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

APPLICATION OF AIRPORT LAND PARTNERS, LTD., A COLORADO LIMITED PARTNERSHIP, FOR AN ORDER DETERMINING WHETHER THE COMMISSION HAS JURISDICTION OVER APPLICANT'S ROYALTY UNDERPAYMENT CLAIMS AGAINST ANTERO RESOURCES CORPORATION AND URSA OPERATING COMPANY, LLC	)	CAUSE NO: DOCKET NO: 171200788

VERIFIED APPLICATION

Airport Land Partners, Ltd., a Colorado Limited Partnership ("Airport Land"), through its attorneys, The Law Offices of George A. Barton, P.C., makes application to the Oil and Gas Conservation Commission of the State of Colorado ("the Commission") to determine whether the Commission has jurisdiction over the disputed royalty underpayment claims asserted by Airport Land against Antero Resources Corporation ("Antero") and Ursa Operating Company, LLC ("Ursa") under certain Royalty Instruments covering lands located in Garfield County Colorado, as more fully described below. Airport Land seeks an Order from the Commission determining that the Commission does not have jurisdiction over Airport Land's royalty underpayment claims against Antero and Ursa under the applicable Royalty Instruments, for the reasons set forth below. In support of this Application, Airport Land states as follows:

1. Airport Land is a limited partnership duly established pursuant to the laws of the State of Colorado.

2. Airport Land owns a mineral interest under the following described lands:

<u>Township 6 South, Range 92 West, 6th P.M.</u>
Section 18: Lot 2, Lot 3, Lot 4

<u>Township 6 South, Range 93 West, 6th P.M.</u>
Section 13: Lot 2, SE/4NW/4, S/2NE/4, S/2 excepting a tract[1]
Section 14: N/2SE/4, SE/4SE/4 excepting a tract[2]
Section 23: NE/4SE/4, SE/4SE/4
Section 24: N/2, NW/4SW/4, E/2SE/4
Section 25: E/2NE/4, SW/4NE/4, SE/4 less a tract[3]

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[1] Tract hereinafter described on the 1994 Lease attached hereto as Exhibit 1.
[2] Tract hereinafter described on the 1994 Lease attached hereto as Exhibit 1.
[3] Tract hereinafter described on the 1994 Lease attached hereto as Exhibit 1.

LESS AND EXCEPT TRACTS[4]

Garfield County, Colorado

(hereinafter "Airport Land Property")

3. The Airport Land Property is subject to the following Oil and Gas Lease, previously owned and controlled by Antero, and now owned and controlled by Ursa:

   Lease dated January 24, 1994 by and between Rifle Land Associates, Ltd., as Lessor, and Snyder Oil Company, as Lessee (the "1994 Lease"). (**Exhibit 1**). Airport Land has succeeded to the rights of Rifle Land Associates Ltd., as Lessor, under the 1994 Lease Agreement, and Antero and Ursa, respectively, have succeeded to the rights of Snyder Oil Company, as Lessee.

4. The 1994 Lease provides for payment of royalties based on the following royalty clause:

   > To pay one-eighth of the gross proceeds each year, payable quarterly, for the gas from each well where gas only is found, while the same is being used off the premises, and if used in the manufacture of gasoline a royalty of one-eighth (1/8) payable monthly at the prevailing market rate for gas.
   >
   > Ex. 1, Paragraph 3, Section 2.

   The first paragraph of the Addendum to the 1994 Lease Agreement states that:

   > Anything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty.
   >
   > Ex. 1, Addendum.

5. Airport Land also is due royalties on production from the lands described in the July 16, 2007 Assignment of Overriding Royalty Agreement between Antero Resources Piceance Corporation, as Assignor, and Airport Land, as Assignee, which "lands" are a portion of the lands covered under the 1994 Lease (the "Overriding Royalty Agreement"). (**Exhibit 2**). Airport Land has held its rights under the Overriding Royalty Agreement since the time it was executed on July 16, 2007. The obligations of Antero Resources Piceance Corporation under the Overriding Royalty Agreement were subsequently assigned to Antero, and later to Ursa.

   The Overriding Royalty Agreement (Ex. 2) states that the royalties payable under the Overriding Royalty Agreement:

[4] Tracts hereinafter described on the 1994 Lease attached hereto as Exhibit 1.

> "Shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the [Overriding Royalty Interest] burden is calculated and paid, and as part of that calculation, the [Overriding Royalty Interest] shall bear the same costs and expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease."

The Overriding Royalty Agreement covers lands more fully described in Exhibit 2, which are exclusively lands which are part of the leased premises under the 1994 Lease. The Overriding Royalty Agreement, like the 1994 Lease, contains no provision which permits Antero or Ursa to deduct any post-production costs in their calculation of royalties paid to Airport Land.

6. On December 5, 2016, Airport Land filed its complaint in Garfield County District Court, claiming breaches by Antero and Ursa of the 1994 Lease and the Overriding Royalty Agreement based on their consistent underpayment of royalties, including failure to pay royalties based upon the prices received for marketable residue gas at the location of first commercial market, failure to pay royalties based upon prices received for natural gas liquid products at the location of the first commercial market, improper deduction of various post-production costs, and improper and excessive tax deductions (the "Airport Land Complaint"). A copy of the Airport Land Complaint is attached as **Exhibit 3**.

7. Antero and Ursa filed a motion to dismiss Airport Land's Complaint for failure to exhaust administrative remedies with the Commission, arguing the royalty underpayment issues should first be brought before the Commission for a determination pursuant to § 34-60-118.5, C.R.S of the Act. A copy of the motion to dismiss is attached as **Exhibit 4**.

8. Airport Land filed a Memorandum in Opposition to Antero's and Ursa's motion to dismiss, relying on the Commission's prior rulings that the resolution of post-production cost royalty underpayment disputes are matters of contract interpretation which are not within the Commission's jurisdiction, and relying on *Grynberg v. Colorado Oil and Gas Comm'n,* 7 P.3d 1060 (Colo. App. 1999). In *Grynberg,* the Colorado Court of Appeals upheld the Commission's determination that it had no jurisdiction over an identical post-production cost deduction dispute, holding that post-production cost royalty underpayment disputes are matters for the courts to decide. A copy of Airport Land's Memorandum in Opposition is attached as **Exhibit 5.** A copy of the *Grynberg* decision is attached as **Exhibit 6**, and copies of the Commission's prior jurisdictional rulings are attached as **Exhibits 7 and 8**.

9. By Order dated July 31, 2017, Judge Denise Lynch of the Garfield County District Court granted Antero's and Ursa's Motion to Dismiss, without prejudice (the "District Court Order"). A copy of that Order is attached as **Exhibit 9**. Judge Lynch ruled that Airport Land should first have exhausted its administrative remedy with the Commission, based upon a finding that even though there was a dispute between the parties regarding whether Airport Land's royalties have been underpaid, there was no "contract interpretation" dispute which would preclude the Commission's

jurisdiction. Judge Lynch therefore concluded that the District Court had no subject matter jurisdiction, and dismissed Airport Land's Complaint without prejudice. (Ex. 9).

10. Although Airport Land is hereby conditionally submitting its Form 38 – Payment of Proceeds Hearing Request to the Commission (**Exhibit 10**, attached), it has been, and remains, Airport Land's position that the Commission does not have jurisdiction to resolve Airport Land's royalty underpayment claims against Antero and Ursa, for the reasons discussed below. Airport Land therefore requests that the Commission first address the threshold question of whether the Commission has jurisdiction to resolve Airport Land's post-production cost royalty underpayment claims against Antero and Ursa, in accordance with its established procedures.

11. The Colorado Court of Appeals' decision in *Grynberg* is dispositive of the jurisdictional issue before the Commission with respect to the claims of Airport Land against Antero and Ursa. In *Grynberg*, the royalty owners filed an Application with the Commission pursuant to C.R.S. § 34-60-118.5, as it existed prior to the 1998 amendments, to have the Commission decide their claim that the Grynberg operators had underpaid the royalties owed to them by deducting post-production costs in the calculation of their royalties. The Commission, *sua sponte*, determined that it did not have jurisdiction over the parties' post-production cost royalty underpayment dispute (Ex. 7), and stated, in pertinent part:

> 37 - Historically, the Commission has interpreted its statutory authority to include the regulation of oil and gas to protect against resource waste, to protect correlative rights and to protect the public health safety and welfare in oil and gas operations. § 34-60-102, C.R.S. <u>The Commission has not interpreted this authority to grant the Commission authority to decide private party contractual disputes.</u> (emphasis added).
>
> Ex. 7, ¶ 37.
>
> 38 - While the Commission <u>recognizes that ensuring timely payment of proceeds falls within its jurisdiction, that obligation is limited to those instances when the Payee is legally entitled to the proceeds. When a dispute regarding the propriety of deductions arises it requires interpretation of the contract(s) creating the interest. This determination may also require the application of principles relating to marketability set forth in Garman</u>. <u>Garman</u>, 886 P.2d at 559. (emphasis added).
>
> Ex. 7, ¶ 38.
>
> 40 - Because <u>section 118.5</u> is intended to ensure timely payment of proceeds due to payees who are legally entitled to payment, and <u>does not create in the Commission authority to adjudicate private disputes related to the legality of specific deductions, the Commission will not exercise jurisdiction over the Application.</u> (emphasis added).

Ex. 7, ¶ 40.

12. After the Commission entered its Order dismissing the royalty owners' application for lack of subject matter jurisdiction, the Grynberg operators sought judicial review of the Commission's Order that it had no subject matter jurisdiction over the royalty owners' claims against the Grynberg operators. *Grynberg*, 7 P.3d at 1062. The Denver District Court affirmed the Commission's Order. *Id.* The Grynberg operators appealed to the Colorado Court of Appeals, which affirmed the Denver District Court's judgment that the Commission did not have subject matter jurisdiction over the royalty owners' royalty underpayment claims against the Grynberg operators. *Id.* at 1062-65. The Court of Appeals' holding and rationale clearly confirm that the Commission does not have subject matter jurisdiction over Airport Land's royalty underpayment claims against Antero and Ursa in this case:

> Section 34-60-118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment. <u>The statute demonstrates the General Assembly's intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.</u>
>
> Moreover, the General Assembly clarified its intent to exclude contractual disputes from the Commission's jurisdiction when it amended § 34-60-118.5 in 1998. See Colo. Sess. Laws 1998, ch. 186 at 636. The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction, only "[a]bsent a bona fide dispute over the interpretation of a contract for payment," § 34-60-118.5(5), C.R.S.1999...
>
> ***
>
> <u>Under this amendment, therefore, the Commission does not have jurisdiction to interpret any royalty agreement to determine the propriety of disputed post-production deductions.</u>
>
> ***
>
> The language of the amendment demonstrates the General Assembly's intent merely to clarify any ambiguity that may have existed in the former version of the statute. <u>Indeed, the statute as originally enacted and the amendment both provide evidence of the General Assembly's intent to exclude the resolution of contractual disputes from the jurisdiction of the Commission.</u>
>
> The parties' real dispute here is not with respect to the timeliness of any payments under § 34-60-118.5. It relates, rather, to plaintiffs' liability for payments that would have been made, but for plaintiffs' deduction of certain post-production costs. <u>Consequently, it is the extent of defendants' legal entitlement to</u>

further payments under the royalty agreement that is at issue. The Commission properly concluded that § 34-60-118.5 gave it no jurisdiction over that question.

Id. at 1063. (emphasis added). (*See* Ex. 6).

In further explaining the legal basis for its decision, the Court of Appeals emphasized that the Colorado Oil and Gas Conservation Act ("the Act") (C.R.S. § 34-60-118.5) reserves the determination of contractual disputes between royalty owners and producers for a district court:

> Section 34-60-118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. *See Garman v. Conoco, Inc.*, 886 P.2d 652 (Colo.1994); *Rogers v. Westerman Farm Co.*, 986 P.2d 967 (Colo.App.1998). Thus, by reserving the determination of contractual disputes for the courts, § 34-60-118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions.

Id. at 1064. (emphasis added). (*See* Ex. 6).

13. Thus, in *Grynberg*, the Court of Appeals determined that: (1) under the Act, the Commission does not have jurisdiction over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement. *Id.* at 1063; (2) under the 1998 amendments to the Act, which added the words "[a]bsent a bona fide dispute over the interpretation of a contract for payment" to § 34-60-118.5 (5), the Commission does not have jurisdiction to interpret any royalty agreement to determine the propriety of disputed post-production deductions. *Id.*; (3) the Commission properly concluded that § 34-60-118.5 does not give the Commission jurisdiction over disputes related to a royalty payee's "legal entitlement to further payments" under a royalty agreement. *Id.*; and (4) instead, § 34-60-118.5 leaves to the courts the authority to decide contractual disputes involving a royalty owner's "legal entitlement to proceeds." *Id.* at 1064. (Ex. 6). These determinations by the Court of Appeals are directly on point to the issue presented here, and confirm that the Commission has no jurisdiction over Airport Land's claims against Antero and Ursa for royalty underpayments based upon improper deduction of post-production costs.

    The Court of Appeals' decision in *Grynberg* has never been overruled, modified, or contradicted by any subsequent appellate court decision, and therefore constitutes binding precedent which the Commission must follow.

14. The appellate court decisions which have been issued since *Grynberg* was decided in 1999 have consistently confirmed its holding. In a decision issued last year, in

which Antero was a party, *Grant Brothers Ranch, LLC v. Antero Resources Piceance Corporation*, No. 15CA2063, 2016 WL 7009138 (Colo. App. December 1, 2016), the Court of Appeals confirmed its holding in *Grynberg* that the Commission lacks jurisdiction to resolve a contractual dispute over whether oil and gas operators are entitled under a lease to deduct post-production expenses in computing royalties due to royalty owners. The Court of Appeals specifically stated that in *Grynberg* it had determined that the Commission "lacked jurisdiction to resolve a contractual dispute over whether operators were entitled under a lease to deduct post-production expenses in computing royalties due to [royalty] owners." *Id.* at *5. The Court of Appeals also held, in accordance with the *Grynberg* decision, that "the Act provides a remedy for claims for the payment of proceeds where the parties have no contract addressing the issue," *id.*, in contrast to this case, where the parties do have contracts addressing the issue.

Moreover, in another decision issued last year, *Lindauer v. Williams Production RMT Company*, 381 P.3d 378 (Colo. App. 2016), the Court of Appeals stated, in accordance with *Grynberg*, that the Act:

> ... prescribes the timing of when royalty payments must be made, and the information that must be provided by the payor. It does not address the propriety of deduction of expenses. See Grynberg v. Colo. Oil & Gas Comm'n, 7 P.3d 1060, 1063 (Colo. App. 1999) (section 34-60-118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment.)

Id. at 386 (emphasis added).

Finally, the Tenth Circuit Court of Appeals, in a 2000 decision issued after *Grynberg* was decided, cited to *Grynberg* in holding that "a Colorado litigant alleging a breach of an oil and gas royalty agreement...must assert his claim in a court of law..." *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1157 (10th Cir. 2000).

The decisions in *Grant Brothers*, *Lindauer*, and *Atlantic Richfield* confirm the holding in *Grynberg*, and also confirm that the Commission does not have jurisdiction over Airport Land's claims against Antero and Ursa.

15. Although Judge Lynch and another judge of the Garfield County District Court have issued orders dismissing royalty owners' royalty underpayment claims against gas producers for failure to exhaust remedies with the Commission, other Colorado district court judges, in accordance with *Grynberg*, have reached the opposite result, and have ruled that royalty owners are not required to exhaust their administrative remedies with the Commission. In three recent Colorado district court decisions, the district court denied the oil and gas producers' motions to dismiss the royalty owners' post-production cost royalty underpayment claims for failure to exhaust administrative remedies with the Commission. Those decisions are attached hereto as **Exhibits 11, 12, and 13.**

16. As previously determined by the Commission and confirmed in *Grynberg,* the Commission's jurisdiction extends to determining the date a royalty payment is due based on reported production dates, when there is no dispute regarding the amounts of royalties due and owing. The Act does not authorize the Commission to examine competing arguments regarding the propriety of various post-production cost deductions, or to determine the point of marketability for various natural gas products. The Commission has long held this type of contract analysis and interpretation exceeds the scope of Commission jurisdiction (Exs. 7 and 8), and the *Grynberg* decision affirms the Commission's ruling. (Ex. 6).

17. Indeed, in the twenty years which have elapsed since the Commission entered its Order in November 1997 determining that it had no jurisdiction to resolve the *Grynberg* post-production cost contract dispute, the Commission has never issued any order which contradicts its jurisdictional determination in *Grynberg*, and has never accepted jurisdiction to decide a post-production cost royalty underpayment dispute between a royalty owner and a gas producer.

18. Notwithstanding Airport Land's jurisdictional position in connection with this Application, Airport Land provided to Antero and Ursa advance notice pursuant to § 34-60-118 (7), C.R.S., copies of which are attached as **Exhibits 14 and 15.** Ursa and Antero responded, relying extensively on their interpretation of Colorado case law, and their determination of the point of marketability, to assert that Airport Land's royalty underpayment claims against Antero and Ursa are without merit. A copy of Ursa's and Antero's Response is attached as **Exhibit 16.**

WHEREFORE, for the foregoing reasons, Airport Land requests that the Commission enter its Order finding that the Commission does not have jurisdiction over Airport Land's royalty underpayment claims against Antero and Ursa, and that such royalty underpayment claims should be determined in a district court lawsuit. Airport Land also requests that a hearing on this issue be scheduled at the earliest possible date.

If the Commission decides to exercise jurisdiction over Airport Land's royalty underpayment claims against Antero and Ursa as set forth in Airport Land's Complaint (Ex. 3), then Airport Land will request the Commission to compel Antero, Ursa, and certain third parties to produce relevant documents and electronic data, and to set the parties' dispute for a hearing. Airport Land estimates that a hearing on the merits of its royalty underpayment claims would take approximately five days.

Dated: October 5, 2017

/s/ Stacy A. Burrows
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Business Center, Suite A
Aspen, Colorado 81611

VERIFICATION OF APPLICATION

George A. Barton, being first duly sworn upon his oath, deposes and states that he is an attorney authorized by Airport Land Partners, Ltd. to submit this verified application to the Commission, and that he is the lead attorney for Airport Land Partners, Ltd. George A. Barton has knowledge of the facts and the statements of law set forth in Airport Land Partners, Ltd.'s Application, and such facts and statements of law are true and correct to the best of the undersigned's knowledge, information and belief.

George A. Barton
Attorney for Applicant
Airport Land Partners, Ltd.

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CERTIFICATE OF MAILING

The undersigned certifies that a copy of the Verified Application was mailed to the parties listed below on October 6, 2017 via United States Mail, postage prepaid.

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ATTORNEYS FOR APPLICANT AIRPORT LAND PARTNERS, LTD.

EXHIBIT 1

RECORDED 12:48 O'CLOCK P.M. REC # 461842
MILDRED ALSDORF, GARFIELD COUNTY CLERK

PRODUCERS 88-PAID UP APR 10 1994
Rev. 5-60, No. 2

BOOK 0899 PAGE 076

OIL AND GAS LEASE

AGREEMENT, Made and entered into the 24th day of January, 19 94, by and between Rifle Land Associates, Ltd., a Limited Partnership whose post office address is 165 S. Union Blvd., Suite 758, Lakewood Colorado 80228 hereinafter called Lessor (whether one or more) and Snyder Oil Corporation whose post office address is 1625 Broadway, Suite 2200, Denver, CO 80202 hereinafter called Lessee:

WITNESSETH, That the Lessor, for and in consideration of *Ten and More* DOLLARS cash in hand paid, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained, has granted, demised, leased and let, and by these presents does grant, demise, lease and let exclusively unto the said Lessee, the land hereinafter described, with the exclusive right for the purpose of mining, exploring by geophysical and other methods and operating for and producing therefrom oil and all gas of whatsoever nature or kind, with rights of way and easements for laying pipe lines, and erection of structures thereon to produce, save and take care of said products, all that certain tract of land situated in the County of Garfield State of Colorado described as follows, to-wit:

See EXHBIT "A" attached hereto and made a part hereof.

together with any reversionary rights therein, and together with all strips, or parcels of land, (not, however, to be construed to include parcels comprising a regular 40-acre legal subdivision or lot of approximately corresponding size) adjoining or contiguous to the above described land and owned or claimed by lessor, and containing 1324.15 acres, more or less.

1. It is agreed that this lease shall remain in force for a term of ~~XXX~~ Four (4) CEC years from this date and as long thereafter as oil or gas of whatsoever nature or kind is produced from said leased premises or on acreage pooled therewith, or drilling operations are continued as hereinafter provided. If, at the expiration of the primary term of this lease, oil or gas is not being produced on the leased premises or on acreage pooled therewith but Lessee is then engaged in drilling or re-working operations thereon, then this lease shall continue in force so long as operations are being continuously prosecuted on the leased premises or on acreage pooled therewith; and operations shall be considered to be continuously prosecuted if not more than ninety (90) days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well. If after discovery of oil or gas on said land or on acreage pooled therewith, the production thereof should cease from any cause after the primary term, this lease shall not terminate if Lessee commences additional drilling or re-working operations within ninety (90) days from date of cessation of production or from date of completion of dry hole. If oil or gas shall be discovered and produced as a result of such operations at or after the expiration of the primary term of this lease, this lease shall continue in force so long as oil or gas is produced from the leased premises or on acreage pooled therewith.

2. This is a PAID-UP LEASE. In consideration of the down cash payment, Lessor agrees that Lessee shall not be obligated, except as otherwise provided herein, to commence or continue any operations during the primary term. Lessee may at any time or times during or after the primary term surrender this lease as to all or any portion of said land and as to any strata or stratum by delivering to Lessor or by filing for record a release or releases, and be relieved of all obligation thereafter accruing as to the acreage surrendered.

3. In consideration of the premises the said Lessee covenants and agrees:

1st. To deliver to the credit of Lessor, free of cost, in the pipe line to which Lessee may connect wells on said land, the equal one-eighth (1/8) part of all oil produced and saved from the leased premises.

2nd. To pay Lessor one-eighth (1/8) of the gross proceeds each year, payable quarterly, for the gas from each well where gas only is found, while the same is being used off the premises, and if used in the manufacture of gasoline a royalty of one-eighth (1/8), payable monthly at the prevailing market rate for gas.

3rd. To pay Lessor for gas produced from any oil well and used off the premises or in the manufacture of gasoline or any other product a royalty of one-eighth (1/8) of the proceeds, at the mouth of the well, payable monthly at the prevailing market rate.

4. Where gas from a well capable of producing gas is not sold or used, Lessee may pay or tender as royalty to the royalty owners One Dollar per year per net royalty acre retained hereunder, such payment or tender to be made on or before the anniversary date of this lease next ensuing after the expiration of 90 days from the date such well is shut in and thereafter on or before the anniversary date of this lease during the period such well is shut in. If such payment or tender is made, it will be considered that gas is being produced within the meaning of this lease.

5. If said Lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties (including any shut-in gas royalty) herein provided for shall be paid the Lessor only in the proportion which Lessor's interest bears to the whole and undivided fee.

6. Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for Lessee's operation thereon, except water from the wells of Lessor.

7. When requested by Lessor, Lessee shall bury Lessee's pipe line below plow depth.

8. No well shall be drilled nearer than 200 feet to the house or barn now on said premises without written consent of Lessor.

9. Lessee shall pay for damages caused by Lessee's operations to growing crops on said land.

10. Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

11. The rights of Lessor and Lessee hereunder may be assigned in whole or part. No change in ownership of Lessor's interest (by assignment or otherwise) shall be binding on Lessee until Lessee has been furnished with notice, consisting of certified copies of all recorded instruments or documents and other information necessary to establish a complete chain of record title from Lessor, and then only with respect to payments thereafter made. No other kind of notice, whether actual or constructive, shall be binding on Lessee. No present or future division of Lessor's ownership as to different portions or parcels of said land shall operate to enlarge the obligations or diminish the rights of Lessee, and all Lessee's operations may be conducted without regard to any such division. If all or any part of this lease is assigned, no leasehold owner shall be liable for any act or omission of any other leasehold owner.

12. Lessee, at its option, is hereby given the right and power at any time and from time to time as a recurring right, either before or after production, as to all or any part of the land described herein and as to any one or more of the formations hereunder, to pool or unitize the leasehold estate and the mineral estate covered by this lease with other land, lease or leases in the immediate vicinity for the production of oil and gas, or separately for the production of either, when in Lessee's judgment it is necessary or advisable to do so, and irrespective of whether authority similar to this exists with respect to such other land, lease or leases. Likewise, units previously formed to include formations not producing oil or gas, may be reformed to exclude such non-producing formations. The forming or reforming of any unit shall be accomplished by Lessee executing and filing of record a declaration of such unitization or reformation, which declaration shall describe the unit. Any unit may include land upon which a well has theretofore been completed or upon which operations for drilling have theretofore been commenced. Production, drilling or reworking operations or a well shut in for want of a market anywhere on a unit which includes all or a part of this lease shall be treated as if it were production, drilling or reworking operations or a well shut in for want of a market under this lease. In lieu of the royalties elsewhere herein specified, including shut-in gas royalties, Lessor shall receive on production from the unit so pooled royalties only on the portion of such production allocated to this lease; such allocation shall be that proportion of the unit production that the total number of surface acres covered by this lease and included in the unit bears to the total number of surface acres in such unit. In addition to the foregoing, Lessee shall have the right to unitize, pool, or combine all or any part of the above described lands as to one or more of the formations thereunder with other lands in the same general area by entering into a cooperative or unit plan of development or operation approved by any governmental authority and, from time to time, with like approval, to modify, change or terminate any such plan or agreement and, in such event, the terms, conditions and provisions of this lease shall be deemed modified to conform to the terms, conditions, and provisions of such approved cooperative or unit plan of development or operation and, particularly, all drilling and development requirements of this lease, express or implied, shall be satisfied by compliance with the drilling and development requirements of such plan or agreement, and this lease shall not terminate or expire during the life of such plan or agreement. In the event that said above described lands or any part thereof, shall hereafter be operated under any such cooperative or unit plan of development or operation whereby the production therefrom is allocated to different portions of the land covered by said plan, then the production allocated to any particular tract of land shall, for the purpose of computing the royalties to be paid hereunder to Lessor, be regarded as having been produced from the particular tract of land to which it is allocated and not to any other tract of land; and the royalty payments to be made hereunder to Lessor shall be based upon production only as so allocated. Lessor shall formally express Lessor's consent to any cooperative or unit plan of development or operation adopted by Lessee and approved by any governmental agency by executing the same upon request of Lessee.

13. All express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules or Regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or if such failure is the result of, any such Law, Order, Rule or Regulation.

14. Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the Lessee shall have the right at any time to redeem for Lessor, by payment, any mortgages, taxes or other liens on the above described lands, in the event of default of payment by Lessor and be subrogated to the rights of the holder thereof, and the undersigned Lessors, for themselves and their heirs, successors and assigns, hereby surrender and release all right of dower and homestead in the premises described herein, insofar as said right of dower and homestead may in any way affect the purposes for which this lease is made, as recited herein.

15. Should any one or more of the parties hereinabove named as Lessor fail to execute this lease, it shall nevertheless be binding upon all such parties who do execute it as Lessor. The word "Lessor," as used in this lease, shall mean any one or more or all of the parties who execute this lease as Lessor. All the provisions of this lease shall be binding on the heirs, successors and assigns of Lessor and Lessee.

IN WITNESS WHEREOF, this instrument is executed as of the date first above written.

Rifle Land Associates, Ltd., a Limited Partnership

BY: Charles E. Chancellor
Charles E. Chancellor, General Partner

Snyder Oil Corp
1625 Broadway #2200
Denver 80202
25

STATE OF COLORADO
COUNTY OF Jefferson } ss.

Oklahoma, Kansas, New Mexico, Wyoming, Montana, Colorado, Utah, Nebraska, North Dakota, South Dakota
ACKNOWLEDGMENT—INDIVIDUAL

BEFORE ME, the undersigned, a Notary Public, in and for said County and State, on this FEB 4 1994 day of ________, 19 94, personally appeared Charles E. Chancellor, a General Partner of Rifle Land Associates, Ltd., a Limited Partnership and ________, to me known to be the identical person ________ described in and who executed the within and foregoing instrument of writing and acknowledged to me that be duly executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

My Commission Expires 7-31-94

Phyllis E. Davis
Notary Public.

Address: ~~758 UNION TOWER~~
165 S. UNION BOULEVARD
LAKEWOOD, CO 80228

STATE OF ________
COUNTY OF ________ } ss.

Oklahoma, Kansas, New Mexico, Wyoming, Montana, Colorado, Utah, Nebraska, North Dakota, South Dakota
ACKNOWLEDGMENT—INDIVIDUAL

BEFORE ME, the undersigned, a Notary Public, in and for said County and State, on this ________ day of ________, 19____, personally appeared ________ and ________, to me known to be the identical person ________ described in and who executed the within and foregoing instrument of writing and acknowledged to me that ________ duly executed the same as ________ free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

My Commission Expires ________

________ Notary Public.

Address: ________

STATE OF ________
COUNTY OF ________ } ss.

ACKNOWLEDGMENT (For use by Corporation)

On this ________ day of ________, A.D. 19____, before me personally appeared ________ to me personally known, who, being by me duly sworn, did say that he is the ________ of ________ and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said ________ acknowledged said instrument to be free act and deed of said corporation.

Witness my hand and seal this ________ day of ________, A.D. 19____.

________ Notary Public.

(SEAL)

Address: ________

My Commission expires ________

No. ________

FROM

TO

Dated ________, 19____

No. Acres ________ County, ________

Term ________

This instrument was filed for record on the ________ day of ________, 19____, at ________ o'clock ________ M., and duly recorded in Volume ________ Page ________ of the records of this office.

________ County Clerk.

By ________ Deputy.

When recorded return to

EXHIBIT "A"

EXHIBIT "A" attached to and made a part of that certain Oil and Gas Lease dated January 24th, 1994 by and between the Rifle Land Associates, Ltd. as LESSOR and Snyder Oil Corporation as LESSEE.

TOWNSHIP 6 SOUTH, RANGE 92 WEST, 6th P.M.
Section 18: Lot 2, Lot 3, Lot 4

TOWNSHIP 6 SOUTH, RANGE 93 WEST, 6th P.M.
Section 13: Lot 2, SE/4NW/4, S/2NE/4, S/2; excepting a parcel of land more particularly described as follows: Beginning at corner No. 1, whence the East quarter corner of said Section 13 bears South 5 degrees 43' East a distance of 418.70 feet; thence South 83 degrees 39' West, 2,520 feet to corner No. 2; thence South 28 degrees 39' West, 366.20 feet to corner No. 3; thence North 89 degrees 21' West, 2,391.20 feet to corner No. 4; thence South 79 degrees 50' West, 152.00 feet to corner No. 5, a point on the West line of said Section 13; thence due North along said Section line 1,052.50 feet to corner No. 6, a point on the top of the bluff; thence South 75 degrees 27' East along the top of the bluff 1,496.10 feet to corner No. 7; thence North 74 degrees 32' East, 581.00 feet to corner No. 8; thence North 47 degrees 41' East, 378.70 feet to corner No. 9; thence North 71 degrees 17' East, 311.50 feet to corner No. 10; thence South 84 degrees 05' East, 437.30 feet to corner No. 11; thence North 9 degrees 52' West, 233.50 feet to corner No. 12; thence South 86 degrees 27' East, 726.40 feet to corner No. 13; thence North 67 degrees 16' East, 401.20 feet to corner No. 14; thence South 57 degrees 20' East, 324.30 feet to corner No. 15; thence South 10 degrees 10' East, 118.50 feet to corner No. 16; thence South 68 degrees 48' East, 395.40 feet to corner No. 17; thence North 83 degrees 39' East, 423.10 feet to corner No. 18; thence South 7 degrees 29' East, 500.10 feet to corner No. 1, the place of beginning.

Section 14: N/2SE/4, SE/4SE/4
Excepting a parcel of land containing 2.0 acres, more particularly described as follows; Beginning at the East quarter corner of said Section 14; thence due South 417.40 feet; thence North 45 degrees West 590.30 feet; thence East 417.40 feet to the point of beginning.

Section 23: NE/4SE/4

Section 24: N/2, NW/4SW/4, E/2SE/4

Section 25: E/2NE/4, SW/4NE/4, SE/4

LESS AND EXCEPT:

Commencing at the South One-Quarter (S. 1/4) Corner of said Section 18; said point being the True Point of Beginning; thence S. 88 degrees 22'36" W. along the South Line of said Lot 4 a distance of 1,620.91 feet to the Southwest Section Corner of said Section 18; thence S. 75 degrees 37'22" W. a distance of 939.91 feet; thence N. 85 degrees 21'39" W. a distance of 1,555.07 feet to a point on the extension of the Westerly Line of the Garfield County Airport Access Road Right-of-Way; thence N. 02 degrees 50'00" E. along said Westerly right-of-way line a distance of 1,226.48 feet to a point on the South Property Line of the Garfield County Airport; thence S. 87 degrees 10'00" E. along said South Property Line a distance of 100.00 feet to the Easterly Line of said Access Road; thence S. 02 degrees 50'00" W. along said Easterly Line a distance of 1,129.63 feet; thence S. 85 degrees 21'39" E. a distance of 1,441.42 feet; thence N. 75 degrees 37'22" E. a distance of 934.34 feet; thence N. 88 degrees 22' 36" E. a distance of 1,412.51 feet; thence along a curve to the left, having a central angle of 39 degrees 37'57" and a radius of 350.00 feet an arc distance of 242.10 feet to a point on the East Line of said Lot 4; thence S. 00 degrees 27'29" E. along said East Line a distance of 180.48 feet to the True Point of Beginning.

EXHIBIT "A"

LESS AND EXCEPT:

A tract of land situated in the SW/4NE/4, NW/4SE/4 and NE/4SW/4 of Section 13, beginning at Corner No. 3 of the tract of land described in Document No. 159053 at Page 221 in Book 190 of the records of the Clerk and Recorder of Garfield County, Colorado, whence the place, as described in above document number description, for the East 1/4 Corner of said Section 13 bears N. 86 degrees 09' E. 2,727.98 feet; thence North 28 degrees 39' E. 366.20 feet along the line and fence between Corner No. 3 and Corner No. 2 as described in the above document No. 159053; thence N. 83 degrees 39' E. 647.93 feet along the line and fence between Corner No. 2 and Corner No. 1 as described in the above Document No. 159053; thence S. 28 degrees 39' W. 455.62 feet; thence N. 89 degrees 21' W. 601.11 feet to Corner No. 3, as described in above Document No. 159053, the point of beginning.

LESS AND EXCEPT:

A parcel of land situated in the Northwest One-Quarter (NW/4) of Section 24, and in the Southwest One-Quarter (SW/4) of Section 13, more particularly described as follows:

Beginning at the Northwest Corner of said Section 24; thence N. 89 degrees 51'14" E. along the North line of said Section 24 a distance of 917.18 feet to the True Point of Beginning; thence N. 14 degrees 21'14" E. a distance of 273.71 feet to a point on the South Right of Way line of County Road 352; thence along said line S. 74 degrees 56'06" E. a distance of 93.36 feet to a point of curve to the left; thence along said curve having a radius of 7,417.42 feet and a central angle of 03 degrees 06'36" an arc length of 402.62 feet to a point of tangent; thence S. 78 degrees 02'42" E. a distance of 413.89 feet; thence leaving said line S. 14 degrees 21'14" W. a distance of 546.16 feet; thence S. 60 degrees 10'30" E. a distance of 1,187.61 feet; thence S. 82 degrees 25'17" W. a distance of 2,214.24 feet; thence N. 14 degrees 21'14" E. a distance of 1,394.20 feet to the True point of Beginning.

LESS AND EXCEPT:

A tract being more particularly described as follows:

All of Lot 2, in the SE/4 of the NW/4, and the SW/4 of the NE/4 of Section 13 Northerly and Easterly of and adjacent to the following described line; Beginning at a point from which the SE corner of Sec. 13 bears S. 25 degrees 04'15" E., a distance of 4,366.3 feet;

1. Thence S. 17 degrees 28' W. a distance of 157.7 feet to a point on the northerly line of that tract of land as recorded in Book 221 on Page 190 of the Garfield County records;
2. Thence along said northerly line, N. 86 degrees 27' W., a distance of 403.5 feet;
3. Thence continuing along said northerly line, S. 9 degrees 52' E., a distance of 233.5 feet;
4. Thence continuing along said northerly line, N. 84 degrees 05' W., a distance of 437.3 feet;
5. Thence continuing along said northerly line S. 71 degrees 17' W., a distance of 311.5 feet;
6. Thence continuing along said northerly line, S. 47 degrees 41' W., a distance of 124.8 feet;
7. Thence N. 55 degrees 10'30" W. a distance of 398.6 feet;
8. Thence S. 89 degrees 14'30" W. a distance of 518.0 feet;
9. Thence S. 89 degrees 57'30" W. a distance of 305.9 feet;
10. Thence N. 89 degrees 32' W. a distance of 1,053.9 feet;
11. Thence S. 9 degrees 03' W. a distance of 100.2 feet, more or less, to the point of beginning.

Anything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS LEASE, IT IS SPECIFICALLY UNDERSTOOD THAT NO EXPLORATION, DRILLING, NOR MINING OF OIL AND GAS, OR OTHER MINERALS, OR ANY SURFACE OPERATIONS WHATSOEVER OF ANY KIND SHALL BE CONDUCTED UPON THE SURFACE OF THE ABOVE DESCRIBED LAND WITHOUT THE PRIOR WRITTEN CONSENT OF LESSOR. IT IS FURTHER UNDERSTOOD THAT SAID PRIOR WRITTEN CONSENT SHALL NOT BE UNREASONABLY WITHHELD.

Signed for Identification:

Rifle Land Associates, Ltd., a Limited Partnership

BY: Charles E. Chancellor
Charles E. Chancellor, General Partner

Reception#: 729743
07/31/2007 03:57:02 PM B: 1957 P: 0565 Jean Alberico
1 of 4 Rec Fee $21.00 Doc Fee 0.00 GARFIELD COUNTY CO

ASSIGNMENT OF OVERRIDING ROYALTY INTEREST

THIS ASSIGNMENT OF OVERRIDING ROYALTY INTEREST ("Assignment"), dated effective July 16, 2007 at 7:00 a.m. Mountain Time (the "Effective Time"), is from **Antero Resources Piceance Corporation**, 1625 17th Street, Suite 300, Denver, Colorado 80202 ("Assignor") to **Airport Land Partners, Limited**, 312 Aspen Airport Business Center, Suite A, Aspen, CO 81611 ("Assignee").

For $100.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby sells, assigns, transfers, grants, bargains and conveys to Assignee an overriding royalty interest ("ORI") equal to 5% in the lease described in Exhibit A attached hereto and incorporated by reference ("Lease"); further, if any Lease covers less than the entire mineral estate in the lands covered by such Lease, then the ORI with respect to such Lease shall be reduced in the same proportion that the portion of the mineral estate covered thereby bears to the entire mineral estate. The ORI shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the ORI burden is calculated and paid, and as part of that calculation, the ORI shall bear the same costs and expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease.

This Assignment and the ORI so assigned are made subject to the following terms and conditions:

A. This Assignment is being made pursuant to the terms of the Lease and any assignments under with the Lease may have been acquired by Assignor. All capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to them in the Lease. If there is a conflict between the terms of this Assignment and the terms of the Lease and any assignments under with the Lease may have been acquired, the terms of the Lease and any assignments under with the Lease may have been acquired shall control in all respects. The Assignor and Assignee intend that the terms of the Lease remain separate and distinct from and not merge into the terms of this Assignment.

B. Any references herein to liens, encumbrances, burdens, defects and other matters shall not be deemed to ratify or create any rights in third parties or merge with, modify or limit the rights of Assignor or Assignee, as between themselves, as set forth in the Lease or other documents executed in connection therewith.

C. This Assignment binds and inures to the benefit of Assignor and Assignee and their respective successors and assigns, and this ORI and all other terms and conditions of this Assignment shall apply to any and all extension, renewal and substitute leases obtained by Assignor, its successors or assigns on the Lease described herein.

D. It is understood and agreed that Assignor shall have the right to pool the oil and gas Lease and lands covered hereby, or any portion thereof, with other lands and leases into voluntary units, or into units as established by any governmental authority having jurisdiction, and if the Lease, and the lands covered thereby, or any part thereof are pooled accordingly, then the ORI herein conveyed shall be reduced in the same proportion that the acreage burdened by the ORI bears to all the acreage included in any pooled unit.

E. This Assignment is expressly made subject to the <u>Term Assignment of Oil and Gas Leases</u> with EnCana Oil and Gas (USA) Inc. recorded at Book 1768, Page 903 of the official records of Garfield County, Colorado. Assignee expressly acknowledges that Assignee's rights in the Lease is by virtue of such assignment and that pursuant to same, Assignors rights as to all or part of the Lease may be reassigned to EnCana Oil and Gas (USA) Inc. in which case the overriding royalty assigned hereunder as to such reassigned lands will expire and be of no further force and effect. It is understood that in no way is this Assignment to be interpreted as increasing the royalty payable under the Lease.

F. This Assignment of Overriding Royalty Interest is made without warranty of title, express or implied, except as to parties claiming by, through or under Assignor, but not otherwise.

Return to: Antero Resources
PO Box 1314
Glenwood Springs, CO 81601

Reception#: 729743
07/31/2007 03:57:02 PM B: 1957 P: 0566 Jean Alberico
2 of 4 Rec Fee:$21.00 Doc Fee:0.00 GARFIELD COUNTY CO

EXECUTED on the dates contained in the acknowledgments of this Assignment, to be effective for all purposes as of the Effective Time.

ASSIGNOR:

ANTERO RESOURCES PICEANCE CORPORATION

By: ______________________
Brian A. Kuhn, Vice President

ASSIGNEE:

AIRPORT LAND PARTNERS, LIMITED

By: Robert A. Hewer
General Partner

Reception#: 729743
07/31/2007 03:57:02 PM B: 1957 P: 0567 Jean Alberico
3 of 4 Rec Fee:$21.00 Doc Fee:0.00 GARFIELD COUNTY CO

ACKNOWLEDGEMENTS

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

This instrument was acknowledged before me on this the 17th day of July, 2007, by Brian A. Kuhn, Vice President of Antero Resources Piceance Corporation, a Delaware corporation, on behalf of said corporation.

