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

IN THE MATTER OF THE AMENDED MOTION TO VACATE ORDER NO. 535-406, OR ALTERNATIVELY, TO AMEND AND CLARIFY ORDER NO. 535-406 POOLING CERTAIN LANDS IN TOWNSHIP 11 NORTH, RANGE 58 WEST, 6TH P.M., WELD COUNTY, COLORADO.	)	Cause No. 535 Docket No. 1307-UP-167 Order No. 535-406 Type: POOLING

AMENDED MOTION TO VACATE ORDER NO. 535-406, OR ALTERNATIVELY, TO AMEND AND CLARIFY ORDER NO. 535-406

Whiting Oil and Gas Corporation ("Applicant" or "Whiting"), Operator No. 96155, by and through its attorneys, Welborn Sullivan Meck & Tooley, P.C., respectfully submits this Amended Motion to Vacate Order No. 535-406, or Alternatively, to Amend and Clarify Order No. 535-406 (the "Amended Motion"), to the Oil and Gas Conservation Commission of the State of Colorado ("Commission") pursuant to Commission Rule 503.b.(10). In support of its Amended Motion, Applicant states as follows:

INTRODUCTION

1. On April 24, 2015, Whiting filed its Motion to Vacate Order No. 535-406, or Alternatively, to Amend and Clarify Order No. 535-406 (the "Original Motion").

2. On June 10, 2015, the Colorado Oil and Gas Conservation Commission hearing officer issued the Order RE: "Motion to Vacate Order No. 535-406, or Alternatively, to Amend and Clarify Order No. 535-406" Filed by Whiting Oil and Gas Corporation (hereinafter the "June 10, 2015 Order"), which permitted Whiting to file an amended motion within fourteen (14) days from the date of the Order.

3. For the reasons herein, Whiting respectfully requests that the Commission grant the relief requested in this Amended Motion.

Certificate of Conferral Pursuant to C.R.C.P. 121 § 1-15(8)

Pursuant to C.R.C.P. 121 § 1-15(8), Whiting is required to make a good faith attempt to confer only with Dakota Exploration, LLC ("Dakota") regarding the relief requested herein, which it did. Colorado Rule of Civil Procedure 121 § 1-15(8) provides that:

> Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel shall confer with opposing counsel before filing a motion. The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel about

> the motion. If the relief sought by the motion has been agreed to by the parties or will not be opposed, the court shall be so advised in the motion. If no conference is has occurred, the reason why shall be so stated.

(hereinafter "Rule 121") (emphasis added). Rule 121's conferral requirement is limited to conferral with "opposing counsel" and, therefore, conferral is only required among represented parties named in the action. When interpreting a rule, effect must be given to the express language of the rule, considering the rule as a whole and giving consistent effect to all of its parts. *Garrigan v. Bowen*, 243 P.3d 231, 235 (Colo. 2010), *as modified on denial of reh'g* (Dec. 20, 2010). If there is ambiguity, courts look to interpretational aids to find meaning including the purpose of the rule, the consequences of a particular construction, and because the Colorado Rules of Civil Procedure are patterned on the federal rules, Colorado courts look to the federal rules for guidance. *Id.* Significantly, unlike the Local Rules of Practice of the United States District Court for the District of Colorado – Civil, which requires conferral with "opposing counsel or unrepresented party" before filing a motion, Rule 121 does not require conferral with unrepresented parties. *Compare* D.C.COLO.LCivR 7.1(a) *and* C.R.C.P. 121 § 1-15(8). Because the Colorado rules are modeled after the federal rules,[1] which require conferral with unrepresented parties, the Colorado Supreme Court's omission of "unrepresented parties" in Rule 121 must be given effect. Accordingly, Rule 121's express language limits the conferral requirement to those parties represented by counsel in an action.

