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

IN THE MATTER OF THE PROMULGATION AND ESTABLISHMENT OF FIELD RULES TO GOVERN OPERATIONS FOR THE NIOBRARA AND CODELL FORMATIONS, WATTENBERG FIELD, BOULDER AND WELD COUNTIES, COLORADO	)))))	CAUSE NO. 407 DOCKET NO. 220700180 TYPE: POOLING

BOULDER COUNTY'S MOTION FOR SUMMARY JUDGMENT

Pursuant to the September 14, 2022, Hearing Officer Order Regarding Motions in this matter, Rule 517(a) and C.R.C.P. 56, Boulder County (the "County") submits this Motion for Summary Judgment requesting that the Colorado Oil and Gas Conservation Commission (the "Commission") deny the Application in the above-referenced docket as a matter of law. Because the legal issues raised in this Motion are fundamental to the Commission's ability to proceed with the Application, they should be decided before any contested hearing on the merits.

As demonstrated below, the Commission does not have the legal authority to subject minerals owned by the County to a statutory or forced pooling order. Such an order would run afoul of exclusive powers delegated to the County for management of its property and budget and would put the County in a position of violating constitutional and statutory limitations on local government powers.

In the alternative, if the Commission finds that it is empowered to force a pooling of government-owned mineral rights, it should nonetheless decline to process the Application because Applicant Extraction Oil & Gas, Inc. ("Extraction") has not proven that it owns or controls more than 45% of the mineral rights in the Application Lands. *See* C.R.S. § 34-60-116(6)(b); Rule 506(a).

CONFERRAL

Pursuant to the Order and C.R.C.P. 121 § 1-15(8), counsel for Boulder County conferred with counsel for Applicant, who indicated Extraction would oppose the Motion.

SUMMARY OF THE ARGUMENT

The County has clear and largely exclusive authority over its own property and budget under state statutes and the Colorado Constitution. The County is also strictly regulated in the management of its assets. A compulsory pooling order would compel the private, for-profit, development and use of County-owned property against the will of its elected officials and its electorate. Such an action would run afoul of numerous constitutional, statutory, and common law rights and obligations. A forced pooling of County minerals would be unlawful because it would conflict with constitutional and statutory requirements and force the County and its governing officials to act in a manner contrary to their statutory and constitutional duties. *See* C.R.S. § 24-4-106(7)(b) (agency rulings and orders are unlawful where they are, for example, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction or authority, or otherwise contrary to law). Thus, the Commission should enter summary judgment denying the Application.

In the alternative, if the Commission finds that it is empowered to override numerous constitutional and statutory provisions and force the County into an involuntary working interest relationship with Extraction, the Application is nonetheless inadequate. Before the Application can be received and considered by the Commission, Extraction must prove to the Commission that it owns or controls more than 45% of the mineral rights in the Application Lands as that term is defined in the Application. Rule 506(a) (a forced pooling application may only be filed "by an Owner who owns, or has secured the consent of the Owners of, more than 45% of the

mineral interests to be pooled"); C.R.S. § 34-60-116(6)(b)(1) (Commission may impose a compulsory pooling order "upon the application of a person who owns, or has secured the consent of the owners of, more than forty-five percent of the mineral interests to be pooled"). The County's Petition for Party Status, with its exhibits, demonstrates that the Application fails to meet Extraction's burden regarding its mineral ownership. *See* Rule 510(a) (applicant bears the burden of proof on all necessary matters in an application). Therefore, the Commission should deny the Application as inadequate on its face or continue the docket. If the Commission believes a separate civil proceeding is required to resolve the parties' mineral title dispute, which relies on the validity of numerous existing oil and gas leases, it should table the Application until the parties reach a final determination on their relative mineral ownership in the Application Lands.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Boulder County is a body corporate and politic organized under Colorado statute.

2. Extraction is a wholly owned subsidiary of Civitas Resources, Inc. and is a corporation authorized to conduct business in Colorado. (Appl. ¶ 1).

