the environment, or wildlife resources, the application will be heard by the Commission pursuant to Rule 510. Requests for a variance may be included within other applications, such as an OGDP application.

II. How to File an Application with the Commission

A. Preparing and Submitting an Application.

A hearings application is a formal document that contains specific information necessary for hearings staff to evaluate the relief requested from the applicant. Rule 503.c explains what information must be included in applications. As explained in Rule 503.c, all applications must include at a minimum the following:

- The operator's name and identification number;
- cause number;
- the type of application being submitted (e.g. ODGP, CAP, Pooling etc.);
- all applicable geologic formations;
- the location of applicable lands (including county, field name, Township / Range / Section, and nearby public crossroads)[1] and map of the same;
- the name and contact information (including email address) for an operator representative designated to receive questions and petitioners;
- a list of all interested parties (name and address) who will be served a copy of the application and notice of hearing;
- a detailed explanation of all Commission Rules and prior Commission Orders affecting the lands subject to the application;
- a detailed description of the relief requested and the legal and factual grounds for that relief;
- a separate "prayer for relief" setting out in separate paragraphs each item of relief requested; and
- the signature of the attorney(s) submitting the application, including the attorney's name, their firm name, mailing address, telephone number, and email.

The application should be:

- Typewritten;
- Letter size (8½" x 11") paper;
- No less than twelve (12) point font, including footnotes;
- One inch margins all around; and
- Single Spaced.

The Commission does not accept paper copies of filings. All applications and supporting documents must be filed using the

[1] The description of the lands should be set forth using symbols and upper/lower case font. For example, S½NW¼, Section 1, Township 6 South, Range 92 West, 6th P.M., is an acceptable legal description in an application. However, S/2NW/4 T6S, R92W is not an acceptable legal description.

Commission's eFiling System.[2] Information on using and accessing the eFiling System can be found on the COGCC's Hearings Unit page.

B. What happens After an Application is Filed.

1. Review of the Application.

When you submit your application through the eFiling System, Hearings Staff will review the application to determine whether to assign the application a docket number. This review by Hearings Staff does not constitute a completeness review for OGDPs and CAPs. Once that review is conducted, the applicant will receive an email either: 1) assigning a docket number to the application, or 2) informing the applicant that additional information is required before the application can be assigned a docket number.

Once the application has a docket number, it will be assigned either to a Hearing Officer or to the full Commission for adjudication. Rule 503.h provides that all applications are automatically assigned to a Hearing Officer unless:

- on its own motion the Commission elects to hear the application;
- the application is for a Comprehensive Area Plan;
- the application is filed pursuant to Rule 604.a.(3) or 604.b.(4);
- the application is for a Rule 502.b variance;
- the application requests that the Commission amend its rules or adopt a new rule; or
- the application seeks expedited review of an action ordered by the Director pursuant to Rules 209.b, 218.g, 423.e, 602.f, or 901.a.

In such matters that are assigned directly to the Commission for adjudication, a Hearing Officer may nevertheless preside over Prehearing Conferences and preliminary matters pursuant to Rule 509.c.

2. COGCC Technical Staff's Review of the Application.

As explained earlier, the COGCC includes several work units, each of which is responsible for a facet of the Commission's oil and gas

[2] If a user is unable to access the eFiling System or has other limitations that prevent them from accessing the eFiling System, please contact Margaret Humecki at margaret.humecki@state.co.us and Angelica Amaro at angelica.amaro@state.co.us.

regulatory system. Once an application has a docket number, but before it is noticed for hearing, COGCC Permitting, Engineering, and Oil and Gas Location Assessment ("OGLA") Staff will review the application. Permitting and Engineering Staff's review of an application submitted after September 30, 2019 will be in writing and available to the applicant and the Hearing Officer. OGLA Staff's review of an OGDP application submitted after January 15, 2021 will be in writing and available to the applicant and the Hearing Officer. Technical Staff may have material and non-material comments to an application. For example, a material comment to a DSU application may be that the lands proposed to be spaced are already subject to a DSU order that the applicant has not addressed in its application. A non-material comment can include noting typographical errors in an application.

In considering and addressing material comments from Technical Staff, the applicant should correspond directly with Staff. The Hearing Officer is a neutral decision maker. Questions, concerns, or objections to Staff's material comments are not properly made to the Hearing Officer. Rather, the applicant should correspond and work directly with Staff to address Staff's material comments.

For OGDPs and CAPs, Hearings Staff will not set a Commission hearing date for an application before the Director makes a completeness determination. *See* Rules 303.b and 314.d.(4).

3. Setting the Hearing and Noticing the Application.

Once an application is assigned a docket number and Staff has completed its technical review, the application will be set for hearing and must be noticed in accordance with Commission Rules. No application will be heard by a Hearing Officer or the Commission unless notice of the hearing has been provided at least **60 days** prior to the noticed hearing date. When determining who must receive notice of an application, applicants must comply with Rules 303.e.(1), 314.f.(1).C, and 504, and § 34-60-108(4), C.R.S. The notice of hearing is prepared by Hearings Staff and provided to the applicant's legal counsel for review and finalization. These notices prepared by Hearings Staff will include a date for the Commission hearing on the application. All persons should be aware that a hearing may be continued by a Hearing Officer, Administrative Law Judge, or the Commission. Parties may request a continuance through a motion to the Hearing Officer, Administrative Law Judge, or the Commission, whichever is appropriate.