Here, other than Whiting, the only named and represented party to Order No. 535-406 and underlying Docket No. 1307-UP-167, is Dakota. On or about April 24, 2015, counsel for Whiting attempted to confer with Dakota's counsel as identified on Dakota's May 30, 2013 Pooling Application in Docket No. 1307-UP-167 but was informed that said counsel no longer represents Dakota and did not know who currently represented Dakota. Rule 121 does not require a party to search out all possible lawyers that may or may not represent another party, such an obligation is not only unreasonable, it is unpractical. Nevertheless, on April 28, 2015, Whiting provided notice of its Original Motion to Dakota by mailing a copy of the same to Dakota. Moreover, Whiting has been in direct communications, on multiple occasions, with representatives of Dakota concerning the issues raised in the Original Motion and this Amended Motion. On June 23, 2015, Whiting confirmed that Dakota is not currently represented in Docket No. 1307-UP-167 and conferred with Dakota regarding the relief requested herein. Dakota opposes this Amended Motion. Accordingly, Whiting made good faith and reasonable efforts to provide notice and confer with Dakota concerning the relief sought in the Original and Amended Motions.[2]

Because Rule 121 only requires conferral with counsel for represented parties, Whiting was not required to confer, before filing either its Original Motion or Amended Motion, with all "interested parties" as defined in COGCC Rule 507.b.(2). With respect to the "interested parties" identified in Docket No. 1307-UP-167, Whiting is without knowledge whether those persons identified in Dakota's Pooling Application are, in fact, interested parties, the correct

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[1] The prior version of D.C.COLO.LCivR 7.1(a) required conferral with "opposing counsel or any pro se party."

[2] The Amended Motion seeks the same relief as the Original Motion except for clarification of the unit size applicable to the Order No. 535-406, which was resolved by Amended Order 535-406, issued on June 10, 2015.

interested parties, or whether such parties are represented. The June 15, 2015 Order's construction of Rule 121 requiring that Whiting confer before filing a motion with all Rule 507.b.(2) interested parties places an unreasonably costly, incredibly time consuming, and arbitrary and capricious burden on Whiting to run title to identify the interested persons under Rule 507.b.(2) and make a reasonable effort to confer with each.[3]

Further, Rule 507.b.(2) only applies "[w]hen any proceeding has been initiated . . . ." Neither the Original Motion, nor the Amended Motion, initiated any proceeding, rather the motions are within existing Docket No. 1307-UP-167, for which notice was already provided pursuant to Rule 507.b.(2). Whiting's Original and Amended Motions are more akin to a protest, which only requires that the protest be served on the applicant and its counsel. Indeed, the only party with any rights under pooling Order No. 535-406 is the applicant – Dakota – who was authorized to seek cost recovery for the drilling of a well identified in Order No. 535-406. No Rule 507.b.(2) "interested party" has any rights under Order No. 535-406 to seek such cost recovery.

For these reasons, Whiting has complied with the letter and spirit of C.R.C.P. 121 § 1-15(8) in its efforts to confer in good faith with Dakota and because conferral with unrepresented parties including "interested parties" as defined by Rule 507.b.(2) is not required. Nevertheless, Whiting has mailed a copy if this Amended Motion and the June 10, 2015 Order to all parties identified on Exhibit A to Dakota's Pooling Application in Docket No. 1307-UP-167.

AMENDED MOTION

4. Applicant owns leasehold interests in a portion of the following lands ("Motion Lands"):

Township 11 North, Range 58 West, 6th P.M.
Section 10: S½
Section 15: All

5. The relief sought herein should be granted for two reasons. First, Dakota's failure to timely drill any of the wells identified in Order No. 535-406 has rendered the Order stale. Second, Order No. 535-406 is ambiguous on its face and cannot be enforced as drafted.

ORDER NO. 535-406 SHOULD BE VACATED BECAUSE IT IS BASED ON OUTDATED INFORMATION AND DAKOTA DID NOT TIMELY DRILL THE HUCKLEBERRY WELLS.