3. Extraction seeks a Commission order pooling all interests in a 2,720-acre drilling and spacing unit that lies mostly in Boulder County (the "Application Lands"). (Appl. ¶ 7).

4. Boulder County is the title owner of mineral rights in the Application Lands. Much, but not all, of Boulder County's minerals may be subject to oil and gas leases of record. (*See* Boulder Cty.'s Pet. for Affected Person Status and to Participate as a Party at 2, Aug. 2, 2022 (parties agree that Boulder County is both an unleased mineral owner and a lessor of mineral rights in the Application Lands) ("Petition").

5. Boulder County purchased its mineral rights with funds from sales and use taxes enacted with voter approval (the "Open Space Taxes") for the express purpose of purchasing and preserving real property. (Ex. 1 ¶ 4 (Whisman Aff.).)

6. Under the Board of County Commissioners' Resolutions imposing the Open Space Taxes, property purchased with Open Space Tax revenues must serve specific purposes and are strictly limited to passive recreation, agriculture, and environmental preservation uses. (*See, e.g.*, Ex. 2 ¶¶ 14, 15 (Resolution 2016-77 (most recent extension of Open

Space Sales Taxes).) Oil and gas development is not a recognized open space purpose. (*Id.*)

7. No property purchased with Open Space Tax revenues can be leased or otherwise conveyed to any party or for any non-open space purpose without prior approval from the Board of County Commissioners of the County, following a public process including multiple hearings before County bodies. (Ex. 2 ¶ 17.)

8. On or about July 5, 2022, Boulder County received a letter from Applicant including offers to lease 552 acres of County-owned mineral rights or to provide a working interest in the wells to be drilled on the Application Lands. (*See* Ex. 3 (Letter from Extraction Oil & Gas, Inc. to Boulder County, July 1, 2022 (the "Offer").).

9. Pursuant to the process set forth in Resolution 2016-77 (Ex. 2) and its predecessors, the Boulder County Parks and Open Space Advisory Committee held a public hearing on Applicant's offers on August 25, 2022. (*See* Agenda and Recording at https://pub-bouldercounty.escribemeetings.com/Meeting.aspx?Id=a92cdf05-5295-4b99-94a8-09320dee8873&Agenda=Agenda&lang=English.) After a presentation from staff, comments from the public and deliberations, the committee voted unanimously to recommend that the Board of County Commissioners decline the offers. (*See Id.* at approx. 1:25:00 available at https://pub-bouldercounty.escribemeetings.com/Meeting.aspx?Id=a92cdf05-5295-4b99-94a8-09320dee8873&Agenda=Agenda&lang=English.)

10. On November 1, 2022, the Board of County Commissioners held a public hearing on Applicant's offers. After consideration of the Parks and Open Space Advisory Committee recommendation and the record of its public hearing, a presentation from staff, further comments from the public, and deliberations, the Board determined to decline the offers, finding that any conveyance of County mineral rights or participation in their development would not be in the best interests of the County or its residents and would be unlawful. (*See* Ex. 4 (Boulder Cty. Resolution 2022-080 at ¶¶ N-O, 1).)

11. In reaching its conclusions, the Board determined that the development of its mineral rights would contribute to significant adverse impacts to public health, safety, and welfare, the environment including air quality and the climate, and wildlife resources. (*Id.* at ¶ 1.c.)

12. In this docket, the County constitutes a "nonconsenting owner" that would be required to pay Extraction a share of the costs and risks of production as provided for under C.R.S. § 34-60-116(7)(a) and (b).(*See* Appl. ¶ 9.)

13. The Board of County Commissioners has not adopted a fiscal year budget that provides for oil and gas development in the Application Lands. (Ex. 4 at ¶ T.)

14. Boulder County voters have not authorized the County to incur an ongoing debt or multi-fiscal year obligation for the purpose of oil and gas development in the Application

Lands. (*Id*. at ¶ L.)