Mandy Payne
NOTARY PUBLIC
STATE OF COLORADO
My comm. exp. 1-10-2011

Witness my hand and official seal.
My commission expires: 1-10-2011

Mandy Payne
Notary Public

STATE OF COLORADO)
) ss.
COUNTY OF ~~GARFIELD~~ Pitkin)

This instrument was acknowledged before me on this the 18th day of July, 2007, by Robert Howard of Airport Land Partners, Limited, on behalf of said company.

Witness my hand and official seal.
My commission expires: 11-16-09

Kathy Carpenter
Notary Public

NOTARY PUBLIC
KATHY CARPENTER
STATE OF COLORADO

Reception#: 729743
07/31/2007 03:57:02 PM B 1957 P: 0568 Jean Alberico
4 of 4 Rec Fee $21.00 Doc Fee:0.00 GARFIELD COUNTY CO

EXHIBIT A

Date: January 24, 1994
Lessor: Rifle Land Associates, Ltd, a Limited Partnership
Lessee: Snyder Oil Corporation
Recording Information: Book 899, Page 76
Description:

T6S-92W, Garfield County, CO
Sec. 18: Lot 2, Lot 3, & Lot 4

T6S-93W, Garfield County, CO
Sec. 13: Lot 2 (39.50), SE/4 NW/4, S/2 NE/4, S/2;
EXCEPTING a parcel of land more particularly described as follows: Beginning at corner No. 1, whence the East quarter corner of said Section 13 bears South 5° 43' East a distance of 418.70 feet; thence South 83° 39' West a distance of 2,520.00 feet to corner No. 2; thence South 28° 39' West a distance of 366.20 feet to corner No. 3; thence North 89° 21' West a distance of 2,391.20 feet to corner No. 4; thence South 79° 50' West a distance of 152.00 feet to corner No. 5, a point on the West line of said Section 13; thence due North along said Section line a distance of 1,052.50 feet to corner No. 6, a point on the top of the bluff; thence South 75° 27' East along the top of the bluff a distance of 1,496.10 feet to corner No. 7; thence North 74° 32' East a distance of 581.00 feet to corner No. 8; thence North 47° 41' East a distance of 378.70 feet to corner No. 9; thence North 71° 17' East a distance of 311.50 feet to corner No. 10; thence South 84° 05' East a distance of 437.30 feet to corner No. 11; thence North 9° 52' West a distance of 233.50 feet to corner No. 12; thence South 86° 27' East a distance of 726.40 feet to corner No. 13; thence North 67° 16' East a distance of 401.20 feet to corner No. 14; thence South 57° 20' East a distance of 324.30 feet to corner No. 15; thence South 10° 10' East a distance of 118.50 feet to corner No. 16; thence South 68° 48' East a distance of 395.40 feet to corner No. 17; thence North 83° 39' East a distance of 423.10 feet to corner No. 18; thence South 7° 29' East a distance of 500.10 feet to corner No. 1, the place of beginning.

Sec. 14: NW/4 SE/4, SE/4 SE/4 & NE/4 SE/4, EXCEPTING a parcel of land containing 2.0 acres, more particularly described as follows: Beginning at the East quarter corner of said Section 14; thence due South 417.40 feet; thence North 45° West a distance of 590.30 feet; thence East a distance of 417.40 feet to the point of beginning

EXHIBIT 2

Reception#: 729743
07/31/2007 03 57:02 PM B: 1957 P. 0565 Jean Alberico
1 of 4 Rec Fee $21.00 Doc Fee 0.00 GARFIELD COUNTY CO

ASSIGNMENT OF OVERRIDING ROYALTY INTEREST

THIS ASSIGNMENT OF OVERRIDING ROYALTY INTEREST ("Assignment"), dated effective July 16, 2007 at 7:00 a.m. Mountain Time (the "Effective Time"), is from **Antero Resources Piceance Corporation**, 1625 17th Street, Suite 300, Denver, Colorado 80202 ("Assignor") to **Airport Land Partners, Limited**, 312 Aspen Airport Business Center, Suite A, Aspen, CO 81611 ("Assignee").

For $100.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby sells, assigns, transfers, grants, bargains and conveys to Assignee an overriding royalty interest ("ORI") equal to 5% in the lease described in Exhibit A attached hereto and incorporated by reference ("Lease"); further, if any Lease covers less than the entire mineral estate in the lands covered by such Lease, then the ORI with respect to such Lease shall be reduced in the same proportion that the portion of the mineral estate covered thereby bears to the entire mineral estate. The ORI shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the ORI burden is calculated and paid, and as part of that calculation, the ORI shall bear the same costs and expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease.

This Assignment and the ORI so assigned are made subject to the following terms and conditions:

A. This Assignment is being made pursuant to the terms of the Lease and any assignments under with the Lease may have been acquired by Assignor. All capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to them in the Lease. If there is a conflict between the terms of this Assignment and the terms of the Lease and any assignments under with the Lease may have been acquired, the terms of the Lease and any assignments under with the Lease may have been acquired shall control in all respects. The Assignor and Assignee intend that the terms of the Lease remain separate and distinct from and not merge into the terms of this Assignment.

B. Any references herein to liens, encumbrances, burdens, defects and other matters shall not be deemed to ratify or create any rights in third parties or merge with, modify or limit the rights of Assignor or Assignee, as between themselves, as set forth in the Lease or other documents executed in connection therewith.

C. This Assignment binds and inures to the benefit of Assignor and Assignee and their respective successors and assigns, and this ORI and all other terms and conditions of this Assignment shall apply to any and all extension, renewal and substitute leases obtained by Assignor, its successors or assigns on the Lease described herein.

D. It is understood and agreed that Assignor shall have the right to pool the oil and gas Lease and lands covered hereby, or any portion thereof, with other lands and leases into voluntary units, or into units as established by any governmental authority having jurisdiction, and if the Lease, and the lands covered thereby, or any part thereof are pooled accordingly, then the ORI herein conveyed shall be reduced in the same proportion that the acreage burdened by the ORI bears to all the acreage included in any pooled unit.

E. This Assignment is expressly made subject to the <u>Term Assignment of Oil and Gas Leases</u> with EnCana Oil and Gas (USA) Inc. recorded at Book 1768, Page 903 of the official records of Garfield County, Colorado. Assignee expressly acknowledges that Assignee's rights in the Lease is by virtue of such assignment and that pursuant to same, Assignors rights as to all or part of the Lease may be reassigned to EnCana Oil and Gas (USA) Inc. in which case the overriding royalty assigned hereunder as to such reassigned lands will expire and be of no further force and effect. It is understood that in no way is this Assignment to be interpreted as increasing the royalty payable under the Lease.

F. This Assignment of Overriding Royalty Interest is made without warranty of title, express or implied, except as to parties claiming by, through or under Assignor, but not otherwise.

Return to: Antero Resources
PO Box 1214
Glenwood Springs, CO 81601

RNL

EXECUTED on the dates contained in the acknowledgments of this Assignment, to be effective for all purposes as of the Effective Time.

ASSIGNOR:

ANTERO RESOURCES PICEANCE CORPORATION

By: ______________________
Brian A. Kuhn, Vice President

ASSIGNEE:

AIRPORT LAND PARTNERS, LIMITED

By: Robert A. Hawn
General Partner

RAH

Reception#: 729743
07/31/2007 03:57:02 PM B: 1957 P: 0667 Jean Alberico
3 of 4 Rec Fee $21.00 Doc Fee 0.00 GARFIELD COUNTY CO

ACKNOWLEDGEMENTS

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

This instrument was acknowledged before me on this the 17th day of July, 2007, by Brian A. Kuhn, Vice President of Antero Resources Piceance Corporation, a Delaware corporation, on behalf of said corporation.

Mandy Payne
NOTARY PUBLIC
STATE OF COLORADO
My comm. exp. 1-10-2011

Witness my hand and official seal.
My commission expires: 1-10-2011

Mandy Payne
Notary Public

STATE OF COLORADO)
) ss.
COUNTY OF ~~GARFIELD~~ Pitkin)

This instrument was acknowledged before me on this the 18th day of July, 2007, by Robert Howard of Airport Land Partners, Limited, on behalf of said company.

Witness my hand and official seal.
My commission expires: 11-16-09

Kathy Carpenter
Notary Public

NOTARY PUBLIC
KATHY CARPENTER
STATE OF COLORADO

Reception#: 729743
07/31/2007 03:57:02 PM B: 1957 P: 0568 Jean Alberico
4 of 4 Rec Fee $21.00 Doc Fee 0.00 GARFIELD COUNTY CO

EXHIBIT A

Date: January 24, 1994
Lessor: Rifle Land Associates, Ltd, a Limited Partnership
Lessee: Snyder Oil Corporation
Recording Information: Book 899, Page 76
Description:

T6S-92W, Garfield County, CO
Sec. 18: Lot 2, Lot 3, & Lot 4

T6S-93W, Garfield County, CO
Sec. 13: Lot 2 (39.50), SE/4 NW/4, S/2 NE/4, S/2;
EXCEPTING a parcel of land more particularly described as follows: Beginning at corner No. 1, whence the East quarter corner of said Section 13 bears South 5° 43' East a distance of 418.70 feet; thence South 83° 39' West a distance of 2,520.00 feet to corner No. 2; thence South 28° 39' West a distance of 366.20 feet to corner No. 3; thence North 89° 21' West a distance of 2,391.20 feet to corner No. 4; thence South 79° 50' West a distance of 152.00 feet to corner No. 5, a point on the West line of said Section 13; thence due North along said Section line a distance of 1,052.50 feet to corner No. 6, a point on the top of the bluff; thence South 75° 27' East along the top of the bluff a distance of 1,496.10 feet to corner No. 7; thence North 74° 32' East a distance of 581.00 feet to corner No. 8; thence North 47° 41' East a distance of 378.70 feet to corner No. 9; thence North 71° 17' East a distance of 311.50 feet to corner No. 10; thence South 84° 05' East a distance of 437.30 feet to corner No. 11; thence North 9° 52' West a distance of 233.50 feet to corner No. 12; thence South 86° 27' East a distance of 726.40 feet to corner No. 13; thence North 67° 16' East a distance of 401.20 feet to corner No. 14; thence South 57° 20' East a distance of 324.30 feet to corner No. 15; thence South 10° 10' East a distance of 118.50 feet to corner No. 16; thence South 68° 48' East a distance of 395.40 feet to corner No. 17; thence North 83° 39' East a distance of 423.10 feet to corner No. 18; thence South 7° 29' East a distance of 500.10 feet to corner No. 1, the place of beginning.

Sec. 14: NW/4 SE/4, SE/4 SE/4 & NE/4 SE/4, EXCEPTING a parcel of land containing 2.0 acres, more particularly described as follows: Beginning at the East quarter corner of said Section 14; thence due South 417.40 feet; thence North 45° West a distance of 590.30 feet; thence East a distance of 417.40 feet to the point of beginning

EXHIBIT 3

<table>
<tr><td>DISTRICT COURT, GARFIELD COUNTY, COLORADO

109 8th Street, Suite 104
Glenwood Springs, CO 81601
<hr>Plaintiff: AIRPORT LAND PARTNERS, LTD.

v.

Defendants: ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE, LLC, and URSA OPERATING COMPANY, LLC
<hr>Attorneys for Airport Land Partners, Ltd.

Stacy A. Burrows, Co. Bar No. 49199
George A. Barton, Mo. Bar No. 26249
Law Offices of George A. Barton, P.C.
7227 Metcalf Ave., Suite 301
Overland Park, KS 66204
Phone: (816) 300-6250
Fax: (816) 300-6259
Email: stacy@georgebartonlaw.com
gab@georgebartonlaw.com

Michael Sawyer, Co. Bar No. 32313
Karp, Neu, and Hanlon, LLP
P.O. Drawer 2030
Glenwood Springs, CO 81602
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<td>DATE FILED: December 5, 2016 5:16 PM
FILING ID: DF5849173D7D2
CASE NUMBER: 2016CV30259

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<hr>Case Number:

Div./Ctrm:</td></tr>
<tr><td colspan="2">COMPLAINT AND DEMAND FOR JURY TRIAL</td></tr>
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Plaintiff Airport Land Partners, Ltd., for its complaint against Defendants Antero Resources Corporation, Antero Resources Piceance, LLC, and Ursa Operating Company, LLC, states as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Airport Land Partners, Ltd. ("Airport Land Partners") is a Colorado limited partnership, with its principal place of business at 312 Aspen Airport Business Center, Suite A, Aspen, Colorado 81611. The general partner of Airport Land Partners is Airport Business Park Corporation, which is a corporation incorporated under the laws of the state of Colorado, with its principal place of business located at 434 E. Cooper Street, Suite 202, Aspen, CO 81611.

2. Defendant Antero Resources Corporation is a Delaware corporation, with its principal place of business located at 1615 Wynkoop Street, Denver, Colorado 80202.

3. Defendant Antero Resources Piceance, LLC is a Delaware limited liability company, with its principal place of business located at 1615 Wynkoop Street, Denver, Colorado 80202. Defendants Antero Resources Corporation and Antero Resources Piceance, LLC are hereinafter collectively referred to as "Antero."

4. Defendant Ursa Operating Company, LLC ("URSA") is a Delaware limited liability company, with its principal place of business located at 1050 17th Street, Suite 2400, Denver, Colorado 80265.

5. This Court has subject matter jurisdiction over this action pursuant to Article VI, section 9 of the Colorado Constitution, which provides that the district courts shall have original jurisdiction in all civil, probate, and criminal cases.

6. This Court has personal jurisdiction over Antero pursuant to C.R.S. § 13-1-124(1), because Antero has conducted substantial business activities in the state of Colorado, and because the acts and conduct of Antero giving rise to the claims asserted in this Complaint occurred in the state of Colorado.

7. This Court has personal jurisdiction over URSA pursuant to C.R.S. § 13-1-124(1), because URSA has conducted substantial business activities in the state of Colorado, and because the acts and conduct of URSA giving rise to the claims asserted in this Complaint occurred in the state of Colorado.

8. Pursuant to C.R.C.P. 98(a), venue is proper in this Court because this is a lawsuit against Antero and URSA affecting real property mineral interests located in Garfield County, Colorado, and because Garfield County, Colorado is the county in which the subject matter of this action, or a substantial part thereof, is situated.

FACTUAL ALLEGATIONS

9. Airport Land Partners claims that Antero and URSA have underpaid the royalties owed to Airport Land Partners since November 1, 2006 on natural gas sales, including residue gas sales and natural gas liquid sales of ethane, propane, butane, isobutane and natural gasoline ("NGLs") which have been obtained from wells produced by Antero and/or URSA which are subject to the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement referenced herein.

10. On January 24, 1994, Rifle Land Associates, Ltd., as Lessor, entered into an Oil and Gas Lease and incorporated Addendum with Snyder Oil Company, as Lessee (the "1994 Lease Agreement"). The royalty provision of the 1994 Lease Agreement, at Paragraph 3, Section 2, obligates the Lessee:

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

11. The first paragraph of the Addendum to the 1994 Lease Agreement states that "[a]nything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty."

12. Sometime prior to November of 2006, Antero acquired Lessee Snyder Oil Company's interests under the 1994 Lease Agreement. Antero subsequently produced natural gas from wells subject to the 1994 Lease Agreement.

13. In 1997, subsequent to the execution of the 1994 Lease Agreement, Airport Land Partners acquired, in whole or in part, the Lessor's interests under the 1994 Lease Agreement, and since that time has had the right to be paid a specified percentage of the royalties payable to the Lessor under the 1994 Lease Agreement.

14. In addition to Airport Land Partner's rights and interests under the 1994 Lease Agreement, on July 16, 2007 Antero assigned to Airport Land Partners a five percent overriding interest in certain lands covered by the 1994 Lease Agreement. (The "5 Percent Overriding Royalty Agreement").

15. The 5 Percent Overriding Royalty Agreement states that the royalties payable under the 5 Percent Overriding Royalty Agreement "shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the [Overriding Royalty Interest] burden is calculated and paid, and as part of that calculation, the [Overriding Royalty Interest] shall bear the same costs and expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease."

16. Antero produced natural gas subject to the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement at various times since November of 2006 through December of 2012, at which time Antero sold its rights, interests, and obligations under the 1994

Lease Agreement and the 5 Percent Overriding Agreement to URSA. URSA then began producing and selling natural gas from wells which are subject to the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement.

17. Under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement, Antero and URSA have had an implied duty to market the gas produced from the wells subject to those Agreements, and to pay royalties to Airport Land Partners based upon prices received for marketable natural gas products at the location of the first commercial market.

18. The location of the first commercial market for the residue gas which came from the wells at issue is at the delivery points at various interconnects to the long distance transportation pipelines, where Antero and URSA have sold residue gas to third party purchasers who purchased such residue gas from them.

19. The location of the first commercial market for the natural gas liquids which came from the gas wells at issue is at the location where such natural gas liquids were fractionated into marketable natural liquid products, including propane, butane, isobutane, natural gasoline, and ethane, and then sold to third party purchasers for prices based upon market index prices for such natural gas liquid products, or similar prices.

20. Antero and URSA have breached their royalty payment obligations to Airport Land Partners by underpaying the royalties owed to Airport Land Partners under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement. Antero and URSA have underpaid the royalties by failing to pay Airport Land Partners royalties based upon prices received for marketable residue gas at the location of the first commercial market, as referenced above, and by failing to pay Airport Land Partners royalties for prices received for marketable natural gas

liquids – including propane, butane, isobutane, natural gasoline and ethane – at the location of the first commercial market, as referenced above.

21. Pursuant to the implied duty to market owed by Antero and URSA to Airport Land Partners, Antero and URSA have had the obligation to incur all of the post-production costs necessary to place the natural gas at issue into a condition acceptable for the commercial market, and all of the costs of delivering the marketable natural gas products to the location of the first commercial market. Airport Land Partners is not obligated to share in any of these costs. Antero and URSA have further breached their obligations under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement by improperly charging Airport Land Partners for various post-production costs necessary to place the natural gas produced from the wells at issue into a marketable condition acceptable for the commercial market, and for the costs of transporting the natural gas to the location of the first commercial market.

22. Antero and URSA have further breached their royalty payment obligations to Airport Land Partners under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement by underpaying the amount of royalties due and owing to Airport Land Partners on condensate which came from the gas wells subject to the 1994 Lease and the 5 Percent Overriding Royalty Agreement.

23. Antero and URSA have further underpaid their royalty obligations to Airport Land Partners by taking improper and/or excessive deductions for various taxes, including severance taxes, ad valorem taxes, and conservation taxes.

24. Airport Land Partners has been a putative member of the Class in the class action case filed against Antero which is captioned *Alice Colton, et al. v. Antero Resources Corporation, et al.*, Case No. 2013CV030281, District Court, Garfield County, Colorado ("the

Class Action Case"), which asserted the same claims that are being asserted in this lawsuit. Therefore, for the purposes of any applicable statute of limitations, the applicable limitations period for the claims of Airport Land Partners against Antero was tolled from the time that the complaint was filed in the Class Action Case on November 19, 2013, and at least until the court in the Class Action Case entered its order on September 26, 2016 denying plaintiffs' motion for class certification.

FIRST CLAIM FOR RELIEF
(Breach of the 1994 Lease Agreement by Antero)

25. The allegations contained in Paragraphs 1 through 24, inclusive, are restated and incorporated by reference herein.

26. Antero has breached its royalty payment obligations to Airport Land Partners under the 1994 Lease Agreement in the manner described above.

27. Airport Land Partners has sustained substantial damages resulting from Antero's breaches of its royalty payment obligations to Airport Land Partners under the 1994 Lease Agreement.

28. Airport Land Partners is entitled to a judgment in its favor and against Antero for all damages which Airport Land Partners has sustained resulting from Antero's breach of the 1994 Lease Agreement.

SECOND CLAIM FOR RELIEF
(Breach of the 1994 Lease Agreement by URSA)

29. The allegations contained in Paragraphs 1 through 28, inclusive, are restated and incorporated by reference herein.

30. URSA has breached its royalty payment obligations to Airport Land Partners under the 1994 Lease Agreement in the manner described above.

31. Airport Land Partners has sustained substantial damages resulting from URSA's breaches of its royalty payment obligations to Airport Land Partners under the 1994 Lease Agreement.

32. Airport Land Partners is entitled to a judgment in its favor and against URSA for all damages which Airport Land Partners has sustained resulting from URSA's breach of the 1994 Lease Agreement.

THIRD CLAIM FOR RELIEF
(Breach of the 5 Percent Overriding Royalty Agreement by Antero)

33. The allegations contained in Paragraphs 1 through 32, inclusive, are restated and incorporated by reference herein.

34. Antero has breached its royalty payment obligations to Airport Land Partners under the 5 Percent Overriding Royalty Agreement in the manner described above.

35. Airport Land Partners has sustained substantial damages resulting from Antero's breach of its royalty payment obligations to Airport Land Partners under the 5 Percent Overriding Royalty Agreement.

36. Airport Land Partners is entitled to a judgment in its favor and against Antero for all damages which Airport Land Partners has sustained resulting from Antero's breach of the 5 Percent Overriding Royalty Agreement.

FOURTH CLAIM FOR RELIEF
(Breach of the 5 Percent Overriding Royalty Agreement by URSA)

37. The allegations contained in Paragraphs 1 through 36, inclusive, are restated and incorporated by reference herein.

38. URSA has breached its royalty payment obligations to Airport Land Partners under the 5 Percent Overriding Royalty Agreement in the manner described above.

39. Airport Land Partners has sustained substantial damages resulting from URSA's breach of its royalty payment obligations to Airport Land Partners under the 5 Percent Overriding Royalty Agreement.

40. Airport Land Partners is entitled to a judgment in its favor and against URSA for all damages which Airport Land Partners has sustained resulting from URSA's breach of the 5 Percent Overriding Royalty Agreement.

PRAYER FOR RELIEF

WHEREFORE, Airport Land Partners prays for the following relief:

A. A judgment against Antero and URSA for damages suffered as a result of their breaches of the 1994 Lease Agreement, and the 5 Percent Overriding Royalty Agreement;

B. An award of prejudgment interest on all royalty underpayments at the Colorado statutory rate of eight percent per annum, compounded annually, pursuant to C.R.S. § 5-12-102(1)(b);

C. An award of court costs; and

D. Such further relief as the Court deems just.

JURY DEMAND

AIRPORT LAND PARTNERS DEMANDS A JURY TRIAL ON ALL ISSUES SO TRIABLE.

DATED: December 5, 2016

/s/ Stacy A. Burrows
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ATTORNEYS FOR PLAINTIFF AIRPORT LAND PARTNERS, LTD.

*Electronically filed via ICCES. Submitted by Plaintiffs' counsel who represents that a duly signed physical copy and/or original is on file at the firm.

Plaintiff's Address:

312 Aspen Airport Business Center, Suite A
Aspen, Colorado 81611

EXHIBIT 4

DATE FILED: April 12, 2017 12:13 PM
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CASE NUMBER: 2016CV30259

<table>
<tr><td>DISTRICT COURT, GARFIELD COUNTY, COLORADO

Garfield County Courthouse
109 8th Street, Suite 104
Glenwood Springs, Colorado 81601</td><td rowspan="2">

▲COURT USE ONLY ▲</td></tr>
<tr><td>Plaintiff: AIRPORT LAND PARTNERS, LTD.

v.

Defendants: ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE, LLC, and URSA OPERATING COMPANY, LLC</td></tr>
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Division: B</td></tr>
<tr><td colspan="2">DEFENDANTS' MOTION TO DISMISS</td></tr>
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Defendants Antero Resources Corporation, Antero Resources Piceance, LLC, and Ursa Operating Company (collectively, "Producers" or "Defendants") move, pursuant to

C.R.C.P. 12(b)(1), to dismiss all claims asserted by Plaintiff Airport Land Partners Ltd. ("Airport Land Partners") for lack of subject matter jurisdiction because Airport Land Partners failed to exhaust administrative remedies before the Colorado Oil and Gas Conservation Commission ("COGCC" or "Commission").

C.R.C.P. 121 § 1-15 ¶ 8 Certification: Counsel for Defendants have conferred in good faith with counsel for Plaintiff regarding this Motion. Plaintiff opposes the relief sought herein.

INTRODUCTION

Airport Land Partners' Complaint seeks an award of additional proceeds derived from the sale of oil, gas, or associated products from gas wells in Colorado. Airport Land Partners claims a right to these additional proceeds under an oil and gas lease agreement and an overriding royalty agreement. Complaint, **Exhibit 1**, ¶¶ 10-17. Under the Colorado Oil and Gas Conservation Act (the "Act"), C.R.S. § 34-60-101 to 130,[1] the Commission has jurisdiction to determine "[t]he amount of proceeds plus interest, if any, due a payee by a payer." *Id.* at 118.5(5). Under the Act, "proceeds" are funds "derived from the sale of oil, gas, or associated products from a well in Colorado." *Id.* at 118.5(1)(a). Airport Land Partners' claims could have and should have been brought before the Commission.

Under Section 118.5(5) of the Act, the sole exception to the Commission's jurisdiction over a proceeds dispute is when the *Commission* determines that "a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." Because Airport Land Partners failed to seek administrative relief, the Commission has made no such determination. Further, there is no such "bona fide dispute" concerning the

[1] For brevity, sections of the Act are referenced hereafter by section number only.

interpretation of a contract. The dispute between Airport Land Partners and Producers is not about contract terms, but about how royalties were calculated, which is a matter properly presented to the Commission.

At least two judges in this District have dismissed similar royalty disputes because plaintiffs failed to first seek relief from the Commission. This case should be dismissed on these same grounds.

FACTS

Producers are oil and natural gas production companies authorized to conduct business in the State of Colorado. Antero paid Airport Land Partners royalties on natural gas produced from Colorado wells located in Garfield County, Colorado prior to December, 2012. Ursa acquired the relevant oil and gas interests from Antero, and paid royalties to Airport Land Partners from approximately January, 2013 to the present.

Airport Land Partners filed its Complaint on December 5, 2016. **Ex. 1**. The Complaint includes claims for breach of contract arising from Producers' alleged underpayment of royalties on proceeds from the sale of oil and gas. *Id.* ¶¶ 25-40. Airport Land Partners alleges that an oil and gas lease executed on January 24, 1994 and an overriding royalty agreement executed on July 16, 2007 (collectively, the "Subject Agreements") create Producers' obligations to pay royalties. *Id.* ¶¶ 9-17. The Producers dispute that additional proceeds are due, but they do not dispute that the Subject Agreements specify how royalties are to be calculated and paid under those leases.

Airport Land Partners alleges that the 1994 oil and gas lease agreement requires Producers:

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

Id. ¶¶ 10. Airport Land Partners also asserts that the addendum to the 1994 oil and gas lease agreement provides that "[a]nything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty." *Id.* ¶ 11.

Producers do not dispute that the 1994 oil and gas lease agreement includes these royalty provisions. However, the 1994 oil and gas lease agreement is silent as to the allocation of post-production costs, therefore the implied covenant of marketability governs who bears the costs of making the gas marketable. *See id.* ¶¶ 17, 21; *Garman v. Conoco, Inc.*, 886 P.2d 652, 659 (Colo. 1994).

Finally, Airport Land Partners alleges that the 2007 overriding royalty agreement provides that royalties:

> shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the [Overriding Royalty Interest] burden is calculated and paid, and as part of that calculation, the [Overriding Royalty Interest] shall bear the same costs and expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease.

Ex. 1 ¶ 15. Producers do not dispute that the 2007 overriding royalty agreement includes this provision.

Based on these contract provisions, Airport Land Partners claims that Producers breached the Subject Agreements by: "failing to pay Airport Land Partners royalties based upon prices received for marketable residue gas at the location of the first commercial market" (*id.* ¶ 20); "failing to pay Airport Land Partners royalties for prices received for marketable natural gas liquids . . . at the location of the first commercial market" (*id.*); "improperly charging Airport Land Partners for various post-production costs necessary to place the natural gas produced from the wells at issue into a marketable condition acceptable for the commercial market, and for the costs of transporting the natural gas to the location of the first commercial market" (*id.* ¶ 21); "underpaying the amount of royalties due and owing to Airport Land Partners on condensate which came from the gas wells subject to [the Subject Agreements]" (*id.* ¶ 22); and "taking improper and/or excessive deductions for various taxes, including severance taxes, ad valorem taxes, and conservation taxes" (*id.* ¶ 23).

Before commencing suit, Airport Land Partners did not seek relief before the Commission under Section 118.5(5). Neither Ursa nor Antero ever received a COGCC Form 37 or other communication from Airport Land Partners requesting an accounting or other documentation regarding deductions or adjustments required under Section 118.5(2.5). **Exhibit 2**, Affidavit of D. Simpson ("Simpson Aff.") at ¶ 2; **Exhibit 3**, Affidavit of K. Cosgriff ("Cosgriff Aff.") at ¶ 3. Nor has Ursa or Antero received notice from the COGCC that an investigation or hearing has been requested concerning underpayment of proceeds. **Ex. 2** ¶ 3; **Ex. 3** ¶ 4.

LEGAL AUTHORITY

I. The Act Vests Jurisdiction Over Disputes for Payment of Proceeds with the Commission.

The Act is a comprehensive statute that is the primary means of regulating development, production, and utilization of gas and oil in the state of Colorado. *Oborne v. Cty. Comm'rs of Douglas Cty.*, 764 P.2d 397, 401-02 (Colo. App. 1988), *cert. denied*, 778 P.2d 1370 (Colo. 1989). The Act serves to "[s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers of a common source of oil and gas to the end that each such owner and producer . . . may obtain a just and equitable share of production therefrom."

Section 102(1)(a)(III).

The Commission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of the Act, and the Commission is authorized to make and enforce rules, regulations, and orders necessary to enforce the Act. Section 105. The Commission comprehensively regulates the related issues of oil and natural gas measurement and reporting, and the payment of proceeds to royalty owners.

The Act directs the Commission to promulgate rules for natural gas measurement and reporting:

> [T]he commission will promulgate rules to ensure the accuracy of oil and gas production reporting by establishing standards for wellhead oil and gas measurement and reporting. At a minimum, the rules will address engineering standards, heating value, specific gravity, pressure, temperature, meter certification and calibration, and methodology for sales reconciliation to wellhead meters. The rules will follow standards established by the American society for testing and materials, the American petroleum institute, the gas processors association, or other applicable standards-setting organizations, and will not affect contractual rights or obligations.

Section 106(11)(b)(II). *See also* COGCC Rule 329 (setting forth the standards for measuring gas); 2 CCR 404-1 *et seq*. (COGCC Practice and Procedures). As evidenced by these regulations, the Commission has administrative expertise in oil and gas production accounting.

The Act imposes on operators record-keeping and reporting obligations. For example, operators must keep records of the quantities of oil or natural gas produced, sold, and transported; separate measurements of production of gaseous and liquid hydrocarbons; and metering or other measures of oil, gas, or other products in pipelines, gathering systems, loading racks, refineries, or other places. Section 106(1). Failure to provide accurate information to the Commission could subject an operator to significant penalties. Section 121(2). As shown by these regulations, the COGCC has administrative expertise in production reporting.

The Act also includes "payment of proceeds" provisions that require payers (the operator or other party responsible for payments) to provide certain information to payees (the parties entitled to payment) every month, including information on production quantity, price per unit, deductions and taxes withheld, and the payee's share before and after deductions or adjustments. Section 118.5(2.3). The producer must also provide an address and telephone number where the payee can request additional information or ask questions. *Id.*

If the payer fails to provide the required information to the payee, the Act provides a comprehensive administrative remedy. Section 118.5(5). The payee may demand "a written explanation of those deductions or adjustments over which the payer has control and for which the payer has information . . . ." Section 118.5(2.5). COGCC's Rule 329(e) provides that a party entitled to payment may submit a Form 37 to the payer requesting additional information concerning the payee's interest in the well, price of the gas sold, taxes applied to the sale of gas, differences in well production and well sales, and other information as described in Section 118.5. The payer is required to return the completed form to the payee within sixty (60) days of receipt. *Id.* The payee's submission of Form 37 fulfills the "written request" requirement of Section 118.5(2.5), and is a prerequisite to filing a petition with the Commission. *Id.*

If the payee finds the information provided by the payer inadequate, the COGCC is authorized to investigate and hold a hearing regarding the payment of proceeds. Section 118.5(5) ("[T]he oil and gas conservation commission shall have jurisdiction to determine . . . [t]he amount of the proceeds plus interest, if any, due a payee by a payer."). *See also* Section 118.5(5.5); COGCC Rule 503(b)(8); COGCC Form 38.

Before reaching the merits of any dispute regarding the payment of proceeds, the Act requires the Commission to "determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." Section 118.5(5.5). If the Commission determines that a bona fide dispute exists, it must decline jurisdiction and only then can the parties seek resolution in the district court. *Id.* Otherwise, the Commission determines any additional proceeds due the payee. *Id.*

II. Motion to Dismiss for Failure to Exhaust Administrative Remedies.

A challenge to subject matter jurisdiction may be raised under C.R.C.P. 12(b)(1) at any time. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). When a defendant challenges jurisdiction, the burden is on the plaintiff to prove jurisdiction. *Id.* Under 12(b)(1), the allegations are not entitled to any presumptions for the non-moving party. *Id.*

If a complete, adequate, and speedy administrative remedy is available, a party must exhaust that remedy before filing suit in district court. *City & Cty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000). This allows the agency to make the first determination on a matter within its expertise, compile a record for judicial review, prevent piecemeal application of judicial relief, and conserve judicial resources. *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998).

To determine whether a party must exhaust its administrative remedies, the court must consider whether: (1) the claim was filed pursuant to the relevant statute; (2) the statute provides a remedy for the claim asserted; and (3) the legislature intended the statute to provide a comprehensive scheme addressing the issues underlying the claim. *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 68-71 (Colo. 1995). As discussed below, each of these factors demonstrates that this case must be dismissed.

ARGUMENT

I. Airport Land Partners' Failure to Exhaust Administrative Remedies Divests This Court of Jurisdiction.

Airport Land Partners seeks additional oil and gas proceeds, and the Act provides a remedy for precisely that claim. Because the legislature provided a comprehensive scheme addressing proceeds disputes, Airport Land Partners was required to exhaust its administrative remedies with the COGCC prior to filing suit.

A. Airport Land Partners Pled a Claim Cognizable Under Section 118.5(5).

This case is a dispute over "[t]he amount of the proceeds plus interest, if any, due a payee by a payer," which must first be addressed by the Commission under Section 118.5(5)(c). Airport Land Partners asserts breach of contract claims for failure to pay proceeds in accord with the Subject Agreements. **Ex. 1** ¶¶ 25-40. Airport Land Partners alleges that Producers underpaid royalties on residue gas, condensate, and natural gas liquid production from wells subject to the Subject Agreements. *Id.* ¶¶ 20-22. It also asserts that Producers have withheld excess funds for the payment of taxes. *Id.* ¶ 23. In short, Airport Land Partners disputes the accuracy of Producers' calculation of Airport Land Partners' "share" of the sales revenue. *See* Section 118.5(5). Because these alleged underpayments concern the "payment of proceeds or sales reconciliation from a well," or information about deductions, adjustments and taxes, Airport Land Partners' claims are subject to the COGCC's jurisdiction. Section 118.5 (2.3) & (5).

Judge Neiley recently came to this conclusion in a similar case asserting alleged underpayment of royalties pursuant to an oil and gas lease. *See Miller Land & Cattle Co. v. Bill Barrett Corp.*, 2016 CV 30102 (Garfield Cty. Dist. Ct., Mar. 6, 2017). In *Miller Land*, Judge Neiley found that the plaintiff's complaint stated a dispute over oil and gas proceeds that should have been brought under Section 118.5(5)(c), and dismissed the complaint for failure to exhaust administrative remedies. **Exhibit 4** at 17.

Judge Neiley found that the COGCC is statutorily responsible for protecting the rights of owners and producers, in part, by ensuring the accuracy of oil and gas production reporting and payment of proceeds. *Id.* at 15-16. *See also* Section 102(1)(a)(III). Judge Neiley further found that the Commission has special expertise in oil and gas accounting and proceeds matters, and that factual disputes concerning these issues should be resolved by the Commission. *Id.*

Airport Land Partners has circumvented the COGCC's administrative authority over proceeds disputes by filing a complaint in the District Court without first exhausting its administrative remedies before the Commission. Because Airport Land Partners' claims are within COGCC's jurisdiction over proceeds disputes, the first prong of the *Brooke* test is satisfied.

B. The Act Provides a Remedy for Airport Land Partners' Claims.

As the *Miller Land* court found, a claim for the payment of proceeds, like Airport Land Partners', meets the second prong of the *Brooke* test because the Act provides a remedy for the underpayment of proceeds. A plaintiff's remedy is to request additional information from the producers on COGCC Form 37, and if necessary, proceed to an administrative hearing under Section 118.5 to determine if it is owed additional proceeds.

The Commission's comprehensive authority to remedy underpayment of proceeds is not found in Section 118.5 alone. Section 105(1) gives the COGCC "jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article," and "the power to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article." Section 102(1)(a)(III) grants the COGCC the power to "enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production therefrom." The COGCC has jurisdiction over the parties and has the power to enforce an order imposing the relief requested to ensure the protection of the correlative rights and interest in proceeds of Producers and Airport Land Partners. Sections 105(1) & 102(1)(a)(III).

In addition to the COGCC's comprehensive authority, Section 118.5(2.5) provides a comprehensive scheme for Producers to calculate and report the amount of royalties due under the Subject Agreements. The Commission is also authorized to resolve disputes if a payee questions the accuracy of the "payee's share" of the sales revenue. Section 118.5(5). This process provides the payee with relevant information and an opportunity to make a demand for further information as required by Sections 118.5(2.3) & (2.5) using COGCC Form 37. Submission of Form 37 to the payer is a prerequisite to filing a petition with the COGCC. Section 118.5(7). If the payee is not satisfied with the response, he or she can seek an administrative hearing under Section 108, COGCC Rule 329(e), and COGCC Form 38. That evidentiary hearing is the proper forum to determine whether the payer has failed to make a required payment, and if so, the amount of the correct payment and whether interest or appropriate penalties are due. **Ex. 4** at 10.

The Act provides oil and gas producers an opportunity to respond administratively to payees' requests for information about proceeds, and allows the COGCC to use its expertise in natural gas operations, measurement, reporting, and sales to make factual findings and determine what proceeds are due a payee, including any applicable interest. Thus, the Act provides a comprehensive remedy for Airport Land Partners' claims, and the second prong of the *Brooke* test is met.

C. The Legislature Intended for the Act to be a Comprehensive Scheme.

Airport Land Partners' claims also meet the third prong of the *Brooke* test—that the legislature intended the administrative remedy to be the primary remedy for the claim asserted. Section 118.5 provides that after the COGCC determines the absence of "a bona fide dispute over the interpretation of a contract for payment," it "shall have jurisdiction" to determine the payment of proceeds including interest. Only upon a finding by the Commission of a bona fide dispute over the terms of a royalty agreement—which has not occurred here—would Airport Land Partners be authorized to pursue its claims before this Court. **Ex. 4** at 10.

Determining whether Producers properly calculated the proceeds from the sale of oil and gas, and whether deductions—including taxes—were proper, is within the unique expertise of the COGCC. *See Golden's Concrete*, 962 P.2d at 923; *Grant Ranch, LLC v. Antero Res. Piceance Corp.*, No. 15CA2063, 2016 Colo. App. LEXIS 1675, at *19 (Colo. App. Dec. 1, 2016) (holding that determination of when proceeds from the sale of oil and gas would be due is "well within the expertise of the Commission"). Thus, all three prongs of the *Brooke* test have been met.

II. Airport Land Partners' Claims Do Not Fall Within the Legal-Question Exception to the Doctrine of Exhaustion of Administrative Remedies.

There is a general exception to the doctrine of exhaustion of administrative remedies that is implicated when the matter at issue raises a question of law outside the expertise of the agency. *Collopy v. Wildlife Comm'n, Dept. of Natural Res.*, 625 P.2d 994, 1006 (Colo. 1981). In accord with this rule, the legislature exempted from the COGCC's jurisdiction any "bona fide dispute over the interpretation of a contract for payment." Section 118.5(5).

Critically, Section 118.5(5) provides that the COGCC—rather than a court—determines whether a bona fide dispute regarding contract interpretation exists in the first instance:

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

Accordingly, this Court should dismiss this case because Airport Land Partners has not sought relief for the payment of proceeds from the COGCC, and no determination was made by the Commission that a bona fide issue of contract interpretation exists. Ex. 2 ¶¶ 2-3; Ex. 3 ¶¶ 3-4.

Moreover, while this Court need not reach the issue in order to dismiss Airport Land Partners' claims, there is no "bona fide dispute" between the parties as to contract interpretation. **Ex. 4** at 12-16. Airport Land Partners has asserted claims for underpayment of royalties based on Producers' alleged action in improperly allocating costs, taking excess tax deductions, and by failing to pay royalties on the sales price of all the natural gas and natural gas products. *See* **Ex. 1**

¶¶ 21, 23-26. All of these claims are based on the implied covenant of marketability rather than on disputed contract terms.

In *Miller Land*, the lease at issue was silent as to the allocation of costs, therefore the court looked to Colorado law to fill the void. *See* **Ex. 4** at 13 (noting that the lack of a provision governing costs "could be considered an ambiguity" necessitating judicial review, but that no review was necessary because "Colorado law fills the void and resolves that issue"). Because Colorado law requires producers to bear the cost of transforming raw gas into a marketable product absent an express lease provision to the contrary, *Garman*, 886 P.2d at 659—and given that marketability is a question of fact, *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 905 (Colo. 2001)—the *Miller Land* court concluded that there was no ambiguity in the contract language to resolve. **Ex. 4** at 13-14 ("Since the implied covenant to market removes any potential ambiguity, there is no contract interpretation as a matter of law.").[2]

Similarly, in *Richard & Mary Jolley Family, LLLP v. Bill Barrett Corp.*, 2014 CV 30330 (Garfield Cty. Dist. Ct., Feb. 12, 2015), this Court held that, where the "Plaintiff has not cited any provisions of the parties' royalty agreement that would form the basis of a claim that exceeds the COGCC's jurisdiction," the case should be dismissed for failure to exhaust administrative remedies. **Exhibit 5** at 5.