6. On May 30, 2013, Dakota applied to the Commission for an order pooling all interests in a 960-acre drilling and spacing unit and for cost recovery pursuant to Section 34-60-116, C.R.S., for the drilling of four (4) horizontal wells, Huckleberry 1-10-1158H Well, Huckleberry 2-10-11-58H Well, Huckleberry 3-10-11-58H Well, and Huckleberry 4-10-11-58H Well (the

[3] A reasonable effort to confer requires more than just a single telephone call. See *Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 636 (D. Colo. 2003) (single-email not reasonable good faith effort to confer).

"Huckleberry Wells") in the S½ of Section 10, and all of Section 15, Township 11 North, Range 58 West, 6th P.M. *See* Docket No. 1307-UP-167.

7. On July 16, 2013, Whiting filed a protest in Docket No. 1307-UP-167. In July 2013, only after Whiting protested, Dakota provided Whiting with well proposals for the Huckleberry Wells with an election deadline of August 28, 2013 (the "2013 Election Letters"). The 2013 Election Letters included a generic Authority for Expenditure ("AFE") for all four (4) Huckleberry Wells. The AFE was based on an estimated spud date of 3rd Quarter of 2013, for the drilling of at least one of the Huckleberry Wells. The protest was subsequently withdrawn based on the parties reaching a verbal agreement for an acreage trade that would resolve the concerns raised by Whiting in its Protest. The terms of the parties' agreement, however, were not reduced to writing.

8. On September 3, 2013, Dakota submitted Rule 530 materials in support of its application in Docket No. 1307-UP-167, materials that included the 2013 Election Letters, the generic AFE based on 2nd Quarter 2013 economics and market conditions, and specified an estimated spud date for the Huckleberry Wells of 3rd Quarter 2013. Whiting did not object to Dakota's pooling application because it understood that an agreement had been reached with Dakota.

9. On September 16, 2013, the Commission entered Order No. 535-406, which pooled all interests in a "640-acre" drilling and spacing unit (corrected June 4, 2015) for the development and operation of the Niobrara Formation. Order No. 535-406 was entered based upon the 2013 Rule 530 information and Dakota's representation that the Huckeberry Wells would be drilled in 3rd Quarter 2013. To date, Dakota has not drilled any of the Huckleberry Wells. The 2013 Election Letters and any actions taken with respect to them are no longer valid because the Huckleberry Wells were not timely drilled.

10. Nearly two (2) years later, by letter dated April 1, 2015 ("2015 Election Letter") and received by Whiting on April 6, 2015, Dakota re-proposed drilling the Huckleberry 3-10-11-58H Well ("Huckleberry 3 Well"). In support of that re-proposal, Dakota provided an outdated AFE. In fact, the AFE included in the 2015 Election Letter is identical, line for line, to that from the 2013 Election Letter, despite the drastic change in oil and gas prices and costs to drill and complete a well. The 2015 Election Letter states that Whiting has seven (7) calendar days to make an election decision on whether to participate in the Huckleberry 3 Well and, if Dakota does not receive an election from Whiting, then Whiting will be deemed to have elected not to participate in not only the Huckleberry 3 Well, but also any future unit operations.

11. The 2015 Election Letter does not comply with Section 34-60-116, C.R.S., and Commission Rule 530 because it does not provide Whiting thirty-five (35) days to elect to participate in a well after receipt of the following information:

(a) The location and objective depth of the well;
(b) The estimated drilling and completion cost of the well; and
(c) The estimated spud date for the well or range of time within which spudding is to occur.

(d) An authority for expenditure prepared by the operator and containing the information required above, together with additional information deemed appropriate by the operator shall satisfy this obligation.

12. Now, nearly two years later, Dakota is attempting to rely on a stale pooling order that was based on outdated Rule 530 materials, drastically different market conditions, and wells that were never drilled to impose cost recovery against Whiting for the Huckleberry 3 Well. Even more, in its 2015 Election Letter, Dakota represents that should Whiting elect to go non-consent on the Huckleberry 3 Well, it will be deemed non-consenting on all future wells in the unit and subject to the non-consent penalty as provided for under Section 34-60-116(7), C.R.S. Further, Dakota only provided for a seven (7) day election period, not thirty-five (35) days, as required by Commission Rule 530.