ARGUMENT

I. Standard of Review

Under COGCC Rule 517(a), the Colorado Rules of Civil Procedure apply in Commission proceedings unless otherwise directed. The September 14, 2022, Hearing Officer Order Regarding Motions contemplates motions under C.R.C.P. 56. Therefore, Colorado courts' interpretations and rules of application for summary judgment are applicable to this docket. The purpose of summary judgment is to permit the parties to save the time and expense connected with trial (or administrative hearing). *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). Summary judgment is properly entered when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist*., 689 P.2d 594, 600 (Colo. 1984).

When a state agency takes action that undermines a county's separate statutorily created legal authority, the county is entitled to challenge that authority as an injury to its protected interests. *Bd. of Cty. Comm'rs of Adams v. Colo. Dep't of Pub. Health & Env't*, 218 P.3d 336, 343 (Colo. 2009).

This Motion presents a question of law: whether the Commission has the legal authority to enter an order creating an involuntary working interest relationship between a local government and a private oil and gas company. The facts associated with this question of law are undisputed. Thus, resolution of these issues in favor of the County on summary judgment is appropriate.

II. The Commission should deny the Application because forced pooling cannot lawfully be applied to mineral rights owned by Boulder County.

The Commission can deny a forced pooling application. *See* C.R.S. § 34-60-116(6)(b)(I).

(approval of a forced pooling application is discretionary); Rule 506(c) (same). As discussed in detail below, the Commission cannot lawfully force the pooling of mineral rights owned by governmental entities in Colorado. Thus, to avoid legal error, the Commission should enter a summary judgment order denying the Application.[1]

A**.** *Forced pooling creates a disposition of real property, imposes a joint venture relationship and creates indefinite financial obligations.*

The provisions in a forced pooling order result in property dispositions, business co-ventures, and budgetary obligations that infringe on local government authority and violate local government obligations. (*See* Sections II.C through -F, below.)

A forced pooling creates a "working interest" or "participation" relationship between the nonconsenting mineral owner and the oil and gas operator, by which the nonconsenting mineral owner is forced to allow development of its minerals for the benefit of private parties and must participate financially in the drilling and on-going operation of the wells. *See generally* C.R.S. § 34-60-116(7) and (8) (providing for payment of a nonconsenting owner's share of the costs of drilling and operating the wells and defining the co-ownership relationship). A forced pooling order puts the mineral owner and the operator into business together, which the mineral owner can only terminate by sale of its interests, regardless of whether it wishes or is legally able to do so. Otherwise, the nonconsenting mineral owner must remain a working interest owner all the way through the well's final plugging and abandonment, paying its share of the

[1] The County is not requesting that the Commission make a finding regarding the facial constitutionality of C.R.S. § 34-60-116(6); *Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 785 (Colo. 2002) (state agencies lack jurisdiction to decide the constitutionality of statutes or regulations). In contrast, the County here argues that the forced pooling provisions of the Oil and Gas Conservation Act cannot lawfully be applied to the *County's* mineral rights. The County expressly reserves the right to raise the facial constitutionality of statutes and regulations in later judicial proceedings, if necessary.

decommissioning costs when production has ceased along with drilling and operating costs during the well's lifetime.

Under a forced pooling, a nonconsenting mineral owner is also subject to a financial penalty. C.R.S. § 34-60-116(7)(b)(II). A forcibly pooled mineral owner must pay 200% of its share of the costs of "staking, well site preparation, obtaining rights-of-way, rigging up, drilling, reworking, deepening or plugging back, testing, . . . completing the well[, and] the cost of equipment in the well, including the wellhead connections." *Id*.

B. The Commission cannot act in a manner that prevents a local government from meeting its statutory and constitutional requirements.

