DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521 Tel: 970.494.3500	DATE FILED: March 13, 2014 4:42 PM FILING ID: 53528B2963CAC CASE NUMBER: 2013CV31385
Plaintiff: COLORADO OIL & GAS ASSOCIATION v. **Defendant:** CITY OF FORT COLLINS, COLORADO	**COURT USE ONLY** Case Number: 2013CV31385 Div: Civ Ctrm: 5B
Attorneys for Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks ("Measure Proponents") Name: Kevin Lynch (Atty. Reg. #39873) Elizabeth Kutch (Student Attorney) Timothy O'Leary (Student Attorney) Gina Tincher (Student Attorney) Address: 2255 E. Evans Avenue, Suite 335 Denver, CO 80208 Phone Number: 303.871.6140 FAX Number: 303.871.6847 E-mail: elc@law.du.edu	

MEASURE PROPONENTS' REPLY TO COGA'S RESPONSE IN OPPOSITION TO INTERVENTION

Measure Proponents are entitled to intervene in this case according to Colo. R. Civ. P. 24(a)(2) & (b)(2). Contrary to the Colorado Oil and Gas Association's ("COGA") assertion, Measure Proponents have a unique and concrete interest that the City does not adequately represent. The individual members fear for their personal health, the health of their loved ones, and their property value. COGA makes much of Measure Proponents being citizens of a city and asserts others in Fort Collins may also feel the effects of fracking. COGA cites a case where the court denied intervention because as taxpayers, the proposed intervenors had generalized interests shared by all. COGA then references cases where business interests satisfied intervention requirements. As citizens whose personal health, safety, and property are threatened, Measure Proponents have just as much a right to intervene, if not more, than a company with a business interest. Notably, COGA does not cite a single case in which courts denied intervention to the ballot proponents.

Furthermore, Measure Proponents' interest in the Fracking Moratorium would be substantially impaired if this Court overturns the citizens' democratic vote. An adverse ruling will expose Measure Proponents to the unknown consequences of fracking.

Finally, the City of Fort Collins ("City") cannot represent Measure Proponents' individual interests because it has a duty to represent all interests within the City. While the City's interests are similar to the Measure Proponents', the City's past actions indicate the City believes its interests would be better served if the Fracking Moratorium were not enacted. Now that the Fracking Moratorium has been enacted, the City cannot adequately represent the Measure Proponents' individual interests because Measure Proponents' interests are different than those of the community as a whole. Notably, the City has not expressed that they would represent the Measure Proponents' interests.

Alternatively, Measure Proponents' intervention would not complicate or delay this case's resolution by injecting collateral and extrinsic issues. COGA suggests that the City adequately represents the Measure Proponents' interests, while also asserting that allowing the Measure Proponents to intervene will cause undue delay. However, preemption in Colorado is an ad hoc determination and Measure Proponents will make arguments necessary to analyze the preemption claims, specifically if it is a matter of local, mixed, or state concern. Therefore, if the City adequately represents Measure Proponents interests, then the Measure Proponents permissive intervention will not delay the case.

In light of these reasons, Measure Proponents respectfully request the Court to admit them as intervenors as a matter of right or, alternatively, as permissive intervenors.

Argument

Measure Proponents (I) have a unique interest (II) that the City does not adequately represent. Measure Proponents also (III) will not interject new issues or create an undue delay in litigation.

I. MEASURE PROPONENTS HAVE A UNIQUE INTEREST IN THE FRACKING MORATORIUM THAT A DECLARATORY JUDGMENT WILL AFFECT.

Measure Proponents are concerned with their own health, safety, and property values, giving them a unique interest in the moratorium beyond the average citizen of Fort Collins. Many of the Measure Proponents fear for their health and property values because of their proximity to proposed wells. Some are within eyesight of these wells, while others can smell the fumes when the wind blows. Giddens Aff. ¶ 8; Holleman Aff. ¶ 3. Just as the proximity to wells will increase negative health effects, some studies show a decrease in home values located near wells. *See* David Kelly, *Study Shows Air Emissions Near Fracking Sites May Pose*

Health Risk, CU Newsroom, Mar. 19, 2012, *available at* http://www.ucdenver.edu/about/newsroom/newsreleases/Pages/health-impacts-of-fracking-emissions.aspx; *see also* Roger Drouin, *How the Fracking Boom Could Lead to a Housing Bust*, Atlantic Cities, Aug. 19, 2013, *available at* http://www.theatlanticcities.com/politics/2013/08/how-fracking-boom-could-lead-housing-bust/6588/. Living close to the existing and proposed wells will likely decrease Measure Proponents' property values.