13. Section 34-60-116(6), C.R.S., requires that all pooling orders must be entered on terms that are just and reasonable, affording each owner an opportunity to recover his or her proportionate share of the minerals without unnecessary expense. Because Order No. 535-406 is based on outdated Rule 530 information it would be unjust and manifestly unreasonable to subject Whiting and any other owner within the Motion Lands to the cost recovery provisions of Section 34-60-116(7), C.R.S., for the drilling of the newly proposed wells. For the above reasons, Order No. 535-406 should be vacated.

ORDER NO. 535-406 SHOULD BE VACATED BECAUSE IT IS AMBIGUOUS ON ITS FACE AND UNENFORCEABLE AS DRAFTED.

14. Order No. 535-406 is ambiguous on its face as to (1) the number of wells subject to the pooling order and (2) how the future wells and compliance with Commission Rule 530 is treated.

A. *The Order is ambiguous as to whether it applies to one or more wells.*

15. The Order is ambiguous as to the number of wells being pooled and for which the cost recovery provisions of Section 34-60-116, C.R.S., apply. Paragraph 1 of the Order identifies four (4) wells (Huckleberry 1-10-11-58H Well, Huckleberry 2-10-11-58H Well, Huckleberry 3-10-11-58H Well, and Huckleberry 4-10-11-58H Well), for which Dakota submitted proposals to the interested parties in 2013, but never drilled. Paragraphs 2, 3, 5, and 6 of the Order (under the Order Section), reference the "Well," singular. Indeed, the "Well" is not defined anywhere in the Order. Only Paragraph 4 within the Order Section references multiple wells, but only with respect to unleased mineral owners. Accordingly, the Order is ambiguous as to whether the terms of the Order apply to one well or all four (4) Huckleberry Wells and, if the latter, whether only as to unleased mineral owners.

B. *The Order fails to address whether it is applicable to future wells drilled within the unit and how such wells are to be treated pursuant to Rule 530.*

16. Finally, the Order is silent as to how future wells drilled in the unit are to be treated. Section 34-60-116, C.R.S., provides for establishing a spacing unit for one well. Because

the language of the statute is intended to apply to the pooling of a spacing unit for which one well is drilled, the terms for one well should apply to each well in the unit subject to Order No. 535-406.

17. Section 34-60-116, C.R.S., and Commission Rule 530 require all pooling orders to be "on terms that are just and reasonable" and limited to wells for which sufficient information is provided and for which the owner of any mineral interest has a reasonable, informed opportunity to elect to participate after receiving that information. Without any information concerning future wells and without knowledge of the range of time within which spudding of each well is to occur, it is not *just* and *reasonable* for the Commission to require the parties subject to the Order to relinquish their rights on unidentified future wells that are not drilled within a reasonable window. Because of continually fluctuating market conditions, including fluctuations in market factors such as oil and gas prices and drilling and completion costs, and because of changes in technology, a party's decision to participate in a well will be based, in part, upon when the well is actually drilled. Indeed, Rule 530 recognizes the importance of timing and market conditions by requiring a proposing party provide an estimated spud date or a range of time in which spudding of the well is to occur.

18. In order for a Commission pooling order, applicable to future wells, to be *just and reasonable*, as required by Section 34-60-116(6), C.R.S., the terms and conditions of the pooling order must include a deadline for drilling the proposed well(s), consistent with industry standards. The Model Form 610 joint operating agreement, which is the industry standard for operations of a multi-well unit, provides that in order to subject a non-consenting owner to the joint operating agreement's cost recovery provisions, the well must be drilled within ninety (90) days after the expiration of the offer to participate. *See* Art. VI.B.2. AAPL Model Form 610-1989.