Once the notice is finalized, it is the responsibility of the applicant

to mail and deliver the notice and the application to all persons required to receive the notice. No later than **30 days** before the noticed hearing date, the applicant must submit to the Secretary of the Commission through the COGCC's eFiling system a certificate of service that identifies and affirms that it served all interested parties a copy of the application and the notice of hearing. Rule 504.a.(2).A. No later than **30 days** before the noticed hearing date, the applicant must also submit to the Secretary of the Commission a notarized affidavit attesting that the applicant published a copy of the notice in relevant newspapers, and the date of publication for each newspaper used. Rule 504.a.(2).B.

All applications that were noticed and pending prior to the effective date of the revised 500 Series Rules, January 15, 2021, will continue to be processed and heard as soon as practicable, taking into consideration the Hearing Officers' and Commissioners' work load. However, it is within the discretion of the Commission and the Hearing Officers to determine on a case-by-case basis whether additional information is necessary to support an application filed prior to January 15, 2021. Applications submitted and noticed prior to September 30, 2019, do not need to be re-noticed.

4. What Happens if I Need to Amend my Application?

The Commission recognizes that an applicant may need to amend an application after it has been noticed. If a minor, non-material amendment to an application is needed prior to notice being sent, the Commission or Hearing Officer will generally accept the amendment. Rule 503.j. However, as detailed in Rule 503.j, the Commission or Hearing Officer might not accept material amendments to an application. If a material amendment to an application is made, the Hearing Officer or Commission may reject the application and require a new application to be filed.

III. How Do I Petition the Commission to Protest an Application?

A. Who can File a Petition Protesting an Application?

If you receive notice of a hearings application and you believe that you will be adversely affected or aggrieved if the application were to be granted, you can file a petition with the Hearings Unit that "protests" the application. Rule 507.a.(1) and (2) identify certain categories of persons who are automatically deemed an "Affected Person." Affected Persons are:

1. Federal and state agencies, tribal governments, Relevant

Local Governments and special districts that have legal authority over the hearing application, or

2. A Surface Owner or resident of a Building Unit within 2,000 feet of a proposed Working Pad Surface for purposes of an OGDP application.

Any individual or entity who is not identified in Rule 507.a.(1) and (2) must submit a petition that:

1. Identifies their interest in the hearing application and how that interest in adversely affected by the activity proposed in the application;
2. Explains that the person's interest could be an injury-in-fact if the application is approved by the Commission; and
3. Demonstrates that the injury alleged is not one that is common to members of the general public.

If a petition is accepted, the petitioner becomes a party and participates in the prehearing processes, though the Hearing Officer and the Commission retain the discretion to determine exactly how a petitioner may participate. If an application is petitioned, the application must go to a hearing before either the Hearing Officer or the Commission.

B. When does a Petition have to be Filed and what does it have to Include?

A petition must be filed with the Commission and served on the applicant's lawyer at least **30 days** before the noticed hearing date. Rule 507.d. The petitioner is responsible for serving the applicant with a copy of the petition. Service must be made through the eFiling System. The deadline to file a petition will not automatically be extended if a hearing is continued. *See* Rule 507.e.

In accordance with Rule 507.f, the petition must include:

- The application docket number;
- A general statement of the factual or legal basis for the petition, including an explanation of what the petitioner believes their injury would be if the application is approved;
- A statement and support for why the person meets the definition of an Affected Person;
- A statement of the relief requested, which must be within the Commission's jurisdiction to grant;
- A description of the petitioner's intended presentation to the Hearing Officer or Commission, including a list of proposed

witnesses;
- A time estimate to hear the petition; and
- A certificate of service attesting that the petition was served on the applicant and any other party in the proceeding.

The petition should be:

- Typewritten;
- Letter size (8½" x 11") paper;
- No less than twelve (12) point font, including footnotes;
- One inch margins all around; and
- Single Spaced

IV. Does an Applicant Have to Provide Evidence in Support of its Application?

At the time of submitting a hearing application pursuant to Rule 503.g.(1)-(7), the applicant will file sworn Rule 505 testimony. For example, sworn public health, safety, welfare, environment, and wildlife, geologic, engineering, regulatory, and land testimony is necessary to support an OGDP application. The Hearing Officer will review the Rule 505 testimony and determine whether additional testimony is needed. If additional testimony is needed and cannot be provided in time prior to the hearing date, the hearing for that particular matter will be continued.

V. Taking an Application to Hearing

Once the application has been noticed, the petition deadline has passed, and the necessary Rule 505 testimony has been received, the application will be placed on either a contested or uncontested hearing track.