Here, just as in *Miller Land*, the Subject Agreements are silent as to how post-production costs are to be allocated, therefore the implied covenant of marketability requires Producers to bear the costs of making the gas marketable. **Ex. 1** ¶¶ 17, 21. Thus, as in *Miller Land*, there are

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[2] In *Salgado v. Ursa Operating Co., LLC*, 15 CV 30057 (Garfield Cty. Dist. Ct., Sept. 23, 2015), the court declined to dismiss a complaint in a class-action royalty litigation over leases that were purportedly "silent" as to the allocation of post-production costs. However, as the *Miller Land* court correctly held, where a lease is silent as to the allocation of costs, those terms are supplied by the implied duty to market. *See Garman*, 886 P.2d at 659; *Rogers*, 29 P.3d at 904.

no legal ambiguities concerning the allocation of costs. The only disputed issues are questions of fact that the COGCC is qualified to address. *See Rogers*, 29 P.3d at 905 ("[T]he determination of marketability is a question of fact."); **Ex. 4** at 15 ("[T]he disputed issue in this case is not one of contract interpretation but rather a factual analysis of the prevailing conditions within each well and each related market.").

Because there is no "bona fide dispute" in regard to the terms of the Subject Agreements, the remaining issues of fact concerning how those terms should be applied should be resolved by the COGCC.

RELIEF REQUESTED

Defendants respectfully request that the Court dismiss Airport Land Partners' claims for failure to exhaust administrative remedies, and grant Defendants all additional relief the Court deems just and proper. A proposed order is attached.

Dated: April 12, 2017

Original signature on file in the offices of Beatty & Wozniak, P.C.

BEATTY & WOZNIAK, P.C.

s/Karen L. Spaulding
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Original Signature on file in the offices of Davis Graham & Stubbs LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2017, a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS** was electronically filed and served via ICCES to:

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EXHIBIT 5

DISTRICT COURT, GARFIELD COUNTY, COLORADO 109 8th Street, Suite 104 Glenwood Springs, CO 81601	DATE FILED: May 3, 2017 2:06 PM FILING ID: 5F4F55E752E34 CASE NUMBER: 2016CV30259
Plaintiff: AIRPORT LAND PARTNERS, LTD., v. Defendants: ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE, LLC, and URSA OPERATING COMPANY, LLC.	
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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS	

INTRODUCTION

Defendants' motion to dismiss is most notable for its glaring failure to reference the controlling Colorado Court of Appeals' decision in *Grynberg v. Colorado Oil and Gas Conservation Com'n*, 7 P.3d 1060 (Colo. App. 1999), which expressly holds that royalty owners who have a post-production cost contract dispute with an oil and gas producer – like this case – are not required to exhaust their administrative remedies with the Colorado Oil and Gas Commission ("the Commission"). The Court of Appeals held that the relevant provisions of the Colorado Oil and Gas Conservation Act ("the Act") demonstrate "the General Assembly's intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement." *Id.* at 1063. The Court of Appeals specifically held that the Commission does not have jurisdiction to adjudicate a royalty owner's claim for a gas producer's breach of the parties' lease agreement based upon improper deduction of post-production costs in the calculation of royalties. *Id.* at 1064.

The Supreme Court of Colorado denied the appellants' petition for certiorari in the *Grynberg* case. *Id.* at 1060. Since the *Grynberg* decision was issued in 1999, the *Grynberg* decision has never been overruled or modified, but has been re-affirmed in subsequent Colorado appellate court decisions. The *Grynberg* decision therefore must be followed as precedent by this Court. C.A.R. 32(e). Moreover, in three other Colorado trial court decisions, including one issued by this Court, the same argument raised by the Defendants has been rejected, in compliance with the *Grynberg* decision.

This Court's March 6, 2017 Order in *Miller Land and Cattle v. Bill Barrett Corporation* ruling that a royalty owner which asserted a royalty underpayment claim based upon improper post-production cost deductions is required to exhaust administrative remedies with the Commission is clearly erroneous, and in direct conflict with the *Grynberg* decision, as well as the Commission's definitive determination (Ex. 5) that it does not have jurisdiction over royalty owners' claims for breach of contract against natural gas producers based upon improper deduction of post-production costs. (Discussed *infra*, pp. 14-17).

In addition, the Plaintiff should not be required to exhaust their administrative remedies before the Commission because it is clear beyond a reasonable doubt that the Commission will not resolve the Plaintiff's royalty underpayment claims, based upon its prior determinations that it has no jurisdiction to resolve contractual disputes regarding the improper deduction of post-production costs in the calculation of royalties. (Discussed *infra*, pp. 18-20).

For these reasons, as further discussed below, Defendants' motion to dismiss should be denied.

STATEMENT OF THE RELEVANT FACTS

1. On January 24, 1994, Rifle Land Associates, Ltd., as Lessor, entered into an Oil and Gas Lease and incorporated Exhibit A with Snyder Oil Company, as Lessee ("the 1994 Lease Agreement") (Ex. 1). The royalty provision of the 1994 Lease Agreement, at Paragraph 3, Section 2, obligates the Lessee:

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

2. On the last page of Exhibit A attached to the 1994 Lease Agreement, it states that "[a]nything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty." (Ex. 1, Ex. A)

3. Exhibit A to the 1994 Lease Agreement sets forth the tracts of land which are subject to the 1994 Lease Agreement, which includes various tracts in Township 6 South, Range

92 West, 6th P.M. in Garfield County, and in Township 6 South, Range 93 West, 6th P.M. in Garfield County. (Ex. 1, Ex. A).

4. In a Quitclaim Deed executed on July 29, 1997 (Ex. 2), Plaintiff acquired Rifle Land Associates, Inc.'s mineral interests in the lands described in Exhibit A to the 1994 Lease Agreement. (Ex. 1).

5. In accordance with the July 29, 1997 conveyance from Rifle Land Associates, Inc. to Plaintiff (Ex. 2), as of July 29, 1997, Plaintiff owned Rifle Land Associates, Inc.'s interests under the 1994 Lease Agreement.

6. As of September 5, 2005, EnCana Oil and Gas (USA) ("EnCana") owned the Lessee's interests under the 1994 Lease Agreement. (Ex. 3). On September 6, 2005, EnCana conveyed to Antero "all right, title and interest" in certain oil and gas leases, which included its Lessee's interest in the 1994 Lease Agreement. (Ex. 3, p. 1, and page 1 of Ex. A attached to Ex. 3).

7. Antero produced natural gas subject to the 1994 Lease Agreement at various times after September 6, 2005 through December 2012, at which time it sold its rights, interests, and obligations under the 1994 Lease Agreement to Ursa. (Complaint, ¶ 16). Ursa thereafter began to produce and sell natural gas from wells which are subject to the 1994 Lease Agreement (Complaint, ¶ 16).

8. In addition to Plaintiff's interests as Lessor under the 1994 Lease Agreement, on July 16, 2007, Antero assigned to Plaintiff "an overriding royalty interest ('ORI') equal to 5% in the lease described in Exhibit A" attached to the Assignment of Overriding Royalty Interest ("the 5 Percent Overriding Royalty Agreement"). (Ex. 4). The lease described in Exhibit A to that the 5 Percent Overriding Royalty Agreement is the 1994 Lease Agreement. (Ex. A to Ex. 4).

9. The 5 Percent Overriding Royalty Agreement states, in pertinent part, that the "ORI [Overriding Royalty Interest] shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the ORI burden is calculated and paid, and as part of that calculation, the ORI shall bear the same costs and expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease." (Ex. 4, p.1).

10. Both the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement are silent regarding the allocation of post-production costs in the calculation of royalties payable to Plaintiff. (Exs. 1 and 4). Accordingly, under the applicable Colorado law, Antero and Ursa have had an implied duty under both of these Agreements to pay royalties to Plaintiff based upon prices received for marketable natural gas products at the location of the first commercial market for such products. *Rogers v. Westerman Farm, Co.* 29 P.3d 887, 906 (Colo. 2001).

11. Plaintiff alleges that the location of the first commercial market for the residue gas which came from the wells at issue is at various interconnects to the long distance pipelines, where Antero and Ursa have sold the residue gas to third party purchasers who purchased the residue gas from them. (Complaint, ¶ 18). Thus, Plaintiff should have been paid royalties based on 20 percent of the sale proceeds of the residue gas which came from the gas wells subject to the two royalty agreements referenced above. (Ex. 1, 15 percent royalty; Ex. 4, 5 percent royalty).

12. Plaintiff alleges that the location of the first commercial market for the natural gas liquids which came from the gas wells at issue is at the location where such natural gas liquids were fractionated into marketable natural gas liquid products, including propane, butane, isobutane, natural gas and ethane, and then sold to third party purchasers of such natural gas liquid products. (Complaint, ¶ 19). Thus, Plaintiff should have been paid royalties based on twenty percent of the proceeds received on the sale of the marketable natural gas liquid products which

came from the gas wells subject to the two royalty agreements referenced above. (Ex. 1, 15 percent royalty; Ex. 4, 5 percent royalty).

13. Plaintiff alleges that the Defendants have breached their royalty payment obligations to Plaintiff under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement by failing to pay Plaintiff based upon prices received for natural gas products sold at the first commercial market for such products. (Complaint, ¶ 21). Plaintiff further alleges that the Defendants have breached their royalty payment obligations to Plaintiff under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement by improperly charging Plaintiff for various post-production costs necessary to place the natural gas produced from the wells at issue into a marketable condition acceptable for the commercial market, and for the costs of transporting the natural gas to the location of the first commercial market. (*Id.*).

14. The Defendants deny that they are obligated to pay royalties to Plaintiff based upon prices which they received on the sale of residue gas to third party purchasers, deny that they are obligated to pay royalties to Plaintiff on prices received for marketable natural gas liquid products sold to third party purchasers, and deny that they have improperly deducted post-production costs in the calculation of royalties paid to the Plaintiff. (Complaint, ¶¶ 17-22; Antero Resources Corporation's ("Antero") Answer to Plaintiff's Complaint, ¶¶ 17-22; Ursa Operating Company, LLC's ("Ursa") Answer to Plaintiff's First Amended Complaint, ¶¶ 17-22).

15. The Plaintiff did not attempt to seek relief with the Commission regarding its royalty underpayment claims against the Defendants because the Commission has no jurisdiction over the Plaintiff's claims against the Defendants, and because attempting to have the Commission resolve their claims would clearly be futile.

ARGUMENT

I. The *Grynberg* Decision Is Directly on Point and Must Be Followed.

The Court of Appeals' decision in *Grynberg*, which the Defendants completely ignore, is directly on point, and requires this Court to deny Defendants' motion. In *Grynberg*, as in this case, a dispute arose between the oil and gas operators and the royalty owners as to whether "[the operators] were entitled under the terms of the lease to deduct certain post-production expenses in computing the royalties due to [the royalty owners]." *Grynberg*, 7 P.3d at 1062. The royalty owners filed an Application with the Commission pursuant to C.R.S. § 34-60-118.5, as it existed prior to the 1998 amendments, to have the Commission determine the amount of royalties owed to them by the Grynberg operators. (Ex. 5). The Commission, *sua sponte*, determined that it did not have subject matter jurisdiction over the royalty owners' post-production cost deduction claims against the Grynberg operators. In making that determination, the Commission stated, in pertinent part (Ex. 5, pp. 3-4):

> 28. The Applicants filed the Application pursuant to § 34-60-118.5, C.R.S., Payment of proceeds, seeking a Commission order directing Grynberg to:
>
> ***
>
> B. account to the Applicants for all Permissible Deductions;
>
> ***
>
> 30. The General Assembly adopted § 34-60-118.5, C.R.S. in 1989 amending the Oil and Gas Conservation Act to provide the Commission with the authority to order Payors, as defined by statute, to make timely payments of proceeds from oil and gas operations to Payees, as defined by statute.
>
> 31. Section 118.5 was enacted in response to "problems that some individuals ha[d] in the past number of years receiving their royalty payments on time in a regular manner." Testimony by Representative Jerkey on House Bill 1113 before the House Agricultural Committee January 25, 1989 (hereinafter "Agricultural Hearings"). The statute requires that Payors make proceeds payments no later than six months after the end of the month in which production is first sold. § 34-60-118.5 (2), C.R.S. The statute is intended to prevent unscrupulous operators from delaying the

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

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

***

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

> The date on which payment of proceeds is due a payee under section (2) of this section;
>
> The existence or nonexistence of an occurrence pursuant to subsection (3) which would justifiably cause a delay in payment; and
>
> The amount of the proceeds plus interest, if any due a payee by a payor. § 34-60-118.5 (5) (a)-(c), C.R.S.

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

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

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

> the Commission authority to decide private party contractual disputes. (emphasis added).
>
> 38. While the Commission recognizes that ensuring timely payment of proceeds falls within its jurisdiction, that obligation is limited to those instances when the Payee is legally entitled to the proceeds. When a dispute regarding the propriety of deductions arises it requires interpretation of the contract(s) creating the interest. This determination may also require the application of principles relating to marketability set forth in Garman. Garman, 886 P.2d at 559. (emphasis added).
>
> 39. The nature of this dispute first will first require a determination of permissible deductions applicable to Applicants' overriding royalty interests, involving an interpretation of the instruments creating the interest(s).
>
> 40. Because section 118.5 is intended to ensure timely payment of proceeds due to payees who are legally entitled to payment, and does not create in the Commission authority to adjudicate private disputes related to the legality of specific deductions, the Commission will not exercise jurisdiction over the Application. (emphasis added).

After the Commission entered its Order dismissing the royalty owners' Application for lack of subject matter jurisdiction, the Grynberg operators sought judicial review of the Commission's Order that it had no subject matter jurisdiction over the royalty owners' claims against the Grynberg operators. *Grynberg*, 7 P.3d at 1062. The Denver District Court affirmed the Commission's Order. *Id.* The Grynberg operators appealed to the Court of Appeals, which affirmed the Denver District Court's judgment that the Commission did not have subject matter jurisdiction over the royalty owners' royalty underpayment claims against the Grynberg operators. *Id.* at 1062-65. The Court of Appeals' holding and rationale clearly confirm that the Commission does not have subject matter jurisdiction over the Plaintiff's royalty underpayment claims against the Defendants in this case:

> Section 34-60-118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes

> deadlines for the payment to those legally entitled to receive payment. The statute demonstrates the General Assembly's intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.
>
> Moreover, the General Assembly clarified its intent to exclude contractual disputes from the Commission's jurisdiction when it amended § 34-60-118.5 in 1998. *See* Colo. Sess. Laws 1998, ch. 186 at 636. The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction, only "[a]bsent a bona fide dispute over the interpretation of a contract for payment," § 34-60-118.5(5), C.R.S.1999...
>
> ***
>
> Under this amendment, therefore, the Commission does not have jurisdiction to interpret any royalty agreement to determine the propriety of disputed post-production deductions.
>
> ***
>
> The language of the amendment demonstrates the General Assembly's intent merely to clarify any ambiguity that may have existed in the former version of the statute. Indeed, the statute as originally enacted and the amendment both provide evidence of the General Assembly's intent to exclude the resolution of contractual disputes from the jurisdiction of the Commission.
>
> The parties' real dispute here is not with respect to the timeliness of any payments under § 34-60-118.5. It relates, rather, to plaintiffs' liability for payments that would have been made, but for plaintiffs' deduction of certain post-production costs. Consequently, it is the extent of defendants' legal entitlement to further payments under the royalty agreement that is at issue. The Commission properly concluded that § 34-60-118.5 gave it no jurisdiction over that question.

Id. at 1063. (emphasis added).

In further explaining the legal basis for its decision, the Court of Appeals emphasized that the Act (C.R.S. § 34-60-118.5) reserves the determination of contractual disputes between royalty owners and producers for a district court:

> Section 34-60-118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, <u>but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs.</u> *See Garman v. Conoco, Inc.*, 886 P.2d 652 (Colo.1994); *Rogers v. Westerman Farm Co.*, 986 P.2d 967 (Colo.App.1998). Thus, by reserving the determination of contractual disputes for the courts, § 34-60-118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions.

Id. at 1064. (emphasis added).

Thus, in *Grynberg*, the Court of Appeals explicitly determined that: (1) under the Act, the Commission does not have jurisdiction over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement. *Id.* at 1063; (2) under the 1998 amendment to the Act, which added the words "[a]bsent a bona fide dispute over the interpretation of a contract for payment" to § 34-60-118.5 (5), the Commission does not have jurisdiction to interpret any royalty agreement to determine the propriety of disputed post-production deductions. *Id.*; (3) the Commission properly concluded that § 34-60-118.5 does not give the Commission jurisdiction over disputes related to a royalty payee's "legal entitlement to further payments" under a royalty agreement. *Id.*; and (4) instead, § 34-60-118.5 leaves to the courts the authority to decide contractual disputes involving a royalty owner's "legal entitlement to proceeds." *Id.* at 1064. These determinations by the Court of Appeals are directly on point to the issue presented here, and confirm that the Commission has no jurisdiction over the Plaintiff's claims against the Defendants for royalty underpayments based upon improper deduction of post-production costs.

The Court of Appeals' decision in *Grynberg* has never been overruled, modified, or contradicted by any subsequent appellate court decision, and therefore constitutes binding precedent which this Court must follow.

II. Subsequent Appellate Court Decisions Confirm the Holding in *Grynberg*.

The appellate court decisions which have been issued since *Grynberg* was decided in 1999 have consistently confirmed its holding. In a decision issued last year, in which Antero was a party, *Grant Brothers Ranch, LLC v. Antero Resources Piceance Corporation*, No. 15CA2063, 2016 WL 7009138 (Colo. App. December 1, 2016), the Court of Appeals confirmed its holding in *Grynberg* that the Commission lacks jurisdiction to resolve a contractual dispute over whether oil and gas operators are entitled under a lease to deduct post-production expenses in computing royalties due to royalty owners. The Court of Appeals specifically stated that in *Grynberg* it had determined that the Commission "lacked jurisdiction to resolve a contractual dispute over whether operators were entitled under a lease to deduct post-production expenses in computing royalties due to [royalty] owners." *Id.* at *5. The Court of Appeals also held, in accordance with the *Grynberg* decision, that "the Act provides a remedy for claims for the payment of proceeds where the parties have no contract addressing the issue," *id.*, in contrast to this case, where the parties do have contracts addressing the issue.

Moreover, in another decision issued last year, *Lindauer v. Williams Production RMT Company*, 381 P.3d 378 (Colo. App. 2016), the Court of Appeals stated, in accordance with *Grynberg*, that the Act:

> … prescribes the timing of when royalty payments must be made, and the information that must be provided by the payor. <u>It does not address the propriety of deduction of expenses.</u> *See Grynberg v. Colo. Oil & Gas Comm'n*, 7 P.3d 1060, 1063 (Colo. App. 1999) (section 34-60-118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes

> deadlines for the payment to those legally entitled to receive payment.)

Id. at 386 (emphasis added).

Finally, the Tenth Circuit Court of Appeals, in a 2000 decision issued after *Grynberg* was decided, cited to *Grynberg* in holding that "a Colorado litigant alleging a breach of an oil and gas royalty agreement...must assert his claim in a court of law..." *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1157 (10th Cir. 2000).

The decisions in *Grant Brothers, Lindauer*, and *Atlantic Richfield* confirm the holding in *Grynberg*, and also confirm that the Defendants' motion to dismiss is without merit.

III. Three Recent Colorado Trial Court Decisions have Rejected the Same Argument which the Defendants Make Here.

Three recent Colorado district court decisions have addressed the same argument which is the subject of Defendants' motion, including a decision by Judge James Boyd of this Court in a pending class action royalty underpayment case against Defendant Ursa, in which the Plaintiff is a member of the defined Class. In each of these three decisions, the district court denied the oil and gas producer's motion to dismiss the royalty owners' post-production cost contract claims for failure to exhaust administrative remedies with the Commission.

A. *Sharon Salgado, et. al. v. URSA Operating Company, LLC*, et.al., Case No. 15CV30057, Garfield County District Court.

In *Salgado*, Defendant Ursa filed the same motion to dismiss which it has filed in this case, in a case involving the same post-production cost claims as this case. (Ex. 6). After full briefing, Judge Boyd denied Ursa's motion to dismiss, finding that: (1) the Act does not grant jurisdiction to the Commission "with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement," citing *Grynberg*, 7 P.3d at 1063; (2) to decide whether there is a bona fide dispute on the interpretation of the written agreements, the Court must determine whether Ursa's authority to make the challenged deductions is governed by principles of contract law or is governed by the applicable statutes and regulations; (3) there are no regulations or statutory provisions that directly govern the authority of an oil and gas producer to make deductions for post-production costs. Instead, the issue is most properly decided under contract law; (4) under the facts alleged in the complaint, there is a bona fide dispute over the interpretation of the royalty and lease agreements; and (5) accordingly, the Commission does not have jurisdiction over the subject matter of the plaintiff's complaint. (Ex. 7, pp. 1-2).

B. ***Retova Resources, et al. v. Bill Barrett Corporation***, Case No. 2015CV34351, Denver District Court.

In *Retova v. Bill Barrett Corporation* ("BBC"), the plaintiff alleged that the defendant breached the applicable lease agreements by failing to pay royalties on the actual sales proceeds received on the sale of marketable natural gas products, and by deducting post-production costs in the calculation of royalties. (Ex. 8). The defendant filed the same motion to dismiss that Defendants have filed in this case. (Ex. 9). Judge Michael Martinez of the Denver District Court denied defendant BBC's motion, finding that: (1) defendant's argument that the plaintiff alleges nothing showing that the defendant disagrees with plaintiff about what the lease means, and that unless plaintiff shows that an interpretative dispute underlies its claim for relief, the Commission retains jurisdiction, is without merit; (2) plaintiff alleges that the royalty agreements at issue do not authorize the defendant to make deductions for post-production costs, and that defendant made such deductions despite the fact that the royalty agreements do not expressly authorize such deductions; (3) plaintiff has properly pled a bona fide dispute over the interpretation of the royalty agreements at issue; and (4) the Commission therefore does not have jurisdiction over the subject matter of the plaintiff's claims against the defendant. (Ex. 10, pp. 3-4).

C. ***Retova Resources, LP, et al. v. Vanguard Permian LLC***, et. al.,

Case No. 2015CV34352, Denver District Court.

In a class action case involving the same disputed post-production costs as this case, the Vanguard defendants filed the same motion to dismiss which is at issue here. (Ex. 11). Judge Elizabeth Starrs of the Denver District Court, in a one line Order, denied the Vanguard defendants' motion to dismiss. (Ex. 12). The defendants then moved for an Order certifying the Order denying the defendants' motion to dismiss for interlocutory appeal, which Judge Starrs granted. (Ex. 13). The defendants then filed a petition for interlocutory appeal in the Court of Appeals, which they were required to do pursuant to C.A.R. 4.2 and C.R.S. § 13-4-102.1. In that petition, the defendants argued that Judge Starrs' Order denying their motion to dismiss for failure to exhaust administrative remedies before the Commission is an "unresolved question of law" that has not been resolved by the Colorado Supreme Court, or determined in a published decision of the Colorado Court of Appeals. (Ex. 14, pp. 5-13).

On June 2, 2016, the Court of Appeals, without asking for a response from plaintiff Retova Resources, denied the Vanguard defendants' petition for interlocutory appeal (Ex. 15), thus rejecting the Vanguard defendants' contention that the exhaustion of administrative remedies issue is an "unresolved question of law."

IV. This Court's Order in *Miller Land and Cattle Co. v. Bill Barrett Corporation* Granting the Defendant's Motion to Dismiss is Clearly Erroneous.

In *Miller Land and Cattle Co.* ("*Miller*") *v. Bill Barrett Corporation* ("BBC"), Case No. 2016CV30102, Garfield County District Court, also involving the propriety of post-production cost deductions, defendant BBC filed the same motion to dismiss which is at issue in this case. (Ex. 16). This Court granted the motion to dismiss, finding that: (1) Miller's claims against BBC did not involve a "bona fide dispute over the interpretation of a contract for payment" under C.R.S. 34-60-118.5(5) because, as a matter of law, under the "silent" lease at issue, BBC was not entitled to deduct post-production costs necessary to make the gas marketable (Ex. 17, pp. 11-15); and (2) the only disputed issues between the parties were issues of fact. (*Id.*).

In its Order, this Court acknowledged the *Grynberg* decision, but stated it was distinguishable "for two reasons." (Ex. 17, p. 16). The first reason was that *Grynberg* was postured procedurally as a review of the Commission's decision to decline jurisdiction over the parties' dispute, and it was "unclear" whether there was a "bona fide issue of contract interpretation" based upon an ambiguity in the underlying lease. (*Id.*). The second reason was that *Grynberg* was decided before the Colorado Supreme Court decision in *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001) clarified the scope of the implied covenant in every oil and gas lease, and that "[s]ince this Court and the [Commission] now have the *Rogers* opinion to supply the missing terms in this lease, the Court does not find that the decision is controlling." (*Id.*).

This Court's ruling in *Miller* that *Grynberg* is not controlling is clearly erroneous, for numerous reasons:

(1) In *Grynberg*, the Court of Appeals held that where the parties' real dispute is not with respect to the timelines of any payments under § 34-60-118.5… [but] rather, to [the gas producer's] liability for payments that would have been made, but for [the gas producer's] deduction of certain post-production costs," that is a dispute related to "the extent of [the royalty owners'] legal entitlement to further payments under the royalty agreement at issue," and the Commission had no jurisdiction over that dispute. 7 P.3d at 1063. The *Miller* Order directly contradicts this holding.

(2) In *Grynberg*, the Court of Appeals held that C.R.S. § 34-60-118.5 "leaves to the courts the authority to decide contractual disputes, such as a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the

application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs." 7 P.3d at 1064. The *Miller* Order directly contradicts this holding.

(3) In *Grynberg*, the Court of Appeals held that under the 1998 statutory amendment which states that the Commission has jurisdiction to determine timely payment of proceeds only "absent a bona fide dispute over the interpretation of a contract for payment," the Commission "does not have jurisdiction to interpret any royalty agreement to determine the propriety of disputed post-production deductions." 7 P.3d at 1063. The *Miller* Order directly contradicts this holding, ruling that the Commission does have jurisdiction to determine the propriety of post-production cost deductions under a royalty agreement between royalty owners and producers. (Ex. 17, pp. 11-15).

(4) In *Grynberg*, the Court of Appeals held that "[s]ection 34-60-118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legal entitled to receive payment. The statute demonstrates <u>the General Assembly's intent to grant to the Commission jurisdiction only over actions for the timely payment of proceeds and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement.</u>" 7 P.3d at 1063. (emphasis added). The *Miller* Order directly contradicts this holding.

(5) The *Miller* Order's finding that the holding in *Grynberg* likely would have been different if the Court of Appeals had the benefit of considering the Supreme Court of Colorado's 2001 decision in *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001) is contradicted by the express holdings in the *Grynberg* decision, as referenced above, and is not supported by any statement in the *Grynberg* decision. Moreover, the Court of Appeals was well aware of the Supreme Court's determination in *Garman v. Conoco, Inc.*, 886 P.2d 652, 659 (Colo. 1994), that "the implied covenant to market obligates the lessee to incur those post-production costs necessary

to place gas in a condition acceptable for market." The Court of Appeals in *Grynberg* specifically cited to the *Garman* opinion in its decision. 7 P.3d at 1064.

(6) This Court's speculation in *Miller* (Ex. 17, p. 16) that it was unclear in *Grynberg* whether there was an ambiguity in the royalty agreement at issue is unfounded. The royalty agreement at issue in *Grynberg* was an overriding royalty agreement which, like the lease agreement at issue in *Miller*, is "silent" regarding the allocation of post-production costs. (Ex. 18).

(7) The *Miller* Order also ignores the holding in *Grynberg* that portions of § 34-60-118.5 are ambiguous, and therefore a court should defer to the Commission's interpretation of that statutory provision, provided it is reasonable. 7 P.3d at 1063. As discussed above, the Commission interpreted § 34-60-118.5 as not conferring jurisdiction to the Commission "to adjudicate private disputes relating to the legality of specific deductions..." (Ex. 5, ¶ 40), and the Court of Appeals affirmed the Commission's interpretation to be not only "reasonable," but also the "proper" interpretation. *Id.* at 1063.

The above-referenced holdings in *Grynberg* unequivocally confirm that *Grynberg* is directly on point with respect to the issue raised in the Defendants' motion to dismiss, and must be followed. This Court's decision in *Miller* to disregard *Grynberg* was erroneous as a matter of law, and flatly contradicts the black letter determinations of law set forth in the *Grynberg* decision.

V. The Dismissal Order in *Jolley v. Bill Barrett Corporation* is also in Conflict with the *Grynberg* Decision and the Commission's Order in *Grynberg*.

In *Richard and Mary Jolley Family, LLLP v. Bill Barrett Corporation*, Case No. 14-CV30330 (Garfield County District Court), the defendant also filed a motion to dismiss the plaintiff royalty owner's royalty underpayment claims based upon failure to exhaust administrative remedies (Ex. 19), which this Court granted ("the *Jolley* Order"). (Ex. 20). The *Jolley* Order is erroneous because, *inter alia*: (1) it directly contradicts the Court of Appeals' holding in *Grynberg* that the Commission does not have jurisdiction to determine " the extent of the [royalty owners'] legal entitlement to further payments" under any royalty agreement. 7 P.3d at 1063; (2) it directly contradicts the holding in *Grynberg* that the Commission "does not have jurisdiction to interpret any royalty agreement to determine the propriety of disputed post-production deductions..." *Id.*; and (3) it directly contradicts the holding in *Grynberg* that C.R.S. § 34-60-118.5 "leaves to the courts the authority to decide contractual disputes," including disputes where "a payor is claiming the right to deduct post-production costs." *Id.* at 1064.

Significantly, after the *Jolley* Order dismissed the plaintiff's complaint without prejudice, the Jolley plaintiff re-filed a new complaint against the defendant, and the case was thereafter settled without the defendant re-filing its motion to dismiss for lack of subject matter jurisdiction. (Ex. 21, p. 6).

VI. The Defendants' Motion to Dismiss Must be Denied Because it would be Futile for the Plaintiff to Exhaust Administrative Remedies with the Commission.

An additional reason why the Defendants' motion to dismiss must be denied is that it would clearly be futile to require Plaintiff to exhaust its administrative remedies with the Commission. Under Colorado law, there is no requirement for a party to exhaust administrative remedies if it "is clear beyond a reasonable doubt" that further administrative review by an agency would be futile because the agency will not provide the relief requested. *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998).

As discussed above (*supra*, pp. 6-8), in *Grynberg* the Commission definitively ruled that it does not have subject matter jurisdiction over any contractual dispute relating to the propriety of a gas producer deducting post-production costs in its calculation of royalties paid to a royalty owner. (Ex. 5, ¶¶ 28-43). The Commission cited to *Garman v. Conoco, Inc.,* 886 P. 2d 652 (Colo. 1994) (Ex. 5, ¶ 35), and to the fact that, after *Garman* was decided in 1994, numerous suits were "filed with the Commission under Section 118.5 asking the Commission to determine whether deductions are proper under lease agreements, operating agreements or other private party contracts governing the legal rights between operating and non-operating mineral interest owners." (Ex. 5, ¶ 36). The Commission then shut the door on all such claims, finding: (1) the "Commission has not interpreted [its statutory] authority to grant the Commission authority to decide private party contractual disputes." (Ex. 5, ¶ 37); (2) "[w]hile the Commission recognizes that ensuring timely payment of proceeds falls within its jurisdiction, that obligation is limited to those instances when the Payee is legally entitled to the proceeds. When a dispute regarding the propriety of deductions arises it requires interpretation of the contract(s) creating the interest. This determination may also require the application of principles relating to marketability set forth in Garman. Garman, 886 P.2d at 559." (Ex. 5, ¶ 38); (3) "The nature of this dispute first will first require a determination of permissible deductions applicable to Applicants' overriding royalty interests, involving an interpretation of the instruments creating the interest(s)." (Ex. 5, ¶ 39); and (4) "Because section 118.5 is intended to ensure timely payment of proceeds due to payees who are legally entitled to payment, and does not create in the Commission authority to adjudicate private disputes related to the legality of specific deductions, the Commission will not exercise jurisdiction over the Application." (Ex. 5, ¶ 40).

In the twenty years which have elapsed since the Commission entered its Order in November 1997 determining that it had no jurisdiction to resolve the *Grynberg* post-production cost contract dispute, the Commission has never issued an Order contradicting its jurisdictional determination in *Grynberg*, and has never accepted jurisdiction to adjudicate a post-production cost deduction contract dispute between a royalty owner and a gas producer. (Ex. 22, Beaver Aff.,

¶¶ 3-5). It is therefore beyond any reasonable doubt that it would be futile to require Plaintiff to attempt to exhaust its remedies with the Commission.

VII. The Language of the Act does not Provide the Commission Jurisdiction to Address Royalty Underpayment Disputes.

The Defendants engage in a long discussion of various provisions under the Act and the Act's regulations to support their contention that the Act provides the Commission with jurisdiction to resolve Plaintiff's royalty underpayment claims. (Defs.' Motion, pp. 7-9, 11-13). None of the Act's provisions or regulations, however, gives the Commission jurisdiction over a royalty owners' claim for royalty underpayments based on a gas producer's breach of a lease agreement.

The powers of the Commission set forth in C.R.S. § 34-60-105(1), and in the Commission Practice and Procedures, 2 CCR 404-1 *et seq.*, do not confer Commission jurisdiction over royalty underpayment claims based on a gas producer's underpayment of royalties owed under a lease agreement. C.R.S. § 34-60-102(1)(a)(III) addresses owners' rights in a common source or pooling of oil and gas production. C.R.S. § 34-60-106(11)(b)(II) and Commission Rule 329 provide the Commission with the authority to promulgate rules regarding the standards for measuring gas production. C.R.S. § 34-60-121 subjects a producer to penalties for making a false entry or statement in a report. And C.R.S. § 34-60-118.5(2.3) and (2.5) set forth disclosure requirements in royalty statements and the royalty owners' right to receive an explanation regarding deductions reflected in such royalty statements. None of these statutory provisions or regulations provide the Commission with subject matter jurisdiction over a claim that a producer breached its royalty payment obligations under a lease agreement or overriding royalty agreement.

Moreover, Defendants incorrectly assert that under C.R.S. § 118.5(7) "[s]ubmission of Form 37 to the [oil and gas producer] is a prerequisite to filing a petition with [the Commission]."

(Defs.' Motion, p. 13). The plain language of section 118.5(7) confirms that the prerequisite imposed under that section is limited to a royalty owner who "seek[s] relief under this section for the failure of the payer to make timely payment," and makes no reference to a royalty owner who seeks to recover royalty underpayments, as the Plaintiff does here.

Clearly, none of the statutory provisions referenced above confer jurisdiction upon the Commission to resolve claims for royalty underpayments under an overriding royalty agreement based upon the improper deduction of post-production costs. Both the Commission and the Court of Appeals have definitively ruled that the Commission does not have subject matter jurisdiction over such claims under C.R.S. § 34-60-118.5(5). (Ex. 5, pp. 3-4; *Grynberg*, 7 P.3d at 1062-65).

VIII. Over the Last Twenty Years, Numerous Other Colorado Post-Production Cost Lawsuits Have Been Adjudicated in State and Federal Courts With No Challenge To The Trial Court's Subject Matter Jurisdiction.

Since *Garman v. Conoco*, 886 P.2d 652 (Colo. 1994) was decided in 1994, royalty owners have filed numerous lawsuits in Colorado state and federal courts against natural gas producers which have breached their contractual obligations to royalty owners by improperly deducting post production costs in the calculation of royalties. A non-exhaustive list of these lawsuits is as follows:

1. *Parry v. Amoco Production Co.*, Case No. 94 CV 111 (La Plata County District Court);

2. *Rogers v. Westerman Farm Co.*, Case No. 95CV5 (Yuma County District Court);

3. *Kerr-McGee Rocky Mountain Corporation v. Abbett, et al.*, Case No. 01CV5922 (Denver District Court);

4. *Mountains West Exploration, Inc. v. Evergreen Resources,* Case No. 02CV8854 (Denver District Court);

5. *Clough v. Williams Production RMT Company*, Case No. 02CV32 (Garfield County District Court);

6. *Holman v. Patina Oil and Gas Corporation*, Case No. 03 CV 9 (Weld County District Court);

7. *Patterson, et al. v. BP America Production Co.*, Case. No. 03CV9926 (Denver District Court);

8. *Burkett et al. Huber, et al.*, Case No. 04 CV 255 (La Plata County District Court);

9. *Boulter v. Kerr-McGee Rocky Mountain Corporation*, Case No. 04CV7739 (Denver District Court);

10. *Savage v. Williams Production RMT Company*, Case No. 04CV99 (Garfield County District Court);

11. *Miller v. EnCana Oil and Gas (USA) Inc.*, Case No. 05 CV 2753 (Denver District Court);

12. *Ace Royalties, LLC, et al. v. Noble Energy, Inc.*, Case No. 05CV5633 (Denver District Court);

13. *Davis, et al. v. Patina Oil and Gas Corporation*, Case No. 06CV3377 (Denver District Court);

14. *Lindauer, et al. v. Williams Production RMT Company*, Case No. 06CV317 (Garfield County District Court);

15. *Anderson v. Merit Energy Company*, Case No. 07-cv-00916-LTB-BNB (consolidated with 07-cv-01025-LTB-BNB) (U.S. District Court for the District of Colorado);

16. *Amsbaugh, et al. v. Petroleum Development Corporation*, Case No. 07-cv-1362-JLK-CBS (U.S. District Court for the District of Colorado);

17. *Amsbaugh, et al. v. Exco Resources, Inc.*, Case No. 09CV2601 (Denver District Court);

18. *Dines, et al v. Berry Petroleum Company, LLC*, Case No. 2012CV7762 (Denver District Court); and

19. *Phelps Oil and Gas, LLC v. Marathon Oil Co.*, Case No. 2015CV30183, (Garfield County District Court).

In each of the above-referenced cases, the royalty owners' breach of contract claims have been fully adjudicated without the defendant oil and gas producer challenging the trial court's subject matter jurisdiction based upon the royalty owners' failure to exhaust their administrative remedies with the Commission.

CONCLUSION

The Defendants' motion to dismiss the Plaintiff's Complaint should be denied.

DATED: May 3, 2017

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CERTIFICATE OF SERVICE

I certify that on May 3, 2017, a true and correct copy of the foregoing was electronically filed and served via ICCES.

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EXHIBIT 6

7 P.3d 1060
Colorado Court of Appeals,
Div. II.

Jack J. GRYNBERG, individually and d/b/a Jack Grynberg and Associates; Grynberg Petroleum Company; and Celeste C. Grynberg, an individual, Plaintiffs–Appellants,
v.
COLORADO OIL AND GAS CONSERVATION COMMISSION; Marilyn B. Bateman, f/k/a M.B. Tate; and R.K. Cramer, a/k/a Richard K. Cramer, Defendants–Appellees.

No. 98CA1928.
|
Dec. 23, 1999.
|
Certiorari Denied Aug. 21, 2000.*

Operators of an interest in oil and gas property sought judicial review of order of the Oil and Gas Conservation Commission declining to assert jurisdiction over dispute between operators and royalty owners as to whether operators were entitled under lease to deduct post-production expenses in computing royalties due to owners. The District Court, City and County of Denver, Frank Martinez, J., affirmed. Operators appealed. The Court of Appeals, Criswell, J., held that: (1) Commission lacked jurisdiction to resolve the contractual dispute between operators and royalty owners, and (2) statute which left to courts the authority to decide contractual disputes did not violate equal protection guarantees.

Affirmed.

West Headnotes (11)

[1] **Mines and Minerals**
Powers and Proceedings of Commissions and Officers in General

Oil and Gas Conservation Commission lacked jurisdiction to resolve contractual dispute between operators and royalty owners of an interest in oil and gas property, concerning whether operators were entitled under lease to deduct post-production expenses in computing royalties due to owners. West's C.R.S.A. § 34–60–118.5.

1 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Permissible or reasonable construction

The interpretation placed upon a statute by the agency vested with authority to administer or to enforce that statute is entitled to deference, provided the interpretation adopted is a reasonable one.

1 Cases that cite this headnote

[3] **Mines and Minerals**
Powers and Proceedings of Commissions and Officers in General

Oil and Gas Conservation Commission has jurisdiction only over actions for the timely payment of proceeds derived from the sale of oil, gas or associated products and not over disputes with respect to the legal entitlement to proceeds under the terms of a specific royalty agreement. West's C.R.S.A. § 34–60–118.5.

3 Cases that cite this headnote

[4] **Statutes**
Presumptions

If the General Assembly amends a statute, an intent to change the law is generally presumed; that presumption may be rebutted by a showing that the General Assembly amended the statute simply to clarify an ambiguity.

2 Cases that cite this headnote

[5] **Statutes**
⇐Legislative History
Statutes
⇐Relationship to statute amended; clarification or change of meaning
Statutes
⇐Legislative history

Whether a statutory amendment was intended as a change of the law or as a clarification is a question of statutory interpretation subject to judicial determination; in making that determination, the Court of Appeals may refer to the language of the statute and to the legislative history of the amendment.

2 Cases that cite this headnote

[6] **Constitutional Law**
⇐Mining and excavation; oil and gas
Mines and Minerals
⇐Powers and Proceedings of Commissions and Officers in General

Classification created by the statute conferring jurisdiction upon Oil and Gas Conservation Commission to calculate amount of proceeds derived from the sale of oil, gas or associated products and to enforce timely payment of those proceeds to payee, but leaving to courts the authority to decide contractual disputes, was rationally related to legitimate state purpose and, thus, did not violate equal protection guarantees. U.S.C.A. Const.Amend. 14; West's C.R.S.A. § 34–60–118.5.