19. Other jurisdictions similarly impose reasonable limits to drill a well and subject a nonconsenting party to cost recovery. The North Dakota Industrial Commission rules provide that in order for a party to avail itself to the cost recovery provisions of the state's pooling statute, N.D.CENT. CODE § 38-08-08, the party must provide other working interest owners an opportunity to participate in the proposed well. A party's election, however, "is only binding upon an owner electing to participate if the well is spudded or reentry operations are commenced on or before ninety days after the date the owner extending the invitation to participate sets as the date upon which a response to the invitation is to be received." N.D. ADMIN. CODE 43-02-03-16.3.1.d. Thus, unless a well is drilled within ninety (90) days from a party electing to go nonconsent, the cost recovery authorization expires, and the proposing party must provide the nonconsenting party with a new opportunity to participate.

20. Similarly, Arkansas requires that when a party obtains a pooling order pursuant to Ark. Code § 15-72-304, the first well must be spud within one (1) year of the date of the order. Ark. Code § 15-72-302. In the event the party seeking cost recovery under the pooling order fails to drill a well within the one (1) year period, the pooling order expires and the party must re-apply for a new pooling order based on new well information and data. *Id.*; see also, e.g., Arkansas Oil and Gas Commission Order No. 021-2015-01, February 12, 2015, p.6 ("This Order will automatically terminate under any of the following conditions: well drilling operations have not been commenced within one year after the effective date; or one year following cessation of drilling operations if no production is established; or within one year from the cessation of production from the unit.").

21. Accordingly, because Order No. 535-406 does not reasonably limit when the proposed Huckleberry Wells must be drilled in order for Dakota to avail itself to Section 34-60-116(6)'s cost recovery provisions, the Order is not *just and reasonable*.

22. For these reasons, Order No. 535-406 should be vacated.

ALTERNATIVELY, ORDER NO. 535-406 SHOULD BE AMENDED TO CLARIFY THE WELLS SUBJECT TO THE ORDER AND THE TREATMENT OF FUTURE WELLS PURSUANT TO RULE 530.

23. Should the Commission decide not to vacate Order No. 535-406, Applicant respectfully requests that the Commission amend and clarify the terms of the Order to clearly identify the number of wells covered by the order and how each well drilled is to be treated pursuant to Commission Rule 530. Should the Commission choose to amend and clarify the terms of Order 535-406, Applicant requests that the Commission include the following language in any amended order:

> For any other well authorized under Commission Order No. 535-268, if any owner to whom notice is delivered as provided in Commission Rule 530 does not elect in writing to lease or participate in such well or recompletion within the 35-day notice period provided by Commission Rule 530, then such owner shall be deemed nonconsenting as to the proposed well or recompletion, but only if the proposed well or recompletion is commenced no later than ninety (90) days after the expiration of the 35-day notice period and completed with due diligence, provided, however, said commencement date may be extended upon written notice by the operator to the other parties for reasons of force majeure.
>
> If the drilling of a proposed well is not commenced prior to or within ninety (90) days after expiration of the notice period of thirty-five (35) days (including any extension thereof caused by force majeure) and completed with due diligence, then written notice proposing such well or recompletion must be resubmitted to all nonconsenting parties in accordance with Commission Rule 530 as if no prior proposal had been made, and the parties shall have a new 35-day period within which to lease or participate in such well or recompletion.
>
> With respect to any future well drilled in the spacing unit, in order for this pooling order to apply to such well or recompletion, the operator of the proposed well or recompletion shall file with the Commission an affidavit stating that the requirements of Commission Rule 530 have been satisfied for such well or recompletion.

24. The names and addresses of the interested parties according to the information and belief of the Applicant are set forth in Exhibit A attached hereto and made a part hereof, and the undersigned certifies that copies of this Amended Motion and the June 10, 2015

Order were mailed to each interested party on the same date this Amended Motion was filed with the Commission, in compliance with Rule 503.e.

WHEREFORE, Applicant respectfully requests that this matter be set for hearing, that notice be given as required by law and that, upon such hearing, this Commission enter its order consistent with Applicant's proposals as set forth above.

Dated this 24th day of June, 2015.