A. Contested Applications.

A contested hearing application means that a petition has been accepted and that the application must go before the Hearing Officer or Commissioners for hearing pursuant to Rule 509.

To prepare the application for hearing, the parties to the matter must participate in prehearing conferences. The purposes of a prehearing conference are to establish communication between the parties in contested matters, discuss the potential for settling disputed matters, narrow the issues disputed between the parties, and set time frames for the conduct of the hearing. The Hearing Officer may require the parties to provide prehearing statements,

address substantive issues and various procedural matters for the hearing, specify how many witnesses each party may call at hearing, and address other matters raised by the parties, Commission, or Hearing Officer. The Hearing Officer will prepare a Case Management Order that addresses motions for discovery, the deadlines for discovery, deadlines for other various prehearing filings, and set a deadline for the parties to furnish a proposed order for consideration.

The parties to a contested application will have the opportunity to make presentations at the hearing, call witnesses in support of their position, and cross-examine witnesses called by the opposing party. The Hearing Officer, Administrative Law Judge, or Commission may admit parties for limited purposes or consolidate parties for presentation at hearing in the interests of maintaining an efficient and effective process. Rule 507.a. The Hearing Officer will provide in a Final Prehearing Order the framework for how the hearing will be conducted, including how much time each party will have to present its case to the Hearing Officer.

At the conclusion of the hearing, no more evidence or argument will be heard and the matter will be ready for a decision. If the matter is heard by a Hearing Officer, the Hearing Officer will make a written recommended order based upon evidence in the record, consistent with the Act and Commission rules, permit, or other orders. The Commission is provided each Hearing Officer's recommended order.

If the Commission disagrees with a recommended order, it may stay the recommended order. A stay of an order means that the Hearing Officer's recommended order will not take effect until the Commission can review the recommended order and decide whether it should become a final order of the Commission. If the Commission does not stay the recommended order, and no party files an exception (that is an appeal) of the recommended order to the Commission, it becomes a final agency action **20 days** after service upon the parties. Rule 520.b.

B. Uncontested Applications.

If a hearing application is uncontested, meaning that no petition was accepted or that every accepted petition was withdrawn, the Hearing Officer will proceed to evaluate the application pursuant to Rule 508. The Hearing Officer will consider the sworn written testimony, and prepare a written draft order if the application is found to comply with Commission rules, the Act, and existing Commission orders. The Hearing Officer will prepare the written

draft order on or prior to the noticed hearing date. The Commission reviews each Hearing Officer's written draft order. Written draft orders in uncontested hearing matters will be placed on the Commission's consent agenda for approval pursuant to Rule 519.

VI. What if I Disagree with the Hearing Officer's Recommended Decision?

A party to a contested matter may file an exception to the written recommended order.[3] An exception is similar to an appeal of a civil court proceeding to an appellate court. A party who disagrees with a Hearing Officer's written recommended order has **20 days** to file an exception with the Commission, telling the Commission that the party disagrees with the written recommended order and wants the Commission to review the order. § 34-60-108(9), C.R.S. When an exception is filed, the written recommended order will be stayed pending the Commission's review of the matter. Once an exception is filed, the other party(s) to the matter can file a response to the exception within **14 days** after they are served with the exception. Rule 520.c.

A hearing before the Commission on the exception will be scheduled. The Commission will review the same record that the Hearing Officer had before them when they made the written recommended order. This is important, because it means that the Commission will not hear new evidence from the parties. The Commission will consider the same evidence that the Hearing Officer considered. However, the Commission will review whether the Hearing Officer properly interpreted and applied the law to the facts. The Commission may allow the parties to the exception to make oral argument to the Commission. No witness testimony will be made to the Commission, only oral argument.

VII. What if I Disagree With the Commission's Final Order?

All final orders of the Commission can be appealed to district court. § 34-60-111, C.R.S.; *see also* Rules 307.c; 503.i; 520.b. Appeals of Commission orders are governed by the State Administrative Procedure Act. § 24-4-106, C.R.S. A party who wishes to appeal a Commission order should, at a minimum, refer to the Administrative Procedure Act.

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[3] At times, the Hearing Officer may issue non-dispositive orders that are not "recommended orders." These interim decisions are not subject to exceptions. Rule 520.a.

VIII. What if I Do Not Have a Lawyer Representing Me?

If you are a natural person appearing on your own behalf, you do not need a lawyer to represent you before the Commission in adjudicatory proceedings, rulemakings, or local public hearings. Rule 515.a. A natural person is an individual person and not a private or public organization, such as a business or not-for-profit organization. Additionally, persons who are authorized on behalf of an organization or entity to make oral or written comments may do so in the course of public comment at a Commission hearing.

However, the Commission does strongly encourage every person appearing before it in an adjudicatory proceeding to consult legal counsel to determine whether they may benefit from legal representation.