Cases that cite this headnote

[7] **Constitutional Law**
⇐Differing levels set forth or compared

In an equal protection analysis, the level of judicial scrutiny varies according to the type of classification involved and the nature of the right affected; if a classification does not infringe on a fundamental right and is not based on either a suspect classification or a classification requiring intermediate scrutiny, the rational basis standard of review is used. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**
⇐Statutes and other written regulations and rules

Under the rational basis standard of review for equal protection challenges, the person challenging a statute must show that the classification arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[9] **Constitutional Law**
⇐Statutes and other written regulations and rules

Under the rational basis standard of review for equal protection challenges, a statute is presumed to be constitutional, and the party challenging its validity bears the burden of convincing the court beyond a reasonable doubt that the classification does not bear a rational relationship to a legitimate legislative purpose; if any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume the existence of those facts. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[10] **Constitutional Law**
⟹Mining and excavation; oil and gas
Mines and Minerals
⟹Powers and Proceedings of Commissions and Officers in General

Statute conferring jurisdiction upon Oil and Gas Conservation Commission to calculate amount of proceeds derived from the sale of oil, gas or associated products and to enforce timely payment of those proceeds to payee, but leaving to courts the authority to decide contractual disputes, was not unconstitutionally vague. West's C.R.S.A. § 34–60–118.5.

1 Cases that cite this headnote

[11] **Constitutional Law**
⟹Mining and excavation; oil and gas
Mines and Minerals
⟹Powers and Proceedings of Commissions and Officers in General

Statute conferring jurisdiction upon Oil and Gas Conservation Commission to calculate amount of proceeds derived from the sale of oil, gas or associated products and to enforce timely payment of those proceeds to payee, but leaving to courts the authority to decide contractual disputes, did not violate any guarantee of equal protection by subjecting the two types of actions distinguished under the statute to a different statute of limitations or by requiring each action to be brought in particular forum. U.S.C.A. Const.Amend. 14; West's C.R.S.A. § 34–60–118.5.

2 Cases that cite this headnote

Attorneys and Law Firms

***1062** Phillip D. Barber, P.C., Phillip D. Barber, Denver, Colorado; Dufford & Brown, P.C., Lisa A. Lee, Denver, Colorado, for Plaintiffs–Appellants.

Opinion

Opinion by Judge CRISWELL.

In this action to review a decision of the Colorado Oil and Gas Commission (Commission), plaintiffs, Jack J. Grynberg, individually and d/b/a Jack Grynberg and Associates, Celeste C. Grynberg, and Grynberg Petroleum Company, seek reversal of the district court judgment that affirmed the Commission's conclusion that the Commission lacked jurisdiction to interpret the terms of an oil and gas lease between plaintiffs and defendants, Marilyn B. Bateman and Richard K. Cramer. We affirm.

Plaintiffs are the operators and defendants are the royalty owners of an interest in an oil and gas property. A dispute arose between them with respect to whether plaintiffs were entitled under the terms of the lease to deduct certain post-production expenses in computing the royalties due to defendants.

Defendants initially commenced an action at law to recover royalties from plaintiffs. Later, however, they filed an application with the Commission pursuant to § 34–60–118.5, as it existed prior to recent amendments, *see* Colo. Sess. Laws 1998, ch. 186 at 636, to have the Commission determine the amount of royalties owed by plaintiffs, and the district court stayed its proceedings, pending final action by the Commission.

The Commission, however, concluded that, while the pertinent statute authorized it to ensure timely payments to those legally entitled to such payments, 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." Hence, it dismissed defendants' application without prejudice to defendants' right to re-apply for relief from it once the dispute over the propriety of such deductions had been resolved either by the stipulation of the parties or by decision of a court of competent jurisdiction.

Plaintiffs sought judicial review of this order, asserting that the Commission erred in declining to assert jurisdiction over this dispute. The district court affirmed the Commission's action, and plaintiffs now appeal from that judgment.

I.

[1] Plaintiffs contend that § 34–60–118.5(5) granted to the Commission exclusive jurisdiction to resolve their dispute with defendants and that the district court erred by concluding otherwise. We disagree.

Section 34–60–118.5(2), C.R.S.1999, requires that payments of proceeds derived from the sale of oil, gas, or associated products be made in a timely fashion. Section 34–60–118.5(5), then, provided that the Commission "shall have exclusive jurisdiction" to determine the following:

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

Section 34–60–118.5 imposed an obligation on the part of "payors" to make timely payments of proceeds to "payees," and it granted the Commission exclusive jurisdiction to enforce compliance with that requirement. A "payee," as that term is used in § 34–60–118.5, is "any person or persons *legally entitled* to payment from proceeds derived from the sale of oil, gas, or associated products from a well in Colorado...." Section 34–60—118.5(1)(a), C.R.S.1999 (emphasis added).

Hence, while this statute makes clear that the Commission 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 the Commission, ***1063** determines whether there is legal entitlement to payment in any specific instance. To this extent, therefore, the statute may be said to be ambiguous.

[2] Under such circumstances, the interpretation placed upon a statute by the agency vested with authority to administer or to enforce that statute is entitled to deference, provided the interpretation adopted is a reasonable one. *See Industrial Claim Appeals Office v. Orth,* 965 P.2d 1246 (Colo.1998).

Here, not only was the Commission's interpretation of the statute reasonable; we conclude that it was the proper interpretation.

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

Moreover, the General Assembly clarified its intent to exclude contractual disputes from the Commission's jurisdiction when it amended § 34–60–118.5 in 1998. *See* Colo. Sess. Laws 1998, ch. 186 at 636. The amended provisions now provide that the Commission shall have jurisdiction, but not exclusive jurisdiction, only "[a]bsent a bona fide dispute over the interpretation of a contract for payment," § 34–60–118.5(5), C.R.S.1999, and that:

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

Section 34–60–118.5(5.5), C.R.S.1999.

Under this amendment, therefore, the Commission does not have jurisdiction to interpret any royalty agreement to determine the propriety of disputed post-production deductions.

[4] [5] If the Generally Assembly amends a statute, an intent to change the law is generally presumed. That presumption may be rebutted by a showing that the General Assembly amended the statute simply to clarify an ambiguity. Whether an amendment was intended as a change or as a clarification is a question of statutory interpretation subject to judicial determination. In making that determination, we may refer to the language of the statute and to the legislative history of the amendment. *United Guaranty Residential Insurance Co. v. Dimmick,* 916 P.2d 638 (Colo.App.1996) (court may consider legislative history, prior enactments of the statute, and subsequent amendments to determine legislative intent); *see Southwest Capital Investments, Inc. v. Pioneer General Insurance Co.,* 924 P.2d 1205 (Colo.App.1996) (presumption that General Assembly intends to change law by amending statute not applicable if amendment was meant to clarify ambiguity).

The language of the amendment demonstrates the General Assembly's intent merely to clarify any ambiguity that may have existed in the former version of the statute. Indeed, the statute as originally enacted and the amendment both provide evidence of the General Assembly's intent to exclude the resolution of contractual disputes from the jurisdiction of the Commission.

The parties' real dispute here is not with respect to the timeliness of any payments under § 34–60–118.5. It relates, rather, to plaintiffs' liability for payments that would have been made, but for plaintiffs' deduction of certain post-production costs. Consequently, it is the extent of defendants' legal entitlement to further payments under the royalty agreement that is at issue. The Commission properly concluded that § 34–60–118.5 gave it no jurisdiction over that question.

Similarly, the district court properly affirmed the Commission's determination of the extent of its authority.

***1064** II.

[6] Plaintiffs further contend that, if § 34–60–118.5 is interpreted in this manner, it violates the constitutional provisions guaranteeing equal protection of the laws, because it will improperly distinguish between those payors who assert their right to take deductions prior to calculating royalties owed to payees and other payors who do not assert that right, even though the two classes of payors are similarly situated. We are not persuaded.

[7] In an equal protection analysis, the level of judicial scrutiny varies according to the type of classification involved and the nature of the right affected. If a classification does not infringe on a fundamental right and is not based on either a suspect classification or a classification requiring intermediate scrutiny, the rational basis standard of review is used. *Culver v. Ace Electric,* 971 P.2d 641 (Colo.1999).

[8] [9] Under this rational basis standard, the person challenging a statute must show that the classification arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated. In such a review, a statute is presumed to be constitutional, and the party challenging its validity bears the burden of convincing the court beyond a reasonable doubt that the classification does not bear a rational relationship to a legitimate legislative purpose. If any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume the existence of those facts. *Christie v. Coors Transportation Co.,* 933 P.2d 1330 (Colo.1997); *Colorado Society of Community & Institutional Psychologists, Inc. v. Lamm,* 741 P.2d 707 (Colo.1987) (statute relating to economic or social subjects will be struck down only if no reasonably conceivable set of facts could establish a rational relationship between the act and a legitimate end of government).

Here, the rational basis standard of review is appropriate because § 34–60–118.5 does not infringe upon a fundamental right, does not involve a suspect class, and does not draw a distinction that would require an intermediate level of scrutiny.

As a threshold matter, we disagree with plaintiffs' characterization of the distinction drawn by the statute. Section 34–60–118.5 distinguishes between broader classes than those described by plaintiffs. The statute does not simply classify payors based on whether or not they assert the right to deduct post-production costs. Rather, it distinguishes between parties based on the existence or non-existence of a dispute over the rights arising under a contract. Thus, while the statute may distinguish between the two classes of payors described by plaintiffs, those two classes comprise only subcategories of larger groups classified by the statute.

Moreover, although we will assume that payors in the two groups are similarly situated, we conclude that there is a rational relationship between the statutory classification and a legitimate state purpose.

Section 34–60–118.5 confers jurisdiction upon the Commission to calculate the amount of proceeds due a payee and to enforce the timely payment of those proceeds, but it leaves to the courts the authority to decide contractual disputes, such as a determination of a potential payee's legal entitlement to proceeds. These types of disputes may involve not only contractual interpretation, but the application of complex legal principles if, for example, a payor is claiming the right to deduct post-production costs. *See Garman v. Conoco, Inc.*, 886 P.2d 652 (Colo.1994); *Rogers v. Westerman Farm Co.*, 986 P.2d 967 (Colo.App.1998). Thus, by reserving the determination of contractual disputes for the courts, § 34–60–118.5 promotes the state's legitimate interest in ensuring the proper and consistent resolution of complex legal questions.

We conclude, therefore, that the classification made by § 34–60–118.5 is rationally related to a legitimate state purpose, and it does not violate any equal protection guarantees.

III.

[10] [11] Finally, there is no merit in plaintiffs' contentions that the statute is unconstitutionally ***1065** vague, impermissibly subjects different classes of payors to different statutes of limitations, and denies certain classes of payors access to particular forums.

Contrary to plaintiffs' assertion, the statute does not create a vague classification based on the class of payor involved. Rather, the statute clearly distinguishes between two different classes of disputes, one of which involves actions under § 34–60–118.5 for the timely payment of proceeds and the other concerning disputes over the parties' rights under a royalty contract. The fact that each of these types of actions may be subject to a different statute of limitations and must be brought in a particular forum does not violate any guarantee of equal protection.

The judgment of the district court is affirmed.

Judge RULAND and Judge ROTHENBERG concur.

All Citations

7 P.3d 1060, 145 Oil & Gas Rep. 249, 1999 CJ C.A.R. 6797

Footnotes

* Justice KOURLIS does not participate.

End of Document

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EXHIBIT 7

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

IN THE MATTER TO GOVERN OPERATIONS IN THE BLUE GRAVEL FIELD, MOFFAT COUNTY, COLORADO	))	CAUSE NO. 1 ORDER NO. 1-73

REPORT OF THE COMMISSION

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

FINDINGS

The Commission finds as follows:

1. That Marilyn B. Bateman and R.K. Cramer, as applicants herein, are interested parties in the subject matter of the above-referenced hearing.

2. That Jack J. Grynberg ("Grynberg"), as protestant herein, is an interested party in the subject matter of the above-referenced hearing.

3. On November 25, 1996, Marilyn B. Bateman and R.K. Cramer, through counsel, filed an application with the Commission pursuant to §34-60-118.5, C.R.S., (the "Application"), seeking an order to determine the proceeds, interest and attorney's fees due the Applicants from production attributable to Applicants' overriding royalty interests in certain wells located in the Blue Gravel Field, Moffat County, Colorado described on Exhibit "A" attached hereto and made a part hereof (the "Blue Gravel Wells").

4. The Applicants claimed that Jack J. Grynberg, Jack Grynberg & Associates, Grynberg Petroleum Company and Celeste C. Grynberg have failed to timely and properly tender proceeds attributed to Applicants' overriding royalty interest in the Blue Gravel Wells. Specifically, the Applicants requested that the Grynbergs provide a full accounting of all proceeds and permissible deductions attributable to the overriding royalty interests and payment of proceeds and interest.

5. On December 31, 1996, Grynberg filed with the Commission a protest and intervention to the Application.

6. On January 3, 1997, the Applicants submitted a written request to continue the Application on a month-to-month basis while Applicants gathered data. The Secretary declined continuing the matter month-to-month, and instead granted the Applicants' request for continuance to the April hearing pursuant to Rule 506 of the Rules and Regulations of the Oil and Gas Conservation Commission (the "Rules").

7. By letter dated March 11, 1997, the Applicants requested a continuance to the April hearing.

8. At the March 19, 1997, hearing the Commission considered evidence and arguments of both parties and found good cause pursuant to Rule 506 to continue the matter. After polling counsel on availability for potential hearing dates and reviewing the data provided, the Commission set the matter for the October hearing.

9. By Order No. 1-67 dated May 9, 1997, effective April 21, 1997, the Commission denied Grynberg's pro se motion to reconsider hearing date.

10. By Order dated September 23, 1997, the Commission ordered Grynberg to produce certain non-privileged documents in response to the Subpoena Duces Tecum issued by the Commission on April 21, 1997.

11. The Applicants have filed with Arapahoe County District Court an action seeking similar relief, 95 CV 2246, Division 5 (the "Civil Matter"). By Order dated April 16, 1997, the District Court Judge stayed further discovery in the Civil Matter pending resolution of the Application filed before the Commission.

Motion to Recuse Commissioner Williams

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

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

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

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

Prehearing Conference and Prehearing Order

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

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

A. Whether Commissioner Marla Williams must be recused from participation in this matter.

B. Whether, and to what extent, the Commission has jurisdiction to decide legal and factual issues in this matter.

C. Whether § 34-60-115, C.R.S. limits the scope of this hearing to proceeds accruing after August 1, 1995.

D. Whether Respondent Celeste C. Grynberg should be relieved of any liability for payment of proceeds to Applicants in this matter.

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

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

CONCLUSIONS

Motion to Recuse Commissioner Williams

20. Rule 516. provides as pertinent:

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

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

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

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

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

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

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

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

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

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

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

<u>Commission Subject Matter Jurisdiction Over Contested Issues</u>

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

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

B. account to the Applicants for all Permissible Deductions;

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

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

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

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

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

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

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

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

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

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

> The date on which payment of proceeds is due a payee under section (2) of this section;
>
> The existence or nonexistence of an occurrence pursuant to subsection (3) which would justifiably cause a delay in payment; and
>
> The amount of the proceeds plus interest, if any due a payee by a payor. § 34-60-118.5 (5) (a)-(c), C.R.S.

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

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

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

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

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

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

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

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

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

ORDER

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

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

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

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

ENTERED this ________ day of November 1997.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By________________________________
Patricia C. Beaver, Secretary

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

EXHIBIT "A"
Order 1-73 dated November 20, 1997

Blue Gravel #1-24
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: NE¼ SW¼

#2-24 USA C-1727
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: NW¼ NW¼ SE¼

#4-24 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: NE¼ SW¼ SW¼

#5-24 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: N½ NW¼ SW¼

#6-24 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 24: SE¼SE¼SW¼

#1-25 Stauffer Federal or #1-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: NE¼ NW¼

#2-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: NW¼ NW¼ SE¼

#4-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: NW¼ SW¼ NW¼

#5-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: NE¼ NW¼ SW¼

#6-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: SE¼ NE¼ SW¼

#7-25 Federal
Township 9 North, Range 91 West, 6th P.M.
Sec. 25: SE¼ SE¼ NW¼

EXHIBIT 8

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

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

ORDER

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

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

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

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

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

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

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

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

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

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

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

Dated: May 8, 2017

By Jill N Dorancy
Jill Dorancy, Hearing Officer

CERTIFICATE OF SERVICE

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

Nathan Keever
Attorney for Byron Hunter Dixon
keever@dwmk.com

Jamie Jost
Kelsey Wasylenky
Attorneys for Noble Energy, Inc.
jjost@jostenergylaw.com
kwasylenky@jostenergylaw.com

Jill N Dorancy

(170300096)

EXHIBIT 9

☐ Small Claims ☐ County Court ☒ District Court ☐ Probate Court ☐ Juvenile Court ☐ Water Court Garfield County, Colorado Court Address: GARFIELD COMBINED COURTS 109 8TH Street, Suite 104 Glenwood Springs, CO 81601	DATE FILED: July 31, 2017 CASE NUMBER: 2016CV30259
Plaintiff(s): AIRPORT LAND PARTNERS, LTD. v. Defendant(s): ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE, LLC and URSA OPERATING COMPANY, LLC	▲ COURT USE ONLY ▲
GARFIELD COMBINED COURTS Phone Number: 970-928-3065 FAX Number: 970-928-3067	Case No. 16CV30259 Div.: Ctrm: B

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

THIS MATTER comes before the Court on Defendant's Motion to Dismiss. The Court having read the response, reply, supplemental authority, exhibits attached to the pleadings, file and the relevant authorities, hereby finds and orders as follows.

NATURE OF THE CASE AND ISSUE BEFORE THE COURT

Plaintiff is suing Defendants for allegedly underpaying royalties under oil and gas leases. Defendants have filed a motion pursuant to C.R.C.P. 12(b)(1) requesting that the case be dismissed because the court lacks subject matter jurisdiction to hear the case. More specifically, Defendants argue that because Plaintiff has failed to exhaust its administrative remedies with the Colorado Oil and Gas Conservation Commission (hereinafter "COGCC") before filing suit, the Court lacks subject matter jurisdiction.

STATEMENT OF THE FACTS

It is undisputed that the parties entered into oil and gas leases. The royalty provision of the 1994 Lease Agreement, at paragraph 3, Section 2, obligates the Lessee:

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

(Complaint, ¶ 10). Plaintiff also asserts that an addendum to the 1994 oil and gas lease provides that "[a]nything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty." (Complaint ¶ 11).

In 1997, Antero assigned to Plaintiff a five percent overriding interest in certain lands covered by the 1994 Lease Agreement. (Complaint ¶ 14).

None of these agreements contained any provisions regarding the allocation of post-productions costs.

Defendants admit that these agreements and royalty provisions exist. Defendants also admit that agreements specify how royalties are to be calculated and paid under the Leases.

Based on these agreements, Plaintiff is seeking damages for failing to pay royalties based on prices received for marketable residue gas at the location of the first commercial market; improperly charging Plaintiff for various post-production costs; and taking improper deductions for taxes. (Complaint, ¶¶ 20, 21, and 23). Defendants deny that any additional royalties are due and owing.

It is also undisputed that prior to filing suit, Plaintiff did not exhaust its administrative remedies before the COGCC.

CONCLUSIONS OF LAW AND ORDER

The Colorado Oil and Gas Conservation Act

The Colorado Oil and Gas Conservation Act (hereinafter the "Act"), is a comprehensive statute intended to regulate development, production, and utilization of gas and oil. *Oborne v. Cty. Comm'rs,* 764 P.2d 397, 401 (Colo. App. 1988).

The Act gives the COGCC authority to make rules, regulations, and orders necessary to enforce the Act. See, C.R.S. § 34-60-105.

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

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

C.R.S. § 34-60-118.5(5).

Before reaching the merits of any dispute regarding the payment of proceeds, the Act requires the Commission to determine whether a "bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." C.R.S. § 34-60-118.5(5.5). If the Commission determines that a bona fide dispute exists regarding the interpretation of a contract, it must decline jurisdiction over the dispute and the party may then seek resolution in the district court. *Id.*

Exhaustion of Administrative Remedies

If "complete, adequate, and speedy" administrative remedies are available, a party generally must exhaust these remedies before filing suit in district court. *City & Cty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000). This allows the agency to make the first determination on a matter within its expertise and compile a record that is adequate for judicial review so as to prevent piecemeal application of judicial relief and to conserve judicial resources. *State v. Golden's Concrete Co. 962 P.2d 919, 923 (Colo. 1998).* If a party fails to exhaust available remedies, courts lack subject-matter jurisdiction over the action in question. *City & County of Denver v. United Airlines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000).

In determining whether a court has subject matter jurisdiction over a claim where a party did not exhaust administrative remedies available to it, courts examine whether (1) the claim was filed pursuant to the relevant statute; (2) this statute provides a remedy for the claim asserted; and (3) the legislature intended this statute to provide a "comprehensive scheme addressing the issues underlying the claim. *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995).

In determining whether the claim was filed pursuant to the Act, the Court looks to the Complaint. Plaintiff has asserted claims for breach of the 1994 Lease Agreement and for breach of the 5 percent overriding royalty agreement against both Defendants. Plaintiff asserts that Defendants have underpaid royalties under the two agreements.

This falls squarely under Section 34-60-118.5(5)(c) of the Act which grants the Commission jurisdiction over issues over "the amount of proceeds, plus interest, due a payee by a payer." Thus, the first prong of the *Brooke* test is satisfied.

With regard to the second prong, whether the relevant statute provides a remedy, the Court agrees with the finding and rationale of her esteemed colleague, Judge Neiley, when he found in *Miller Land & Cattle Company v. Bill Barret Corporation* [1] that the COGCC provides a remedy for claims involving the payment of proceeds. As stated by Judge Neiley "Section 34-60-118.5(2.5), C.R.S. provides a comprehensive scheme for the lessee to calculate and report the amount of royalties due under any lease. Section 34-60-108 also provides a hearing process for alleged violations of the statute. COGCC rule 329(e) further expands on this administrative complaint process. To resolve disputes regarding the payment of proceeds, a payee may submit a Form 37 to the payer requesting additional explanation of the information required by Section 34-60-118.5." Under these provisions of the Act, the remedy for the alleged violation is an evidentiary hearing before the COGCC who would then determine whether the payer has failed to make the required payment. The Act therefore, provides a remedy and the second prong of *Brooke* has been met.

With regard to the third prong, whether the legislature intended the statute to provide a comprehensive scheme addressing the issues underlying the claim, the Court finds that the Act was intended to do so. Section 118.5 provides that after the COGCC determines the absence of "a bona fide dispute over the interpretation of a contract for

[1] The Miller case has been cited by both parties. Judge Neiley's Order may be found in Garfield County Case No. 16CV30102.

payment", it "shall have jurisdiction to determine payment of proceeds. Only upon a finding by the Commission of a bona fide dispute over the terms of a royalty payment is a payee entitled to file suit in district court. This express language demonstrates that the legislature intended that the COGCC have the initial or primary jurisdiction to determine whether a claim falls within its jurisdiction.

<u>Is there a Bona Fide Dispute over Interpretation of a Contract for Payment?</u>

The critical inquiry for the Court to determine whether Plaintiff should have first exhausted its administrative remedy before the COGCC is whether there is a bona fide dispute over contract interpretation.

Interpretation of a written contract and whether ambiguity exists in a contract is a question of law for the court. *Colorado Interstate Gas Co., Inc. v. Chemco, Inc.*, 833 P.2d 786, 788 (Colo. App. 1991); *Pepcol Manufacturing Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 (Colo. 1984). Thus, the Court must examine the agreements to determine if the allocation of post-production costs is addressed.

The agreements do not discuss how to handle the allocation of post-production costs. The agreements are completely silent as to post-production costs. However, Colorado case law provides the terms with respect to how to handle post-production costs. In *Garman v. Conoco, Inc.*, 866 P.2d 652, 659 (Colo. 1994), the court held that "the implied covenant to market obligated the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market." Therefore, even if the agreements are silent as to the allocation of costs, the implied covenant to market provides the missing term and there is nothing to interpret. There are only questions of fact as to the proper allocation of post-production costs, and the prevailing conditions of the wells and related markets which the COGCC is well equipped to address. And, once these factual issues are determined, the allocation of the post-production cost becomes a matter of simple math. As the supreme court explained:

> Once gas is deemed marketable based on a factual determination, the allocation of all costs can properly be determined. Absent express lease provisions addressing allocation of costs, the lessee's duty to market requires that the lessee bear the expenses incurred in obtaining a marketable product. Thus, the expense of getting the product to a marketable condition and location are born by the lessee. Once a product is marketable, however, additional costs incurred to improve the product, or transport the product, are to be shared proportionately by the lessor and lessee. All costs must be reasonable.

Rogers v. Westerman Farm Co., 29 P.3d 887, 906 (Colo. 2001).

The factual determination of marketability is an analytical exercise to which the COGCC is particularly well suited based on its" administrative discretion and expertise." *Collopy v. wildlife Comm'n,* 625 P.2d 994, 1006 (Colo. 1981). The Court agrees with Judge Neiley's conclusion in the *Miller* case that "[b]ecause the COGCC is best suited to determine the benchmark of marketability as a factual matter, and because no contract interpretation is required to make this determination, the jurisdictional exclusion for bona fide disputes over the interpretation of a contract does not apply here." Therefore, Plaintiff should have exhausted its administrative remedies with the COGCC and the Court lacks subject matter to hear this case.[2]

Grynberg v. Colorado Oil & Gas Conservation Comm'n Case

Plaintiff relies principally on the case of *Grynberg v. Colorado Oil & Gas Comm'n,* 7 P.3d 1060 (Colo. App. 1999), to support its position that the COGCC does not have jurisdiction in this case. The Court recognizes that in *Grynberg,* the court of appeals held that the COGCC "does not have jurisdiction to interpret any royalty agreement to determine the propriety of disputed post-production deduction." *Id at 1063.* However, the Court finds that this case is distinguishable.

Grynberg was decided before the *Rogers* decision clarified the scope of the implied covenant to market which is in every oil and gas lease. Since this Court and COGCC now have the *Rogers* opinion to supply the missing terms in the agreements, there is no bona fide dispute and *Grynberg* is not controlling and this Court declines to follow it.

Futility of Exhausting its Administrative Remedies with the Commission

An exception to the exhaustion of remedies doctrine is futility. Under the "futility" exception, exhaustion is not necessary 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." *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998).

Plaintiff again, relies on *Grynberg* and argues that in that case, the Commission definitively ruled that it does not have subject matter jurisdiction over any contractual dispute relating to the propriety of a gas producer deducting post-production costs in its

[2] The Court further notes that Plaintiff did not cite this Court to or identify a single provision in the Agreements that require interpretation by this Court.

calculation of royalties paid to a royalty owner. (Plaintiff's Exhibit 5, ¶¶ 28-43). As set forth above, *Grynberg* predates the Colorado Supreme Court holding in *Rogers*. In *Grynberg*, there were contracts to interpret because the missing terms had not yet been supplied by *Rogers*. Therefore, the Court cannot conclude "beyond a reasonable doubt" that the Commission would decline to hear these claims.

Plaintiff also submitted an Affidavit from Ms. Beaver who has previously worked for the Commission. (See Plaintiff's Exhibit 22). Ms. Beaver contends that the Commission's *Grynberg* Order has never contradicted. She also states that the Commission has "never accepted jurisdiction to adjudicate a post-production cost deduction claim where a contract dispute existed between a royalty owner and a gas producer." (See Plaintiff's Exhibit 22, ¶ 5). The Court does not doubt that both of these statements are true. However, this case does not involve a bona fide contract dispute so the Commission should hear the case and the Court does not find "beyond a reasonable doubt" that it would not hear the case or that pursing an exhaustion of remedies would be futile.

Defendant's Motion to Dismiss pursuant to 12(b)(1) is granted for all of the reasons set forth above. The Court lacks subject matter to hear the case because Plaintiff did not exhaust its administrative remedies with the COGCC. The case is therefore dismissed, without prejudice.

Dated this 31st day of July, 2017.

BY THE COURT:

Denise K. Lynch
District Court Judge

EXHIBIT 10

FOR OFFICIAL USE ONLY

FORM 38 Rev 1/10

State of Colorado
Oil and Gas Conservation Commission
1120 Lincoln street, Suite 801, Denver, Colorado 80203 (303) 894-2100 Fax: (303) 894-2109

PAYMENT OF PROCEEDS HEARING REQUEST

This form may be submitted only by a payee legally entitled to payment from proceeds derived from the sale of oil, gas, or associated products from a well in Colorado. The payee is to complete this form (one form per well), attach required documentation and mail to: COGCC, 1120 Lincoln Street, Suite 801, Denver, Colorado 80203 or fax to: (303) 894-2109. COGCC will investigate the report and determine what action, if any, should be taken.

PAYEE INFORMATION

NAME OF PAYEE: Airport Land Partners, Ltd. **PHONE NO:** 816-300-6250 (Attorney for Airport Land Partners)

ADDRESS: 312 Aspen Airport Business Center, Suite A **FAX:** 816-300-6259 (Attorney for Airport Land Partners)

CITY: Aspen **STATE:** CO **ZIP:** 81611 **E-MAIL:** gab@georgebartonlaw.com

PAYEE NUMBER: 14832

MINERAL INFORMATION

WELL NAME: SEE ATTACHED LETTTER **COUNTY:** SEE ATTACHED LETTER

QTR/QTR SEC: TOWNSHIP: RANGE: SEE ATTACHED LETTER **API NUMBER:** SEE ATTACHED LETTER

NON-COMPLIANCE ISSUES NOT RESOLVED (PLEASE CHECK ALL THAT APPLY)

Required checkstub detail not provided:	
Late payment	X
Non payment	X
No interest paid on late payment	X
No response to Form 37 inquiry	

NONE OF THE ABOVE

All pertinent documentation must be attached. This includes: completed copy of operator contact Form 37, proof of mailing, response (if received from operator), redacted checkstub detail and any other documentation necessary.

EXHIBIT 11

2016 WL 7009138

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.

Colorado Court of Appeals,
Div. VI.

GRANT BROTHERS RANCH, LLC,
Plaintiff–Appellant,
v.
ANTERO RESOURCES PICEANCE CORPORATION, a withdrawn Colorado corporation, and Ursa Operating Company, LLC, a Delaware corporation, Defendants–Appellees.

Court of Appeals No. 15CA2063
|
Announced December 1, 2016

Synopsis
Background: Owner of property within drilling and spacing units approved by Oil and Gas Conservation Commission, who had refused to lease minerals or participate in their production, brought action against oil and gas exploration and production companies, seeking an equitable accounting and its share of proceeds derived from the production and sale of oil and gas underlying property pursuant to the Oil and Gas Conservation Act. The District Court, Garfield County, James B. Boyd, J., granted summary judgment in favor of companies, holding that it lacked subject matter jurisdiction over the claims because owner failed to exhaust administrative remedies under the Act. Owner appealed.

Holdings: The Court of Appeals, Fox, J., held that:

[1] owner was required to exhaust administrative remedies, and

[2] dismissal of owner's claim for failure to exhaust administrative remedies should have been without prejudice.

Affirmed in part, reversed in part, and remanded.

West Headnotes (11)

[1] **Appeal and Error**
⇐Necessity of presentation in general

The Court of Appeals does not consider arguments never presented to, considered or ruled upon by the district court.

Cases that cite this headnote

[2] **Appeal and Error**
⇐Necessity of presentation in general

All that is needed to preserve an issue for appeal is for the issue to be brought to the district court's attention so that the court has an opportunity to rule on it.

Cases that cite this headnote

[3] **Appeal and Error**
⇐Proceedings preliminary to trial

The Court of Appeals employs a mixed standard of review to motions to dismiss for lack of subject matter jurisdiction. Colo. R. Civ. P. 12(b)(1).

Cases that cite this headnote

[4] **Administrative Law and Procedure**
⇐Exhaustion of administrative remedies

If complete, adequate, and speedy administrative remedies are available, a party generally must exhaust these remedies before filing suit in district court.

Cases that cite this headnote

[5] **Administrative Law and Procedure**
⇐Exhaustion of administrative remedies

The administrative exhaustion doctrine enables an agency to make initial determinations on matters within its expertise and to compile a record that is adequate for judicial review so as to prevent piecemeal application of judicial relief and to conserve judicial resources.

Cases that cite this headnote

[6] **Administrative Law and Procedure**
⇐Exhaustion of administrative remedies

When an administrative agency does not have the authority to grant the relief requested by a party seeking judicial action, and the available administrative remedies are ill-suited for providing the relief requested, administrative exhaustion is not required.

Cases that cite this headnote

[7] **Administrative Law and Procedure**
⇐Exhaustion of administrative remedies

In determining whether a court has subject matter jurisdiction over a claim where a party did not exhaust administrative remedies available to it, courts examine whether: (1) the claim was filed pursuant to the relevant statute, (2) this statute provides a remedy for the claim asserted, and (3) the legislature intended this statute to provide a comprehensive scheme addressing the issues underlying the claim.

Cases that cite this headnote

[8] **Mines and Minerals**
⇐In general; procedure

Nonconsenting property owner was required to exhaust administrative remedies on its non-contractual dispute with oil and gas exploration and production companies regarding proceeds due from companies' production and sale of oil and gas underlying owner's property, which was within drilling and spacing units approved by Oil and Gas Conservation Commission, before bringing court action against companies under the Oil and Gas Conservation Act; Commission had primary jurisdiction over dispute, the Act provided a remedy for the dispute, and the statutory scheme suggested that the legislature intended the Act to provide a comprehensive scheme addressing the issues underlying the claim. Colo. Rev. Stat. Ann. §§ 34-60-101 et seq.

Cases that cite this headnote

[9] **Mines and Minerals**
⇐Powers and Proceedings of Commissions and Officers in General

The statutory scheme of the Oil and Gas Conservation Act establishes a typical administrative process allowing for rulemaking, hearings, and eventual judicial review of disputes within the Oil and Gas Conservation Commission's area of expertise. Colo. Rev. Stat. Ann. §§ 34-60-101 et seq.

Cases that cite this headnote

[10] **Pretrial Procedure**
⇐Dismissal with or without prejudice
Pretrial Procedure
⇐Adjudication on merits

Dismissal of nonconsenting property owner's claim against oil and gas exploration and production companies regarding proceeds owner was due from companies' production and sale of oil and gas underlying owner's property, which was within drilling and spacing units approved by Oil and Gas Conservation Commission, for failure to exhaust administrative remedies under the Oil and Gas Conservation Act, should have been without prejudice; such dismissal was not an adjudication on the merits, but rather was the result of the court lacking subject matter jurisdiction to hear the claims asserted. Colo. Rev. Stat. Ann. §§ 34-60-101 et seq.; Colo. R. Civ. P. 12(b)(1).

Cases that cite this headnote

[11] **Pretrial Procedure**
⇐Adjudication on merits

A dismissal for lack of subject matter jurisdiction is not an adjudication on the merits, but rather is the result of a court lacking the power to hear the claims asserted. Colo. R. Civ. P. 12(b)(1).

Cases that cite this headnote

Garfield County District Court No. 14CV30180, Honorable James B. Boyd, Judge

Attorneys and Law Firms

Dufford, Waldeck, Milburn & Krohn, LLP, Nathan A. Keever, Grand Junction, Colorado, for Plaintiff–Appellant

Beatty & Wozniak, P.C., Michael J. Wozniak, Karen L. Spaulding, Malinda Morain, Denver, Colorado, for Defendants–Appellees

Opinion

Opinion by JUDGE FOX

***1** ¶ 1 Plaintiff, Grant Brothers Ranch, LLC (Grant Brothers), sued defendants, Antero Resources Piceance Corporation (Antero) and Ursa Operating Company, LLC (Ursa) (collectively, Operators), to recover its share of proceeds derived from the production and sale of oil and gas. Concluding that Grant Brothers was required and failed to exhaust its administrative remedies available under the Oil and Gas Conservation Act, §§ 34–60–101 to –130, C.R.S. 2016 (the Act), the district court held that it lacked subject matter jurisdiction over the action and granted summary judgment in favor of Operators. Grant Brothers appeals the judgment dismissing its claims with prejudice. We affirm in part, reverse in part, and remand with directions to correct the judgment.

I. Background

¶ 2 Antero, an oil and gas exploration and production company, received approval from the Colorado Oil and Gas Conservation Commission (the Commission) to establish a drilling and spacing unit to produce oil and gas in Garfield County. Grant Brothers owned property within this unit. Antero wished to produce the oil and gas underlying Grant Brothers' property, but Grant Brothers refused Antero's offer to lease the minerals or participate in their production.

¶ 3 As a result, Antero requested that the Commission pool all nonconsenting interests in the unit and allow Antero to produce and sell the oil and gas of the nonconsenting owners. Grant Brothers asked the Commission to deny Antero's request. After a hearing, the Commission issued an order pooling all of the nonconsenting interests in the unit.

¶ 4 About a year and a half after issuing this pooling order, the Commission approved Antero's request to establish another drilling and spacing unit within the same lands as the first unit in order to produce oil and gas from a deeper formation. Again, Antero asked Grant Brothers to lease the minerals or participate in their production and, again, Grant Brothers refused. Antero requested that the

Commission pool all nonconsenting interests in the second unit. After a hearing, the Commission issued an order pooling all nonconsenting interests in the second unit.

¶ 5 As a result of the Commission's pooling orders, Grant Brothers became a nonconsenting owner pursuant to section 34–60–116(7), C.R.S. 2016, of the Act. In pertinent part, this meant that Grant Brothers was entitled to receive its interest in the proceeds derived from the production and sale of oil and gas from wells in the units. However, Grant Brothers would receive payment only after these wells reached "payout," in other words after Antero recovered the costs allowed by section 34–60–116(7). The pooling orders required Antero to furnish Grant Brothers with monthly statements containing information about its costs and its proceeds.

¶ 6 Almost three years after the Commission issued its last pooling order, Grant Brothers asked Antero for permission to audit its books and records regarding the wells at issue. Antero refused, noting that it had been sending Grant Brothers the required monthly statements.

***2** ¶ 7 About two years after Antero refused the request for an audit, Grant Brothers sued Operators in district court.[1] Grant Brothers' complaint requested an equitable accounting and alleged that the wells had reached payout, but Operators had yet to pay Grant Brothers. Operators filed a motion for summary judgment, asserting that Grant Brothers was required to exhaust its administrative remedies available under the Act and had failed to do so before filing its complaint. Operators argued that the district court lacked subject matter jurisdiction over the action and should dismiss it with prejudice. The court agreed and granted summary judgment, dismissing the action with prejudice.

II. Summary Judgment

¶ 8 Grant Brothers first contends that the district court improperly granted summary judgment because Grant Brothers was not required to exhaust its administrative remedies, and, thus, the court had subject matter jurisdiction over the action. We disagree. Second, Grant Brothers argues that it was inappropriate for the district court to dismiss the action *with* prejudice on the basis that the court lacked subject matter jurisdiction over the action. We agree that dismissal with prejudice was error.

A. Administrative Exhaustion

¶ 9 Grant Brothers argues that the Act does not contain a clear manifestation of legislative intent requiring an involuntarily pooled mineral rights owner to exhaust administrative remedies before seeking an equitable accounting in district court regarding the amount of proceeds owed after the wells at issue reach payout. Grant Brothers asserts that the Act's language and legislative history—including the 1998 amendments to the Act and related testimony from Senator Tilman Bishop, the sponsor of the amendments[2]—and the Commission's rules support this position.

1. Preservation

¶ 10 The parties agree that Grant Brothers properly preserved this argument, except to the extent that Grant Brothers uses Senator Bishop's testimony to support its contention.

[1] [2]¶ 11 We do not consider "arguments never presented to, considered or ruled upon by" the district court. *Core–Mark Midcontinent Inc. v. Sonitrol Corp.*, 2016 COA 22, ¶ 24, 370 P.3d 353 (citation omitted). All that is needed to preserve an issue for appeal is for the issue to be brought to the district court's attention so that the court has an opportunity to rule on it. *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010).

¶ 12 Responding to the motion for summary judgment, Grant Brothers argued that the legislature did not intend for the Commission's jurisdiction over disputes like the one at issue to be exclusive or, relatedly, to require administrative exhaustion. Grant Brothers supported this argument by discussing the Act's 1998 amendments. On appeal, Grant Brothers merely presents relevant legal research—Senator Bishop's testimony—to further support the argument previously made to the district court.[3] Therefore, we conclude that Grant Brothers' argument was properly preserved.

2. Review Standard

*3 ¶ 13 Although Operators moved for summary judgment, their motion argued that the district court lacked subject matter jurisdiction over the action. The district court granted Operators' motion solely on this basis. The district court's order left unresolved significant factual disputes, such as whether payout had occurred. Given these facts, Operators' motion was effectively a motion to dismiss for lack of subject matter jurisdiction more properly brought under C.R.C.P. 12(b)(1) than C.R.C.P. 56. *See Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993) (reasoning that a court's determination under Rule 12(b)(1) reveals whether it has power to hear the case, while its determination under Rule 56 results in an adjudication on the merits); *cf. Winslow v. Walters*, 815 F.2d 1114, 1116 (7th Cir. 1987) ("Seeking summary judgment on a jurisdictional issue ... is the equivalent of asking a court to hold that because it has no jurisdiction the plaintiff has lost on the merits. This is a nonsequitur.").

¶ 14 Because the record contains all necesary information, we apply Rule 12(b)(1) to the record before us and resolve these issues as a matter of law. *See Trinity Broad. of Denver, Inc.*, 848 P.2d at 925; *W.O. Brisben Cos. v. Krystkowiak*, 66 P.3d 133, 137 (Colo. App. 2002) (citing *Norsby v. Jensen*, 916 P.2d 555, 559 (Colo. App. 1995)), *aff'd on other grounds*, 90 P.3d 859 (Colo. 2004).

[3]¶ 15 We employ a mixed standard of review to motions to dismiss for lack of subject matter jurisdiction. *Hanson v. Colo. Dep't of Revenue*, 140 P.3d 256, 257–58 (Colo. App. 2006). We review factual findings for clear error, and such findings will be upheld unless they have no support in the record. *Id.* However, we review legal conclusions de novo. *Id.* We also review a district court's interpretation of a statute de novo. *Anderson v. Vail Corp.*, 251 P.3d 1125, 1127–28 (Colo. App. 2010). In construing legislation, we look first to the plain language of the statute, reading it as a whole. *Young v. Brighton Sch. Dist. 27J*, 2014 CO 32, ¶ 11, 325 P.3d 571. Then, if the language is ambiguous, we "construe the statute in light of the General Assembly's objective," presuming "that the legislature intended a consistent, harmonious, and sensible effect." *Anderson*, 251 P.3d at 1127–28.