Compulsory pooling of government-owned minerals is an unlawful invasion of local government property rights and budget control. Colorado counties have statutory authority over their real property and their budgets, and they have strict statutory and constitutional limitations on how they manage both. *See, e.g.*, C.R.S. §§ 30-11-107(2)(a), 30-11-101(1)(c); Colo. Const. art. X Sec. 20; Colo. Const. art. XI Sec. 1, 2, and 6. The Commission must not exercise its jurisdiction or authority in a manner that interferes with those local government processes or impairs the ability of local officials to comply with them. *See* C.R.S. § 24-4-106(7)(b) (agencies may not act in ways contrary to constitutional and statutory rules); *see also Weld Air & Water v. Colo. Coil & Gas Conservation Comm'n*, 2019 COA 86, ¶ 34 ("The Commission is a creature of statute and has only the powers conferred on it by the [Oil and Gas] Act."); *Bd. Of Cty. Comm'rs of Adams Cty.*, 218 P.3d at 343 (counties can challenge state agency actions that infringe on their authority).

C. The Colorado Constitution does not allow for forced pooling of government-owned mineral rights.

Colorado has long recognized that constitutional limitations on official power are

inviolable. *See Four-County Metro. Capital Improvement Dist. v. Bd. of Cty. Comm'rs*, 149 Colo. 284, 289 (Colo. 1962) ("That which cannot be done because of constitutional limitations upon the power of officeholders, simply cannot be done, either directly or indirectly. . . ."). Moreover, the General Assembly cannot create a scheme by statute to "accomplish objectives which for generations have been achieved by local officers directly responsible to the people, and upon whom the duty of discharging such local duties has been placed by constitutional provision or municipal home rule charter, or both." *Id.* at 292. Thus, the Commission must avoid any exercise of its forced pooling authority that would result in the nullification of the authority of county officeholders. Forced pooling of the County's minerals would violate two articles of the state constitution.

1. Article XI, Sections 1 and 2, prohibit the forced pooling of a local government's mineral interests.

The Colorado Constitution places strict duties on local governments designed to define and limit the powers of their officials. First, Article XI contains two critical limitations on local government management of money and property. Section 1 prevents inappropriate financial dealings by elected officials, prohibiting local governments from "becom[ing] responsible for any debt, contract or liability of any person, company or corporation." The General Assembly cannot violate this prohibition by statute. *Leddy v. People ex rel. Farrar*, 59 Colo. 120, 122 (1915) (where statute is clearly in conflict with Art. XI Section 1, "it is the duty of this court to declare it void"). Section 2 of Article XI prohibits local governments from becoming "a joint owner with any person, company, or corporation, public or private, in or out of the state." Under Section 2, any conveyance of government property for an inadequate price is unconstitutional. *Tamblyn v. City & Cty. of Denver*, 118 Colo. 191, 196 (1948).

Compulsory pooling conflicts directly with Article XI, Sections 1 and 2. Those sections prohibit the kind of private benefits from government property and government-private working interest, joint venture, co-owner relationships that a forced pooling order requires. The language of the constitution "could not make plainer the intent of the framers of the constitution, to utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever." *Lord v. Denver*, 58 Colo. 1, 16 (1914).

Although courts have recognized a public purpose exception to Article XI, Section 2, *see In re Interrogatory Propounded by Romer etc.*, 814 P.2d 875, 882 (Colo. 1991), the private, for-profit use of government property against the express will of those governments does not fall within this exception. The public purpose exception generally applies when a government voluntarily and intentionally works with a private entity for the benefit of its constituents or community on projects, such as preserving municipal resources or undertaking urban renewal. *See id.* at 882 (citing cases approving a variety of local government activities supporting "public purposes" that would otherwise run afoul of Article XI, Section 2). In stark contrast, the County's Board of County Commissioners expressly found that it is *not* in the best interests of the County or its residents to lease its minerals or enter a joint venture with Extraction. (Ex. 4 ¶ 1).