IX. Communications with the Commission, Hearings Staff, and Technical Staff

A. The Commission and Hearings Staff.

When an application is filed with the Hearings Unit, it becomes an adjudicatory proceeding, meaning that the Hearing Officer, Administrative Law Judge, and the Commission are the impartial, neutral entities that will decide whether to grant or deny the application. Under Rule 530, each party to an adjudicatory proceeding must copy all other parties (if applicable) on every communication with a Hearing Officer, Administrative Law Judge, or with the Commission.

Parties to a filed application should not attempt to communicate directly with the Commission, even if all other parties are copied, outside of a public hearing. The proceedings prior to a Commission hearing on a filed application will allow for submission of written position statements, and the parties will be able to submit their positions to the Commission directly at hearing, which is a sufficient opportunity to communicate with the Commission.

If a party fails to comply with Rule 530, their attempted communication will be made public and the Hearing Officer, Administrative Law Judge, or the Commission may require that party to explain why their application or petition should not be dismissed or denied.

In contested hearing applications, if a party requests that a hearing officer take a certain action on an application, then that request

should be made formally in a motion to the Hearing Officer, filed via the eFiling system. Informal email requests for status updates, decisions on pending motions, etc., should not be communicated via email to the Hearing Officer in a contested hearing application. If a party has a question regarding the status of a case, please contact the Hearings Assistant Margaret Humecki at 303-894-2100, ext. 5139 or by email at margaret.humecki@state.co.us

People who are not parties to a proceeding on a filed application may communicate with the Commission regarding that matter through oral public comment at a public hearing or through written comments submitted pursuant to Rule 512. For an OGDP or CAP, people who are not parties may also communicate with the Commission at a local public forum held pursuant to Rule 511, should the Commission choose to hold a local public forum.

B. Technical Staff.

If COGCC Technical Staff offer a technical review of a hearing application, communication of that review will be made in writing and made available to the applicant, the Hearing Officer, and any petitioners via the eFiling system. Generally, COGCC Technical Staff are not parties to hearing applications. Accordingly, it is not necessary to serve Technical Staff with filings made in a docket, even if it is a contested application. Additionally, should an applicant have questions regarding Technical Staff's material comments, they should contact Technical Staff directly and not include the Hearing Officer on those communications.

X. Standard of Conduct before the Commission

While the rules and process for appearing before an administrative agency like the Commission may be more relaxed than appearing before a civil or criminal court, every person appearing before the Commission must comply with standards of civil discourse. The same decorum used in a court should be used when appearing before the Commission. Parties are asked to be patient, dignified, and courteous to other parties, attorneys, and staff.

XI. Motions Practice

In contested hearing applications, parties frequently file motions in the course of the prehearing process. The following guidelines apply to all motions.

A. Page Limitations.

Motions and responses will not exceed 15 pages double-spaced. Replies will not exceed 10 pages double-spaced. These page limitations do not include the caption, signature block, certificate of service, or attachments. The body of the text and all footnotes will be no smaller than 12-point type. Motions to exceed the page limitations will be granted only upon a showing of good cause. Such motion will indicate the number of pages of the proposed document and the reason why the additional pages are necessary.

B. Motions.

The Colorado Rules of Civil Procedure apply to Commission proceedings unless they are inconsistent with Commission Rules or the Colorado Oil and Gas Conservation Act, or as the Hearing Officer may otherwise direct on the record during prehearing proceedings. The Commission does not adhere strictly to the Colorado Rules of Evidence and may accept evidence or information that would be excluded by the Colorado Rules of Evidence.

Before filing a motion, the party filing a motion must confer with all other parties to determine what their position is on the motion. The motion should state the position of all other parties. The movant should allow sufficient time for conferral, and make all such reasonable efforts to contact parties. Motions, responses, and replies must be served on all parties to the docket. Failure to confer or properly serve a motion may result in the motion being denied without prejudice or stricken *sua sponte*.

XII. Whom Can I Contact for More Information?

Please contact Hearings Assistant, Margaret Humecki, at 303-894-2100, ext. 5139, or by email at margaret.humecki@state.co.us.

EXHIBIT 2

19CA1799 Antero v Airport Land 06-03-2021

COLORADO COURT OF APPEALS

DATE FILED: June 3, 2021
CASE NUMBER: 2019CA1799

Court of Appeals No. 19CA1799
City and County of Denver District Court Nos. 18CV33277, 18CV33278, 18CV33281 & 18CV33289
Honorable Morris B. Hoffman, Judge

Antero Resources Corporation,

Plaintiff-Appellee,

v.