3. Applicable Law

¶ 16 In the Act, the Colorado Legislature granted the Commission "the authority to regulate: ... the drilling, producing, and plugging of wells and all other operations for the production of oil or gas...." § 34–60–106(2)(a), C.R.S. 2016.[4] The Act's declaration gives the Commission a broad grant of jurisdiction. *See* § 34–60–105(1), C.R.S. 2016 ("The commission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article, and has the power to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article."); *see also Oborne v. Cty. Comm'rs*, 764 P.2d 397, 401 (Colo. App. 1988) (stating that the Act is a comprehensive statute intended to regulate development, production, and utilization of gas and oil).

¶ 17 The Act further provides that "[a]bsent a bona fide dispute over the interpretation of a contract for payment, the oil and gas conservation commission shall have jurisdiction to determine ... [t]he date on which payment of proceeds is due" and any "amount of proceeds" or interest due. § 34–60–118.5(5)(a) and (c), C.R.S. 2016. Relatedly, the very next provision, subsection 5.5, provides:

> *4 Before hearing the merits of any proceeding regarding payment of proceeds pursuant to this section, the oil and gas conservation commission shall determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee. If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court.

§ 34–60–118.5(5.5).

¶ 18 In relation to whether payout has occurred, the Act states that, "[i]n the event of any dispute" as to the costs allowed to be recovered before having to pay the nonconsenting owners, "the [C]ommission shall determine the proper costs[.]" § 34–60–116(7)(a). It also states that, during the period of cost recovery occurring before the wells reach payout, "the [C]ommission shall retain jurisdiction to determine the reasonableness" of such costs. § 34–60–116(7)(d).

¶ 19 An exception to the Commission's jurisdiction concerns disputes over the interpretation of a payment contract. The Commission shall "decline jurisdiction over the dispute," and the parties can "seek resolution of the matter in *district court*," if the dispute involves a contract. § 34–60–118.5(5.5) (emphasis added).[5]

[4] [5]¶ 20 If "complete, adequate, and speedy" administrative remedies are available, a party generally must exhaust these remedies before filing suit in district court.[6] *City & Cty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000). The administrative exhaustion doctrine "enables the agency to make initial determinations on matters within its expertise and to compile a record that is adequate for judicial review" so as to "prevent piecemeal application of judicial relief and to conserve judicial resources." *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998); *accord Great W. Sugar Co. v. N. Nat. Gas Co.*, 661 P.2d 684, 690 (Colo. App. 1982) (explaining that primary jurisdiction allows an agency to decide "in the first instance ... technical questions of fact uniquely within the agency's expertise and experience") (citation omitted).

[6] [7]¶ 21 However, when the administrative agency does not have the authority to grant the relief requested by the party seeking judicial action, and the available administrative remedies are "ill-suited" for providing the relief requested, administrative exhaustion is not required. *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995) (citation omitted). In determining whether a court has subject matter jurisdiction over a claim where a party did not exhaust administrative remedies available to it, courts examine whether: (1) the claim was filed pursuant to the relevant statute; (2) this statute provides a remedy for the claim asserted; and (3) the legislature intended this statute to provide a "comprehensive scheme" addressing the issues underlying the claim. *Id.* at 68–71; *see Pfenninger v. Exempla, Inc.*, 17 P.3d 841, 843–44 (Colo. App. 2000).

4. Analysis

[8]¶ 22 We conclude that the district court was right to dismiss the action for the reasons stated below.

¶ 23 First, in determining whether the claim at issue was filed pursuant to the relevant statute, *Brooke*, 906 P.2d at 68–71, we understand Grant Brothers' claim as one for payment of proceeds arising under sections 34–60–116 and –118.5 of the Act. At issue is: (1) whether payout has been reached; (2) if so, the date on which payment proceeds became due; and (3) the amount owed (plus interest) to Grant Brothers. § 34–60–118.5(5) and (5.5). It is undisputed that Grant Brothers is a nonconsenting owner seeking payment of funds acquired by Operators by extracting and selling natural gas from the wells at issue. Consequently, Grant Brothers qualifies as a "payee" entitled to payment of proceeds from Operators, the "payers." *See* §§ 34–60–116(7), –118.5(1)(a) and (b).

*5 ¶ 24 Grant Brothers' entitlement, however, is subject to a condition precedent. Where, as here, an operator and a nonconsenting owner have no contract addressing the issue, "[t]he date on which payment of proceeds is due" is the date the wells reach payout. § 34–60–118.5(5). Grant Brothers receives payment only if and when payout occurs.

¶ 25 Reading subsections –118.5(5) and –118.5(5.5) together, as we must, and applying the statutory language, *Young*, ¶ 11, we conclude that the Act's comprehensive scheme means that primary jurisdiction for the present dispute remains with the Commission. *See Great W. Sugar Co.*, 661 P.2d at 690. If one party is dissatisfied with the results of the administrative process, that party can then seek judicial review. *See* § 34–60–111, C.R.S. 2016 (providing that any final order of the "[C]ommission shall be subject to judicial review"); *see also* Dep't of Nat. Res. Reg. 501(c), 2 Code Colo. Regs. 404–1 (adopting the State Administrative Procedure Act (APA), sections 24–4–101 to –108, C.R.S. 2016); Dep't of Nat. Res. Reg. 503(b)(8), 2 Code Colo. Regs. 404–1 (allowing a mineral interest owner to file an application to the Commission for the purpose of seeking a hearing on provisions related to measurement); Dep't of Nat. Res. Reg. 503(b)(10), 2 Code Colo. Regs. 404–1 (allowing an aggrieved interest owner to file an application for relief for any other matter not described in the regulation); Dep't of Nat. Res. Reg. 522, 2 Code Colo. Regs. 404–1 (allowing a mineral owner to file a complaint requesting the issuance of a violation notice directing an operator to voluntarily remedy the violation).

¶ 26 Second, as to whether the relevant statute provides a remedy for the claim asserted, *Brooke*, 906 P.2d at 68–71, the Act provides a remedy for claims for the payment of proceeds where the parties have no contract addressing the issue.

¶ 27 Here, there is no contract; thus, there is no contract dispute. *See, e.g., Atl. Richfield Co. v. Farm Credit Bank*

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of Wichita, 226 F.3d 1138, 1157 (10th Cir. 2000) (applying Colorado law); *Anderson Living Trust v. ConocoPhillips Co., LLC*, 952 F.Supp.2d 979, 1054 (D.N.M. 2013) (applying Colorado law); *Grynberg v. Colo. Oil & Gas Conservation Comm'n*, 7 P.3d 1060, 1062–63 (Colo. App. 1999) (finding the Commission had jurisdiction to calculate the amount of proceeds due to a payee and to enforce timely payment, but lacked jurisdiction to resolve a contractual dispute over whether operators were entitled under a lease to deduct post-production expenses in computing royalties due to owners).

¶ 28 A payee contesting the payment (or nonpayment) of proceeds must first submit a written request, such as Commission Form 37, to the payer(s) requesting certain information regarding the costs of installing and operating the well. § 34–60–118.5(2.5); Dep't of Nat. Res. Reg. 329, 2 Code Colo. Regs. 404–1. After submitting Form 37, if the dispute remains unresolved, the payee may then submit Form 38 to request a hearing before the Commission. Any final order resulting from such a hearing is subject to judicial review pursuant to the APA, sections 24–4–101 to –108. *See* § 34–60–111; *see also* Dep't of Nat. Res. Reg. 501, 2 Code Colo. Regs. 404–1.

[9]¶ 29 Third, with regard to whether the legislature intended the statutory remedy to be the primary remedy for the claim asserted, *Brooke*, 906 P.2d at 68–71, the legislature has said, by the Act's language and structure, that a proceeding before the Commission, as described above, is the primary remedy for nonconsenting owners's claims for the payment of proceeds where there is no germane contract between the parties. *See* §§ 34–60–118.5(5), –118.5(5.5), and –116(7). The comprehensive statutory scheme detailed above—addressing when payout has occurred, the date when payment of proceeds is due, and the amount of proceeds due where the parties have no contract regarding the payment of proceeds—evidences this intent. *See Brooke*, 906 P.2d at 68–71; *Egle v. City & Cty. of Denver*, 93 P.3d 609, 612 (Colo. App. 2004). The scheme establishes a typical administrative process allowing for rulemaking, hearings, and eventual judicial review of disputes within the Commission's area of expertise.

***6** ¶ 30 Contrary to Grant Brothers' suggestion, the 1998 amendments do not evidence a change in the legislature's intent regarding the primacy of the Commission's jurisdiction over disputes like this one. Before the amendments, the Act stated that the Commission "shall have *exclusive* jurisdiction to determine ... [t]he date on which payment of proceeds is due a payee [;] ... [t]he existence or nonexistence of an occurrence ... [justifying] a delay in payment; and ... [t]he amount of proceeds plus interest, if any, due a payee by a payor." § 34–60–118.5(5), C.R.S. 1997 (emphasis added). After the amendments, the Act states that, "[a]bsent a bona fide dispute over the interpretation of a contract for payment, [the Commission] shall have jurisdiction to determine" the same three issues outlined in the older version of the Act. § 34–60–118.5(5), C.R.S. 2016. The 1998 amendments did not change the Commission's primary jurisdiction over disputes for the payment of proceeds such as the one before us. 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. *See* §§ 34–60–118.5(5) and –118.5(5.5). The history of the 1998 amendments to the Act, implemented through Senate Bill 98–159,[7] reveals the following:

• Senator Bishop repeatedly stated 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. *See* Hearings on S.B. 98–159 before the Conf. Comm., 61st Gen. Assemb., 2nd Sess. (Apr. 16, 1998) (comments of Senator Bishop); Hearings on S.B. 98–159 before the S. Agricultural Comm., 61st Gen. Assemb., 2nd Sess. (Feb. 4, 1998) (comments of Senator Bishop). Bishop, along with the Member of the House who worked with him on the bill, also stressed multiple times that the bill was not meant to change any *substantive* contractual rights established by oil and gas leases, but it would change some *procedural* rights (such as how payments should be made and what information should be disclosed regarding such payments). Hearings on S.B. 98–159 before the Conf. Comm., 61st Gen. Assemb., 2nd Sess. (Apr. 16, 1998) (comments of Senator Bishop). Bishop also emphasized that the Commission should not be asked to resolve disputes that are better addressed by courts (e.g., interpretation of contract provisions). *Id.*

• Walter Fees, who worked with Bishop on the bill, authored a letter discussing changes to section 34–60–118.5, which states, "[a]fter my talk with [Senator] Bishop[,] he feels the [Commission] should have exclusive jurisdiction over the payment of proceeds." *See* Hearings on S.B. 98–159 before the S. Agricultural Comm., 61st Gen. Assemb., 2nd Sess. (Feb. 4, 1998) (letter to Richard Griebling, referenced at the hearing).

• Jack Rigg, associated with Amoco and the Rocky Mountain Oil and Gas Association, also testified that the Commission should not be involved in private *contract* disputes and that one of the main purposes of the amendment was to clarify that the Commission was not to interpret contract terms in place of a court. *See id.* (comments of Jack Rigg). He never suggested that the Commission should not continue to have primary jurisdiction over noncontractual disputes over the payment of proceeds. *Id.*

We are thus unpersuaded by Grant Brothers' arguments to the contrary.

¶ 31 While section 34–60–118.5 alone does not create an entitlement to proceeds, *Grynberg*, 7 P.3d at 1063, a final order from the Commission recognizing one's status as a nonconsenting owner pursuant to section 34–60–116 does. Grant Brothers' entitlement to payment is not at issue; the issues are if and when Grant Brothers is to receive payment and in what amount.

*7 ¶ 32 To allow parallel judicial proceedings on these same issues, rather than giving the Commission the first opportunity to decide them, *see Great W. Sugar Co.*, 661 P.2d at 690, would go against the legislative intent revealed by the Act's declaration (§ 34–60–105(1)), language (§ 34–60–118.5), and administrative processes (*see* Dep't of Nat. Res. Regs. 501, 503(b)(8), 503(b)(10), 522, 2 Code Colo. Regs. 404–1). And, requiring Grant Brothers and similarly situated claimants to exhaust administrative remedies promotes the policy objectives at the heart of the doctrine of administrative exhaustion. *See Golden's Concrete Co.*, 962 P.2d at 923 (expounding on the doctrine's policy objectives, including the conservation of judicial resources). The determination Grant Brothers seeks concerning key details of the oil and gas production process is well within the expertise of the Commission, and allowing the Commission to develop a record in resolving this dispute will conserve judicial resources and result in a more optimal application of judicial relief, should the claim undergo later judicial review. *See id.*

¶ 33 We therefore conclude that Grant Brothers was required to exhaust its administrative remedies and did not do so before filing suit in the district court. As a result, we conclude that the district court properly dismissed the action.

B. Dismissal With Prejudice

[10]¶ 34 Grant Brothers contends that the district court erred in dismissing its claim with prejudice solely on the basis that the court lacked subject matter jurisdiction. We agree.

[11]¶ 35 A dismissal under C.R.C.P. 12(b)(1) is not an adjudication on the merits, but rather is the result of a court lacking the power to hear the claims asserted. *See Trinity Broad. of Denver, Inc.*, 848 P.2d at 925. Because we have determined that the issue of subject matter jurisdiction raised by Operators' motion should have been addressed pursuant to Rule 12(b)(1), the dismissal we affirm is necessarily without prejudice, which the district court shall correct upon remand. Grant Brothers therefore retains the ability to seek further relief from the Commission, whose orders are then subject to judicial review. *See* Dep't of Nat. Res. Reg. 501, 2 Code Colo. Regs. 404–1.

III. Operators' Request for Costs

¶ 36 Operators requested their costs pursuant to C.A.R. 39. Because we affirm in part and reverse in part, we conclude that the trial court should determine what amount of appellate costs, if any, to award upon remand. *See* C.A.R. 39(a)(4) ("[I]f a judgment is affirmed in part, ... costs are taxed *only* as ordered by the *trial court*.") (emphasis added).

IV. Conclusion

¶ 37 The judgment is affirmed in part and reversed in part, and the case is remanded to the district court with directions to correct the judgment to clarify that the dismissal is without prejudice and to make a determination regarding Operators' request for costs pursuant to C.A.R. 39.

JUDGE BERNARD and JUDGE RICHMAN concur.

--- P.3d ----, 2016 WL 7009138, 2016 COA 178

All Citations

Footnotes

1 Antero drilled and operated the wells within the units until December of 2012, when Ursa assumed operation of the wells.

2 In 1998, Senator Bishop sponsored a bill, S.B. 98–159, that amended several parts of the Act, including provisions in section 34–60–118.5, C.R.S. 2016, concerning the Commission's jurisdiction over certain disputes. *See* Ch. 186, sec. 1, § 34–60–118.5, 1998 Colo. Sess. Laws 636.

3 Although Senator Bishop's testimony was not specifically presented to the district court, the arguments regarding legislative intent and related legislative history were brought to the court's attention such that it had an opportunity to rule on this issue. *See Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010). We will not address the remainder of the arguments that Grant Brothers raised for the first time either on appeal or in its reply brief. *See Core–Mark Midcontinent Inc. v. Sonitrol Corp.*, 2016 COA 22, ¶ 24, 370 P.3d 353; *see also People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (refusing to address issues not raised in an appellant's original brief but raised for the first time in the reply brief).

4 The Commission also regulates "[t]he spacing of wells ... and ... [l]imit[s] the production of oil or gas, or both, from any pool or field for the prevention of waste, and [limits] and [allocates] the production from such pool or field among or between tracts of land having separate ownership therein, on a fair and equitable basis so that each such tract will be permitted to produce no more than its just and equitable share from the pool...." § 34–60–106(2)(c) and (3)(a), C.R.S. 2016.

5 The legislature limited the Commission's jurisdiction over lawsuits for damages or injunctive relief, but this is not at issue in this case. *See* § 34–60–114, C.R.S. 2016.

6 There are exceptions to administrative exhaustion, but none was invoked here.

7 Although we conclude that the Act's language evidences its underlying legislative purpose, we examine the legislative history of the 1998 amendments in order to fully address the issues Grant Brothers raises on appeal. *See Kisselman v. Am. Family Mut. Ins. Co.*, 292 P.3d 964, 969 (Colo. App. 2011) ("[W]e may consider legislative history when there is substantial legislative discussion surrounding the passage of a statute, and the plain language interpretation of a statute is consistent with legislative intent.").

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EXHIBIT 12

381 P.3d 378
Colorado Court of Appeals,
Div. VII.

Ivo LINDAUER; Sidney Lindauer; Ruth Lindauer; and Diamond Minerals, LLC, on behalf of themselves and all others similarly situated, Plaintiffs–Appellees,
v.
WILLIAMS PRODUCTION RMT COMPANY, n/k/a WPX Energy Rocky Mountain, LLC, Defendant–Appellant.

Court of Appeals No. 14CA2502
|
Announced March 10, 2016

Synopsis
Background: Lessors brought class action challenging operator's calculation and payment of royalties. Following a bench trial, the District Court, Garfield County, Denise K. Lynch, J., entered judgment against operator for $5,136,296.95. Operator appealed.

[Holding:] The Court of Appeals, Richman, J., held that operator's reasonable costs of transporting gas to downstream markets were deductible from royalty payments.

Reversed and remanded with directions.

West Headnotes (5)

[1] **Appeal and Error**
⚖Cases Triable in Appellate Court

The Court of Appeals reviews the district court's interpretation of case law de novo.

Cases that cite this headnote

[2] **Mines and Minerals**
⚖Amount and time of payment

"Production costs," for purposes of enhancement test, under which upon obtaining a marketable product, any additional costs incurred to enhance the value of the marketable gas may be charged against nonworking interest owners, means certain processing costs that enhance the value of marketable gas.

Cases that cite this headnote

[3] **Mines and Minerals**
⚖Amount and time of payment

Oil and gas operator's reasonable costs of transporting gas to downstream markets were deductible from royalty payments; once the gas reached the commercial marketplace, operator should have been given flexibility in determining where to market the gas to achieve the best results for all concerned, and requiring operator to prove that downstream marketing enhanced the value of the gas before deducting costs each month could discourage it from pursuing a downstream marketing strategy with long-term benefits for both the operator and the royalty owners.

Cases that cite this headnote

[4] **Mines and Minerals**
⚖Extent of production, paying quantities, and marketing

Oil and gas lease operators have an implied duty under their leases to act diligently and prudently in marketing the gas for royalty owners; if an operator pursues an imprudent downstream marketing strategy that harms royalty owners, it may be subject to a claim for breach of that duty, separate and apart from a claim for improper deduction of costs.

Cases that cite this headnote

[5] **Mines and Minerals**
.=Amount and time of payment

Transportation costs for natural gas beyond the first commercial market need not enhance the value of the gas, such that actual royalty revenues increase in proportion to those costs, to be deductible from royalty payments.

Cases that cite this headnote

***379** Garfield County District Court No. 06CV317, Honorable Denise K. Lynch, Judge

Attorneys and Law Firms

Dufford, Waldeck, Milburn & Krohn, LLP, Nathan A. Keever, Grand Junction, Colorado, for Plaintiffs–Appellees.

Holland & Hart LLP, John F. Shepherd, Christopher A. Chrisman, Denver, Colorado, for Defendant–Appellant.

Opinion

Opinion by JUDGE RICHMAN

¶ 1 This case raises two undecided questions of Colorado law regarding the payment of royalties to lessors of oil and gas leases. First, must costs incurred to transport natural gas to markets beyond the first commercial market "enhance" the value of that gas, such that actual royalty revenues increase, in order to be deductible from royalty payments? Second, if the enhancement test applies to such transportation costs, must the enhancement, and the reasonableness of the costs, be shown on a month by month basis? We answer the first question "no" and therefore do not reach the second question.

¶ 2 Defendant, Williams Production RMT Company n/k/a WPX Energy Rocky Mountain, LLC (WPX), appeals the district court's entry of judgment after a bench trial in favor of plaintiffs, Ivo Lindauer, Sydney Lindauer, Ruth Lindauer, Diamond Minerals, LLC, and all those similarly situated. We reverse and remand with directions to enter judgment in favor of WPX.

I. Background

¶ 3 Plaintiffs (the lessors) own royalty interests under oil and gas leases for wells operated by WPX (the lessee) in northwest Colorado. They brought this class action in 2006 challenging WPX's calculation and payment of royalties.

¶ 4 The parties reached a partial settlement agreement in 2008 that resolved all but two reserved claims. Only the second claim is before us in this appeal, namely, plaintiffs' assertion that WPX improperly deducted transportation costs incurred beyond the first commercial market when calculating royalties on natural gas in certain months from July 2000 to July 2008.[1]

¶ 5 The facts underlying this claim are largely undisputed. The natural gas on the lands subject to plaintiffs' leases was produced in an area known as the Piceance Basin. WPX incurred costs to transport the natural gas from the wellhead to the point of sale. These included costs for compressing the gas, gathering it through small pipelines, and processing it at a plant. Once processed, the gas reached the "tailgate" of the processing plant and entered a large mainline ***380** pipeline. The costs of processing and transporting the gas up to the point it reached the tailgate are not deducted from royalties paid to plaintiffs.

¶ 6 Although there is a commercial market for gas at or near the tailgate in the Piceance Basin, WPX has sold some of the produced gas in "downstream" markets where higher prices are sometimes available. The gas sold downstream must be transported to the point of sale. WPX entered into long-term contracts with pipeline companies to reserve capacity on the mainline pipelines to transport the gas from the tailgate to the downstream markets.

¶ 7 The downstream transportation charges involve two components. First, there is a "demand charge," which is a charge paid by WPX to reserve space on the mainline pipelines. The demand charge is paid by WPX whether or not it uses the pipeline to ship gas, but according to WPX's procedures, demand charges are deducted from plaintiffs' royalties only in months where gas is shipped. The second component is a "commodity charge," which is paid by WPX per unit volume actually shipped on the pipeline. WPX deducts these commodity charges from the revenues before paying royalties to plaintiffs.

¶ 8 It is undisputed in this appeal that plaintiffs' leases are silent regarding the allocation of transportation costs. Accordingly, the parties agree that the framework set forth in *Garman v. Conoco, Inc.*, 886 P.2d 652, 661 (Colo. 1994), and *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 903 (Colo. 2001), governs this issue. The parties also agree that the tailgate of the processing plant is the first commercial market for the gas and that transportation costs incurred before that point are not deductible from royalty payments under that framework. At issue in this case are the costs incurred to transport the gas to downstream markets *beyond* the first commercial market.

¶ 9 Relying on both *Garman* and *Rogers*, plaintiffs contend that costs incurred to transport gas downstream are deductible only if WPX can show that (1) the costs are reasonable and (2) actual royalty revenues increase in proportion with the costs assessed against the royalties ("enhancement"). Plaintiffs do not contest the reasonableness of the amounts of the transportation costs (the first element), but they dispute whether actual royalty revenues increased in proportion to those costs (the second element).

¶ 10 Specifically, plaintiffs argue that WPX must show enhancement on a month by month basis by comparing the downstream prices at the point of sale to the price of gas in the Piceance Basin. They argue that transportation costs are not deductible during any given month in which the additional transportation costs exceed any increase in royalty revenue achieved from selling the gas downstream.

¶ 11 WPX contends that the enhancement test does not apply to costs incurred to transport the gas to downstream markets. Alternatively, WPX argues that, even if the enhancement test applies, it must be determined based on the "prudent operator rule" rather than a month by month price comparison. According to WPX, the court should consider the overall reasonableness of WPX's decisions to enter into long-term transportation contracts, as well as the long-term benefits to royalty owners such as plaintiffs as a result of WPX's downstream marketing strategy.

¶ 12 The district court issued two written orders before trial resolving these legal issues in favor of plaintiffs. The court agreed with plaintiffs that the enhancement test applied to the costs of transporting the gas beyond the first commercial market. It interpreted *Garman* and *Rogers* to require that *all* costs incurred after the gas becomes marketable meet the enhancement test in order to be deducted from royalty payments. Accordingly, the court ruled that WPX bore the burden of proving that its transportation costs were reasonable and resulted in an actual increase in royalty revenues.

¶ 13 In its second order, the district court required that WPX apply the enhancement test on a month by month basis to determine whether its transportation costs were deductible. The court relied heavily on section 34–60–118.5(2)(a), (2.3)(h), (2.5), C.R.S. 2015, which requires lessees to pay royalties and ***381** report deductions on a monthly basis and provide a written explanation of those deductions upon request. The court rejected WPX's contention that the enhancement test should be evaluated based on the prudent operator rule.

¶ 14 The court then held a bench trial to determine the only remaining issue—the price of gas at the first commercial market against which the downstream sales price would be compared. At the bench trial, WPX presented evidence that its downstream marketing strategy allowed it to substantially increase the volume of production from plaintiffs' wells during the eight-year period at issue. WPX also maintained that, in many months, the increase in royalty revenue resulting from higher downstream prices exceeded the deduction for transportation costs, so that the overall revenues for the eight-year period as a whole were approximately $6,000,000 higher than if the gas had been sold at the tailgate market.

¶ 15 At the close of evidence, the district court, applying the enhancement rule, concluded that WPX did not establish enhancement in thirty-five months during the eight-year period, made factual findings on the price differentials in those months, and ordered a post-trial accounting. Based on that accounting, the court entered judgment against WPX for $5,136,296.95.

¶ 16 Neither party appeals the court's findings regarding the prices of gas, or the post-trial accounting.

II. Discussion

¶ 17 WPX contends that the district court erred in ruling that (1) the enhancement test applies to post-marketability transportation costs and (2) the enhancement must be shown on a month by month basis by comparing prices in the first commercial market to the downstream sales price.

¶ 18 We agree with WPX that *Garman* and *Rogers* do not require post-marketability transportation costs to meet the enhancement test in order to be deducted from royalty payments and that other considerations militate against imposing an enhancement test on transportation costs. We conclude that post-marketability transportation costs are deductible if they are reasonable, and that lessees are not required to establish that such costs enhance the value of the gas or increase royalty revenues. Accordingly, we need not address whether the enhancement test must be applied on a month by month basis, but we do note that the statute on which the district court relied has no bearing on whether the enhancement test applies to the deductibility of post-marketability transportation costs.

A. Standard of Review

[1] ¶ 19 We review the district court's interpretation of Colorado case law de novo. *Gallegos v. Colo. Ground Water Comm'n,* 147 P.3d 20, 28 (Colo. 2006).

B. *Garman*

¶ 20 The Colorado Supreme Court in *Garman* addressed a certified question from the federal court that asked whether post-production costs, such as processing, transportation, and compression, were deductible from royalty payments where the assignment creating the royalty interest was silent on the issue.[2] 886 P.2d at 653.

¶ 21 The supreme court held that, absent express language in the assignment, all costs incurred to make the gas marketable must be borne entirely by the lessee and are not deductible from royalty payments. *Id.* at 659, 661. In adopting this rule, the court relied on the "implied covenant to market" contained in every oil and gas lease. *Id.* at 659. The court explained that this covenant "obligates the lessee to engage in marketing efforts which 'would be reasonably expected of all operators of ordinary prudence, having regard to the interests of both lessor and lessee.' " *Id.* (citation omitted). Applying this principle to the allocation of costs, the ***382** court held that "the implied covenant to market obligates the lessee to incur those post-production costs necessary to place gas in a condition acceptable for market," and that "[o]verriding royalty interest owners are not obligated to share in these costs." *Id.* The court relied on decisions from Kansas and Oklahoma that adopted similar rules based on the implied covenant to market. *Id.* at 658 (citing *Gilmore v. Superior Oil Co.,* 192 Kan. 388, 388 P.2d 602, 606 (Kan. 1964); *Wood v. TXO Prod. Corp.,* 854 P.2d 880, 882 (Okla. 1992)).

¶ 22 The supreme court in *Garman* also noted the basic difference between royalty owners (nonworking interest owners), who do not participate in decisions regarding operations and expenditures, and risk-bearing parties (working interest owners). *Id.* at 657, 660.

> Normally, paying parties have the right to discuss proposed procedures and expenditures and ultimately have the right to disagree with the course of conduct selected by the operator. Under the terms of a standard operating agreement[,] nonoperating working interest owners have the right to go "non-consent" on an operation and be subject to an agreed upon penalty. This right checks an operator's unbridled ability to incur costs without full consideration of their economic effect. No such right exists for nonworking interest owners.

Id. at 660 (citation omitted).

¶ 23 Then the court addressed the allocation of costs after gas becomes marketable. The royalty owners in *Garman* conceded that (1) "the transportation costs associated with moving marketable gas from the tailgate of the processing plant where the gas enters the interstate pipeline to the point of sale are properly deductible"; and (2) "the costs incurred to process raw gas into its component parts after a marketable product has been obtained are generally deductible to the extent they are reasonable, provided such operations actually enhance the value of the product." *Id.* at 655 n.8.

¶ 24 Referencing these concessions, the court stated the rule that the parties in this case refer to as the enhancement test:

> Upon obtaining a marketable product, any additional costs incurred to enhance the value of the marketable gas, such as those costs conceded by the [royalty owners], may be charged against nonworking interest owners. *To the extent that certain processing costs enhance the value of an already marketable product the burden*

> *should be placed upon the lessee to show such costs are reasonable, and that actual royalty revenues increase in proportion with the costs assessed against the nonworking interest.* We are not, however, called upon today to consider the reasonableness of [the lessee's] expenses incurred to process, transport or compress already marketable gas.

Id. at 661 (emphasis added) (footnotes omitted).

¶ 25 Contrary to plaintiffs' contention, *Garman* did not address whether post-marketability transportation costs are subject to the enhancement test. The first sentence quoted above referred merely to the general rule that post-marketability costs are deductible from royalty payments. Indeed, the footnote to that sentence in *Garman* quoted language from a treatise stating that "*[a]fter a marketable product has been obtained,* then further costs in improving or transporting such product should be shared by the lessor and lessee...." *Id.* at 661 n.27 (quoting 3 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 40.5 (1989 & 1994 Supp.)).

¶ 26 The italicized sentence in *Garman* is worthy of repetition. It states: "To the extent that certain processing costs enhance the value of an already marketable product the burden should be placed upon the lessee to show such costs are reasonable, and that actual royalty revenues increase in proportion with the costs assessed against the nonworking interest." *Id.* at 661.

¶ 27 In that sentence, the supreme court set out two requirements that lessees must meet to deduct a certain category of post-marketability costs, namely, "*processing* costs [that] enhance the value of an already marketable product." *Id.* (emphasis added). To deduct such costs, the lessee must show that (1) the costs are reasonable; and (2) ***383** actual royalty revenues increase in proportion with deducted costs. *Id.* Thus, the term "processing costs" and the two requirements for deducting those costs reflected the royalty owners' concession in *Garman* that "the costs incurred to process raw gas into its component parts after a marketable product has been obtained are generally deductible to the extent they are reasonable, provided such operations actually enhance the value of the product." *Id.* at 655 n.8.

¶ 28 In this context, the term "processing costs" did not refer to the transportation costs incurred to move the gas from the first point of marketability to the actual point of sale, because the royalty owners in *Garman* conceded those transportation costs were deductible without any enhancement requirement. *See id.*

¶ 29 Indeed, the very next sentence of *Garman* referred to "expenses incurred to process, transport, or compress already marketable gas." *Id.* at 661. This language indicates that the supreme court treated processing and transportation costs as separate categories. Moreover, that sentence mentioned only the "reasonableness" requirement in connection with transportation costs. It did not state that such costs must also increase royalty revenues. *Id.*

¶ 30 Accordingly, we conclude that *Garman* did not expressly require post-marketability transportation costs to meet the enhancement test in order to be deductible.

C. *Rogers*

¶ 31 In *Rogers* the supreme court reaffirmed its holding in *Garman* and concluded that where a lease is silent on that issue, the implied covenant to market requires the lessee to bear all costs of obtaining a marketable product. 29 P.3d at 903, 906. In discussing *Garman*'s holding, the *Rogers* court stated:

> We also determined [in *Garman*] ... that in those circumstances where the gas was marketable, and subsequent *production costs* were incurred to enhance the value of the already marketable gas, such subsequent costs may be shared by the lessors and lessees provided that certain conditions are met. Specifically, under these circumstances, the lessee has the burden to show that such costs were reasonable, and that the actual royalty revenues increased proportionately to the costs assessed against the royalties.

Id. at 903 (emphasis added) (citing *Garman*, 886 P.2d at 661).

¶ 32 Contrary to plaintiffs' contention and the district court's interpretation, *Rogers* did not expressly state that the enhancement test applies to all post-marketability costs, but instead referred specifically to "production costs" incurred to enhance the value of marketable gas.

Id. Although *Rogers* did not define the term "production costs" or clarify whether it includes transportation costs, the *Rogers* court gave no indication that it intended this language as anything other than a summary of *Garman*'s holding.

[2]¶ 33 Accordingly, we interpret "production costs" to mean the same category of costs to which *Garman* applied the enhancement test; namely, "certain processing costs" that enhance the value of marketable gas. 886 P.2d at 661. We are not persuaded that the court in *Rogers* intended to extend the enhancement test to include the transportation costs incurred by lessees to move gas to downstream markets.

¶ 34 The *Rogers* court specifically addressed transportation costs later in the opinion when it articulated the general framework for determining whether costs are deductible:

> Absent express lease provisions addressing allocation of costs, the lessee's duty to market requires that the lessee bear the expenses incurred in obtaining a marketable product. Thus, the expense of getting the product to a marketable condition and location are borne by the lessee. *Once a product is marketable, however, additional costs incurred to either improve the product, or transport the product, are to be shared proportionately by the lessor and lessee. All costs must be reasonable.*

29 P.3d at 906 (emphasis added). Thus, when referring to the deduction of post-marketability transportation costs, the court in *Rogers* required only that such costs be "reasonable." ***384** *Id.* The court did not state that such costs must also result in an increase in royalty revenues, as would be required under the enhancement test.

¶ 35 Other portions of the *Rogers* opinion focused on two questions that are not at issue in this appeal: (1) whether the royalty owners' leases were silent regarding allocation of costs and (2) how to define marketability. However, *Rogers* discussed transportation costs in addressing those two questions, and both parties argue that those portions of the opinion support their positions regarding the application of the enhancement test.

¶ 36 The *Rogers* court determined that the leases were silent regarding allocation of costs, and rejected the argument that all transportation costs were deductible based on lease language providing for payment of royalties "at the well." *Id.* at 900. Instead, the court stated that the deductibility of transportation costs, like other types of costs, "is based on whether the gas is marketable before or after the transportation cost are incurred." *Id.* As in *Garman*, the *Rogers* court cited Kuntz's treatise for the "general rule" that "costs incurred after a marketable product has been obtained, that either enhance the value of the product or cause the product to be transported to another location, are shared by the lessee and the lessor." *Id.* (citing 3 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 40.5, at 351 (1989 & 2001 Supp.)). It concluded that, absent express provisions allocating costs, it was "inconsistent to carve out a rule for transportation costs alone." *Id.*

¶ 37 The *Rogers* court also declined to carve out a separate rule for transportation costs when it addressed the definition of marketability. *Id.* at 906. The court looked to the first marketable product rule for guidance, as explained in a treatise by Owen Anderson, and held that gas is marketable when it is (1) in a marketable condition and (2) in the location of the commercial marketplace. *Id.* at 904–06 (citing Owen L. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically, Part 2 (Should Courts Contemplate the Forest or Dissect Each Tree?)*, 37 Nat. Resources J. 611, 637–42 (1997)).

¶ 38 However, the court specifically rejected the first-marketable product rule's separate treatment of transportation costs:

> We recognize that pursuant to the first-marketable product rule, as explained by Anderson, transportation costs to a distant market are to be shared proportionately between the lessors and lessees. This allocation of transportation costs is consistent with the view the "at the well" language must be given some meaning. However, we have concluded that the "at the well" lease language in this case is silent as to allocation of all costs, including transportation costs. Under these circumstances, the logic of the first-marketable product rule requires that the allocation of all costs be determined based on when the gas

> is marketable. Thus, *we decline to single out transportation costs and treat them differently than other costs.*

Id. at 906 (emphasis added).

¶ 39 Plaintiffs argue that, because *Rogers* "declined" to carve out a separate rule for transportation costs in those portions of the opinion, the court intended that the enhancement test apply to post-marketability transportation costs as well. We are not persuaded. Those passages concerned whether transportation costs could be excluded from the general rule that costs incurred before gas is marketable are not deductible. *See id.* at 900, 906. Those passages did not address the conditions that must be met to deduct costs incurred *after* gas is marketable, nor did they address the applicability of the enhancement test.

¶ 40 Given the statement from *Rogers* that specifically addresses transportation costs incurred after gas is marketable, we cannot conclude, as did the district court, that *Rogers* requires application of the enhancement test. Instead, we conclude that *Rogers* requires only that transportation costs be reasonable, *see id.* at 906, and does not require that such costs enhance the value of the gas in order to be deducted from royalty payments.

***385** ¶ 41 Plaintiffs also rely on *Mittelstaedt v. Santa Fe Minerals, Inc.*, an Oklahoma case that cited *Garman* in applying the enhancement test to transportation costs incurred after the gas was marketable. 954 P.2d 1203, 1208 (Okla. 1998). However, *Mittelstaedt* was decided before our supreme court announced *Rogers*, and, in any event, the Oklahoma court's application of *Garman* is not controlling in Colorado.

¶ 42 In sum, we conclude that neither *Garman* nor *Rogers* requires that transportation costs incurred after the first commercial market enhance the value of the gas or increase royalty revenues in order to be deducted from royalty payments.

D. Other Considerations

[3]¶ 43 We further conclude that other considerations militate against requiring transportation costs to meet the enhancement test.

¶ 44 As WPX argues, imposing an enhancement requirement on transportation costs, particularly on a month by month basis, ignores the "commercial realities of the marketplace." *Rogers*, 29 P.3d at 905. The *Rogers* court took those realities into account in defining marketability, *see id.* and we conclude that they should also be considered in determining whether to require transportation costs to meet the enhancement test.

¶ 45 An enhancement test which compares gas prices in downstream markets to those in the Piceance Basin does not account for the significant increase in the volume of gas produced from plaintiffs' wells as a result of downstream marketing. There was evidence presented at trial that plaintiffs realized a tenfold increase in the volume of gas produced during the eight-year period at issue, and a mere price comparison does not indicate whether the same volume of gas could have been sold in the local market. Moreover, WPX maintains that its decision to transport gas out of the Piceance Basin altered local prices, and it is unlikely that those same prices would be available had the gas only been sold locally.

¶ 46 The enhancement test sought by plaintiffs and imposed by the district court also fails to take into account the long-term nature of decisions to market gas downstream. There was evidence presented at trial that operators such as WPX must invest in long-term transportation contracts to guarantee access to downstream markets and to obtain higher downstream prices and that those decisions cannot be made or changed on a monthly basis. Thus, a month by month enhancement requirement is inconsistent with the long-term nature of the downstream marketing strategy and its long-term benefits.

¶ 47 Anderson's article explains that "[a]llowing the deduction of ... transportation costs is important to assure that royalty law does not skew the lessee's determination of the best market location. Under modern gas marketing scenarios, many producers may choose to operate extensive transportation networks. Royalty law should not 'artificially' discourage this choice." Anderson, 37 Nat. Resources J. at 691–92.

¶ 48 Although the court in *Rogers* rejected Anderson's view that transportation costs incurred to reach the first commercial market are deductible from royalty payments, *see* 29 P.3d at 906, it did not address Anderson's reasoning with respect to the deduction of transportation costs *beyond* the first commercial market. WPX persuasively argues that once gas reaches the commercial marketplace, operators should be given flexibility in determining where to market the gas to achieve the best results for all concerned. We are persuaded that requiring operators to prove that downstream marketing enhanced the value of the gas before deducting costs each month could discourage them from pursuing a downstream marketing strategy with long-term benefits for both operators and royalty owners.

¶ 49 Indeed, WPX asserts in its brief that plaintiffs received over $6,000,000 in additional royalty revenues over the eight-year period that they would not have received had the gas been sold locally. Plaintiffs have not refuted this claim and at trial their own marketing expert admitted that selling gas downstream was a reasonable strategy to achieve the highest prices. Under these circumstances, we are not persuaded that WPX ***386** should be required to refrain from deducting transportation costs based solely on a month by month comparison of prices. Such a rule would give plaintiffs a "free ride" by allowing them to enjoy the long-term benefits of WPX's downstream marketing strategy in certain months, while avoiding paying their proportionate share of the costs in other months.

¶ 50 We also conclude, contrary to the district court, that section 34–60–118.5(2), (2.3) and (2.5) has no bearing on whether the enhancement test applies to the deductibility of post marketability transportation costs. If it did, one would expect that the statute would have been discussed in *Garman* or *Rogers,* but it is not. Rather, the statute prescribes the timing of when royalty payments must be made, and the information that must be provided by the payor. It does not address the propriety of deduction of expenses. *See Grynberg v. Colo. Oil & Gas Comm'n,* 7 P.3d 1060, 1063 (Colo. App. 1999) (section 34–60–118.5 does not create an entitlement to proceeds; it presumes the existence of such an entitlement and imposes deadlines for the payment to those legally entitled to receive payment).

[4]¶ 51 Plaintiffs argue that the enhancement test is necessary to protect their interests as nonworking interest owners because they cannot participate in marketing and transportation decisions. *See Garman,* 886 P.2d at 660. However, even without the enhancement test, operators still have an implied duty under their leases to act diligently and prudently in marketing the gas for royalty owners. *See id.* at 659. If an operator pursues an imprudent downstream marketing strategy that harms royalty owners, it may be subject to a claim for breach of that duty, separate and apart from a claim for improper deduction of costs. *See Rogers,* 29 P.3d at 908–09.

¶ 52 Moreover, we are not persuaded that plaintiffs' interests conflict with WPX's interests with respect to marketing the gas. All of the parties' interests are served by a marketing strategy that achieves the highest possible sales price with reasonable transportation costs.