No Colorado state court has determined that a forced pooling of minerals is a public purpose that can override the constitutional prohibitions of Article XI, Section 2. Federal courts interpreting various state schema, from various eras, have found valid public purposes in orders regulating or requiring common mineral development in the private sector. *See, e.g., Wildgrass Oil & Gas Comm. v. Colorado*, 447 F. Supp. 3d 1051, 1070 (D. Colo. 2020) (citing cases). However, no Colorado state court has considered whether there is sufficient public purpose

underlying the forced pooling statute and regulations, particularly in the modern era of highly controlled hydraulic fracturing of tightly held shale oil and gas formations. With such modern technology, the traditional reasons for the forced pooling power are weakened if not eliminated. *See, e.g.,* Kate Mantle, *Directional Drilling Procedures* at 2 (available at https://www.slb.com/resource-library/oilfield-review/defining-series/defining-directional-drilling) (describing advances in steering technology in horizontal drilling that allow operators to create wellbores while avoiding obstacles or geological formations); *see also Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 52 (Tex. 2017) (finding no trespass where operator was able to drill through another operator's leased minerals with minimal disturbance in order to access its own leased area).

Moreover, no case has found a public purpose for forced pooling strong enough to supplant the utter prohibitions on mingling public and private property and funds set forth in the state constitution. *See Lord*, 58 Colo. at 16; *see also Wildgrass*, 447 F. Supp. 3d at 1065-66 (relying on *Burford* abstention where the Colorado-centric "policy problems and state law questions" inherent in the plaintiffs' challenge to C.R.S. § 34-60-116(7) outweighed the importance of the individual case).

For these reasons, a forced pooling order affecting County-owned minerals as requested in the Application, it would violate Article XI, Sections 1 and 2 of the Colorado Constitution.

2. Article X, Section 20 and Article XI, Section 6 prohibit forced pooling of a local government.

Pursuant to Section 20 of Article X (the Taxpayer Bill of Rights or TABOR), a governmental entity cannot enter into a "multiple-fiscal year direct or indirect debt or other financial obligation" without either approval of the voters or cash reserves pledged irrevocably to the obligation and held "for payments in all future years." Colo. Const. art. X, § 20(4)(b).

Similarly, local governments may not "contract any general [financial] obligation" in the absence of a "legislative measure" and an election. Colo. Const. art. XI, § 6(1). The term "debt" used in these sections is read expansively to include any "legally enforceable obligation" lasting into future years. *See Bd. of Cty. Comm'rs v. Dougherty, Dawkins, Strand & Bigelow*, 890 P.2d 199, 205 (Colo. App. 1994), *overruled on other grounds by In re House Bill 99-1325*, 979 P.2d 549, 556 (Colo. 1999). Such obligations are considered "constitutional debt" and are subject to requirements in Article X, Section 20 and Article XI, Section 6. *See Fischer v. City of Colo. Springs*, 260 P.3d 331, 335 (Colo. App. 2010); *Cf. Gude v. City of Lakewood*, 636 P.2d 691, 700 (Colo. 1981) (financial obligations that are "discretionary or contingent" in future fiscal years are not constitutional debt).

Forced pooling makes a local government liable for a share of the on-going costs of operating oil and gas facilities, including "cost[s] of surface equipment beyond the wellhead connections, including stock tanks, separators, treaters, pumping equipment, and piping" C.R.S. § 34-60-116(7)(b)(1). This liability meets the criteria for constitutional debt by creating an enforceable obligation that is binding over multiple fiscal years. Throughout the undefined lifetime of the wells, no future county commissioners can choose not to renew the obligation for any fiscal year. Therefore, under TABOR and Article XI, Section 6, a local government legislative action and either an election or a pledge of funds (of an unknown amount) for an unknown number of years would be required to approve a county assuming liability for oil and gas development costs for decades into the future. Colo. Const. art. XI, § 6(2); art. X, § 20(4)(b).