Airport Land Partners Ltd.; Richard N. Casey; Paul Limbach; Nanci Limbach; Fred Limbach; Shidelerosa LLP; Shideler Energy Company, LLC; Patrick Shuster; Toni Shuster; and Colorado Oil and Gas Conservation Commission,

Defendants-Appellants.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE GROVE
Johnson and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 3, 2021

Beatty & Wozniak, P.C., Karen L. Spaulding, Malinda Morain, Tyler Weidlich, Denver, Colorado, for Plaintiff-Appellee

Barton and Burrows, LLC, Stacy A. Burrows, Mission, Kansas, for Defendants-Appellants Airport Land Partners Ltd.; Richard N. Casey; Paul Limbach; Nanci Limbach; Fred Limbach; Shidelerosa LLP; Shideler Energy Company, LLC; Patrick Shuster; Toni Shuster

Philip J. Weiser, Attorney General, Kyle W. Davenport, Senior Assistant Attorney General, Jeff M. Fugate, First Assistant Attorney General, Denver,

Colorado, for Defendant-Appellant Colorado Oil and Gas Conservation Commission

Visani Bargell LLC, Cynthia Bargell, Dillon, Colorado, for Amicus Curiae Colorado Alliance of Mineral and Royalty Owners

Baker Hostetler LLP, L. Poe Leggette, Alexander Obrecht, Denver, Colorado, for Amicus Curiae HighPoint Resources Corporation

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 In these consolidated disputes over natural gas royalties, we consider the extent of the jurisdiction of the Colorado Oil and Gas Conservation Commission (the Commission or COGCC) to enforce contracts for royalty payments under section 34-60-118.5(5), C.R.S. 2020. After determining that the parties had "bona fide dispute[s] . . . regarding the interpretation" of each of the leases, COGCC declined jurisdiction over the matter as required by statute. *See* § 34-60-118.5(5.5). On judicial review, the district court remanded the matter to the Commission after concluding that the disagreement between the parties was purely factual. In particular, the court concluded that remand was required because none of the leases required legal interpretation, and section 34-60-118.5(5) vests COGCC with jurisdiction over the resolution of factual disputes with respect to the amount of royalties owed.

¶ 2 Because we disagree with the district court's conclusion that the parties' contractual disputes are purely factual, we conclude that COGCC correctly determined that it lacked jurisdiction over them. We therefore reverse and remand the case to the Denver District Court for resolution of each of the cases on the merits.

I. Background

¶ 3 In 2016 and 2017, several royalty owners (Applicants)[1] sued Antero Resources Corporation and Ursa Operating Company (Operators) in Garfield County District Court, alleging that the Operators had failed to pay them royalties due under their respective oil and gas leases. The Operators moved to dismiss each of the complaints for failure to exhaust administrative remedies. The Garfield County District Court granted those motions and dismissed the complaints.

¶ 4 Each of the Applicants then filed an application with the Commission alleging that the Operators had underpaid royalties. Rather than asking COGCC to order the Operators to pay those royalties, however, the Applicants asked COGCC to rule that it lacked jurisdiction over their claims for underpayment. After the Operators protested each application, a hearing officer recommended that the Commission dismiss each matter due to a lack of jurisdiction. COGCC adopted that recommendation and in

[1] The Applicants are Airport Land Partners Ltd.; Richard N. Casey; Paul Limbach; Nanci Limbach; Fred Limbach; Shidelerosa LLP; Shideler Energy Company, LLC; Patrick Shuster; and Toni Shuster.

each case issued a report concluding that dismissal was required because the parties had a bona fide dispute over the interpretation of their lease.

¶ 5 The Operators responded by filing a complaint in Denver District Court seeking judicial review of the Commission's orders, along with a request for a declaratory judgment that COGCC had jurisdiction to consider the applications. After consolidating the cases, the district court ruled that "COGCC's determinations that it lacked jurisdiction were erroneous as a matter of law." The court therefore remanded the cases back to COGCC so that it could consider the Applicants' underpayment claims on the merits. COGCC and the Applicants now appeal that order.

II. Analysis

A. Standard of Review

¶ 6 On judicial review under the Administrative Procedure Act, we review the district court's decision de novo. *Weld Air & Water v. Colo. Oil & Gas Conservation Comm'n*, 2019 COA 86, ¶ 32. When reviewing the agency's decision, "we view the record in the light most favorable to the agency" and "defer to an agency decision that

involves 'factual and evidentiary matters within an agency's specialized or technical expertise.'" *Id.* at ¶ 33 (citation omitted).

B. Final Appealable Order

¶ 7 At the threshold, Operators assert that this appeal should be dismissed for lack of a final appealable order. Specifically, they maintain that because the district court remanded the case to COGCC for further findings rather than issuing a ruling on the merits, we should apply the "administrative remand rule" and hold that there is no final judgment to appeal. We are not persuaded.

¶ 8 When a district court reviews an administrative decision and, as a result of that review, remands the case to the agency for additional action, the district court's judgment is final if it resolves the merits of the controversy. *See Scott v. City of Englewood*, 672 P.2d 225, 226 (Colo. App. 1983); *Hickam v. Colo. Real Est. Comm'n*, 36 Colo. App. 76, 83, 534 P.2d 1220, 1225 (1975). However, when the district court does not reach the merits of the controversy, but merely remands the matter for a further hearing or other proceedings on the issues, there is no final, appealable order. *Safeway Stores, Inc. v. City of Trinidad*, 31 Colo. App. 75, 76, 497 P.2d 1277, 1277-78 (1972); *cf. Cline v. City of Boulder*, 35 Colo.