[5]¶ 53 We have concluded that *Garman* and *Rogers* do not require transportation costs to meet the enhancement test and that imposing such a requirement is inconsistent with marketplace realities. Thus, transportation costs beyond the first commercial market need not enhance the value of the gas, such that actual royalty revenues increase in proportion to those costs, to be deductible from royalty payments.

¶ 54 Because plaintiffs have conceded that the costs of transporting the gas to downstream markets were reasonable, we conclude that those costs were deductible from royalty payments.

III. Conclusion

¶ 55 The judgment is reversed and the case is remanded with directions to enter judgment in favor of WPX.

JUDGE BERGER and JUDGE ROTHENBERG* concur.

All Citations

381 P.3d 378, 2016 COA 39

Footnotes

1 The first reserved claim concerned interpretation of certain lease provisions not at issue here. The district court entered summary judgment in favor of WPX on that claim in 2010, and a division of this court affirmed. *See Lindauer v. Williams Prod. RMT Co.,* (Colo. App. No. 10CA0798, 2011 WL 1564618, Apr. 21, 2011) (not published pursuant to C.A.R. 35(f)).

2 *Garman* addressed whether costs could be allocated to overriding royalty interest owners, whose interest is typically created by an agreement separate from the lease. *Garman v. Conoco, Inc.,* 886 P.2d 652, 653, 656 (Colo. 1994). However, in *Rogers,* the supreme court later held that *Garman's* analysis applied equally to royalty interests derived from oil and gas leases. *See Rogers v. Westerman Farm Co.,* 29 P.3d 887, 902 n.16 (Colo. 2001).

* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24–51–1105, C.R.S. 2015.

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EXHIBIT 13

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Adair v. EQT Production Co., W.D.Va., January 21, 2011

226 F.3d 1138
United States Court of Appeals,
Tenth Circuit.

ATLANTIC RICHFIELD COMPANY,
Plaintiff–Counter–Defendant–Appellee,
v.
The FARM CREDIT BANK OF WICHITA, formerly known as the Federal Land Bank of Wichita,
Defendant–Counter–Claimant–Appellant,
and
Stanley A. Mollerstuen; Hal A. McVey; Helen D. McVey; Carol Koscove,
Defendants–Counter–Claimants,
Alfred Garcia; Naddie Garcia; Edward Garcia; Mary Ruth Salazar–Tier; Peggy Garcia; Jacquie Garcia; Catherine Voelkerding; Manuelita Beck; Anna M. Martinez; Geraldine Velasquez,
Intervenors,
and
National Association of Royalty Owners, Inc.,
Amicus Curiae.
Atlantic Richfield Company,
Plaintiff–Counter–Defendant–Appellant,
v.
The Farm Credit Bank of Wichita, formerly known as the Federal Land Bank of Wichita; Carol Kos-cove,
Defendants–Counter–Claimants–Appellees,
and
Stanley A. Mollerstuen; Hal A. McVey; Helen D. McVey, Defendants–Counter–Claimants,
Alfred Garcia; Naddie Garcia; Edward Garcia; Mary Ruth Salazar–Tier; Peggy Garcia; Jacquie Garcia; Catherine Voelkerding; Manuelita Beck; Anna M. Martinez; Geraldine Velasquez,
Intervenors–Appellees,
and
National Association of Royalty Owners, Inc.,
Amicus Curiae.
Atlantic Richfield Company,
Plaintiff–Counter–Defendant–Appellee,
v.
The Farm Credit Bank of Wichita, formerly known as the Federal Land Bank of Wichita; Stanley A. Mollerstuen; Hal A. McVey; Helen D. McVey,
Defendants–Counter–Claimants,
and
Carol Koscove,
Defendant–Counter–Claimant–Appellant,
Alfred Garcia; Naddie Garcia; Edward Garcia; Mary Ruth Salazar–Tier; Peggy Garcia; Jacquie Garcia; Catherine Voelkerding; Manuelita Beck; Anna M. Martinez; Geraldine Velasquez,
Intervenors,
and
National Association of Royalty Owners, Inc.,
Amicus Curiae.
Atlantic Richfield Company,
Plaintiff–Counter–Defendant–Appellee,
v.
Darwin H. Smallwood, Defendant,
and
The Farm Credit Bank of Wichita, formerly known as the Federal Land Bank of Wichita; Stanley A. Mollerstuen; Hal A. McVey; Helen D. McVey; Carol Koscove, Defendants–Counter–Claimants,
Alfred Garcia; Naddie Garcia; Edward Garcia; Mary Ruth Salazar–Tier; Peggy Garcia; Jacquie Garcia; Catherine Voelkerding; Manuelita Beck; Anna M. Martinez; Geraldine Velasquez,
Intervenors–Appellants,
and
National Association of Royalty Owners, Inc.,
Amicus Curiae.

Nos. 99–1147, 99–1148, 99–1154, 99–1183.
|
Sept. 13, 2000.

Lessee under oil and gas leases sued lessors seeking, inter alia, a judicial declaration that it was proper for lessee to deduct from royalties costs associated with transporting carbon dioxide gas to market, and lessors filed counterclaims alleging, inter alia, breach of lease agreements, fraud and breach of fiduciary duty. The United States District Court for the District of Colorado, Zita L. Weinshienk, J., determined that lessee could deduct certain amounts as transportation costs and rejected various counterclaims, and all parties appealed. The Court of Appeals, Briscoe, Circuit Judge, held that: (1) certain leases allowed a transportation deduction; (2) lease did not foreclose the use of a weighted average price (WAP) in determining royalty; (3) under Colorado law, lessee's cost of interest during construction (IDC) and cost of capital (COC) were transportation costs and thus deductible unless lease provided otherwise; (4) lessee's depreciation deduction could not be based on capital expenditures of third party to which lessee had conveyed a 50% interest; (5) general prejudgment interest statute applied; (6) lessors were not entitled to moratory interest;

(6) lessor failed to state a claim of fraudulent concealment under Colorado law; (7) there were material facts at issue as to whether lessee had fiduciary duties to lessors under Colorado law as operator of unit; (8) district court did not abuse its discretion by excluding under *Daubert* economist's testimony in support of lessors' claim that royalties were not based on fair market value; and (9) Colorado statute which allows a party against whom a claim has initially been asserted to plead a stale claim in response to the claim asserted against that party was not available to intervenors.

Affirmed in part, reversed in part, and reversed and remanded in part.

West Headnotes (50)

[1] **Federal Courts**
⚖=Defects, objections, and amendments; striking brief

Motion seeking to strike an amicus curiae brief would be granted to the extent that the brief raised arguments that had never been advanced by the parties.

1 Cases that cite this headnote

[2] **Federal Courts**
⚖=Property in general
Federal Courts
⚖=Summary judgment

Where the propriety of lessee's deduction of transportation costs from royalties under leases for carbon dioxide gas wells was determined on motions for summary judgment, standard of review was de novo, viewing the evidence and drawing all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

197 Cases that cite this headnote

[3] **Federal Civil Procedure**
⚖=By both parties

When the parties file cross motions for summary judgment, court is entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts.

286 Cases that cite this headnote

[4] **Contracts**
⚖=Language of contract
Evidence
⚖=Grounds for admission of extrinsic evidence

Under Colorado law, the primary goal of contract interpretation is to determine and give effect to the intention of the parties, and the parties' intent is determined primarily from the language of the instrument itself and extraneous evidence of intent is only admissible where there is an ambiguity in the terms of the agreement.

3 Cases that cite this headnote

[5] **Contracts**
⚖=Existence of ambiguity
Contracts
⚖=Construction as a whole
Contracts
⚖=Language of Instrument

In determining, under Colorado law, whether a contractual term is ambiguous, the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words employed, and reference must be made to all the provisions of the agreement, and merely because the parties have different opinions regarding the interpretation of the contract does not itself create an ambiguity in the contract.

1 Cases that cite this headnote

[6] **Mines and Minerals**
Amount and time of payment

Provision in oil and gas lease, amended to clearly include carbon dioxide, that lessor's royalty shall be based on the "proceeds of the sale" at "the mouth of the well" necessarily incorporated a transportation deduction where the nearest market for carbon dioxide was 400 miles away, and even assuming that the "at the mouth of the well" clause was silent on the allocation of transportation costs, Colorado law provided for deduction, regardless of lessor's purported ignorance of any trade usage associated with the clause.

2 Cases that cite this headnote

[7] **Mines and Minerals**
Amount and time of payment

The rule in Colorado is that, absent an oil and gas lease provision to the contrary, the cost required to transport an otherwise marketable product to a distant market is to be deducted before the royalty is to be computed.

Cases that cite this headnote

[8] **Mines and Minerals**
Amount and time of payment

Under Kansas law, where oil or gas royalties are based on market price "at the well," or where the lessor receives his or her share of the oil or gas "at the well," the lessor must bear a proportionate share of the expenses in transporting the gas or oil to a distant market.

Cases that cite this headnote

[9] **Evidence**
Leases

Amendment to lease ostensibly requiring lessee to pay a $^3/_{16}$ royalty on the highest of three specified amounts at the moment of any carbon dioxide sales was ambiguous as to deduction of transportation costs, when juxtaposed with the "at the mouth of the well" clause in the original lease, so that extrinsic evidence could be considered, under Colorado law.

1 Cases that cite this headnote

[10] **Contracts**
Existence of ambiguity

Under Colorado law, terms used in a contract are ambiguous when they are susceptible to more than one reasonable interpretation.

Cases that cite this headnote

[11] **Contracts**
Ambiguity in general

Under Colorado law, once a contract is determined to be ambiguous, the meaning of its terms is generally an issue of fact to be determined in the same manner as other disputed factual issues.

3 Cases that cite this headnote

[12] **Mines and Minerals**
Amount and time of payment

Language in the gas pricing provision of lease, stating that lessor was entitled to royalty based on the "highest current market price at the time the gas is produced and sold of" a specified range of alternatives, one of which was the "amount received by [lessee] for its share of the gas" did not foreclose the use of a weighted average price (WAP) in determining royalty for carbon dioxide; "amount" typically means "aggregate" or "the total number or quantity", indicating that the "amount received" referred to the aggregate price received by lessee from all carbon dioxide sales, not the price received from a particular sale, but where the lessee had conveyed to third party a 50% interest in the carbon dioxide produced, the amount received by the third party could not be included in the WAP.

6 Cases that cite this headnote

[13] **Contracts**
Application to Contracts in General
Contracts
Rewriting, remaking, or revising contract

The court's duty is to interpret and enforce contracts as written between the parties, not to rewrite or restructure them.

Cases that cite this headnote

[14] **Mines and Minerals**
Amount and time of payment

Lease contract which permitted "reasonable" deductions for the "cost of transporting" carbon dioxide gas from the unit to the point of use was ambiguous, under Colorado law, as to whether the deduction included or excluded interest during construction (IDC) and cost of capital (COC).

3 Cases that cite this headnote

[15] **Mines and Minerals**
Actions

Under Colorado law establishing that gas lessees may deduct reasonable transportation costs from royalties absent a lease provision to the contrary, lessee's cost of interest during construction (IDC) and cost of Capital (COC) were deductible if they qualified as transportation costs and were reasonable, and for this purpose, the definition of "transportation costs" is a question of law, while the reasonableness of any given transportation expense is a question of fact.

1 Cases that cite this headnote

[16] **Mines and Minerals**
Amount and time of payment

Under the law of Colorado, which is a "marketable product" jurisdiction, lessee's cost of interest during construction (IDC) and cost of Capital (COC) were transportation costs and thus deductible from royalties for carbon dioxide gas unless the parties provided otherwise in the lease. 30 C.F.R. § 206.157(b).

2 Cases that cite this headnote

[17] **Mines and Minerals**
Amount and time of payment

Though leases allowed deduction of reasonable transportation expenses from royalty payments on carbon dioxide gas and lessee paid royalties on 100% of the gas from unit, lessee's depreciation deduction could not be based on capital expenditures of third party to which lessee voluntarily conveyed a 50% interest in carbon dioxide from the unit, under agreement whereby lessee paid all the royalties and third party reimbursed it for royalties paid on third party's share of the gas, where lessee did not shoulder 100% of the cost to construct the pipeline to transport the gas to the oil fields where it was used; nothing in the "work back" method required such a result, but if lessee paid for third party's unequal capital contribution by assigning 50% of the gas, a depreciation deduction may be permissible.

2 Cases that cite this headnote

[18] **Federal Courts**
⇐Interest

A federal court sitting in diversity applies state law, not federal law, regarding the issue of prejudgment interest.

11 Cases that cite this headnote

[19] **Federal Courts**
⇐Interest

An award of prejudgment interest is generally subject to an abuse of discretion standard of review on appeal, but any statutory interpretation or legal analysis underlying such an award is reviewed de novo.

7 Cases that cite this headnote

[20] **Statutes**
⇐General and specific statutes

Under Colorado law, a more specific statute controls over a more general one in case of conflict.

Cases that cite this headnote

[21] **Interest**
⇐Computation of rate in general

Interest provision of the of the Colorado Oil and Gas Conservation Act only governs enforcement proceedings before the Colorado Oil and Gas Commission and is inapplicable to claims for breach of contract, and thus statute which establishes the general rate of prejudgment interest in courts of law applied to such claims. West's C.R.S.A. §§ 5-12-102, 34-60-118.5, 34-60-118.5(5).

3 Cases that cite this headnote

[22] **Interest**
⇐Computation of rate in general

In order to receive the higher interest rate under Colorado statute allowing award of moratory interest which fully recognizes the gain or benefit realized by the person withholding money, the claimant must specifically prove that the withholding party actually benefited in a greater amount than the statutory rate, and thus a trial court faced with a record devoid of evidence relating to the amount of the withholding party's gain or benefit lacks discretion to award interest at a rate other than the statutory rate. West's C.R.S.A. § 5-12-102(1).

3 Cases that cite this headnote

[23] **Federal Courts**
⇐Interest
Interest
⇐Computation of rate in general

The district court did not commit reversible error by refusing to award moratory interest on allegedly improperly withheld royalty payments under gas leases, based on lessee's return on equity during the period in question, as return on equity calculation lacked the requisite specificity, where the values undergirding the calculation came from annual reports that were derived from consolidated balance sheets and cash flows for a wide range of different entities, both domestic and international, and were based in part on investments made long before any additional royalties were withheld. West's

C.R.S.A. § 5-12-102(1)(a, b).

2 Cases that cite this headnote

[24] **Federal Civil Procedure**
⚖=Judgment on the Pleadings

A motion for judgment on the pleadings is treated as a motion to dismiss for failure to state a claim on which relief can be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

131 Cases that cite this headnote

[25] **Federal Civil Procedure**
⚖=Insufficiency of claim or defense
Federal Courts
⚖=Judgment on the pleadings
Federal Courts
⚖=Judgment or dismissal on the pleadings

Dismissal of claim pursuant to grant of motion for judgment on the pleadings is reviewed de novo, and dismissal should be upheld only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the non-moving party. Fed.Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

71 Cases that cite this headnote

[26] **Fraud**
⚖=Fraudulent Concealment

A plaintiff asserting a claim of fraudulent concealment under Colorado law must show: (1) the concealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages.

1 Cases that cite this headnote

[27] **Fraud**
⚖=Reliance on Representations and Inducement to Act
Fraud
⚖=Injury and causation

Delay in filing suit, without more, does not satisfy the element of a claim for fraudulent concealment under Colorado law that plaintiff show action on the concealment resulting in damages.

4 Cases that cite this headnote

[28] **Fraud**
⚖=Damage from fraud

Oil and gas lessor failed to state a claim of fraudulent concealment under Colorado law, in alleging that lessee "intentionally prepared and disseminated false accounting reports and correspondence" to hide improper deductions from royalties, purportedly preventing lessor from taking timely action to recover the improper deductions, where lessor did not allege that her delay in filing suit permitted lessee to successfully assert a statute of limitations defense, nor did she allege that her delay caused any other form of damage.

1 Cases that cite this headnote

[29] **Damages**
⚖=Necessity of actual damage

Under Colorado law, a claim for punitive damages is not a separate and distinct cause of action, but is auxiliary to an underlying claim, and thus an award of punitive damages can be entered only after awarding damages in conjunction with an underlying and successful claim for actual damages.

1 Cases that cite this headnote

[30] **Federal Courts**
Admission or exclusion in general

Exclusion of evidence relating to a particular claim, on the grounds that claimant inexcusably failed to include its theory of damages in the final pre-trial order and that newly alleged damages were too speculative to go to a jury, was reviewed for an abuse of discretion.

Cases that cite this headnote

[31] **Federal Civil Procedure**
Pretrial Order

The district court's refusal to amend the pre-trial order, to allow assertion of a new theory of damages on counterclaim, could not be deemed an abuse of discretion, where the only argument advanced by counterclaimant on appeal was that evidence of its damages was available to counterclaim defendant through the report of counterclaimant's expert.

Cases that cite this headnote

[32] **Federal Courts**
Failure to mention or inadequacy of treatment of error in appellate briefs

Failure to address in appellate brief the district court's ruling that certain proposed damages were too speculative to go to a jury constituted a waiver.

1 Cases that cite this headnote

[33] **Mines and Minerals**
In general; procedure

Colorado Supreme Court would not categorize as fiduciary all lessee-lessor relationships involving oil and gas unitization agreements, but this does not mean a fiduciary duty never arises from such a relationship.

6 Cases that cite this headnote

[34] **Fraud**
Fiduciary or confidential relations

Under Colorado law, a variety of relationships can create fiduciary responsibilities under certain circumstances, even if those relationships are not fiduciary per se.

1 Cases that cite this headnote

[35] **Fraud**
Questions for Jury

Under Colorado law, the existence of a fiduciary or confidential relationship is generally a question of fact for the jury.

2 Cases that cite this headnote

[36] **Federal Civil Procedure**
Mines and minerals, cases involving

There were material facts at issue as to whether lessee under oil and gas leases had fiduciary duties to lessors under Colorado law as operator of unit, thus precluding summary judgment on claims of breach of such duty in selling and using carbon dioxide gas at less than fair market value and by wrongfully deducting post-production costs and expenses from royalties without disclosure.

1 Cases that cite this headnote

[37] **Fraud**
Fiduciary or confidential relations

Under Colorado law, a "fiduciary" is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking, and a "fiduciary relationship" exists when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of their relationship, and can arise when one party occupies a superior position relative to another, and may be based upon a professional, business, or personal relationship. Restatement (Second) of Torts § 874.

6 Cases that cite this headnote

[38] **Evidence**
Necessity and sufficiency

Daubert inquiry as to whether scientific or other technical testimony or evidence is not only relevant, but reliable is a flexible one, not governed by a definitive checklist or test, and potentially pertinent factors include whether the expert's theory or technique (1) can be, and has been, tested, (2) has been subjected to peer review and publication, (3) has a known or potential rate of error with standards controlling the technique's operation, and (4) enjoys widespread acceptance in the relevant scientific community.

13 Cases that cite this headnote

[39] **Federal Courts**
Abuse of discretion in general

As a general matter, a district court abuses its discretion when it renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.

10 Cases that cite this headnote

[40] **Evidence**
Minerals, trees, or timber

The district court did not abuse its discretion by excluding under *Daubert* economist's testimony, in support of lessors' claim that royalties were not based on fair market value of carbon dioxide gas, that sales prices did not reflect fair market value because of vertical integration of carbon dioxide producers and users in tertiary recovery of oil and that, therefore, a profit maximization theory should be used, where expert's opinions were formed specifically for the litigation, he had not employed the theory on previous occasions to determine the value of carhon dioxide, opinions had not been published or subjected to peer review in scholarly journals, and expert disregarded or failed to account for prices actually received in sales to third parties of a percentage of the gas in the same area or for prices actually received by suppliers in other markets.

5 Cases that cite this headnote

[41] **Mines and Minerals**
Amount and time of payment

"Market value" to which gas leases referred represented the price that would be paid by a willing buyer to a willing seller in a free market, and when a lessee sells gas in an open and competitive market,the price derived from such sale should establish the market price and market value of the gas, but if the lessee is a corporate affiliate of the purchaser and the sale is not at an arm's length, the sale price will not be accepted as representing the market price or market value, nor will sales on a market which is dominated by a few producers and purchasers establish an acceptable market price of gas.

4 Cases that cite this headnote

[42] **Mines and Minerals**
Amount and time of payment

If a competitive market for gas does not exist at the well, market value, for purposes of determining royalties, can be determined from comparable sales of gas, and comparable sales are those that are comparable in time, quality, quantity, and availability of marketing outlets, and if the market value cannot be established by proof of comparable sales, then the actual value or intrinsic value of the gas can be shown, but the burden is on the lessor to prove that there is no market and to prove the reasonable value of the gas.

2 Cases that cite this headnote

[43] **Evidence**
Comparable sales or values

While expert testimony based on hypothesis can, and sometimes must, be used to establish market value, courts tend to prefer evidence derived from actual sales, and even if the relevant market is not perfectly competitive, it still makes better sense to begin with the collective judgment expressed in the market price.

4 Cases that cite this headnote

[44] **Mines and Minerals**
Amount and time of payment

When determining market value of gas in determining royalties, completely comparable sales are not likely to be found, and sales that have some different characteristics must be considered.

1 Cases that cite this headnote

[45] **Federal Courts**
Abuse of discretion in general

When Court of Appeals applies an abuse of discretion standard, it defers to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.

2 Cases that cite this headnote

[46] **Limitation of Actions**
Set-offs, counterclaims, and cross-actions

Colorado statute allows a party against whom a claim has initially been asserted to plead a stale claim only in response to the claim asserted against that party and only if it arises out of the same transaction or occurrence, or the same series thereof, but permits a defending party to plead a stale claim even if it was time-barred when the complaint was filed. West's C.R.S.A. § 13-80-109.

2 Cases that cite this headnote

[47] **Federal Courts**
Inferior courts

Although Court of Appeals is not required to follow the dictates of an intermediate state appellate court in determining state law, it may view such a decision as persuasive as to how the state supreme court might rule.

Cases that cite this headnote

[48] **Declaratory Judgment**
Counterclaim for declaratory relief in other action

Colorado statute which allows a party against whom a claim has initially been asserted to plead a stale claim in response to the claim asserted against that party, if it arises out of the same transaction or occurrence, did not apply to counterclaims asserted by parties who were not named as defendants in plaintiff's declaratory judgment action, and against whom no claim was asserted, but who sought and received permission to intervene. West's C.R.S.A. § 13-80-109.

3 Cases that cite this headnote

[49] **Federal Civil Procedure**
Limitations and laches

Plaintiff did not waive its statute of limitations defense to intervenors' counterclaims by failing to object to their motion to intervene, where it raised the defense in its answer. Fed.Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.

1 Cases that cite this headnote

[50] **Federal Civil Procedure**
Limitations and laches

A limitations defense is generally waived unless it is raised in the defendant's responsive pleading. Fed.Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.

1 Cases that cite this headnote

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Before BRISCOE, McWILLIAMS, and ALARCON[1], Circuit Judges.

Opinion

BRISCOE, Circuit Judge.

[1] This complex litigation involves several oil and gas leases. The lessee, plaintiff Atlantic Richfield Company ("ARCO"), filed a claim for declaratory relief. The defendant lessors—the Farm Credit Bank of Wichita ("FCB"), Carol Koscove ("Koscove"), and members of the Garcia family ("the Garcias")—countered by filing a variety of counterclaims against ARCO. The district court issued a series of rulings resolving all of the parties' claims prior to trial. ARCO appeals three of these rulings, and the defendants appeal at least seven others. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, affirm in part, and reverse in part.[2]

***1146 I. BACKGROUND**

In the 1970s, ARCO discovered that carbon dioxide ("CO^2") can be used to increase recovery from certain types of oil reservoirs. This process is commonly referred to as "tertiary recovery" or "enhanced oil recovery" ("EOR"). Joint Appendix ("Jt.App.") at 95–96 (¶¶ 22–23), 2447(¶ 5), 7106–07. In 1975, ARCO acquired oil and gas leases for lands in Huerfano County, Colorado with the potential for CO^2 production. FCB, Koscove, and the Garcias own royalty interests in these leases, which were unitized[3] into a "Sheep Mountain Unit" ("SMU") for the exploration, development, and production of CO^2. *Id.* at 97 (¶ 27), 1700. Because the nearest market is approximately 400 miles away, ARCO constructed a pipeline (the "Pipeline") to transport the CO^2 from the SMU to the Permian Basin in West Texas.

The parties' leases provide the starting point for all royalty calculations. The Garcias' lease expressly contemplates some form of a transportation deduction and states that royalties shall be based on market values determined "at the mouth of the well":

> If Lessee sells gas at the mouth of the well, Lessee shall pay Lessor as royalty ⅛ of the proceeds from such sale. If Lessee sells gas at a point other than at the mouth of the well, Lessee shall pay Lessor as royalty on said gas ⅛ of the proceeds from such sale, after deducting from such proceeds the reasonable cost of preparing said gas for market, including but not limited to the cost of any necessary compression and the cost of transporting said gas to the point of sale. Where gas is not sold by Lessee, but is used by Lessee for any purpose other than the manufacture of gasoline or any other product, Lessee shall pay Lessor as royalty on said gas ⅛ of the market value of said gas, said value to be determined at the mouth of the well, and in determining said market value, there shall be deducted any cost of any necessary compression, the cost of transporting said gas to the point of use, and any other reasonable cost for preparing such gas for use.

Id. at 276. FCB's lease is silent on the deductibility of transportation expenses. Like the Garcias' lease, however, the 1975 version of FCB's lease states that royalties shall be based on market values determined "at the mouth of the well":

> The lessee shall pay to lessor for gas produced from any oil well and used by the lessee for the manufacture of gasoline or any other product as royalty ⅛ of the market value of such gas at the mouth of the well: if said gas is sold by the lessee, then as royalty ⅛ of the proceeds of the sale thereof at the mouth of the well.

Id. at 345. FCB's lease was amended and "corrected" in 1977. Among other things, the corrected amendment changes the royalty rate from ⅛ to $^3/_{16}$, *id.* at 348, and adds a provision entitled "Gas Pricing":

> Anything to the contrary above stated notwithstanding, the price which Lessee shall pay for gas produced pursuant to this lease when Lessor is not exercising its option to take in kind shall be respectively for each chemical or generic type of gas (for example, carbon dioxide gas, or hydrocarbon gas, etc.), as the case may be, the highest current market price at the time the gas is produced and sold of (1) the highest paid in Huerfano County, (2) the current market price established by the Federal Government for its share of the gas, or (3) the amount received by Atlantic for its share of the gas.

***1147** *Id.* at 352. The amendment also inserts the following language into the lease's granting clause: "The word 'gas' as used in this lease shall include gases of all kinds, whether hydrocarbon gas or gases or nonhydrocarbon gas or gases, including but not limited to carbon dioxide gas, and any mixture or mixtures of any such gases." *Id.* at 348.

In addition to the lease contracts, the question also arose as to whether ARCO's relationship with the Exxon Company ("Exxon") affected the parties' royalty obligations. ARCO executed an "Agreement on Principles" ("AOP") in 1981 that conveyed to Exxon a 50% interest in the Pipeline and the CO^2 produced at the SMU. *Id.* at 4025, 4030. Under the AOP, ARCO pays all royalties on CO^2 produced at the SMU. Exxon then reimburses ARCO for royalties paid on Exxon's share of the gas. Exxon agreed in the AOP to pay the first $128.7 million to develop the SMU facilities, the first $120 million to develop the Pipeline, and 50% of all costs thereafter.[4] By the defendants' calculation, ARCO ultimately contributed less than $50 million in capital toward the SMU and the Pipeline. This $50 million contribution represented about 15% of the companies' combined capital expenditure, which amounted to more than $285 million.

As intended, CO^2 from the SMU is sold, used in kind, or exchanged to increase oil production in West Texas. To determine the "wellhead" value of the CO^2 and the lessors' royalties, ARCO uses a "work back" or "net back" method. ARCO calculates the wellhead value of the CO^2 by subtracting transportation and conditioning costs from the value of the CO^2 in the West Texas market. The costs deducted by ARCO fall into three categories: (1) operations and maintenance costs; (2) depreciation costs, which include interest during construction ("IDC"); and (3) cost of capital ("COC"). ARCO defines IDC as the cost of money used to build a facility, or the "[i]nterest charged on the investments made prior to commencement of operations." *Id.* at 2787, 2917. ARCO defines COC as the "opportunity cost" of capital, including the cost of building a facility through debt or equity financing. *Id.* at 2923–24, 2963. In other words, COC is "the rate of return that is required to induce investors to purchase the securities of a firm. This rate of return is the same as an investor's opportunity cost of capital, which is the rate of return that an investor can earn on an investment of similar risk." *Id.* at 2787 (citation omitted).

ARCO initiated this litigation by filing suit against FCB, Koscove, and other parties in July 1995. Among other things, the company requested a judicial declaration that "it has been and continues to be proper for ARCO to deduct the allocated share of all costs associated with transporting the CO^2 Gas from the point of production at the Sheep Mountain Unit to the West Texas market from royalty payments." *Id.* at 80–81. With the district court's permission, the Garcias intervened and became parties to the case in April 1997.[5] FCB, Koscove, and the Garcias answered the complaint and filed counterclaims alleging that ARCO breached the lease agreements by underestimating the fair market value of SMU CO^2 and by deducting certain transportation costs from royalty payments. The defendants also asserted counterclaims for fraud and breach of fiduciary duty based on ARCO's alleged misrepresentation and concealment of the manner in which the company calculated market value and royalty deductions.

*1148 II. ARCO'S TRANSPORTATION DEDUCTION

[2] [3] Because the parties litigated the propriety of ARCO's transportation deduction in motions for summary judgment, our standard of review is de novo. *See King of the Mountain Sports, Inc. v. Chrysler Corp.,* 185 F.3d 1084, 1089 (10th Cir.1999) (affirming that "[w]e review the grant of summary judgment de novo"). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When applying this standard, we "view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Martin v. Kansas,* 190 F.3d 1120, 1129 (10th Cir.1999). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Martin,* 190 F.3d at 1129 (citation omitted). When the parties file cross motions for summary judgment, "we are entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts." *James Barlow Family Ltd. Partnership v. David M. Munson, Inc.,* 132 F.3d 1316, 1319 (10th Cir.1997); *see also Buell Cabinet Co. v. Sudduth,* 608 F.2d 431, 433 (10th Cir.1979) ("Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another.").

A. Procedural history

The parties began by submitting cross-motions for summary judgment addressing the deductibility of transportation costs from the defendants' royalties. ARCO later withdrew its request for summary judgment against Koscove, stating that "certain unique facts and circumstances" indicated that "it was the intent of the parties to the Koscove lease that transportation costs not be deducted." *Id.* at 940. The district court then considered the balance of ARCO's motion and concluded that ARCO could deduct transportation expenses for its 50% share of the SMU CO^2 from the royalties of all defendants except Koscove. The court ruled that the phrase "at the mouth of the well" in FCB's original lease was an industry term of art, and that the 1977 amendments to FCB's lease unambiguously "did not extinguish th[at] word of art." *Id.* at 1386f; *see also id.* ("It just seems very clear to this court that that's the only way that [the Gas Pricing provision] can be read."). The court also found that the 1981 AOP constituted a "sale at the well head" of 50% of the CO^2 to Exxon, from which transportation costs could not be deducted. *Id.* at 1386e.

The defendants subsequently filed a separate motion for summary judgment asking the district court to rule that IDC, COC, and other depreciation costs could not be used by ARCO to reduce royalty payments. The court granted the motion in part, holding that under the terms of the defendants' leases "neither the cost of capital, nor the interest during construction are to be included or can be included as a matter of law in transportation costs." *Id.* at 3795. The court reasoned that IDC and COC were "ownership charges, not transportation charges." *Id.* at 3794. ARCO filed two motions to reconsider, both of which were denied. In its order denying ARCO's first motion to reconsider, the court reiterated that the defendants' lease contracts permitted deductions for "*actual* costs, that is, plaintiff's out of pocket expenses for transporting the gas.... Interest during construction is not authorized under the agreement, and cost of capital and plaintiff's hypothetical profit margin for transporting the gas are not actual costs." *Id.* at 3849–50 (emphasis in original). The court went on to conclude that operations and maintenance costs and depreciation expenses constituted "actual cost[s] of transporting the gas." *Id.* at 3850.

***1149** On ARCO's motion, the parties then filed briefs "to determine the appropriate methodology to value the Exxon share of the Sheep Mountain gas for royalty payments." *Id.* at 3816. The parties agreed that this was a question of law, and stipulated certain facts. Ruling from the bench, the district court held that ARCO's depreciation deduction should be based on "the sale price in Texas less the transportation cost without regard to the 15–percent/85–percent provisions in the AOP." *Id.* at 5144. The court commented that the deduction had to be calculated for "50 percent of the gas," and found that the AOP was "not relevant to the royalty owners' obligation to share a proportional share of the costs of transportation." *Id.* at 5150, 5152. The court also concluded that (1) the language of FCB's lease did not preclude a transportation deduction; and (2) ARCO properly based FCB's royalty on a weighted average price ("WAP"), rather than the highest price for CO^2 in any individual sales contract.

The district court thus made three important rulings bearing on ARCO's transportation deduction. The court determined that (1) ARCO could deduct transportation costs from FCB's and the Garcias' royalties, but not from Koscove's; (2) ARCO could not include IDC or COC in its transportation deduction, but could include other depreciation costs; and (3) ARCO and Exxon should share all transportation costs equally for purposes of computing the depreciation deduction.[6] ARCO appeals the court's ruling that IDC and COC should not have been included in the transportation deduction. The defendants appeal the remainder of the district court's rulings. In addition, FCB appeals the court's approval of WAP-based royalty calculations.

B. Royalty calculations under FCB's lease

[4] [5] We must first determine whether the district court correctly construed FCB's lease. The Colorado Supreme Court recognizes that "[t]he primary goal of contract interpretation is to determine and give effect to the intention of the parties." *USI Properties East, Inc. v. Simpson,* 938 P.2d 168, 173 (Colo.1997); *see also May v. United States,* 756 P.2d 362, 369 (Colo.1988) ("It is axiomatic that a contract must be construed to ascertain and effectuate the mutual intent of the parties."). The parties' intent "is determined primarily from the language of the instrument itself and extraneous evidence of intent is only admissible where there is an ambiguity in the terms of the agreement." *May,* 756 P.2d at 369; *see also New York Life Ins. Co. v. KN Energy, Inc.,* 80 F.3d 405, 411 (10th Cir.1996) (stating that under Colorado law a reviewing court must "ascertain the parties' intent at the time the document was executed, and that intent is to be determined primarily from the instrument itself"); *Pepcol Mfg. Co. v. Denver Union Corp.,* 687 P.2d 1310, 1314 (Colo.1984) ("It is only where the terms of an agreement are ambiguous or are used in some special or technical sense not apparent from the contractual document itself that the court may look beyond the four corners of the agreement in order to determinethe meaning intended by the parties."). In determining whether a contractual term is ambiguous, "the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words employed, and reference must be made to all the provisions of the agreement." *May,* 756 P.2d at 369 (quoting ***1150** *Radiology Prof'l Corp. v. Trinidad Area Health Ass'n, Inc.,* 195 Colo. 253, 577 P.2d 748, 750 (1978)). "Merely because the parties have different opinions regarding the interpretation of the contract does not itself create an ambiguity in the contract." *USI Properties East,* 938 P.2d at 173; *accord Radiology,* 577 P.2d at 750; *see also Lowell Staats Mining Co. v. Pioneer Uravan, Inc.,* 596 F.Supp. 1428, 1430 (D.Colo.1984) (indicating that under Colorado law "[t]he express provisions of a document should not be rewritten merely because of the contrary assertions of a party to the agreement").

1. Transportation expenses

[6] [7] [8] The 1975 version of FCB's lease clearly permits deductions for transportation expenses. The original lease states that FCB's royalty shall be based on the "proceeds of the sale" at "the mouth of the well." By itself, the

phrase "at the mouth of the well" necessarily incorporates a transportation deduction, since the nearest market for CO_2 from the SMU is 400 miles away in West Texas:

> Many leases make specific provision for payment on the basis of the market value or market price at the well.... If there should be no market for gas at the well but there should be a distant market, then the market value of gas at the well may be determined by using the market price at the distant market after deducting from such price the costs of transportation to such distant market.

3 Eugene Kuntz, *Treatise on the Law of Oil and Gas* § 40.5, at 356 (1989); *see also* 3 *Williams & Meyers on Oil and Gas Law* § 645.2, at 597–98, 601–02 (1999) (confirming that a royalty interest payable "at the well" is "usually subject to a proportionate share of the costs incurred subsequent to production," including "[t]ransportation charges or other expenses incurred in conveying the minerals produced from the well-head to the place where a buyer of the minerals takes possession thereof"). Even if we assume that the "at the mouth of the well" clause is silent on the allocation of transportation costs, Colorado law fills the void. The rule in Colorado is that "absent a lease provision to the contrary, the cost required to transport an otherwise marketable product to a distant market is to be deducted before the royalty is to be computed." *Rogers v. Westerman Farm Co.*, 986 P.2d 967, 971 (Colo.Ct.App.1998); *see also Garman v. Conoco, Inc.*, 886 P.2d 652, 654 n. 1 (Colo.1994) (noting that "[t]raditionally, the costs to transport gas to a distant market are shared by all benefitted parties").[7]

Unable to identify any ambiguities in the original lease, FCB nonetheless argues that the "at the mouth of the well" clause cannot support a transportation deduction for two reasons. First, FCB asserts that there was no "trade usage or custom relating to the leasing, production or transportation of CO_2" at the time the phrase "at the mouth of the well" was written into the lease. FCB's Opening Brief at 16. As a result, says FCB, it could not have "contracted in reference to 'mouth of the well' " as a binding "term of art." *Id.* at 20. Second, FCB contends that "the word 'gas', as used in the original Leas[e], was not understood by the parties to include CO_2." *Id.* at 20. In FCB's view, the lease did not encompass the production and sale of CO_2 until it was amended in 1977.

Both of these arguments are red herrings. As discussed above, the phrase "at the mouth of the well" in the original lease either (a) expressly contemplates a transportation deduction; or (b) is silent on the issue, in which case the parties are required to share transportation expenses under state law. FCB's purported ignorance of any "trade usage" associated with the phrase "at the mouth of the well" in ***1151** 1975 simply does not address the latter proposition. FCB's assertion that the original lease did not encompass CO_2 is similarly irrelevant. Even if the original lease did not specifically address CO_2 (an issue that we need not decide), the amended lease does. Unless the corrected amendment eliminates or alters the "at the mouth of the well" clause, transportation costs for CO_2 must be shared. *See Rogers,* 986 P.2d at 972 (explaining that lease terms which "provid[e] that the valuation point is the wellhead" confirm the "traditional rule" that "transportation costs to some other point are to be shared").

[9] This brings us to the 1977 amendments, which arguably trump the terms of the original lease. The Gas Pricing provision appears to shift the focus of FCB's royalty calculation from the "proceeds of the sale" at "the mouth of the well" to the highest of three "current market price[s] at the time the gas is produced and sold." Jt.App. at 352. The Gas Pricing provision further states that it overrides "[a]nything to the contrary." *Id.* Without any immediate market in Colorado, ARCO necessarily had to account for transportation costs under the original lease to determine the proceeds of any sale "at the mouth of the well." In contrast, the Gas Pricing provision in the amended lease ostensibly requires ARCO to pay a $^3/_{16}$ royalty on the highest of three specified amounts at the moment of any CO_2 sale. Whether ARCO must transport the CO_2 to a distant market has no effect on this proposed calculation. Stated differently, the royalty calculation under the amended lease may not involve a constructed value for CO_2 "at the mouth of the well," but instead may turn on one of three pre-determined amounts. Nothing within the four corners of the lease contract suggests that this interpretation of the Gas Pricing provision is unreasonable.

There is, however, an alternative interpretation of the Gas Pricing provision that is equally reasonable. As ARCO points out, the original lease arguably "provided the critical information for calculating FCB's royalty: (i) the rate—'⅛', (ii) the principal or corpus on which the royalty is calculated—'proceeds of the sale' and (iii) the place of valuation—'at the mouth of the well.' " ARCO's Response Brief To Opening Brief Of FCB at 5. Because the Gas Pricing provision "does not mention the place of valuation," *id.* at 9, it is conceivable that the 1977 amendments had no effect on the "at the mouth of the well" language in the 1975 version of the lease. The amendments do not expressly contradict or remove this language, and adopt by reference most of the terms of the original lease "as if fully set out herein." Jt.App. at 348, 351. Once again, nothing within the four corners of the contract suggests that this alternative interpretation of the Gas Pricing provision is unreasonable.

[10] [11] We therefore conclude that the Gas Pricing provision is ambiguous when juxtaposed with the "at the mouth of the well" clause in the original lease. It is beyond cavil that "[t]erms used in a contract are ambiguous when they are susceptible to more than one reasonable interpretation." *B & B Livery, Inc. v. Riehl,* 960 P.2d 134, 136 (Colo.1998). Once a contract is determined to be ambiguous, "the meaning of its terms is generally an issue of fact to be determined in the same manner as other disputed factual issues." *Dorman v. Petrol Aspen, Inc.,* 914 P.2d 909, 912 (Colo.1996) (citation omitted); *see also Polemi v. Wells,* 759 P.2d 796, 798 (Colo.Ct.App.1988) (stating that when an ambiguity "cannot be resolved by reference to other contractual provisions," extrinsic evidence must be considered "to determine the mutual intent of the parties at the time of contracting"). The parties' appellate briefs refer to several types of extrinsic evidence that may help resolve this issue of fact, including (1) statements by FCB's chief negotiator suggesting that he inserted the Gas Pricing provision in 1977 to replace the "at the mouth of the well" clause; (2) correspondence from 1977 suggesting that ARCO did not bargain away its right to deduct transportation expenses; ***1152** and (3) Koscove's lease, which may be similar in some respects to FCB's. We leave it to the district court to consider on remand whether this or any other extrinsic evidence is relevant and admissible for the purpose of clarifying the Gas Pricing provision.