Property rights and health concerns provide sufficient interests for intervention as of right. As property owners, Measure Proponents have a unique interest, which the Colorado Supreme Court has recognized is distinct from the general public. In *Roosevelt*, the court allowed parties to intervene as of right because they were property owners in the affected area whose interests the local government did not adequately represent. *Roosevelt v. Beau Mode Co*. 384 P.2d 96, 100 (Colo. 1963). Similarly, in *Dillon*, the court granted intervention because the proposed intervenors lived near the property that the city considered rezoning. *Dillon Cos. v. City of Boulder*, 515 P.2d 627, 629 (Colo. 1973). The court noted that a landowner who lives in an area sought to be rezoned meets the requirement under C.R.C.P. 24(a)(2) of "an interest relating to the property or transaction which is the subject of the action." *Id.* at 628. The court further commented that "[t]he rule does not require an 'interest in the property' but an 'interest relating to the property,'" and determined that intervenors living over three blocks away had an "interest" to satisfy intervention. *Id.* at 628-29.

COGA erroneously declares that Measure Proponents' interests in their personal well-being and property values stemming from their proximity to wells are "generalized" interests shared with everyone in Fort Collins. COGA Resp. 4. For instance, COGA points to *Denver Chapter of Colorado Motel Ass'n v. City and County of Denver,* 374 P.2d 494 (Colo. 1962), to show that **taxpayers** had a generalized interest in the lawsuit to intervene is misplaced. *See* COGA Resp. 4. Colorado has treated taxpayers who seek to intervene in lawsuits as a separate class. In *Roosevelt*, the court distinguished intervenors who were property owners from people trying to intervene as taxpayers. *Roosevelt*, 384 P.2d at 101.

> In *Motel Ass'n v. Denver*, supra, we have parties seeking to intervene as taxpayers. As taxpayers, they occupied a very different position than that of intervenors here, who do not seek intervention as taxpayers, but as property owners who will be directly affected by the outcome of the litigation. The interests of all taxpayers are the same, hence the rule denying intervention. The interests of property owners in zoning matters are often very divergent and differ one from the other, and may well sanction individual representation by different counsel.

Id. Measure Proponents are not trying to intervene as taxpayers. Rather, they are property owners seeking to protect both their health and property values. Analogous to the zoning ordinance in *Roosevelt*, the moratorium is a valid use of the

City's zoning power. Therefore, Measure Proponents' intervention is appropriate so they will have the opportunity to defend their interests.

COGA also relies on *Westlands Water Dist. v. United States*, 700 F.2d 561 (9th Cir. 1983), and compares Measure Proponents to the environmental group in that case who had an interest in water quality. COGA Resp. 5-6. The court denied intervention in *Westlands* because it found that the environmental group's interests were not distinct from the rest of the state and the interests were not founded on the contracts at issue but rather on public policy. *Westlands,* 700 F.2d at 563. Measure Proponents' unique interests in their health, safety, and property values **do** bear on a legal issue in this case- whether state law preempts the moratorium. As described in more detail below, Measure Proponents' unique and concrete interests are necessary to determine if the moratorium is a local, state, or a mixed issue. *See Webb v. City of Black Hawk*, 295 P.3d 480, 486-87 (Colo. 2013).

In addition to their health, safety, and property interests, Measure Proponents also have an interest in defending a measure that they dedicated their time, energy, and money to enact. Holleman Aff. ¶ 5-7. Courts have recognized supporting legislation as an interest adequate to support intervention.