App. 349, 352, 532 P.2d 770, 772 (1975) (court of appeals had jurisdiction over an appeal where the district court remanded to the agency for further proceedings, but evidence had already been presented on all issues). Federal courts call this the "administrative remand rule." *See, e.g.*, *W. Energy All. v. Salazar*, 709 F.3d 1040, 1046-48 (10th Cir. 2013). Colorado courts have not used this phrase, but the finality requirements described above — which are intended to avoid piecemeal review — follow essentially the same framework.

¶ 9 That framework includes a number of exceptions, including, as relevant here, a rule of "practical finality." *See id.* at 1049-50. This exception requires the existence of a "serious and unsettled" question, and "exists in the administrative agency context, if nowhere else, because agencies may be barred from seeking district court (and thus [appellate] court) review of their own administrative decisions." *Rekstad v. First Bank Sys., Inc.*, 238 F.3d 1259, 1262 (10th Cir. 2001); *see also Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 118 (3d Cir. 1999) (holding that a remand to an administrative agency may be deemed final "when a District Court finally resolves an important legal issue in reviewing an

administrative agency action and denial of appellate review before remand to the agency would foreclose appellate review as a practical matter").

¶ 10 The potential unavailability of appellate review is certainly a risk here. COGCC would be unable to appeal its own order after addressing the merits of each matter on remand, and there is no guarantee that any of the parties would pursue an appeal on their own. And the parties' briefs demonstrate the importance of the question. Based on case law that we discuss in detail below, Applicants and COGCC point out that section 34-60-118.5(5) has been narrowly construed at the administrative level for more than two decades. That narrow construction impacts a host of issues, from the applicable statute of limitations for the recovery of royalty underpayments to the calculation of pre- and post-judgment interest. And amicus curiae HighPoint Resources Corporation further highlights the importance of the issue by listing the "numerous payment-of-proceeds disputes" in which it is currently involved "before both the courts and [COGCC] that raise the same issues presented in this appeal."

¶ 11 Even if the order were not final and appealable for the reasons outlined above, we would apply the rule of practical finality here and conclude that "the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review." *Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984).

C. Bona Fide Dispute

¶ 12 Applicants and COGCC contend that the district court erroneously found that none of the applications involved a "bona fide dispute over the interpretation of a contract for payment," § 34-60-118.5(5), and, as a result, erred in concluding that COGCC had jurisdiction over them. We agree.

¶ 13 Colorado is one of several oil and gas producing states that, in the 1980s and 1990s, adopted legislation to address the problem of untimely royalty payments by producers. *See* Si M. Bondurant, *To Have and To Hold: The Use and Abuse of Oil and Gas Suspense Accounts*, 31 Okla. City. Univ. L. Rev. 1, 17-18 (Spring 2006) ("The lackadaisical payment practices in the industry, and the refusal of many companies to voluntarily pay interest on suspended royalties led to the enactment in many producing states of statutes which require interest penalties for sums not timely paid to royalty

owners."). Section 34-60-118.5 addresses that issue by, among other things,

- setting a deadline for the commencement of royalty payments: "Unless otherwise agreed . . . payments of proceeds derived from the sale of oil, gas, or associated products shall be paid . . . commencing not later than six months after the end of the month in which production is first sold," § 34-60-118.5(2)(a), C.R.S. 2020;
- providing that, following the commencement of royalty payments, future payments "shall be made on a monthly basis," except for very small royalty interests, *id.*;
- requiring the party paying royalties to provide detailed accounting information for the royalty amount, § 34-60-118.5(2.3); and
- imposing interest penalties for royalty payments that are not timely made, § 34-60-118.5(4).

¶ 14 As relevant here, the 1989 version of section 34-60-118.5(5) also vested COGCC with jurisdiction to decide disputes over the untimely payments that the law was intended to address. The pertinent subsection provided as follows:

> (5) [COGCC] shall have exclusive jurisdiction to determine the following:
>
> (a) The date on which payment of proceeds is due a payee . . . ;
>
> (b) The existence or nonexistence of an occurrence . . . which would justifiably cause a delay in payment; and
>
> (c) The amount of proceeds plus interest, if any, due a payee by a payor.

§ 34-60-118.5(5), C.R.S. 1989.

¶ 15 In 1998, the General Assembly passed three amendments to section 34-60-118.5 that are significant to our analysis here. The first amended subsection (5) to read "[a]bsent a bona fide dispute over the interpretation of a contract for payment, [COGCC] shall have jurisdiction to determine the following." The second added a new subsection (5.5), which stated:

> Before hearing the merits of any proceeding regarding payment of proceeds pursuant to this section, [COGCC] 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.

§ 34-60-118.5(5.5), C.R.S. 2020. The third added subsection 8(a) to the statute, which states that "[n]othing in this section shall be construed to alter existing substantive rights or obligations nor to impose upon [COGCC] any duty to interpret a contract from which the obligation to pay proceeds arises." § 34-60-118.5(8)(a), C.R.S. 2020. Each of these amendments still appears in the current version of the statute.