2. Highest price

FCB also contends that the amended lease precludes ARCO from (1) using a weighted average price (WAP) to calculate royalties, and (2) basing the WAP in part on the value of Exxon's CO^2. ARCO acknowledges that its WAP methodology "takes into account all the volumes of CO^2 sold or delivered and the prices received for those volumes," ARCO's Response To Opening Brief of FCB at 26–27, and does not object to FCB's description of the process:

> Each month ARCO first calculates the volume of gas it uses based on contracts for sale, in-kind use, and exchanges in West Texas. Depending on the month, ARCO adds the volumes of twenty or so different contracts to determine total volume. It then estimates the value for exchanges and supply-in-kind contracts based on sales contracts in that unit. It then multiplies the value times the volume. ARCO then adds the volume of gas used by Exxon, times the Exxon price. Finally, ARCO averages the values from all sales, exchanges and supply-in-kind contracts to arrive at a weighted average price.

FCB's Opening Brief at 12–13 (footnote omitted). According to FCB, this methodology is inconsistent with the phrase "amount received by Atlantic for its share of the gas" in subsection (3) of the Gas Pricing provision.

[12] [13] We conclude the "amount received" language in the Gas Pricing provision does not foreclose the use of a WAP. "Amount" typically means "aggregate" or "the total number or quantity." *Webster's Third New Int'l Dictionary* 72 (unabridged ed.1993). That definition indicates that the "amount received" in the amended lease refers to the aggregate price received by ARCO from all CO^2 sales, not the price received from a particular sale. Furthermore, it is hornbook law that "[t]he court's duty is to interpret and enforce contracts as written between the parties, not to rewrite or restructure them." *Fox v. I–10, Ltd.,* 957 P.2d 1018, 1022 (Colo.1998). Accepting FCB's proffered interpretation would require us to do just that. Subsection (3) of the Gas Pricing provision does not say that FCB is entitled to the "*highest* amount received" by ARCO on its share of the gas. Instead, it says that FCB is entitled to the "highest current market price at the time the gas is produced and sold of" a specified range of alternatives, one of which is ARCO's "amount received."

On the flip side of the coin, however, the use of Exxon's sales to calculate the WAP disregards the plain language of the lease. Subsection (3) of the Gas Pricing provision does not say that a potential basis for FCB's royalties is "the amount received by Atlantic *and Exxon* " for their respective shares of the CO^2. Rather, the only party named in the subsection is ARCO. ARCO contends that interpreting the contract to exclude the amount received by Exxon would "produce an absurd result," because the AOP grants Exxon a 50% interest in the SMU CO^2 and "royalty is due on all production." ARCO's Response To

Opening Brief Of FCB at 26. But any "absurdities" created by this interpretation stem from ARCO's voluntary decision to enter into the AOP, not from the amended lease. As a consequence, we conclude that the Gas Pricing provision permits the use of a WAP founded on the amounts received by ARCO—not Exxon—for ARCO's share of the CO^2.

C. The components of the transportation deduction

1. IDC and COC

[14] Whether IDC and COC are deductible transportation expenses depends in part on the language of the parties' lease contracts. We begin with the Garcias' ***1153** lease contract, which permits "reasonable" deductions for the "cost of transporting" CO^2 from the SMU to the point of use. Jt. App. at 276. Accordingly, our first task is to determine whether the phrase "cost of transporting" in the Garcias' lease unambiguously includes or excludes IDC and COC. If we conclude that the phrase is indeed unambiguous and that it includes IDC and COC, our next task is to determine whether the reasonableness of ARCO's deductions is a disputed issue of material fact.

We need not complete the second task, because the phrase "cost of transporting" is decidedly ambiguous. The phrase does not expressly include IDC and COC. Nor does it expressly exclude IDC and COC. Moreover, several permutations of the word "cost" have been deemed ambiguous by Colorado courts. For example, in *Tripp v. Cotter Corp.,* 701 P.2d 124 (Colo.Ct.App.1985), a Colorado court of appeals concluded that the phrase "cost of milling" was ambiguous:

> [T]he mining contract at issue here does not expressly describe the components to be included in calculating the costs of milling. There is nothing in the contract which defined the phrase "cost of ... milling," nor were there any provisions which described what the phrase encompassed in terms of those costs. The phrase in question is therefore ambiguous, and testimony offered for the purpose of explaining and interpreting it should not have been excluded.

Id. at 126. Other Colorado cases reach similar results. *See Pepcol,* 687 P.2d at 1314 (finding the term "at seller's cost" to be ambiguous); *Southgate Water Dist. v. City and County of Denver,* 862 P.2d 949, 955 (Colo.Ct.App.1992) (deeming the phrase "actual costs" to be ambiguous); *Hott v. Tillotson–Lewis Constr. Co.,* 682 P.2d 1220, 1223 (Colo.Ct.App.1983) (finding the term "cost-plus" to be ambiguous).

Generic dictionary definitions also provide little assistance in resolving this ambiguity. The leading definition of "cost" is "the amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or for service rendered." *Webster's Third New Int'l Dictionary* 515 (unabridged ed.1993); *see also Black's Law Dictionary* 345 (6th ed.1990) (defining "cost" as "expense," "price," and "[t]he sum or equivalent expended, paid or charged for something"). "Transport" is normally defined as "to transfer or convey from one person or place to another," and "transportation" is commonly thought to mean "an act, process, or instance of transporting or being transported." *Webster's Third New Int'l Dictionary* 2430 (unabridged ed.1993); *see also Black's Law Dictionary* 1499 (6th ed.1990) (defining "transport" as "[t]o carry or convey from one place to another," and "transportation" as "[t]he movement of goods or persons from one place to another, by a carrier"). It is not obvious whether IDC and COC—i.e., the returns that might have been achieved through alternative investments—constitute "amounts paid or given or charged" to "transfer or convey" something from one place to another. Given the uncertain meaning of the Garcias' lease, we reverse the district court's grant of summary judgment and remand this issue for additional proceedings.

[15] Next we address FCB's lease contract, which does not contain the phrase "cost of transporting." Because FCB's lease does not address the deductibility of transportation expenses, our review of the contract is governed by *Garman. Garman* and its progeny establish that lessees may deduct reasonable "transportation costs," absent a lease provision to the contrary. *See Rogers,* 986 P.2d at 971, 975. Hence, under the *Garman-Rogers* rubric ARCO's IDC and COC are deductible if they (1) qualify as transportation costs, and (2) are reasonable. The definition of "transportation costs" is a question of law, while the reasonableness of any given transportation expense is a question of fact. *Cf. Garman,* 886 P.2d at 661 n. 28 (remarking that the deductibility of certain ***1154** post-production marketing costs is "a question of fact to be decided based on competent evidence in the record"); *Rogers,* 986 P.2d at 972 (echoing that "whether any specific post-production cost" is incurred to make a product marketable or to enhance its value is "to be determined by the fact-finder in each case").

[16] We conclude that IDC and COC are, in fact, deductible unless the parties provide otherwise in the lease contract. No Colorado case directly addresses this issue. Nonetheless, at least two other sources of authority suggest that IDC and COC fall within the definition of "transportation costs" for purposes of royalty deductions. First, as the Colorado Supreme Court intimated in *Garman*, federal regulations governing deductions for post-production expenses are "instructive." 886 P.2d at 661 n. 28. These regulations permit a "transportation allowance" based on the "reasonable actual costs" incurred by certain lessees. 30 C.F.R. § 206.157(b) (1998). As implemented by the Minerals Management Service (a bureau of the United States Department of the Interior), federal regulations allow ARCO to deduct IDC and COC when calculating royalties on government leases. Second, Colorado tax regulations enacted in 1996 allow "return on investment" and "return of investment" deductions for transportation equipment. Jt.App. at 2375–76, 2434–36, 2442. These regulations likewise suggest that IDC and COC constitute deductible expenses.

The writings of Professor Owen L. Anderson—upon which the defendants heavily rely in their appellate brief—also support ARCO's position. In a 1994 article, Professor Anderson opined that an oil and gas lessee often has "an incentive to overstate post-production costs in order to minimize its royalty-payment obligations," and that courts should "consider only reasonable and necessary costs, not to exceed actual direct costs, when determining the lessee's royalty obligation." Owen L. Anderson, *Calculating Royalty: "Costs" Subsequent To Production—"Figures Don't Lie, But....",* 33 Washburn L.J. 591, 597 (1994). Professor Anderson thus concluded that in what are known as "wellhead value" jurisdictions, "a return on investment 'cost' should be eliminated from the work-back royalty calculation or—at the very least—be limited to a cost-of-money charge, such as the prime rate of interest." *Id.* at 637. In a forthcoming piece, however, Professor Anderson clarifies his 1994 article and states that a different rule should attach in "marketable product" jurisdictions such as Colorado:

> Because the lessee is unable to recover the royalty owner's costs up front, prior to the payment of royalty, the lessee must recover its capital costs of moving gas through depreciation. Accordingly, even in the absence of third-party financing, the operator incurs an indirect cost of money.... [T]he lessee should be ordinarily permitted to recover, against undepreciated capital, its reasonable cost-of-money when calculating freight in a marketable-product jurisdiction.... [I]n keeping with the general goal that a lessee should incur no loss or profit in moving gas, a reasonable cost-of-money charge should ordinarily be allowed even if the cost of building the system was not actually financed with borrowed money. The argument for a cost-of-money charge is that, by electing to construct a gathering or transportation system with its own cash, the lessee is unable to use this money elsewhere. Moreover, by recovering capital through depreciation over the life of production, such as would occur with unit-of-production depreciation, a cost-of-money charge against undepreciated capital merely reimburses the lessee for financing the royalty owner's proportionate share of moving costs. Based upon this ... reasoning, the lessee would be permitted to deduct a reasonable cost-of-money charge against the undepreciated design, construction and start-up capital costs of a gathering or transportation system that is actually constructed.

*1155 Owen L. Anderson, *Royalty Valuation: Calculating Freight in a Marketable–Product Jurisdiction,* 21 Energy & Min. L. Inst. 331, 354–55 (2000). While Colorado tribunals obviously do not uncritically defer to Professor Anderson's views, the *Rogers* court adopted an argument advanced by Professor Anderson and rejected contrary positions taken by courts in Kansas and Oklahoma. *See* 986 P.2d at 972, 974–75 (citing Owen L. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, Or Realistically?,* 37 Nat. Resources J. 611, 669, 646–47 & n. 138 (1997)).[8]

2. Depreciation

[17] On this issue of first impression, we hold that ARCO's

depreciation deduction cannot be based on Exxon's capital expenditures. The defendants' leases require ARCO to make royalty payments on all CO^2 from the SMU. Before ARCO pays the defendants' royalties, it is entitled to deduct reasonable transportation expenses. Simply because ARCO pays royalties on 100% of the CO^2 does not mean that ARCO shouldered 100% of the cost to construct the Pipeline to transport the gas to West Texas. As the district court acknowledged, the record indicates that ARCO may have contributed only 15% of the capital needed to build the SMU and the Pipeline. To permit ARCO to deduct expenses for capital contributions it never made would be both nonsensical and unfair. An extreme example illustrates the point. Suppose that ARCO and Exxon executed an agreement under which ARCO contributed $1 of the $285 million needed to construct the SMU and the Pipeline, and retained responsibility for paying royalties on 100% of the CO^2. Under ARCO's logic, the company would still be able to claim a substantial royalty deduction, even though it incurred virtually no costs to transport the gas. Nothing in the "work back" method requires such an indefensible result.

Practical considerations also support the conclusion that ARCO cannot use Exxon's capital expenditures to reduce the defendants' royalties. First, ARCO cannot use Exxon's capital expenditures to obtain tax deductions. ARCO offers no objection to the following description of joint venture tax returns filed by the two companies: "These returns conform to ... the 1981 AOP and the amendment thereto, including ARCO and Exxon's tax partnerships. In these documents ARCO and Exxon receive credit for depreciation expense for the capital each provided to the venture. ARCO does not report a depreciation expense based on Exxon capital and vice versa." Opening Brief of Koscove, FCB, and Garcias at 54. Second, to calculate their royalty dividends the defendants should not be forced to examine the financial reports of third parties like Exxon. That ARCO decided to execute an agreement with Exxon does not change the equation. Through the AOP, ARCO voluntarily conveyed to Exxon a 50% interest in CO^2 from the SMU. ARCO pays the defendants' royalties, and Exxon reimburses ARCO for royalties paid on Exxon's share of the gas. If Exxon were required to pay royalties to the defendants, it too could deduct its transportation expenses. But Exxon is not in privity ***1156** with and has no direct royalty obligation to the defendants. Only ARCO bears that obligation, and the defendants should not be forced to audit the books of other companies to ascertain the amounts owed by ARCO.

There is, however, yet another factual matter that must be remanded to the district court for consideration. ARCO contends that it "paid" for Exxon's unequal capital contribution by assigning 50% of the SMU CO^2 to Exxon under Article 3.1 of the AOP. Some evidence adduced by ARCO appears to support this argument. For instance, an Exxon division manager testified in his deposition that ARCO gave up a 50% interest in the CO^2 "in return for th[e] disproportionate investment being provided by Exxon." Jt. App. at 4761; *see also* Opening Brief of Koscove, FCB, and Garcias at 51 ("Defendants acknowledge that ARCO likely did not secure Exxon's disproportionate capital contribution without ARCO's concession of one-half of the SMU CO^2."). The district court should determine on remand (1) whether ARCO's assignment of 50% of the CO^2 is sufficiently analogous to a capital expenditure to permit a depreciation deduction; and (2) ARCO's total deductible contribution to the SMU and the Pipeline.

III. THE DEFENDANTS' PREJUDGMENT INTEREST

[18] [19] Well-worn principles govern our review of the district court's grant of prejudgment interest. "A federal court sitting in diversity applies state law, not federal law, regarding the issue of prejudgment interest." *Chesapeake Operating, Inc. v. Valence Operating Co.,* 193 F.3d 1153, 1156 (10th Cir.1999). An award of prejudgment interest "is generally subject to an abuse of discretion standard of review on appeal." *Driver Music Co. v. Commercial Union Ins. Companies,* 94 F.3d 1428, 1433 (10th Cir.1996); *accord Chesapeake Operating,* 193 F.3d at 1156. That said, "any statutory interpretation or legal analysis underlying such an award is reviewed de novo." *Driver Music,* 94 F.3d at 1433.

A. Procedural history

The issue of prejudgment interest arose after the district court ruled that ARCO improperly deducted IDC and COC from the defendants' royalties. The parties stipulated that as a result of these deductions, ARCO withheld $988,909 from FCB and $687,556 from the Garcias. Applying Colorado Revised Statutes ("C.R.S.") § 5–12–102(1)(b), the court awarded prejudgment interest on these sums at an annually compounded rate of 8%. The court denied the defendants' request for moratory interest pursuant to C.R.S. § 5–12–102(1)(a). FCB and the Garcias appeal this ruling. The court also rejected ARCO's argument that prejudgment interest after July 1, 1990 should be governed by C.R.S. § 34–60–118.5. ARCO appeals this ruling.

B. C.R.S. § 34–60–118.5

ARCO contends that the district court should have applied § 34–60–118.5 of the Colorado Oil and Gas Conservation Act, not § 5–12–102, to determine the rate of prejudgment interest. Section 34–60–118.5 governs certain proceedings before the Colorado Oil and Gas Commission ("Commission"), *see generally Grynberg v. Colorado Oil and Gas Conservation Comm'n,* 7 P.3d 1060, 1062–64 (Colo.Ct.App.1999) (discussing the Commission's jurisdiction under the statute), and contains the following provision:

> If a payor does not make payment within the time frames specified in ... this section and such delay in payment was not caused by any of the reasons specified in ... this section, the payor shall pay such payee simple interest on the amount of the proceeds withheld, which interest shall be calculated from the date of each sale at a rate equal to two times the discount rate at the federal reserve bank of Kansas City as such rate existed on the first day of the calendar year or years in which proceeds were withheld.

C.R.S. § 34–60–118.5(4). The statute defines a "payee" as a person "legally entitled to payment from proceeds derived ***1157** from the sale of oil, gas, or associated products from a well." C.R.S. § 34–60–118.5(1)(a). The definition of "payor" includes an operator who "has entered into an agreement under which" it "has accepted responsibility for making payment to payees." C.R.S. § 34–60–118.5(1)(b).

ARCO's argument is twofold. First, ARCO labels § 34–60–118.5 as a "specific" (rather than a "general") provision, and asserts that nothing in the statute "limits the interest rate on 'proceeds withheld' to Oil and Gas Commission proceedings." ARCO's Opening Brief at 63. Second, ARCO draws an analogy to *Bulova Watch Co. v. United States,* 365 U.S. 753, 81 S.Ct. 864, 6 L.Ed.2d 72 (1961). In that case a claimant recovered a judgment against the United States for "an overpayment of its excess profits taxes." *Id.* The claimant and the government disputed whether the provisions of 28 U.S.C. § 2411(a) or the provisions of § 3771(e) of the Internal Revenue Code governed the date from which interest accrued. The claimant asserted that § 2411(a) controlled because his judgment was entered by a court rather than an administrative body. The Supreme Court rejected the claimant's position, reasoning that the effect of the claimant's argument would make "the starting date of interest in such cases dependent upon the forum selected by the taxpayer.... [I]t is almost certain that Congress did not intend such an anomalous, nonuniform and discriminatory result." *Id.* at 757, 81 S.Ct. 864.

[20] [21] Neither of these arguments demonstrates that the district court's refusal to apply § 34–60–118.5 was erroneous. As in most jurisdictions, in Colorado "[i]t is a well-accepted principle of statutory construction that in the case of conflict, a more specific statute controls over a more general one." *Delta Sales Yard v. Patten,* 892 P.2d 297, 298 (Colo.1995). But that general principle does not control the outcome of this case, because there is no inherent conflict between § 34–60–118.5 and § 5–12–102. By its terms, § 34–60–118.5 only governs enforcement proceedings before the Commission and is inapplicable to claims for breach of contract:

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

Grynberg, at 1063. Indeed, through its amendment of the statute in 1998, the Colorado legislature clarified and reinforced its intent "to exclude the resolution of contractual disputes from the jurisdiction of the Commission." *Id.* at *3; *see also* C.R.S. § 34–60–118.5(5) (stating that the Commission "shall decline jurisdiction" over any "bona fide dispute over the interpretation of a contract for payment"). Unlike the claimant in *Bulova,* therefore, a Colorado litigant alleging a breach of an oil and gas royalty agreement cannot select among different fora. Instead, that litigant must assert his claim in a court of law, where § 5–12–102 establishes the rate of prejudgment interest. In addition, even if a litigant alleging a breach of an oil and gas agreement could choose between administrative and judicial tribunals, *Bulova* would not necessarily control. The law of oil and gas "is unlike any other area," *see supra* n. 7, and the

Supreme Court's construction of the Internal Revenue Code hardly limits the Colorado General Assembly's ability to prescribe different rates of prejudgment interest for different types of oil and gas proceedings.

C. Moratory interest

[22] Moratory interest is governed by § 5–12–102(1). That statute "allows a court to award interest in 'an amount which fully recognizes the gain or benefit realized by the person withholding such money,' or at the statutory rate of eight ***1158** percent per annum compounded annually." *Ballow v. PHICO Ins. Co.,* 878 P.2d 672, 683 (Colo.1994) (citations omitted); *accord Northwest Cent. Pipeline Corp. v. JER Partnership,* 943 F.2d 1219, 1229 (10th Cir.1991).[9] Section 5–12–102(1) "recognizes the time value of money," and is intended to "discourage a person responsible for payment of a claim to stall and delay payment until judgment or settlement." *Mesa Sand & Gravel Co. v. Landfill, Inc.,* 776 P.2d 362, 364 (Colo.1989); *see also Great Western Sugar Co. v. KN Energy, Inc.,* 778 P.2d 272, 274 (Colo.Ct.App.1989) (indicating that the aim of the statute is to "correct the situation in which a wrongdoer would stall settlement or judgment in order to reap the benefit of having use of money or property which was producing more profit for him than the statutory interest rate he would eventually have to pay"). Colorado courts generally "apply a liberal construction to the statute" to achieve this purpose. *Mesa Sand & Gravel,* 776 P.2d at 365. Nevertheless, "in order to receive the higher interest rate, the claimant must specifically prove that the withholding party actually benefited in a greater amount." *Northwest,* 943 F.2d at 1229; *see also Lowell Staats Mining Co. v. Pioneer Uravan, Inc.,* 878 F.2d 1259, 1270 (10th Cir.1989) (stating that the statutory interest rate applies "in the absence of specific proof of the benefit derived by the defendant"); *Davis Cattle Co. v. Great Western Sugar Co.,* 393 F.Supp. 1165, 1194 (D.Colo.1975) (same), *aff'd,* 544 F.2d 436 (10th Cir.1976). Accordingly, "a trial court faced with a record devoid of evidence relating to the amount of the withholding party's gain or benefit lacks discretion to award interest at a rate other than the statutory rate of 8% per annum." *Chaparral Resources, Inc. v. Monsanto Co.,* 849 F.2d 1286, 1291 n. 4 (10th Cir.1988); *accord Ballow,* 878 P.2d at 683–84.

[23] In the present case, the district court held that the defendants failed to show ARCO's return on wrongfully withheld royalties was greater than 8%. The defendants offered to prove that (1) ARCO "had the use of these underpayments of royalty in its own corporate treasury;" (2) the appropriate measure of ARCO's gain was its "return on equity" ("ROE"), or "the net income of the company divided by the average amount of equity;" and (3) ARCO's ROE for the period in question was approximately 16%. Jt.App. at 7182, 7183–86, 7292. The court concluded that § 5–12–102 required a "showing [of] what happened to the specific money withheld," and found that the defendants' proffered evidence did not address "what happened with this particular money." *Id.* at 7212. Because this evidence was "speculative" and there was "not sufficient tracing of the funds," the court applied § 5–12–102(1)(b). *Id.* at 7211, 7212.

The district court did not commit reversible error by refusing to award moratory interest. Section 5–12–102(1)(a) requires "specific proof" of the amount gained from withheld funds. *See, e.g., Northwest,* 943 F.2d at 1229; *Lowell Staats,* 878 F.2d at 1270; *Davis Cattle,* 393 F.Supp. at 1194. The defendants' return on equity calculation lacks the requisite specificity. As ARCO notes in its appellate brief, the values undergirding the calculation come from annual reports that

> are derived from consolidated balance sheets and cash flows for a wide range ***1159** of different entities, both domestic and international. Those computations measure ARCO's overall performance on a consolidated basis for all its operations around the world and are based in part on investments made long before any additional royalties were withheld.

ARCO's Answer Brief In Response To Opening Brief Of Koscove, FCB and Garcias at 53 (citations omitted). The annual reports do not contain a ROE for the SMU, ARCO Permian (the ARCO division responsible for the SMU), or even ARCO's domestic oil and gas operations. Moreover, the value of the additional royalties owed is dwarfed by ARCO's net income, making it difficult to say with certainty what gain ARCO specifically derived by withholding those payments.

The defendants' arguments to the contrary are not compelling. The defendants maintain that the district court's ruling renders § 5–12–102(1)(a) "inapplicable to ARCO or virtually any company which wrongfully withholds another's money," because companies like ARCO could create "an effective defense against claims for moratory interest" simply by "co-mingling" funds with other corporate assets. Opening Brief Of Koscove, FCB, and Garcias at 61–62. This argument sidesteps the rule that § 5–12–102 requires a claimant to specifically prove the gain or benefit received by the offending party—whether that party is an individual or a corporation. The "specific proof" requirement has been in force at least since the *Davis Cattle* decision in 1975, and in the interim the Colorado legislature has declined to amend the statute. Perhaps for that reason, courts routinely deny requests for moratory interest pursuant to § 5–12–102. *See, e.g., Northwest,* 943 F.2d at 1229; *Lowell Staats,* 878 F.2d at 1270–71; *Chaparral,* 849 F.2d at 1291 & n. 4; *James v. Coors Brewing Co.,* 73 F.Supp.2d 1250, 1256 (D.Colo.1999); *FDIC v. Clark,* 768 F.Supp. 1402, 1414–15 (D.Colo.1989); *Ballow,* 878 P.2d at 683–84. Indeed, over the last 25 years it appears that courts have approved awards of moratory interest in only two published opinions, neither of which is factually similar to the instant case. *See Great Western Sugar,* 778 P.2d at 273–75 (approving an award of moratory interest based on a three-part model designed to show the net profit resulting from the wrongful withholding of natural gas under a sales contract); *Davis Cattle,* 393 F.Supp. at 1194–95 (awarding moratory interest where the claimant demonstrated that the offending party "was able to leave $23–million of [its] credit line untapped" and save 11.5% in interest).

IV. THE DEFENDANTS' FRAUD COUNTERCLAIMS

A. Procedural history

Koscove and FCB each asserted counterclaims sounding in fraud.[10] In her claim for fraudulent concealment, Koscove alleged that ARCO "intentionally prepared and disseminated false accounting reports and correspondence" to hide improper deductions. Jt.App. at 186 (¶ 99). This concealment purportedly prevented Koscove from taking timely action against ARCO to recover the improper deductions and to "set a proper valuation for the gas." *Id.* (¶ 100). FCB alleged in its claim for fraud that the stubs on payment checks used by ARCO contained printed codes that "did not set forth the amounts that [ARCO] was deducting." *Id.* at 2222–26 (¶ 124(a)(1)). FCB further alleged that it made repeated inquiries about the extent of ARCO's deductions, but ARCO either ignored these inquiries or provided misleading responses.

FCB's claim survived ARCO's initial motions to dismiss, but Koscove's did not. After the district court denied ARCO's first motion to dismiss as untimely, the company sought judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The court granted ARCO's ***1160** request for judgment on the pleadings, but permitted FCB and Koscove to re-plead their claims if they could allege "some detrimental reliance other than delay in pursing legal remedies." Jt.App. at 2087, 2100–01. In accordance with the court's instructions, FCB re-pleaded its claim. Koscove, who did not re-plead her claim, appeals the district court's original order of dismissal.

ARCO challenged FCB's re-pleaded fraud claim in two motions. The first was a motion for summary judgment, which the district court denied. As the scheduled trial date approached, ARCO filed a "Motion To Exclude Evidence Of Farm Credit's Alleged Fraud Damages." *Id.* at 3965. The court granted this motion, precipitating the dismissal of FCB's fraud claim. *Id.* at 5186, 6639, 6867. FCB appeals the grant of ARCO's motion to exclude.

B. Koscove's claim

[24] [25] A motion for judgment on the pleadings under Rule 12(c) is treated as a motion to dismiss under Rule 12(b)(6). *Mock v. T.G. & Y. Stores Co.,* 971 F.2d 522, 528 (10th Cir.1992). Our standard of review is therefore de novo. *Realmonte v. Reeves,* 169 F.3d 1280, 1283 (10th Cir.1999). We uphold a dismissal under Rule 12(b)(6) "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." *Mock,* 971 F.2d at 529 (quoting *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence,* 927 F.2d 1111, 1115 (10th Cir.1991)). We likewise "accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the non-moving party." *Realmonte,* 169 F.3d at 1283; *accord Mock,* 971 F.2d at 529.

[26] [27] [28] [29] Even if we construe the allegations in her favor, Koscove's claim for fraudulent concealment is insufficient as a matter of law. Detrimental reliance is an essential element of a claim for fraudulent concealment. A plaintiff asserting such a claim must show

> (1) the concealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages.

Ballow v. PHICO Ins. Co., 875 P.2d 1354, 1361 (Colo.1993); *see also Alzado v. Blinder, Robinson & Co.,* 752 P.2d 544, 558 (Colo.1988) ("To claim damages from allegedly fraudulent statements, the plaintiff must establish detrimental reliance on the statements."). Here, Koscove concedes that she cannot plead detrimental reliance other than delay in filing suit. *See* Opening Brief Of Koscove, FCB and Garcias at 5, 42. Delay in filing suit, without more, does not satisfy the fifth element of a claim for fraudulent concealment—"action on the concealment resulting in damages." Koscove does not allege that her delay in filing suit permitted ARCO to successfully assert a statute of limitations defense. Nor does she allege that her delay caused any other form of damage. Because Koscove's fraudulent concealment claim contains no allegations of any injury, the district court properly dismissed it. *Cf. Mills v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 703 F.2d 305, 308 (8th Cir.1983) (finding that a plaintiff failed to establish detrimental reliance because he did not allege that he was "barred from filing suit" as a consequence of the defendant's conduct); *Werman v. Malone,* 750 F.Supp. 21, 23 (D.Me.1990) (concluding that a plaintiff's bare-bones allegation that he "refrained from filing suit" as a result of the defendant's conduct was "insufficient as a matter of law to establish the element of detrimental reliance").[11]

*1161 C. FCB's claim

[30] The district court excluded evidence relating to FCB's fraud claim on two grounds. First, the court held that FCB inexcusably failed to include its theory of damages in the final pre-trial order. FCB initially alleged that, but for ARCO's fraudulent conduct, it would have taken its share of CO^2 from the SMU in kind. Unable to produce any evidence to support that theory, FCB later alleged that ARCO's fraudulent conduct prevented it from selling its "entire mineral interest." Jt.App. at 5165–66. FCB did not disclose or list witnesses for the latter theory in the pre-trial order. Second, the court concluded that FCB's newly alleged fraud damages were "too speculative to go to [a] jury." *Id.* at 5169. We review the court's rulings for an abuse of discretion. *See Koch v. Koch Indus., Inc.,* 203 F.3d 1202, 1222 (10th Cir.2000) ("This court reviews a district court's failure to amend a final pretrial order for an abuse of discretion."); *Vining v. Enterprise Fin. Group, Inc.,* 148 F.3d 1206, 1217 (10th Cir.1998) (stating that "the admission or exclusion of evidence" is reviewed "for abuse of discretion").

[31] [32] The district court's exclusion of FCB's alleged fraud damages was proper. The only argument advanced by FCB on appeal is that evidence of its damages "was available to ARCO" through the report of FCB's expert. Opening Brief Of Koscove, FCB and Garcias at 62–63. FCB cites no evidence in the record and no case law to support its assertion. Under these circumstances, the district court's refusal to amend the pre-trial order cannot be deemed an abuse of discretion. *See Koch,* 203 F.3d at 1222 (explaining that a final pre-trial order "shall be modified only to prevent manifest injustice," and that "the burden of demonstrating manifest injustice falls upon the party moving for modification"). Similarly, FCB presents no argument on appeal concerning the district court's ruling that the proposed "mineral interest" damages were too speculative to go to a jury. FCB's failure to address this issue in its appellate brief constitutes a waiver. *See Coleman v. B–G Maintenance Management of Colorado, Inc.,* 108 F.3d 1199, 1205 (10th Cir.1997) ("Issues not raised in the opening brief are deemed abandoned or waived."); *Phillips v. Calhoun,* 956 F.2d 949, 953–54 (10th Cir.1992) (observing that "[a] litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point") (citation omitted).

V. THE DEFENDANTS' BREACH OF FIDUCIARY DUTY COUNTERCLAIMS

A. Procedural history

FCB, Koscove, and the Garcias asserted counterclaims against ARCO for breach of fiduciary duty. The defendants alleged that ARCO, as the operator of the SMU, breached a fiduciary duty "[b]y selling and using the gas at less than fair market value" and "by wrongfully deducting ... post-production costs and expenses without disclosure." Jt.App. at 185 (¶ 96). The defendants averred that they "d[id] not have access to the records and information" maintained by ARCO, and that ARCO occupied "a position of superiority" with respect to this revenue and royalty information. *Id.* at 146 (¶ 104). The defendants reiterated their allegation that ARCO brushed aside "repeated demands for an accounting and for proper payment of royalty owed." *Id.* (¶ 109).

As it did with FCB's re-pleaded fraud claim, ARCO challenged the defendants' breach of fiduciary duty claims in two motions. After an unsuccessful attempt to secure judgment on the pleadings, ARCO filed a motion for summary judgment. The court granted the summary judgment ***1162** motion, concluding that relationship between ARCO and the defendants involved "no fiduciary duty" under Colorado law. *Id.* at 3793. Each of the three defendants appeals this ruling, which we review de novo. *See King of the Mountain Sports,* 185 F.3d at 1089; *Lopez,* 172 F.3d at 759.

B. ARCO's alleged duty

[33] Prior decisions from Colorado and this circuit strongly suggest that a lessee-lessor relationship, even if it encompasses the operation of an oil and gas unit, does not automatically create fiduciary responsibilities. Cases dealing with "overriding" royalty owners are illustrative. For example, the court in *Degenhart v. Gold King Petroleum Corp.,* 851 P.2d 304 (Colo.Ct.App.1993) commented that "[o]rdinarily, the mere reserving of an overriding royalty in the assignment of an oil and gas lease does not create a confidential or fiduciary relationship." *Id.* at 306; *see also id.* (stressing that the record in the case was "devoid of any evidence indicating any personal or other special relationship between plaintiffs and defendant which could support the existence of a confidential or fiduciary relationship"). The Colorado Supreme Court expressly endorsed this portion of the *Degenhart* opinion in *Garman. See* 886 P.2d at 659 n. 23 (stating that the *Degenhart* court "correctly explained the reservation of an overriding royalty interest does not create a confidential or fiduciary relationship"). Furthermore, at least one case from this circuit indicates that a lessee who serves as a unit operator generally owes lessors only a duty of good faith, not a fiduciary duty:

> [A]lthough the lessee's duty of good faith requires that it take the lessor's interest into account in exercising its powers under the unitization clause, the lessee need not subordinate its interest entirely to those of the lessor. Thus, although the lessee's good faith duty has at times been referred to as fiduciary, such standard is altogether too strict.

Amoco Prod. Co. v. Heimann, 904 F.2d 1405, 1412 (10th Cir.1990) (citations omitted). In view of these precedents, we predict that the Colorado Supreme Court would not categorize as fiduciary all lessee-lessor relationships involving unitization agreements.[12]

[34] [35] However, that a fiduciary duty does not *necessarily* arise from a lessee-lessor relationship does not mean a fiduciary duty *never* arises from such a relationship. Colorado courts recognize that a variety of relationships can create fiduciary responsibilities under certain circumstances, even if those relationships are not fiduciary per se. *See, e.g., Paine, Webber, Jackson & Curtis, Inc. v. Adams,* 718 P.2d 508, 517–18 (Colo.1986) (declining to "adopt a rule that a stockbroker/customer relationship is, per se, fiduciary in nature," and holding that the existence of any fiduciary obligations turns on "proof of circumstances"); *Bohrer v. DeHart,* 943 P.2d 1220, 1225 (Colo.Ct.App.1996) (remarking that a clergy-parishioner relationship "may be fiduciary in nature," depending on the facts of the case); *Dolton v. Capitol Fed. Sav. and Loan Ass'n,* 642 P.2d 21, 23 (Colo.Ct.App.1981) ("While there is no per se fiduciary relationship between a borrower and lender, a fiduciary duty may arise from a business or confidential relationship...."). These cases demonstrate that "the existence of a fiduciary or confidential relationship is generally a question of fact for the jury." *Elk River Associates v. Huskin,* 691 P.2d 1148, 1152 (Colo.Ct.App.1984); *see also Winkler v. Rocky Mountain Conference of the United Methodist* ***1163** *Church,* 923 P.2d 152, 157 (Colo.Ct.App.1995) ("Whether a fiduciary relationship exists is a question of fact to be resolved by the jury.").

[36] [37] Applying these authorities to the case at hand, we conclude the district court erred when it entered summary judgment as a matter of law on the defendants' fiduciary duty claims. The district court granted ARCO's motion for summary judgment based on *Degenhart* and *Garman.* Our review of the facts asserted by the parties convinces us there are material facts at issue and we remand the case for further factual development of this issue. The proceedings on remand should take into account Colorado's definition of a "fiduciary": "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking." *Destefano v. Grabrian,* 763 P.2d 275, 284 (Colo.1988). Further proceedings should also take into account Colorado's operative definition of a "fiduciary relationship":

> A fiduciary relationship exists when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of their relationship. A fiduciary relationship can arise when one party occupies a superior position relative to another. It may be based upon a professional, business, or personal relationship.

Johnston v. CIGNA Corp., 916 P.2d 643, 646 (Colo.Ct.App.1996); *see also Winkler,* 923 P.2d at 157 (citing the Restatement (Second) of Torts § 874 (1979) for an identical proposition); *Dolton,* 642 P.2d at 23 (indicating that "a fiduciary duty may arise from a business or confidential relationship which impels or induces one party 'to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger' ") (citation omitted).

VI. THE DEFENDANTS' FAIR MARKET VALUE COUNTERCLAIMS

[38] Our review of the defendants' fair market value counterclaims is controlled by *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). *Daubert* requires a trial judge to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589, 113 S.Ct. 2786. This inquiry is "a flexible one," not governed by "a definitive checklist or test." *Id.* at 593, 594, 113 S.Ct. 2786. Potentially pertinent factors include whether the expert's theory or technique (1) "can be (and has been) tested," *id.* at 593, 113 S.Ct. 2786; (2) "has been subjected to peer review and publication," *id.;* (3) has a "known or potential rate of error" with "standards controlling the technique's operation," *id.* at 594, 113 S.Ct. 2786; and (4) enjoys "widespread acceptance" in the relevant scientific community. *Id. Kumho Tire* establishes that the "gatekeeping" requirement set forth in *Daubert* "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." 119 S.Ct. at 1171 (citation omitted). The objective of that requirement "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 1176.

[39] *Kumho Tire* also establishes that "a court of appeals is to apply an abuse-of-discretion standard when it 'review[s] a trial court's decision to admit or exclude expert testimony.' " *Id.* (quoting *General Elec. Co. v. Joiner,* 522 U.S. 136, 138–39, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)); *accord Summers v. Missouri Pacific R.R. Sys.,* 132 F.3d 599, 603 (10th Cir.1997). This standard "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion." *Kumho Tire,* 119 S.Ct. at 1176. As a general matter, a district court abuses its discretion "when it renders 'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.' " *Copier v. Smith &* ***1164** *Wesson Corp.,* 138 F.3d 833, 838 (10th Cir.1998) (quoting *FDIC v. Oldenburg,* 34 F.3d 1529, 1555 (10th Cir.1994)). Put another way, under the abuse of discretion standard "a trial court's decision will not be disturbed unless [we have] a definite and firm conviction that the [trial] court has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Beaird v. Seagate Tech., Inc.,* 145 F.3d 1159, 1164 (10th Cir.) (citation omitted), *cert. denied,* 525 U.S. 1054, 119 S.Ct. 617, 142 L.Ed.2d 556 (1998).

A. Procedural history

The defendants' fair market value counterclaims rested in large part on the testimony of their expert witness, economist James Smith. ARCO filed a motion in limine to preclude Smith from testifying, arguing that Smith's opinions were speculative, based on unsupported hypotheses, and unreliable. At a hearing the court advised the defendants that it would allow Smith to render opinions based on "actual sales" of CO^2, but it was "not going to permit him to make assumptions and projections and hypotheticals that conflict with the actual data." Jt. App. at 5173. The defendants informed the court that an important component of Smith's analysis was that there was neither a competitive market for nor "reliable actual sales" of CO^2 in West Texas. *Id.* at 5175. According to Smith, actual prices did not reflect the true market value of the gas "because of the vertical integration of the buyers and the sellers of CO^2 and ... because there were no arms' length transactions." *Id.*

Before ruling on ARCO's motion in limine, the district court held an *in camera* evidentiary hearing. Smith testified at the hearing and was subject to cross-examination. After listening to Smith's testimony and reviewing the papers submitted by the parties, the court concluded that Smith "disregarded the actual sales data of carbon dioxide gas in West Texas" and "failed to look to comparable sales of CO^2 in other markets." *Id.* at 6583. The court thus excluded Smith's proposed testimony, holding that Smith could only discuss "what the market conditions actually are in West Texas and what the comparables are." *Id.* at 6584. The defendants appeal this ruling. Because the defendants could not present a prima facie case without Smith's testimony, the court dismissed their claims for fair market value.

B. Smith's theory of valuation

The valuation theory in Smith's expert report proceeds along the following lines. Smith's initial premise is that "a high percentage" of the CO^2 from the SMU "is never sold." *Id.* at 4855. Instead, "it is supplied in-kind by Exxon and Arco to satisfy their own needs as working interest owners in various West Texas EOR projects." *Id.* (footnote omitted). While ARCO "planned from the beginning to sell some amount of its gas to outsiders," those projected sales "have been small relative to Arco's own use." *Id.* at 4856. Smith estimates that only about 14% of ARCO's SMU production has been "available over the life of the field to support third-party sales," and that in recent years ARCO sold less than 5% of the gas. *Id.*

According to Smith, ARCO and Exxon "are not alone in producing carbon dioxide primarily to meet their own needs." *Id.* Smith notes that the industry is "vertically integrated," *id.*, since the same firms that produce CO^2 also consume much of what they produce:

> The six principal suppliers of carbon dioxide (i.e., Shell, Mobil, Amoco, Arco, Exxon, and Amerada Hess) also collectively operate two-thirds of all the carbon dioxide injection wells located in the Permian Basin of West Texas. But that does not represent the full extent of their needs for carbon dioxide, since all of these firms hold additional working interests in, and supply carbon dioxide to, injection wells that are operated by other firms. Although the resulting transfers of carbon dioxide from upstream entities to downstream affiliates may be referred to as "intradivisional sales," they do not constitute arms- ***1165** length transactions where the separate and opposing interests of buyer and seller would establish a fair market value.

Id. (footnotes omitted). As a result, "most of the carbon dioxide moves within, not between, firms, and therefore the market price is not observed." *Id.*

Against this backdrop, Smith avers that "third-party sales of carbon dioxide in West Texas" do not provide "a reliable indicator of fair market value." *Id.* at 4857. Because ARCO supplies CO^2 in kind to satisfy its own needs, "the company's interest in obtaining a high price (as seller) is nullified by an offsetting interest in obtaining a low price (as buyer)." *Id.* Taking into account "the impact on royalties and taxes," Smith concludes that "Arco gains on balance whenever the price of carbon dioxide is reduced." *Id.* In other words, "[g]iven the incentives that are created by the vertically integrated structure of this industry, there is no assurance that the price favored by Arco would correspond to the fair market value of the gas. Indeed, Arco gains by establishing a price that is below fair market value." *Id.; see also id.* ("The fact that Arco also sells some of its carbon dioxide to third parties does not change the conclusion that the company comes out ahead if prices are held below fair market value.").