> An organization like the Group has a sufficient interest to support intervention by right where the underlying action concerns legislation previously supported by the organization. This is particularly true where, as here, the personal interests of its members in the continued environmental quality of the area and the continued rural character of East Hampton would be threatened if the Superstore Law is found to be invalid or unconstitutional and A & P proceeds with development of its planned market.

Great Atl. & Pac. Tea Co., Inc. v. Town of E. Hampton, 178 F.R.D. 39, 42 (E.D.N.Y. 1998). In *Town of East Hampton*, the court found "supporting legislation" by attending hearings and urging the adoption of a law through testimony and comment was sufficient to convey an interest for intervention. *Id.* at 41-42. Similar to the intervenors in *Town of East Hampton*, Measure Proponents supported the ordinance at the heart of this litigation and have a continued interest in the protection the moratorium affords. Unlike *Town of East Hampton*, the Measure Proponents sponsored the Fracking Moratorium as a ballot measure.

In addition to supporting the moratorium, Measure Proponents campaigned for the vote of the people and coordinated the design, printing, and submission of the petition for the moratorium. Giddens Aff. ¶ 4. In fact, the Ninth Circuit has recognized "a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to Fed. R. Civ. P. 24(a)." *Yniguez v. Arizona*, 939 F.2d 727, 735 (9th Cir. 1991); *see also Washington State Bldg. and Const. Trades Council AFL-CIO v.*

Spellman, 684 F.2d 627, 629-30 (9th Cir. 1982)(holding that denial of motion to intervene was error where proposed intervenors were public interest group that sponsored the initiative). As supporters and sponsors of the moratorium, Measure Proponents satisfy the interest prong for intervention.[1]

Lastly, a decision in this case will impair Measure Proponents' interests. COGA briefly asserts the litigation will not impair Measure Proponents' interests. *See* COGA Resp. 3. However, intervention is Measure Proponents' only chance to defend their health, safety, and property values because a determination by the Court that the moratorium is preempted would leave Measure Proponents without recourse. *Feigin* established that proposed intervenors satisfy the impairment prong of intervention when "[a]n intervenor's interest is impaired if the disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue his interest." *Feigin v. Alexa Grp*., Ltd., 19 P.3d 23, 30 (Colo. 2001). When denying intervention in *Feigin*, the court noted that the proposed intervenors could bring a civil suit against the defendants in the case to recover their damages. *Id*. Unlike the proposed intervenors in *Feigin*, the injuries that the Measure Proponents could suffer are not limited to monetary losses. That is, the Measure Proponents want to prevent harms to their health that could not be remedied by an after-the-fact lawsuit.

II. THE MEASURE PROPONENTS' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE CITY.

In Colorado, there is a presumption in favor of intervention when parties' interests are similar but not identical, as is the case with Measure Proponents and the City. COGA suggests that because the City and Measure Proponents wish for the same outcome in the case, the Court should presume adequate representation. However, the Colorado Supreme Court recently stated:

> [1] If the interest of the absentee is not represented at all, or if all existing parties are adverse to the absentee, then there is no adequate

[1] COGA's reliance on *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), is misplaced. COGA Resp. 6. The Court in *Hollingsworth* analyzed whether a party satisfied federal standing requirements for an appeal and not the interest prong of intervention. Standing and intervention are separate analyses. Art. III standing requirements are more stringent. *See Yniguez*, 939 F.2d at 735. *Compare* C.R.C.P. 24 (a) ("[W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest...") *with Wimberly v. Ettenberg*, 570 P.3d 535, 538 (Colo. 1977) (holding that the standing inquiry requires seeing "(1) whether the plaintiff was injured in fact, (2) whether the injury was to a legally protected right.").