The Oil and Gas Act and Commission rules make no allowance for a county to hold an election to approve the outcomes of a forced pooling order before it is entered. Nor can any party

properly estimate the amount of money a county would need to irrevocably pledge or the duration of a such a pledge to cover its share of "cradle to grave" costs. Nor is there an opportunity under a forced pooling order for future boards of county commissioners to re-evaluate the financial obligation. Thus, applying the forced pooling statutes and regulations to a local government is a violation of TABOR and Article XI, Section 6 and cannot stand. *See Four-County Metro. Capital Improvement Dist.*, 149 Colo. at 289 (the state cannot take action affecting local jurisdictions that the local officials cannot take under the constitution).

Importantly, the costs involved in these situations are not de minimis. Extraction has provided projections suggesting Boulder County could be liable for over $25,000,0000 in costs over just the first 20 years of well operation, in addition to a multi-million-dollar statutory penalty for not consenting to development of it minerals under C.R.S. § 34-60-116(7)(b)(II).(Ex. 1 ¶ 6.)

D. Counties are authorized to make dispositions of their property only if they find it is in the best interests of the county and its inhabitants.

Counties are given the express power to lease county-owned interests for oil and gas development only if the county commissioners deem the transaction to be "in the best interests of the county." C.R.S. § 30-11-303(1). Any other type of conveyance of county property is authorized where the county commissioners deem it in the "best interests of the county and its residents." § 30-11-101(1)(c).

The County purchased the mineral rights at issue as part of land purchases made with funds from a sales tax imposed under its taxing authority contained in C.R.S. §§ 29-2-101 *et seq.*. The local government tax law sets out detailed requirements for counties in imposing sales taxes. In accord with those requirements, the County enacted the Open Space Taxes. (*See* Ex. 2.) The Tax Resolutions define the specific purposes to be served by any property purchased with

Open Space Tax dollars (Ex. 2 ¶ 12) and define the limited uses to which the property can be put. (Ex. 2 ¶ 15 (listing only passive recreation, agriculture, and environmental preservation).) The Tax Resolutions further prohibit the sale, lease, trade, or other conveyance of property purchased with Open Space Tax funds without a multi-body public proceeding, followed by a waiting period sufficient to allow for a public referendum (Ex. 2 ¶ 17). Thus, the County cannot convey the mineral rights purchased with Open Space Tax funds and owned by the County without complying with both its statutory property disposition requirements and following its own taxpayer-approved Tax Resolutions.

Moreover, county commissioners are elected representatives of their local jurisdictions. As such, they are directly accountable to the residents and uniquely positioned to be aware of and responsive to local concerns and needs. This is in stark contrast to appointed COGCC commissioners who are responsible for managing an agency that regulates all 64 counties in Colorado, with their widely differing approaches to property and mineral development, across several geologically and geographically separate mineral basins. The statutory powers and exclusive authorities granted to county governments reflect this critical point, placing the discretion to manage county property with boards of county commissioners, strictly in light of the best interests of the specific county and its specific residents.

At a public hearing on November 1, 2022, the County's Board of County Commissioners determined that leasing its minerals or participating in any way in their development was not in the best interests of the county or its residents and was directly contrary to the Tax Resolutions and could not be permitted. (Ex. 4¶¶ 1.) Yet a forced pooling order from the Commission would result in just the property disposition and use that the County's governing body has found to be contrary to law. If a county attempted to make such a transfer under the circumstances of this

case, the contract would be void *ab initio*. *See Rocky Mt. Natural Gas, LLC v. Colo. Mt. Junior College Dist.*, 2014 COA 118, ¶ 14. The Commission cannot infringe on the County's authority over its public property in such a way. *See CAW Equities, L.L.C. v. City of Greenwood Vill.*, 425 P.3d 1197, 1204 (Colo. 2018) quoting *Denver Power & Irrigation Co. v. Denver & R.G.R. Co.*, 69 P. 568, 570 (Colo. 1902) ("[P]roperty already devoted to a public use cannot be taken for another in such manner or to such extent that the use to which it is devoted will be wholly defeated or superseded, unless the power to so take be granted expressly or by necessary implication . . . .")

E. Forced pooling violates a board of county commissioners' exclusive authority to manage county budgets in accordance with law.