Smith then turns his attention to the actual market value of CO^2 from the SMU. Smith states that he is unaware of "any other market where carbon dioxide is sold at prices that would provide an accurate benchmark for estimating the fair market value." *Id.* at 4861. Smith reasons that the value of CO^2 from the SMU

> derives from its usefulness in recovering enhanced oil reserves in West Texas. Relatively few projects of this type are located anywhere else—more than 80% of the carbon dioxide injection wells that exist in the world are located in the Permian Basin area of West Texas. Moreover, the West Texas fields that receive carbon dioxide from Sheep Mountain are the best prospects for this particular technology and give better results with greater recovery of enhanced oil reserves than the carbon dioxide-based EOR projects located elsewhere.

Id. (footnotes omitted). Thus, "even if arms-length prices were available from other geographic areas or other markets, the amount that purchasers would be willing to pay for use of carbon dioxide in those applications would understate the value" of CO^2 that is shipped from the SMU to West Texas. *Id.*

Because no "direct indicator" of fair market value is available, Smith focuses on "indirect indicators" of what CO^2 "would sell for in West Texas if the market were perfectly competitive and characterized by truly arms-length transactions." *Id.* Smith acknowledges that "this approach involves a hypothetical situation, and the price that would result can only be estimated, not observed." *Id.* Nonetheless, says Smith, the economic theory of "profit maximization" provides "a clear prediction regarding the price that would emerge under such conditions, and clear directions on how to estimate that price." *Id.* In a nutshell, profit maximization theory "predicts that, in equilibrium, the price paid by firms to purchase the carbon dioxide will equal the net economic benefit which that carbon dioxide generates in use." *Id.* Using this approach, Smith estimates the true market value of CO^2 from the SMU from 1983 through 1996, ranging from a high of $3.38 per thousand cubic feet ("mcf") in 1983 to a low of $1.15 per mcf in 1986 and 1988. *Id.* at 5562.[13]

***1166 C. Basis for exclusion**

[40] The district court did not abuse its discretion by excluding Smith's testimony. The court initially examined some of the factors listed in *Daubert,* and found that (1) Smith's opinions were formed specifically for this litigation; (2) Smith had not employed the profit maximization theory on previous occasions to determine the value of CO^2; and (3) Smith's opinions had not been published or subjected to peer review in scholarly journals. There is evidence in the record to support all of these findings. The court then concluded that Smith's analysis disregarded or failed to account for (1) the prices actually received by certain CO^2 suppliers in West Texas, and (2) the prices actually received by CO^2 suppliers in comparable markets. As discussed below, neither of these findings "exceeded the bounds of permissible choice in the circumstances."

[41] [42] The defendants offered Smith's testimony as a means of determining the "market value" to which their lease contracts referred. "Market value" represents "the price that would be paid by a willing buyer to a willing seller in a free market." 3 Eugene Kuntz, *Treatise on the Law of Oil and Gas* § 40.4, at 329 (1989); *see also Black's Law Dictionary* 597 (6th ed.1990) (defining "fair market value" as "[t]he amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts"); *Rhodes v. Amoco Oil Co.,* 143 F.3d 1369, 1373 n. 4 (10th Cir.1998) (same). That being the case, when a lessee sells gas in an open and competitive market,

> the price derived from such sale should establish the market price and market value of the gas. If however, the lessee is a corporate affiliate of the purchaser and the sale is not at an arm's length, the sale price will not be accepted as representing the market price or market value. Nor will sales on a market which is dominated by a few producers and purchasers establish an acceptable market price of gas.

3 Eugene Kuntz, *Treatise on the Law of Oil and Gas* § 40.4, at 332 (1989) (footnotes omitted);[14] *cf. United States v. 79.95 Acres of Land,* 459 F.2d 185, 187 (10th Cir.1972) (recognizing in a condemnation proceeding that a transaction that is not conducted at arm's length "is not evidence of fair market value"). If a competitive market does not exist at the well, there is "general agreement" that market value "can be determined from comparable sales of gas," and that "comparable sales are those that are comparable in time, quality, quantity, and availability of marketing outlets." 3 Eugene Kuntz, *Treatise on the Law of Oil and Gas* § 40.4, at 335 (1989). As a corollary,

> [i]f the market value cannot be established by proof of comparable sales, then the actual value or intrinsic value of the gas can be shown. The burden is on the lessor to prove that there is no market and to prove the reasonable value of the gas.... In proving the actual value of the gas, the lessor is not limited to proof of the market value at a distant market ***1167** less the expense of transportation, but the lessor may also prove such value by proof of other factors and by the "opinion of competent persons having knowledge of the facts, whether expert or not."

Id. § 40.4, at 337 (footnotes and citation omitted); *see also Weymouth v. Colorado Interstate Gas Co.,* 367 F.2d 84, 88 (5th Cir.1966) (stating that market value "may be established by expert opinion" or by "[e]vidence of sales of comparable properties") (citation omitted).

[43] [44] While expert testimony based on hypothesis can (and sometimes must) be used to establish market value, courts tend to prefer evidence derived from actual sales. For instance, in *Ashland Oil, Inc. v. Phillips Petroleum Co.,* 554 F.2d 381 (10th Cir.1975), we intimated that "comparable sales or current market price is the best" and "by far the preferable method" for determining value. *Id.* at 387; *see also id.* (commenting that the expert testimony presented in the case, "[n]o matter how interesting" as a matter of theory, was "only opinion evidence" and did not "establish facts"); *cf. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."). Accordingly, even if the relevant market is not perfectly competitive, "it still makes better sense to begin with the collective judgment expressed in the market price" than to start with "a wholly subjective pronouncement of worth." *Campbell v. United States,* 228 Ct.Cl. 661, 661 F.2d 209, 221 (1981). By the same token, when determining market value "[c]ompletely comparable sales are not likely to be found" and "[s]ales that have some different characteristics must be considered." *Piney Woods Country Life Sch. v. Shell Oil*

Co., 726 F.2d 225, 239 (5th Cir.1984); *see also id.* (suggesting that a court "should not dismiss fairly comparable sales out of hand because of certain incomparable qualities").

Judged by these standards, the district court's conclusion that Smith strayed too far from the available sales data cannot be described as "manifestly unreasonable." For example, the prices received by ARCO from several CO_2 sales in the early 1980s conceivably could serve as the basis for a "market value" calculation. The record indicates that between 1982 and 1984, ARCO made several sales to "working interest" owners in West Texas who were not CO_2 suppliers. The defendants do not contest that during this time ARCO sold or delivered approximately 55% of its CO_2 to third parties. The record also indicates that between 1983 and 1989 ARCO sold or delivered an average of 37% of its CO_2 to third parties. In light of this evidence, it was not "arbitrary, capricious, or whimsical" for the district court to conclude that, at least during the early 1980s, ARCO's purported incentive to depress CO_2 prices was substantially blunted.

Moreover, the district court's conclusion that Smith unjustifiably disregarded sales data from all CO_2 markets outside of West Texas falls short of an abuse of discretion. The district court received testimony that the *Oil and Gas Journal* publishes a list of all EOR projects in the United States and around the world. This testimony revealed the existence of EOR projects that use CO_2 in north Texas, Colorado, Wyoming, Oklahoma, Louisiana, Mississippi, and Canada. Smith admittedly did not use sales data from any of these markets when estimating the fair market value of CO_2 from the SMU. Smith also admitted that he did not attempt to determine whether these markets were competitive or characterized by arm's length transactions. Smith opted not to do so because he believed "the economic benefits that would be generated by the use of CO_2" in other markets "would not be comparable to the West Texas productivity." Jt. App. at 5280. But the only evidence cited by Smith to establish that other markets were wholly uncomparable was the response of an ARCO witness to the following deposition question: "Q: Where are the fields ***1168** that are most susceptible to the use of CO_2 located? A: Located in the Permian Basin in West Texas." *Id.* at 5557.[15] It is difficult to quarrel with the district court's judgment that this abbreviated response was "a far cry from saying that West Texas is unique and that other markets should not be considered, as the court in *Piney Woods* indicates." *Id.* at 6582.

[45] Suffice it to say that our standard of review plays a major role in the disposition of this issue. Whether the existence of other markets and the sales data presented by ARCO fatally undermine Smith's theory is eminently debatable. If our review were de novo, we might very well conclude that Smith's theory explains or otherwise accounts for these markets and data. When we apply an abuse of discretion standard, however, "we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value." *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 763 (10th Cir.1997) (quoting *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir.1994)). With that standard in mind, we affirm the district court's exclusion of Smith's testimony.

VII. ARCO'S STATUTE OF LIMITATIONS DEFENSE

A. Procedural history

The final issue for review has a brief procedural history. In a motion for judgment as a matter of law, ARCO asserted a statute of limitations defense against some of the Garcias' counterclaims. Citing C.R.S. § 13–80–109, the district court held that the counterclaims were timely because they (1) "arose out of the same transaction that is the subject matter of ARCO's declaratory judgment claim;" and (2) "were filed within one year after ARCO initiated" its claim for declaratory relief. Jt.App. at 3735. ARCO appeals this ruling, which we review de novo. *See King of the Mountain Sports*, 185 F.3d at 1089.

B. C.R.S. § 13–80–109

[46] The focal point of the parties' arguments on appeal is § 13–80–109. That statute states in full:

> Except for causes of action arising out of the transaction or occurrence which is the subject matter of the opposing party's claim, the limitation provisions of this article shall apply to the case of any debt, contract, obligation, injury, or liability alleged by a defending party as a counterclaim or setoff. A counterclaim or setoff arising out of the transaction or occurrence which is the subject matter of the opposing party's claim shall be commenced within one year after service of the complaint by the opposing party and not thereafter.

As interpreted by the Colorado courts, this provision "makes it clear that its purpose is to allow a party against whom a claim has initially been asserted to plead a stale claim only in response to the claim asserted against that party and only if it arises out of the same transaction or occurrence, or the same series thereof." *Duell v. United Bank of Pueblo,* 892 P.2d 336, 340–41 (Colo.Ct.App.1994); *see also id.* at 343 (stating that the statute brings Colorado "into line" with "the majority of jurisdictions which allow the use of stale claims defensively") (Tursi, J., concurring).

[47] We reject at the outset ARCO's proposed construction of § 13–80–109. ARCO principally contends that (1) § 13–80–109 "says nothing about reviving all ***1169** claims which were time-barred when the complaint was filed," unlike specific revival statutes in other jurisdictions, ARCO's Opening Brief at 52–53; and (2) interpreting § 13–80–109 as a "revival" provision would be inconsistent with the statute's legislative history, as well as the purpose of declaratory judgment actions. These arguments cannot be squared with the statement in *Duell* that § 13–80–109 permits a defending party "to plead a stale claim." 892 P.2d at 340–41. "Although we are not required to follow the dictates of an intermediate state appellate court, we may view such a decision as persuasive as to how the state supreme court might rule." *Sellers v. Allstate Ins. Co.,* 82 F.3d 350, 352 (10th Cir.1996); *see also Lowell Staats,* 878 F.2d at 1269 ("In the absence of a state supreme court ruling, a federal court must follow an intermediate state court decision unless other authority convinces the federal court that the state supreme court would decide otherwise."). Without any direct authority to the contrary, we view *Duell* as persuasive.

[48] [49] [50] Even so, the district court erred when it applied § 13–80–109 to the Garcias' counterclaims. To trigger the statute, one party must seek relief against a "defending party." That did not happen in this case. In its declaratory judgment action, ARCO asserted no claim against the Garcias. Because the Garcias were not named as defendants, ARCO was not obligated to serve them. The Garcias essentially named *themselves* as defendants in 1997, when they sought and received permission to intervene. By that time, however, well over a year had elapsed since ARCO filed its claim for declaratory relief in 1995. By leaving the Garcias out of its complaint, ARCO eliminated the risk that it would be exposed to defensive counterclaims that otherwise would have been barred by the statute of limitations. By the Garcias' reasoning, a party who previously sat on its hands could automatically revive a "stale" claim arising out of a common transaction or occurrence by seeking and obtaining leave to intervene as a defendant. That stretches the language of § 13–80–109 too far. Consequently, we vacate the district court's ruling and remand the case to determine whether the Garcias' claims are in fact barred by the applicable statute(s) of limitation.[16]

VIII. CONCLUSION

Our ruling today is necessarily multifaceted.

1. We REVERSE the district court's ruling that FCB's lease unambiguously permits ARCO to deduct transportation expenses, and REMAND this issue for additional proceedings. On remand the district court should determine what extrinsic evidence, if any, is relevant and admissible for the purpose of clarifying the meaning of the Gas Pricing provision in FCB's contract.

2. We AFFIRM the district court's ruling that FCB's lease permits ARCO to use a weighted average price under the third subsection of the Gas Pricing provision, but REVERSE the district court's ruling that the same provision permits ARCO to use amounts received by Exxon to calculate the weighted average price.

3. We REVERSE the district court's ruling that the phrase "cost of transporting" in the Garcias' lease unambiguously ***1170** excludes IDC and COC, and REMAND this issue for additional proceedings. On remand the district court should again determine what extrinsic evidence, if any, is relevant and admissible for the purpose of clarifying the meaning of the phrase "cost of transporting" as it appears in the Garcias' contract.

4. As regards FCB's lease which was silent as to transportation costs, we REVERSE the district court's ruling that IDC and COC do not constitute "transportation costs" under *Garman* and its progeny. Unless the parties intended something to the contrary in their contracts, IDC and COC are "transportation costs" under *Garman* and its progeny. If the district court or a jury determines on remand that FCB's lease permits ARCO to deduct transportation expenses, then IDC and COC should be included in the calculation.

5. We REVERSE the district court's ruling permitting ARCO to deduct depreciation expenses based on Exxon's capital expenditures, and REMAND this issue to determine the amount ARCO actually contributed toward the development of the SMU and the Pipeline.

6. We AFFIRM the district court's ruling that C.R.S. § 5–12–102(1)(b), rather than C.R.S. § 34–60–118.5, governs the rate of prejudgment interest. If the district

court or a jury determines on remand that the leases executed by FCB and the Garcias permit ARCO to deduct IDC and COC, this issue will become moot.

7. We AFFIRM the district court's ruling that the defendants failed to specifically prove their entitlement to moratory interest.

8. We AFFIRM the district court's ruling that Koscove failed to plead the element of detrimental reliance and thus failed to state a claim for fraudulent concealment.

9. We AFFIRM the district court's ruling that FCB failed to present or preserve a viable damages theory in support of its claim for fraud.

10. We REVERSE the district court's ruling that the defendants' breach of fiduciary duty counterclaims are insufficient as a matter of law and REMAND for further proceedings.

11. We AFFIRM the district court's ruling excluding the testimony of the defendants' expert, Dr. James Smith.

12. We REVERSE the district court's ruling that C.R.S. § 13–80–109 applies to the Garcias' counterclaims, and REMAND this issue to determine whether the Garcias' claims are barred by the applicable statute(s) of limitation.

All Citations

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Footnotes

1 Honorable Arthur L. Alarcon, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

2 ARCO has filed a motion to supplement the record to "correct and clarify" what it views as factual misstatements in the defendants' appellate brief. After reviewing the briefs submitted in connection with ARCO's motion, we conclude (as we did in *United States v. Haddock,* 50 F.3d 835 (10th Cir.1995)) that the proffered materials "are neither necessary nor helpful to the resolution of this appeal" under Federal Rule of Appellate Procedure 10(a). *Id.* at 841 n. 4; *see also United States v. Hernandez,* 94 F.3d 606, 611 n. 3 (10th Cir.1996) (declining to consider supplemental evidence that was not necessary to the court's decision). For that reason, we deny the motion to supplement. ARCO has also filed a motion seeking to strike an amicus curiae brief submitted by the National Association of Royalty Owners ("NARO"). To the extent that NARO's brief raises arguments that have never been advanced by the parties, we grant ARCO's motion. *See Tyler v. City of Manhattan,* 118 F.3d 1400, 1404 (10th Cir.1997) ("[I]t is truly the exceptional case when an appellate court will reach out to decide issues advanced not by the parties but instead by amicus."). The rest of the arguments in NARO's brief are either unsupported by the record, unencumbered by citations to legal authority, or irrelevant to our resolution of the issues presented in this appeal.

3 "Unitization refers to the consolidation of mineral or leasehold interests in oil or gas covering a common source of supply." *Amoco Prod. Co. v. Heimann,* 904 F.2d 1405, 1410 (10th Cir.1990).

4 ARCO, Exxon, and Amerada Hess own the Pipeline. ARCO and Exxon own 50% interests in the northern part of the Pipeline, and 35% interests in the southern part. Amerada Hess owns the remaining 30% interest in the southern part of the Pipeline.

5 The Garcias filed two motions to intervene, the first of which was denied without prejudice. The Garcias agreed in their second motion to intervene "to enter th[e] litigation subject to all previous orders regarding substantive legal issues and procedural matters." Jt.App. at 2280 (¶ 15).

6 In May 1996, the district court granted Exxon's motion for summary judgment and dismissed Exxon as a party. The court determined that there was "no basis in this case for Exxon to be sued" because there was "no privity between any of the lessees and Exxon." Jt.App. at 1386b. The court also concluded that there was "no indication that Exxon [wa]s a partner of ARCO or a joint venturer with ARCO." *Id.* ARCO and the defendants do not contest this ruling on appeal.

7 Kansas, FCB's principal place of business, observes the same rule. *See Sternberger v. Marathon Oil Co.,* 257 Kan. 315, 894 P.2d 788, 796 (1995) ("[W]here royalties are based on market price 'at the well,' or where the lessor receives his or her share of the oil or gas 'at the well,' the lessor must bear a proportionate share of the expenses in transporting the gas or oil to a distant market."); *id.* at 800 (stating that the Colorado Supreme Court in *Garman* "held as we believe

the law in Kansas to be").

8 The defendants also rely on *Huddleston v. Grand County Board of Equalization*, 913 P.2d 15 (Colo.1996), but that decision does not address the dispositive issue in this case. Construing a mine tax valuation statute, the *Huddleston* court disallowed a deduction for a "margin allocation" that was admittedly "a hypothetical figure not representing direct costs." *Id.* at 18. At the outset, the court acknowledged that it was "dealing with a very different kind of property with its own taxation scheme under the constitution and statutes." *Id.* at 20. The court then determined that "[t]he history of the mine tax valuation system" demonstrated that "a hypothetical profit or margin allocation is not deductible." *Id.* The court simply did not consider the deductibility of IDC and COC, let alone the deductibility of these expenses in the context of an oil and gas lease. In the words of the Colorado Supreme Court, "the law of oil and gas is unlike any other area." *Davis v. Cramer*, 808 P.2d 358, 359 (Colo.1991).

9 Section 5–12–102(1) provides in full:

(1) Except as provided in section 13–21–101, C.R.S., when there is no agreement as to the rate thereof, creditors shall receive interest as follows:

(a) When money or property has been wrongfully withheld, interest shall be an amount which fully recognizes the gain or benefit realized by the person withholding such money or property from the date of wrongful withholding to the date of payment or to the date judgment is entered, whichever first occurs; or, at the election of the claimant,

(b) Interest shall be at the rate of eight percent per annum compounded annually for all moneys or the value of all property after they are wrongfully withheld or after they become due to the date of payment or to the date judgment is entered, whichever first occurs.

10 The Garcias also asserted a claim for fraud, but voluntarily dismissed it with prejudice.

11 Koscove's suggestion that she should be able to pursue a claim for fraudulent concealment in order to obtain punitive damages puts the cart before the horse. Under Colorado law "[a] claim for punitive damages is not a separate and distinct cause of action; rather, it is auxiliary to an underlying claim. An award of punitive damages can be entered only after awarding damages in conjunction with an underlying and successful claim for actual damages." *Pulliam v. Dreiling*, 839 P.2d 521, 524 (Colo.Ct.App.1992).

12 In the same vein, it is unlikely that the Colorado Supreme Court would follow *Leck v. Continental Oil Co.*, 800 P.2d 224 (Okla.1989). *Leck* generally recognizes "the existence of a fiduciary duty owed by a unit to the royalty owners and lessees who are parties to the unitization agreement or subject to the order creating the unit." *Id.* at 229. As one commentator has observed, "[m]ost jurisdictions other than Oklahoma have rejected the notion that there is a fiduciary obligation owed by [an] operator absent special circumstances." Gary W. Catron, *The Operator's "Fiduciary" Duty To Royalty And Working Interest Owners*, 64 Okla. Bar J. 2763 (1993).

13 At the *in camera* evidentiary hearing, Smith's testimony on direct examination closely followed the statements in his expert report. Smith reiterated that the industry was "vertically integrated" and that the market for CO^2 was not competitive. Jt.App. at 5212. Smith likewise testified that sales to third parties and other market indicators did not reflect "the actual fair market value of the CO^2." *Id.* at 5213. Smith emphasized that "over 80 percent of the CO^2 production wells in the world are located in West Texas" and that other CO^2 projects are "widely scattered" and "mostly in foreign countries." *Id.* at 5214. Smith repeated that the market lacks "arms length" transactions, and that suppliers such as ARCO have "a clear interest and profit in setting the price of the CO^2 below the fair market value." *Id.* at 5216. Smith also discussed the "underlying assumption" of the profit maximization theory—that "management is driven by the objective to maximize profits for the firm." *Id.* at 5228. Smith revised his estimate of outside sales, stating that ARCO sold 22% of its SMU CO^2 to third parties from 1983 to 1996.

14 While this section of the Kuntz treatise uses "market value" and "market price" interchangeably, the two terms are not always synonymous:

Market price is the price that is actually paid by buyers for the same commodity in the same market. It is not necessarily the same as "market value" or "fair market value" or "reasonable worth". Price can only be proved by actual transactions. Value or worth, which is often resorted to when there is no market price provable, may be a matter of opinion.

Shamrock Oil & Gas Corp. v. Coffee, 140 F.2d 409, 410–11 (5th Cir.1944).

15 Smith also claimed that he had "seen this statement in various forms in various documents." Jt.App. at 5283. That may be true, but none of those documents have been submitted by the defendants on appeal. The only evidence highlighted by the defendants is (1) a statement by an ARCO witness that he would not look to other geographical markets in order to formulate a bid for a CO^2 supply contract in West Texas; and (2) a statement by another ARCO

witness that he would not value an in kind delivery for a specific EOR in West Texas by looking to another state. These statements do not directly address the issue faced by the district court, and even if they did, they hardly constitute overwhelming proof that all forms of comparison between West Texas and other markets are invalid.

16 The Garcias suggest that ARCO waived its statute of limitations defense by failing to object to their motion to intervene, but cite no authority to support their position. A limitations defense "is generally waived unless it is raised in the defendant's responsive pleading." *Expertise, Inc. v. Aetna Fin. Co.,* 810 F.2d 968, 973 (10th Cir.1987); *see also Venters v. City of Delphi,* 123 F.3d 956, 967 (7th Cir.1997) ("Federal Rule of Civil Procedure 8(c) requires a defendant to plead a statute of limitations defense and any other affirmative defense in his answer to the complaint."). ARCO raised the defense in its answer. The Garcias also suggest that as intervenors they had "the same power as the original parties." Response Brief of FCB and Garcias at 55 (citation omitted). Even if that is true, it does not demonstrate that the Garcias were entitled retroactively to name themselves as "defending parties" and invoke § 13–80–109.

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EXHIBIT 14

LAW OFFICES
OF
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7227 Metcalf Ave., Suite 301
Overland Park, KS 66204
Facsimile: (816) 300-6259

George A. Barton
DIRECT DIAL: (816) 300-6250
Email: gab@georgebartonlaw.com

August 17, 2017

VIA CERTIFIED MAIL
Antero Resources Corporation
1615 Wynkoop Street
Denver, Colorado 80202

Re: Written notice pursuant to C.R.S. § 34-60-118.5(7) by Airport Land Partners, Ltd. to Antero Resources Corporation of its failure to make timely payments for the full amount of royalties owed to Airport Land Partners, Ltd. under the attached 1994 Lease Agreement and the attached 5 Percent Overriding Royalty Agreement

Dear Antero Resources Corporation:

The undersigned attorney for Airport Land Partners, Ltd. ("Airport") hereby provides written notice by certified mail to Antero Resources Corporation ("Antero") of its failure to make timely payments of royalties due and owed to Airport under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement referenced herein, pursuant to C.R.S. § 34-60-118.5(7), and further states as follows:

1. Airport is a Colorado limited partnership, with its principal place of business at 312 Aspen Airport Business Center, Suite A, Aspen, Colorado 81611. The general partner of Airport Land Partners is Airport Business Park Corporation, which is a corporation incorporated under the laws of the state of Colorado, with its principal place of business located at 434 E. Cooper Street, Suite 202, Aspen, Colorado 81611.

2. On January 24, 1994, Rifle Land Associates, Ltd., as Lessor, entered into an Oil and Gas Lease and incorporated Addendum with Snyder Oil Company, as Lessee (the "1994 Lease Agreement") (Copy attached). The royalty provision of the 1994 Lease Agreement, at Paragraph 3, Section 2, obligates the Lessee:

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

3. The first paragraph of the Addendum to the 1994 Lease Agreement states:

> Anything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty.

4. Sometime prior to November of 2006, Antero acquired Lessee Snyder Oil Company's interests under the 1994 Lease Agreement.

5. In 1997, subsequent to the execution of the 1994 Lease Agreement, Airport acquired, in whole or in part, the Lessor's interests under the 1994 Lease Agreement, and since that time has had the right to be paid a specified percentage of the royalties payable to the Lessor under the 1994 Lease Agreement.

6. In addition to Airport's rights and interests under the 1994 Lease Agreement, on July 16, 2007 Antero assigned to Airport a five percent overriding interest in certain lands covered by the 1994 Lease Agreement (The "5 Percent Overriding Royalty Agreement") (Copy Attached).

7. The 5 Percent Overriding Royalty Agreement states that the royalties payable under the 5 Percent Overriding Royalty Agreement:

> Shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the [Overriding Royalty Interest] burden is calculated and paid, and as part of that calculation, the [Overriding Royalty Interest] shall bear the same costs and expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease.

8. The only lease which is subject to the 5 Percent Overriding Royalty Agreement is the 1994 Lease Agreement, as set forth in Exhibit A to the 5 Percent Overriding Royalty Agreement. Therefore, Antero is obligated to pay royalties to Airport on the 5 Percent Overriding Royalty Agreement in the same manner that it is obligated to pay royalties to Airport under the 1994 Lease Agreement as more fully described herein.

9. Antero produced natural gas subject to the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement at various times since November of 2006 through December of 2012, at which time Antero sold its rights, interests, and obligations under the 1994 Lease Agreement and the 5 Percent Overriding Agreement to Ursa Operating Company, LLC ("Ursa"). Ursa then began producing and selling natural gas from wells which are subject to the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement.

10. Under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement, Antero had an implied duty to market the gas produced from the wells subject to those Agreements, and to pay royalties to Airport based upon prices received for marketable natural gas products at the location of the first commercial market.

11. The location of the first commercial market for the residue gas which came from the wells at issue is at the delivery points at various interconnects to the long distance transportation pipelines, where Antero sold residue gas to third party purchasers who purchased such residue gas from Antero.

12. The location of the first commercial market for the natural gas liquids which came from the gas wells at issue is at the location where such natural gas liquids were fractionated into marketable natural gas liquid products, including propane, butane, isobutane, natural gasoline, and ethane, and then sold to third party purchasers for prices based upon market index prices for such natural gas liquid products, or similar prices.

13. Antero breached its royalty payment obligations to Airport by underpaying the royalties owed to Airport under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement. Antero underpaid the royalties by failing to pay Airport royalties based upon prices received for marketable residue gas at the location of the first commercial market, as referenced above, and by failing to pay Airport royalties for prices received for marketable natural gas liquids—including propane, butane, isobutane, natural gasoline and ethane—at the location of the first commercial market, as referenced above.

14. Pursuant to the implied duty to market owed by Antero to Airport, Antero had the obligation to incur all of the post-production costs necessary to place the natural gas at issue into a condition acceptable for the commercial market, and all of the costs of delivering the marketable natural gas products to the location of the first commercial market. Airport was not obligated to share in any of these costs. Antero further breached its obligations under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement by improperly charging Airport for various post-production costs necessary to place the natural gas produced from the wells at issue into a marketable condition acceptable for the commercial market, and for the costs of transporting the natural gas to the location of the first commercial market.

15. Antero further breached its royalty payment obligations to Airport under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement by underpaying the amount of royalties due and owing to Airport Land Partners on condensate which came from the gas wells subject to the 1994 Lease and the 5 Percent Overriding Royalty Agreement.

16. Antero further underpaid its royalty obligations to Airport Land Partners by taking improper and/or excessive deductions for various taxes, including severance taxes, ad valorem taxes, and conservation taxes.

17. Antero breached its royalty payment obligations to Airport under the 1994 Lease and the 5 Percent Overriding Royalty Agreement in the manner described above.

18. Airport sustained substantial damages resulting from Antero's breaches of its royalty payment obligations to Airport under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement.

19. By engaging in the conduct referenced above, Antero substantially underpaid the royalties owed to Airport under the attached 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement, and is obligated to compensate Airport for all royalty underpayments resulting from such conduct, and is also obligated to pay Airport prejudgment interest on said royalty underpayments, from the date of each underpayment, at the Colorado rate of eight percent per annum, compounded annually. C.R.S. § 5-12-102(1)(b).

Very truly yours,

George A. Barton.

cc: Ms. Karen L. Spaulding (via email, w/ attachment)

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Denver CO 80202

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EXHIBIT 15

LAW OFFICES
OF
GEORGE A. BARTON, P.C.
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Facsimile: (816) 300-6259

George A. Barton
DIRECT DIAL: (816) 300-6250
Email: gab@georgebartonlaw.com

August 17, 2017

VIA CERTIFIED MAIL
Ursa Operating Company, LLC
1050 17th Street, Suite 2400
Denver, Colorado 80265

Re: Written notice pursuant to C.R.S. § 34-60-118.5(7) by Airport Land Partners, Ltd. to Ursa Operating Company, LLC of its failure to make timely payments for the full amount of royalties owed to Airport Land Partners, Ltd. under the attached 1994 Lease Agreement and the attached 5 Percent Overriding Royalty Agreement

Dear Ursa Operating Company, LLC:

The undersigned attorney for Airport Land Partners, Ltd. ("Airport") hereby provides written notice by certified mail to Ursa Operating Company, LLC ("Ursa") of its failure to make timely payments of royalties due and owed to Airport under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement referenced herein, pursuant to C.R.S. § 34-60-118.5(7), and further states as follows:

1. Airport is a Colorado limited partnership, with its principal place of business at 312 Aspen Airport Business Center, Suite A, Aspen, Colorado 81611. The general partner of Airport Land Partners is Airport Business Park Corporation, which is a corporation incorporated under the laws of the state of Colorado, with its principal place of business located at 434 E. Cooper Street, Suite 202, Aspen, Colorado 81611.

2. On January 24, 1994, Rifle Land Associates, Ltd., as Lessor, entered into an Oil and Gas Lease and incorporated Addendum with Snyder Oil Company, as Lessee ("the 1994 Lease Agreement") (Copy attached). The royalty provision of the 1994 Lease Agreement, at Paragraph 3, Section 2, obligates the Lessee:

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

3. The first paragraph of the Addendum to the 1994 Lease Agreement states:

> Anything to the contrary notwithstanding, Paragraph 3 of the printed form regarding the one-eighth royalty paid shall be amended to read a 15.00% royalty in lieu of the one-eighth royalty.

4. Sometime prior to November of 2006, Antero Resources Corporation ("Antero") acquired Lessee Snyder Oil Company's interests under the 1994 Lease Agreement.

5. In 1997, subsequent to the execution of the 1994 Lease Agreement, Airport acquired, in whole or in part, the Lessor's interests under the 1994 Lease Agreement, and since that time has had the right to be paid a specified percentage of the royalties payable to the Lessor under the 1994 Lease Agreement.

6. In addition to Airport's rights and interests under the 1994 Lease Agreement, on July 16, 2007 Antero assigned to Airport a five percent overriding interest in certain lands covered by the 1994 Lease Agreement ("the 5 Percent Overriding Royalty Agreement") (Copy Attached).

7. The 5 Percent Overriding Royalty Agreement states that the royalties payable under the 5 Percent Overriding Royalty Agreement:

   > Shall be calculated and paid in the same manner as the landowner's royalty in each Lease on which the [Overriding Royalty Interest] burden is calculated and paid, and as part of that calculation, the [Overriding Royalty Interest] shall bear the same costs and expenses that are borne by the landowner's royalty pursuant to the terms of each applicable Lease.

8. The only lease which is subject to the 5 Percent Overriding Royalty Agreement is the 1994 Lease Agreement, as set forth in Exhibit A to the 5 Percent Overriding Royalty Agreement. Therefore, Ursa is obligated to pay royalties to Airport on the 5 Percent Overriding Royalty Agreement in the same manner that it is obligated to pay royalties to Airport under the 1994 Lease Agreement as more fully described herein.

9. Antero produced natural gas subject to the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement at various times since November of 2006 through December of 2012, at which time Antero sold its rights, interests, and obligations under the 1994 Lease Agreement and the 5 Percent Overriding Agreement to Ursa Operating Company, LLC ("Ursa"). Ursa then began producing and selling natural gas from wells which are subject to the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement.

10. Under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement, Ursa has an implied duty to market the gas produced from the wells subject to those Agreements, and to pay royalties to Airport based upon prices received for marketable natural gas products at the location of the first commercial market.

11. The location of the first commercial market for the residue gas which came from the wells at issue is at the delivery points at various interconnects to the long distance transportation pipelines, where Ursa has sold residue gas to third party purchasers who purchased such residue gas from Ursa.

12. The location of the first commercial market for the natural gas liquids which came from the gas wells at issue is at the location where such natural gas liquids were fractionated into marketable natural gas liquid products, including propane, butane, isobutane, natural gasoline, and ethane, and then sold to third party purchasers for prices based upon market index prices for such natural gas liquid products, or similar prices.

13. Ursa has breached its royalty payment obligations to Airport by underpaying the royalties owed to Airport under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement. Ursa has underpaid the royalties by failing to pay Airport royalties based upon prices received for marketable residue gas at the location of the first commercial market, as referenced above, and by failing to pay Airport royalties for prices received for marketable natural gas liquids—including propane, butane, isobutane, natural gasoline and ethane—at the location of the first commercial market, as referenced above.

14. Pursuant to the implied duty to market owed by Ursa to Airport, Ursa has had the obligation to incur all of the post-production costs necessary to place the natural gas at issue into a condition acceptable for the commercial market, and all of the costs of delivering the marketable natural gas products to the location of the first commercial market. Airport is not obligated to share in any of these costs. Ursa has further breached its obligations under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement by improperly charging Airport for various post-production costs necessary to place the natural gas produced from the wells at issue into a marketable condition acceptable for the commercial market, and for the costs of transporting the natural gas to the location of the first commercial market.

15. Ursa has further breached its royalty payment obligations to Airport under the 1994 Lease Agreement and the 5 percent Overriding Royalty Agreement by underpaying the amount of royalties due and owing to Airport Land Partners on condensate which came from the gas wells subject to the 1994 Lease and the 5 Percent Overriding Royalty Agreement.

16. Ursa has further underpaid its royalty obligations to Airport Land Partners by taking improper and/or excessive deductions for various taxes, including severance taxes, ad valorem taxes, and conservation taxes.

17. Ursa has breached its royalty payment obligations to Airport under the 1994 Lease and the 5 Percent Overriding Royalty Agreement in the manner described above.

18. Airport has sustained substantial damages resulting from Ursa's breaches of its royalty payment obligations to Airport under the 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement.

19. By engaging in the conduct referenced above, Ursa substantially underpaid the royalties owed to Airport under the attached 1994 Lease Agreement and the 5 Percent Overriding Royalty Agreement, and is obligated to compensate Airport for all royalty underpayments resulting from such conduct, and is also obligated to pay Airport prejudgment interest on said royalty underpayments, from the date of each underpayment, at the Colorado rate of eight percent per annum, compounded annually. C.R.S. § 5-12-102(1)(b).

Very truly yours,

George A. Barton.

cc: Ms. Karen L. Spaulding (via email, w/ attachment)

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EXHIBIT 16

BEATTY & WOZNIAK, P.C.

ATTORNEYS AT LAW

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DENVER, COLORADO 80202-5115
TELEPHONE 303-407-4499
FAX 1-800-886-6566
www.bwenergylaw.com

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NORTH DAKOTA
UTAH
WYOMING

KAREN L. SPAULDING

303-407-4467
KSPAULDING@BWENERGYLAW.COM

September 18, 2017

George A. Barton
Law Offices of George A. Barton P.C.
7227 Metcalf Avenue, Suite 301
Overland Park, KS 66204

RE: Response to Written Notice Pursuant to C.R.S. § 34-60-118.5(7)
(Airport Land Partners, Ltd.)

Dear George:

Ursa Operating Company, LLC ("Ursa") and Antero Resources Corporation ("Antero") provide the following response to the written notices, dated August 17, 2017, issued by Airport Land Partners, Ltd. ("Airport") pursuant to C.R.S. § 34-60-118.5(7). In its notices, Airport advances blanket allegations that the lessees have breached royalty obligations under the Airport Lease and the Overriding Royalty Agreement by: (1) failing to pay royalties for production based upon prices received at the location of the first commercial market, (2) improperly deducting transportation, processing and "other" cost items in calculating royalties, (3) taking "excessive" severance, *ad valorem* and conservation tax deductions, and (4) underpaying royalties owed on condensate. Ursa and Antero object to the notice, at the outset, insofar as it fails to conform to C.R.S. § 34-60-118.5(2.5) and COGCC Rule 329(e). These provisions – not C.R.S. § 34-60-118.5(7) – govern a lessor's dispute concerning the amount of royalty proceeds, including sales reconciliations, deductions, and taxes. As styled, the notice fails to provide sufficient detail required under C.R.S. § 34-60-118.5(2.5) and COGCC Rule 329(e) that would enable either lessee to conduct a meaningful audit of their records and otherwise attempt in good faith to reconcile Airport's claims.

The Airport Lease and the Overriding Royalty Agreement are unambiguous and no bona fide dispute exists requiring the interpretation of their terms. Airport's notices concern only accounting and related issues that have been properly addressed herein and may ultimately be reviewed by the COGCC. Subject to the foregoing, Ursa and Antero respond to the notices as follows.

I. Deductions for Post-Marketability Processing

Antero, the original lessee, charged no processing fees to Airport prior to January 1, 2011. Instead, Antero sold its production to Enterprise Gas Processing, LLC ("Enterprise") pursuant to a "keep-whole" agreement at "residue gas" prices. Because Antero incurred no processing or related charges on the gas sold to Enterprise, royalty payments were remitted on 100% of the value of all Btu's in the gas stream.

Antero and its royalty owners received 100% of the value of residue gas sold under the initial contract with Enterprise. When the price of natural gas liquids ("NGLs") increased relative to residue gas, Antero negotiated a new contract with Enterprise, effective January 1, 2011, by which Antero was paid separately for the Y Grade stream. Airport received its royalty on the Y Grade stream when sold.

Airport's assertion that it was paid royalties based on values less than the price received for residue gas or Y Grade stream at the first commercial market is inaccurate. Royalties paid to Airport were based on the fair and reasonable value of the residue gas or the Y Grade stream at the place where sold or used, as required under the lease. These values were calculated based on the actual sale of production to Enterprise pursuant to a gas purchase contract. Equally flawed is the assertion that Airport should be paid royalties for NGLs based on the price of liquid products sold downstream by Enterprise in Texas or New Mexico. The point of first marketability is at the wellhead or the inlet of the Meeker Plant – not the point at which Enterprise sells NGL products downstream to another third party.

Once gas is rendered marketable (like here), Colorado law is clear that additional costs to improve, enhance, and transport the product are costs that are shared proportionally between the lessor and lessee.[1]

II. Deductions for Interstate Pipeline Reservation Fees

Ursa, like Antero before it, pays a fee to guarantee access of the residue gas along two interstate pipelines to downstream markets. These fees are incurred after the gas is rendered marketable to reserve capacity *within* the interstate pipelines – notably, they are not incurred to transport gas *to* the interstate pipelines. Thus, these deductions are in all events permitted under the Airport Lease as well as under *Garman* and *Rogers*.

III. Deductions for Severance, *Ad Valorem* and Conservation Taxes

The assertion that deductions for severance, *ad valorem* and conservation taxes were excessive is incorrect. Ursa and Antero properly paid and deducted for these taxes.

IV. Deductions for Gathering and Compression

Based on the silent lease language, no gathering deductions should have been taken. Ursa's records show that deductions in the amount of $7,464.66 for gathering and for compression were taken from August 2014 to August 2017. While Ursa's audit remains ongoing, Ursa intends to tender payment to Airport for these deductions, plus interest, in the near future.

[1] *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 906 (Colo. 2001); *Garman v. Conoco, Inc.*, 886 P.2d 652, 660-661 (Colo. 1994); *Lindauer v. Williams Production RMT Co.*, 2010CA0798 (Colo. App. April 21, 2011).

V. Royalties for Condensate

Ursa's records confirm that Airport was properly paid its lessor royalty on the sale of condensate with no deductions, other than its share of appropriate taxes. The assertion that it was underpaid on condensate is incorrect.

Conclusion

The accounting methodology instituted by Antero, and adopted by Ursa, is wholly consistent with the Airport Lease and Colorado law. Contrasted with Airport's broad assertions, royalties paid over the course of its lease have been calculated based on the fair and reasonable value of residue gas or the Y Grade stream. The limited deductions for processing and transportation were taken after the gas was rendered marketable and for purposes otherwise permissible under the lease. Moreover, Airport's assertions that tax deductions have been "excessive" and further that it was underpaid on condensate are also misguided.

Please do not hesitate to contact me with any questions regarding the above. Ursa and Antero look forward to working with Airport to reconcile its claims.

Very truly yours,

BEATTY & WOZNIAK, P.C.

Karen L Spaulding

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