> representation. [2] On the other hand, if the absentee's interest is identical to that of one of the present parties, or if there is a party charged by law with representing the absentee's interest, than a compelling showing should be required to demonstrate why this representation is not adequate. [3] *But if the absentee's interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, although intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee.*

Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist., 266 P.3d 401, 407 (Colo. 2011) (quoting 7C Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* § 1909 (3d ed. 1997)) (alterations in original). "Wright and Miller suggest that in the third category, 'all reasonable doubts should be resolved in favor of the absentee . . . to intervene . . . .'" *Id.* While Measure Proponents' interests are similar to the City's, they are not identical. Measure Proponents are interested in their personal health, private property, and preserving the moratorium. The City's interests consist of protecting its authority, preserving local control, and representing the community interest. Because these interests are not identical, Measure Proponents occupy the third category.[2]

Individual interests and the interests of a community are not always aligned. The City has a duty to protect and represent the broad public interest. *Utah Ass'n of Cntys v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001). The Measure Proponents are narrowly focused on protecting their members' health, safety, and property, which is currently safeguarded by the moratorium. *See* Ron Holleman Aff. Therefore, the City's duty to account for the broad public interest prevents it from adequately representing Measure Proponents.

The City has not affirmatively stated that it will adequately represent Measure Proponents' interests. In fact, the City has taken no position on the Measure Proponents' intervention. "[The government's] silence on any intent to defend the [intervenors'] special interests is deafening." *Utah Ass's* 255 F.3d at 1256 (quoting *Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992))

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[2] COGA's reliance on *Utah Ass'n*, 255 F.3d 1246, because that case addressed a specific piece of property, whereas the fracking moratorium addresses the entire City of Fort Collins, is puzzling. COGA Resp. 9-10. *Utah Ass'n* involved the Grand Escalante National Monument, an area encompassing 1.7 million acres of land not owned by the proposed intervenors. In that case, the court granted intervention based on intervenors' use of public lands. In contrast, the Measure Proponents own property near potential fracking sites where they seek simply to live without threats to their health and safety from fracking.

(second alteration in original). COGA and the Court cannot presume the City will adequately represent the Measure Proponents' interests absent a clear showing.

COGA also relies on *Motel Ass'n* and *Feigin* to assert that "absent a 'compelling showing' to the contrary, there is a presumption that '[r]epresentation by the governmental authorities is considered adequate.'" COGA Resp. 6-7. But in *Roosevelt,* the Colorado Supreme Court distinguished taxpayer intervention from property owner intervention. *See* 384 P.2d at 101. Measure Proponents do not wish to intervene as taxpayers but as property owners that are currently protected by the Fracking Moratorium. Not unlike COGA, Measure Proponents seek to protect their members' individual interests and rights in this case. But, unlike COGA, Measure Proponents have supplied supporting affidavits detailing health and property concerns based on proximity to proposed wells. *See San Juan Cnty., Utah v. United States,* 503 F.3d 1163, 1172 (10th Cir. 2011); *see also Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009) (holding that standing of similarly situated parties need not be determined because Court's subject matter jurisdiction is established).

In *Feigin* the individuals were seeking to intervene in an action where the government brought a civil action against the defendants for engineering a "Ponzi" scheme. *Feigin*, 19 P.3d at 24. There, the court held that "[n]o adversity of interests exists" between the state and the intervenors. *Id.* at 32. Here, the City's and the Measure Proponents' interests have been at odds in the past and Measure Proponents continue to take very different positions concerning community development matters. For example, the City did not support the Fracking Moratorium because,

> the Ballot Measure in October 2013 was due to the fact that the initiative was "under these circumstances . . . unnecessary," that it was "not in the best interests of the City, and [that it] could result in litigation that, if not resolved in the City's favor, could not only work for the detriment of the City, but could also establish legal precedents that would be damaging to the interests of other Colorado municipalities."

COGA Resp. 11 (citing City of Fort Collins Res. 2013-085). Despite these concerns, Measure Proponents continued to advocate for the Fracking Moratorium because they determined that it was necessary to protect their individual health and property.

Finally, COGA heavily relies on *Town of East Hampton* to assert that the City adequately represents Measure Proponents' interests. However, Colorado case law states that the standard applied to determine if a party is adequately represented is the test articulated in *Cherokee*. Under this test, Measure Proponents' interests are similar to, but not identical, with the City's because the Measure Proponents' interests are in their personal health and property, not the entire community's well-being.