Respectfully submitted,

WELBORN SULLIVAN MECK & TOOLEY, P.C.

By: _____

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Denver, CO 80290-2300

Attn: Scott McDaniel, Regional Land Manager
Phone: 303-390-4261

VERIFICATION

STATE OF COLORADO)
) ss.
CITY & COUNTY OF DENVER)

Laura Sluder, Landman with Whiting Oil and Gas Corporation, upon oath deposes and says that she has read the foregoing Amended Motion and that the statements contained therein are true to the best of her knowledge, information and belief.

WHITING OIL AND GAS CORPORATION

Laura Sluder, Landman

Subscribed and sworn to before me this 24 day of June, 2015 by Laura Sluder, Landman for Whiting Oil and Gas Corporation.

Witness my hand and official seal.

Notary Public
My Commission Expires: 9-31-18

FRANK J. OLSEY III
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20104034633
MY COMMISSION EXPIRES 08/31/2018

EXHIBIT A

INTERESTED PARTIES

Dakota Exploration LLC
Attn: Paul Collins
8801 South Yale Ave, Ste. 120
Tulsa, Oklahoma 74137

Joyce E. Smock
46715 WCR 128
New Raymer, CO 80742

Larry L. and Geraldine Highland
62205 WCR 130
New Raymer, CO 80742

D&J Oil Company, Inc. (Dakota Partner)
P.O. Box 10129
Enid, OK 73706

Ronald Kindvall
38012 County Road 47
Eaton, CO 80615

George Kindvall
63741 County Road 131
New Raymer, CO 80742

Alma Louise O'Hare Living Trust
PO Box 146
Reliance, WY 82943

Larry Kindvall
1702 3rd Avenue
Greeley, CO 80631

Heirs to Doris Fritz (Frank Fritz)
P.O. Box 247
Pine Bluffs, WY 82082

Frank Myron Fritz
P.O. Box 247
Pine Bluffs, WY 82082

Wayne Earl Fritz
6190 Bradley Drive
Mohave Valley, AZ 86440

Marcia Earline Johnson
98 Terry Boulevard
Gering, NE 69341

Mildred Ruth Meroney
2632 Oxbow Drive
Great Bend, KS 67530

Karel Lea Smock
P.O. Box 37
Grover, CO 80729

Darlene Marie Butler
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Pine Bluffs, WY 82802

Arlene Gloria Christensen
P.O. Box 624
Scottsbluff, NE 69361

Contex Energy
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Denver, CO 80293

Whiting Petroleum Corporation
(a/k/a Whiting Oil and Gas Corporation)
1700 Broadway, Suite 2300
Denver, CO 80202

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

IN THE MATTER OF THE AMENDED MOTION TO VACATE ORDER NO. 535-406, OR ALTERNATIVELY, TO AMEND AND CLARIFY ORDER NO. 535-406 POOLING CERTAIN LANDS IN TOWNSHIP 11 NORTH, RANGE 58 WEST, 6TH P.M., WELD COUNTY, COLORADO.	))))))	Cause No. 535 Docket No. 1307-UP-167 Order No. 535-406 Type: POOLING

AFFIDAVIT OF MAILING

STATE OF COLORADO §
§
CITY AND COUNTY OF DENVER §

I, Chelsey J. Russell, of lawful age, and being first duly sworn upon my oath, state and declare:

That I am the attorney for Whiting Oil and Gas Corporation and that on or before June 24, 2015, I caused a copy of the attached Amended Motion and June 10, 2015 Order to be deposited in the United States mail, postage prepaid, addressed to the parties listed on Exhibit A to the Amended Motion to Vacate Order No. 535-406, or Alternatively, to Amend and Clarify Order No. 535-406.

Chelsey J. Russell

Subscribed and sworn to before me June 24th, 2015.

Witness my hand and official seal.

Melissa A. Morman
Notary Public
My commission expires: 8/29/2017

MELISSA A. MORMAN
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 19894012434
MY COMMISSION EXPIRES AUGUST 29, 2017