¶ 16 The 1998 amendments "did not change [COGCC's] primary jurisdiction over disputes for the payment of proceeds." *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*, 2016 COA 178, ¶ 30. "Rather, they clarified that disputes involving a 'bona fide dispute over the interpretation of a contract for payment' should be brought in the district court." *Id.* (citation omitted). And, as with the statute as it was originally adopted, legislative sponsors emphasized that "the thrust of the bill was to ensure that royalty owners received more information regarding the payments from operators so that they could ensure the sufficiency of the payments of proceeds." *Id.*

¶ 17 In 1999, a division of this court decided *Grynberg v. Colorado Oil and Gas Conservation Commission*, 7 P.3d 1060 (Colo. App.

1999), a case with facts strikingly similar to those before us now. Like the Applicants here, the defendants in *Grynberg* were royalty owners who "initially commenced an action at law to recover royalties" from the plaintiff operators. *Id.* at 1062. "Later, however, they filed an application with [COGCC] pursuant to [section] 34-60-118.5 . . . to have [COGCC] determine the amount of royalties owed by plaintiffs." *Id.* As it did in the present disputes, COGCC dismissed the application after concluding that "it lacked jurisdiction to adjudicate private disputes related to the legality of specific deductions, which disputes would require 'an interpretation of the instruments creating the [royalty] interests.'" *Id.* The operators then "sought judicial review of this order, asserting that [COGCC] erred in declining to assert jurisdiction." *Id.*

¶ 18 Although the *Grynberg* plaintiffs filed their application before the 1998 amendments to section 34-60-118.5 took effect, the division issued its opinion after the bill's effective date, and its analysis accounted for both versions of the statute. Focusing on the obligation by "payers," as defined by section 34-60-118.5(1)(a), C.R.S. 2020, "to make timely payment of proceeds to 'payees,'" as defined by section 34-60-118.5(1)(b), the division noted that while

the statute "makes clear that [COGCC] can order a payment be made only to one who is 'legally entitled' to that payment, it does not make clear which tribunal, either the court or [COGCC], determines whether there is legal entitlement to payment in any specific instance." *Grynberg*, 7 P.3d at 1062-63. Thus, the division concluded, the statute is ambiguous, and COGCC's interpretation of it was "entitled to deference, provided the interpretation adopted is a reasonable one." *Id.* at 1063 (citing *Indus. Claims Appeals Off. v. Orth*, 965 P.2d 1246 (Colo. 1998)).

¶ 19 Just like Applicants in this case, the royalty owners in *Grynberg* sought to recover "payments that would have been made, but for plaintiffs' deduction of certain post-production costs." *Id.* Consequently, the division held, at issue was "the *extent* of [the royalty owners'] legal entitlement to *further payments* under the royalty agreement." *Id.* (emphasis added). "[COGCC] properly concluded that [section] 34-60-118.5 gave it no jurisdiction over that question." *Id.*

¶ 20 In reversing COGCC's order in the matters before us, the district court distinguished *Grynberg* on the ground that the lease in that case "was silent as to post-production costs," and, therefore,

because the covenant of marketability had yet to be fully defined by case law, it "had to be implied" by the *Grynberg* court. According to the district court, it was uncertainty about "the legal boundaries" of the covenant of marketability that "drove the [*Grynberg* court's] conclusion that the royalty issues there went beyond the mere amounts of the royalties that were due, and implicated legal questions about the meaning of 'marketability.'" But, the district court concluded, because the covenant of marketability has now been defined by our supreme court, *see Rogers v. Westerman Farm Co.*, 29 P.3d 887, 906 (Colo. 2001), a lease's silence about the deduction of post-production costs from royalty payments no longer causes any uncertainty. In short, as the district court saw it, *Rogers* supplied the definition that required a legal interpretation in *Grynberg*, and, armed with that definition, COGCC could simply apply that definition to the facts it found in Applicants' cases.

¶ 21 We disagree with this analysis for two reasons. First, there is simply no support for the district court's conclusion that *Grynberg*'s analysis turned on the lease's failure to mention post-production costs. Indeed, the *Grynberg* division neither quoted the relevant

terms of the lease nor described which specific post-production expenses underlay the parties' dispute.