County governments have the exclusive power to adopt annual budgets and their final budget determinations are binding. C.R.S § 30-11-107(2)(a). Budgets must be set for an ensuing fiscal--or budget--year and account for "all proposed expenditures" in that year. C.R.S. § 29-1-103(1)(a). No expenditures exceeding the amounts appropriated for a fiscal year are allowed. C.R.S. § 29-1-110. Violation of these requirements constitutes malfeasance in office by elected officials and can subject them to removal from office. C.R.S. § 29-1-115.

As discussed above, the Commission has no authority to interfere in a county's budgeting process or expose elected officials to statutory penalties and censure. Yet a forced pooling order would subject a local government to unallocated, unquantified expenditures for oil and gas development costs and the forced pooling penalty without regard to the county's fiscal year or its adopted budget. *See* C.R.S. § 29-1-103(1)(a) (all proposed expenditures for a given budget year must be identified). The Oil and Gas Act does not give the Commission authority to force a county and its commissioners into violations of budgeting law.

F. Compulsory pooling of government-owned mineral rights is prohibited by the common-law purpresture doctrine.

Private individuals or corporations are forbidden from taking government assets for their own use and profit as long-recognized by the common law doctrine known as purpresture. A purpresture is

> the appropriation to private use of that which belongs to the public; an invasion of the right in the soil while the same remains in the people; the making serviceable by one to himself of that which belongs to many; an encroachment upon rights belonging to the public. 35A Words and Phrases, perm. ed., Purpresture p. 330. Sir Edward Coke defined purpresture as an encroachment by one which 'makes several to himself that which ought to be common to many'. Coke, Litt., 277b. *See* 4 Blackstone, Comm., 197.

Hill Farm, Inc. v. Hill Cty., 425 S.W.2d 414, 417 (Tex. App. 1968). This doctrine is unrelated to constitutional takings claims, even though the context is similar. *See generally, id.* (analyzing purpresture concepts without discussion of constitutional issues); 10A McQuillin *Mun. Corp.* § 30:72 (3d ed.). The purpresture doctrine is not commonly invoked in the modern era or outside the context of obstructed public rights-of-way. *See, e.g., Hill Farm*, 425 S.W.2d at 417 (pipelines placed in public rights-of-way without permission constituted a purpresture); *People v. Vanderbilt*, 26 N.Y. 287, 292-93 (1863) (construction of a pier in a public waterway was an actionable purpresture). Nonetheless, if the County is forced by a Commission order to suffer the appropriation of its publicly-owned rights of access to subsurface minerals by a private company against its wishes, the purpresture doctrine is violated. *See, e.g., Revell v. People*, 52 N.E. 1052, 1056 (Ill. 1898) (a purpresture is enjoinable regardless of whether a public nuisance or damages result). Thus, the Commission should deny the application to avoid a purpresture.

III. The Commission should refuse to process the Application because Extraction failed to prove it meets the 45% ownership threshold.

Even if the Commission determines it has the jurisdiction and legal authority to force pool

county government-owned minerals, it should enter summary judgment for the County based on Extraction's failure to submit an application demonstrating its ownership or control of more than 45% of the minerals in the Application as required by Rule 506(a) and C.R.S. § 34-60-116(6)(b)(1). In support of its Application, Extraction submitted a single witness statement asserting: "Based on the examination of relevant title reports, title opinions, leases, assignment, contracts and/or records, Applicant owns, or has secured the consent of, the owners of, more than 45 percent of the mineral interest to be pooled in the application lands." (Land Testimony—Laure Wizeman[2], attached to Application). Significantly, the Testimony does not supply—or even identify—any of the documents relied on by Ms. Wizeman in reaching her opinion. Further, the Application fails to specify *which* minerals Extraction claims to own or lease in the Application Lands, making it difficult or impossible to understand the scope or the basis of its claim. Finally, Ms. Wizeman does not indicate that she reviewed production data for relevant wells, meaning she made no effort to determine whether leases allegedly held valid by certain wells remain so under the lease terms.