¶ 22 Second, and in large part because the division's reasoning did not depend on the specific language of the lease, we do not read *Grynberg* nearly as narrowly as the district court did. Nothing in the division's opinion suggests that its conclusion that a bona fide interpretive dispute existed depended on the lack of a clear definition of marketability. To the contrary, as we have already noted, the division broadly held that COGCC lacked jurisdiction because it was "the extent of [the royalty owners'] legal entitlement to further payments under the royalty agreement that is at issue." *Grynberg*, 7 P.3d at 1063. COGCC, the division wrote, "does not have jurisdiction to interpret any royalty agreement to determine the propriety of post-production deductions." *Id.*

¶ 23 We find *Grynberg* persuasive and, applying its reasoning here, conclude that the Commission reasonably interpreted section 34-60-118.5 to conclude that each of the applications before it involved one or more bona fide disputes over the interpretation of the leases. Despite the fact that binding precedent defines "marketability" and applies the implied covenant of marketability to all gas leases,

COGCC's reports correctly pointed out that each of the leases included terms that were subject to legal debate. By way of example, COGCC noted the following:

- The Airport Land lease did not define terms like "commercial marketplace" and "commercially saleable," both of which bear on the location of the "first commercial market" as defined by the contract.
- The parties to the Casey lease disagreed as to whether costs could be deducted "if the royalty is calculated based on the sale price for a sale to a third party."
- The remaining leases mention on one hand that royalties are to be "free of all costs of any kind" but then fail to mention "reservation fees" in a subsequent, nonexhaustive list of costs that cannot be deducted.

¶ 24 To be sure, the district court disagreed that any of these ostensible ambiguities might require legal interpretation, rather than factual findings, to resolve. For instance, with respect to whether "reservation fees" would be necessarily count as a "cost[] of any kind," the court concluded that the list included in the lease was "merely illustrative." That is one possible reading of the lease;

but it was not unreasonable for COGCC to conclude otherwise. Indeed, "fees" and "costs" are not necessarily interchangeable terms. *See, e.g.*, *Roberts Ranch Co. v. Exxon Corp.*, 43 F. Supp. 2d 1252, 1272-73 (W.D. Okla. 1997) ("[I]f the 'purification fees' at issue in this case represent any form of treatment expense incurred in order to get the product into the pipeline, then they are not chargeable against the lessors' royalties," but "[i]f . . . the so-called purification fees are in effect an arbitrary surcharge assessed by the transportation company upon delivery into the pipeline without regard to whether any treatment is provided, then these fees are more appropriately treated as a cost of transportation, and may be deducted in pro rata share from the Plaintiffs' royalties.") (citation omitted); *cf. Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶¶ 26-27 (distinguishing between a "tax" and a "fee" under the Taxpayers Bill of Rights).

¶ 25 Perhaps more important, though, is that the existence (or nonexistence) of a bona fide contractual dispute does not turn on the existence of linguistic ambiguities. "Whether a written contract is ambiguous and, if not deemed ambiguous, how the unambiguous contractual language should be construed, are questions of law that

we review de novo." *Lake Durango Water Co., Inc. v. Pub. Utils. Comm'n*, 67 P.3d 12, 20 (Colo. 2003). Consistent with the holding in *Grynberg*, which we find substantively indistinguishable from the circumstances here, we conclude that because the parties disagree over "the extent of [Applicants'] legal entitlement to further payments under the royalty agreement[s]," 7 P.3d at 1063, COGCC reasonably determined that there was a "bona fide dispute over the interpretation of a contract for payment," § 34-60-118.5(5), and appropriately declined to exercise jurisdiction over the applications.

III. Conclusion

¶ 26 We reverse the district court's order remanding the applications to COGCC and remand the case to the district court for resolution of the merits of Applicants' claims.

JUDGE JOHNSON and JUDGE VOGT concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

***Notice to self-represented parties**: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at https://www.cobar.org/For-Members/Committees/Appellate-Pro-Bono*

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	)	Case No. 20-11548 (CSS)
Reorganized Debtors.	)	(Jointly Administered)
ANNETTE LEAZER, *et al.*,	)	
Plaintiffs,	)	Adversary Proceeding
v.	)	Adv. Proc. No. 20-50963 (CSS)
	)	**Hearing Date: November 5, 2021 at 11:00 a.m. ET**
EXTRACTION OIL & GAS, INC.,	)	**Obj. Deadline: October 20, 2021 at 4:00 p.m. ET**
Defendant.	)	

NOTICE OF HEARING

PLEASE TAKE NOTICE that on October 4, 2021, the above-captioned plaintiffs (the "*Plaintiffs*") filed the *Motion for Reconsideration of Court's September 20, 2021 Order* (the "*Motion*"), with the United States Bankruptcy Court for the District of Delaware (the "*Bankruptcy Court*").

[1] The Reorganized Debtors in these chapter 11 cases, along with the last four digits of each Reorganized 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 Reorganized Debtors' principal place of business is 370 17th Street, Suite 5200, Denver, Colorado 80202.

PLEASE TAKE FURTHER NOTICE that the Motion shall be considered at the hearing scheduled in the above-captioned cases for **November 5, 2021** at **11:00 a.m. (Eastern Time)** at the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor, Courtroom 6, Wilmington, Delaware 19801 before the Honorable Christopher S. Sontchi.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be filed in writing with the Bankruptcy Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon and received by counsel for the Plaintiffs on or before **October 20, 2021 at 4:00 p.m. (Eastern Time)**.

PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS TO THE MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: October 4, 2021

GOLDSTEIN & MCCLINTOCK, LLLP

By: */s/ Maria Aprile Sawczuk*

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