Where Extraction failed to meet its burden to prove its alleged 45% ownership interest, the County is under no obligation to disprove it. Nonetheless, as shown in Boulder County's Petition for Party Status and the associated exhibits, many of the oil and gas leases over mineral rights in the Application Lands have terminated by their terms, resulting in Boulder County's ownership of more than 56% of the mineral rights in the Blue Paintbrush DSU. (*See* Pet. ¶ 3.d; Pet. Ex. B.) Because Extraction failed to establish that it owns, or has secured the consent of the owners of,

[2] The only information Extraction provided about Laurie Wizeman is that she has "several years of experience in oil and gas land work. . . ." The statement indicates that her resume is attached to the submission but no resume is attached. Thus, Extraction has provided little basis for the Commission to determine Ms. Wizeman's opinion is admissible or reliable.

more than forty-five percent of the mineral interests to be pooled, the Commission should deny the Application as inadequate as a matter of law under C.R.C.P. 56. *See* Rule 506(a) (forced pooling application may only be filed by an Owner who controls more than 45% of the mineral interests to be pooled); C.R.S. § 34-60-116(6)(b)(1) (same).

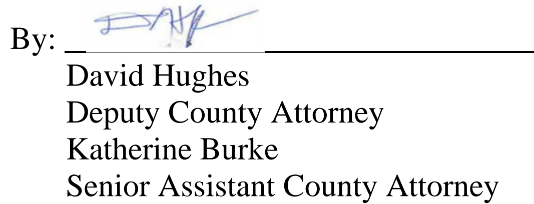
The County and Extraction's dispute over their relative mineral position in the Application Lands depends on the ongoing validity of several oil and gas leases. The Commission does not resolve private disputes or interpret leases. *See Chase v. Colorado Oil & Gas Conservation Comm'n*, 2012 COA 94M, ¶ 34 (approving COGCC's determination that it lacked jurisdiction to interpret terms of lease agreement between landowner and operator); *see also, e.g.*, C.R.S. § 34-60-118.5(5.5) (requiring COGCC to defer to district court any contractual dispute involving royalty payments). If the Commission is unwilling to deny the Application as inadequate on its face, it must continue this docket until the parties' lease dispute is finally resolved. Only then can Extraction prove whether it owns or controls more than 45% of the minerals in the Application Lands. Moreover, any forced pooling order will result in the parties entering an involuntary working interest relationship under which the County's share of revenues and costs will be measured by the percentage of its unleased mineral rights in the pooled unit. *See* C.R.S. § 34-60-116(7). According to the lease offer Extraction sent to the County, Extraction believes the County's unleased mineral share is 20% of the Application Lands, whereas the County believes its share is closer to 60%. Not only must the parties' ownership be determined for Extraction to prove its entitlement to a forced pooling order, but the correct shares of any nonconsenting owners must be determined to allow such a pooling to conform to statute.

RELIEF REQUESTED

For the above reasons, the County requests that the Commission deny the Application on summary judgment as a matter of law to the extent that it affects or implicates mineral rights owned by the County because to do otherwise would exceed the Commission's jurisdiction and violate governing statutes and constitutional provisions. If the Commission denies the Motion on that basis, it should nonetheless either deny the Application on summary judgment for Extraction's failure to sufficiently demonstrate that it owns or controls more than 45% of the minerals in the Application Lands or continue this docket until the parties' lease validity dispute is finally resolved.

Respectfully Submitted this 21st day of November 2022.

BOULDER COUNTY BOARD OF COUNTY COMMISSIONERS

By: 

David Hughes
Deputy County Attorney
Katherine Burke
Senior Assistant County Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BOULDER COUNTY'S MOTION FOR SUMMARY JUDGMENT** was served electronically through the COGCC efiling system, this 21st day of November 2022, to the following:

Extraction Oil & Gas, Inc.
Attn: Jill Fulcher, Beatty & Wozniak

Rachel Nelson, Legal Assistant