III. MEASURE PROPONENTS SHOULD BE GRANTED PERMISSIVE INTERVENTION UNDER C.R.C.P. 24(b)(2)

As demonstrated in the previous section, the City does not adequately represent the Measure Proponents' interests in this case. However, even if the Court denies intervention of right, the Measure Proponents should be allowed to present a defense of the Fracking Moratorium they advocated for and passed over objections of the city council. Without their participation, the votes of over 45,000 citizens of Fort Collins will be left in the hands of the same City Council that urged voters to reject the measure. Measure Proponents participation will not delay or add expense to the case, but will instead help to ensure a fair and full hearing on the issue.

Allowing the Measure Proponents to intervene in this matter will not extend the time for a trial or cause substantial pre-trial discovery. COGA suggests that the City adequately represents the Measure Proponents' interests in this matter. COGA then claims that allowing the Measure Proponents to intervene will cause undue delay, an increase in costs and burdens for the parties, and will significantly delay the resolution of the case. COGA Resp. 14. However, if the City adequately represents the interests of the Measure Proponents, the Court should expect that they would call the same types and numbers of witnesses and provide the same types and amount of evidence that the Measure Proponents would if admitted to this case. As such, COGA's argument that Measure Proponents' intervention will cause undue delay is inconsistent with its position that the City adequately represents Measure Proponent's interests.

Measure Proponents agree that preemption is a central issue in this case. However, in order to determine the preemption issue, the Court will be required to conduct an analysis of whether the moratorium represents a local, mixed, or state issue. By including information in the Motion to Intervene about the explosion of oil and gas drilling occurring in Colorado, the Measure Proponents seek to demonstrate the local interest at stake in this case. The Colorado Supreme Court has denounced "a categorical approach to the determination of that which is general and state-wide." *See City & Cnty. of Denver v. Pike*, 140 Colo. 17, 23 (1959). "Instead, it recognized the high degree of importance of the facts and circumstances of the particular case in making the required determination." *Id.*

The issues presented by the Measure Proponents are neither new, nor extrinsic- they are relevant to the analysis of preemption in this case. In *North Poudre Irrigation Co. v. Hinderlider*, 112 Colo. 467, 475-76 (1944), the Colorado Supreme Court upheld the Larimer County District Court's decision to allow the permissive intervention of junior water appropriators despite the fact that they were neither "necessary" nor "essential" because their participation allowed the court to have a more comprehensive understanding of the matter. *Id.* Similarly, the

participation of the Measure Proponents will allow the Court to have a more comprehensive understanding of the local nature of the moratorium.

COGA claims that the Court should deny the motion for permissive intervention under *Grijalva v. Elkins*, 287 P.2d 970, 972 (Colo. 1955), and *Moreno v. Commercial Sec. Bank,* 240 P.2d 118, 119 (Colo. 1952). In *Grijalva*, the court denied intervention because the applicants waited until the eve of trial to submit their applications for intervention. The court found that the injection of these new claims, though arising out of the same accident, indicated the applicants were simply hoping to use the evidentiary record of the main parties to their advantage. *Grijalva,* 287 P.2d at 972. Here, there has been no discovery or trial date set. Therefore, COGA cannot assert that the Measure Proponents are trying to take advantage of the evidentiary record in this case and no injustice has occurred.

While the Colorado Supreme Court has stated that courts have a duty to respect the issues raised by the original parties, *Moreno* involved a taxpayer who attempted to intervene in a case in which a bank sued for a determination of the proper disposition of money held by the City of Pueblo pursuant to an ordinance. *See Moreno*, 240 P.2d at 119. The ordinance in question had previously been challenged by the same individual who later tried to intervene in *Moreno*. The court had thus already settled the question of whether the ordinance was valid. Therefore, *Moreno* is not applicable to these circumstances. Here, Measure Proponents have not introduced new or extrinsic issues. As explained above, Colorado's preemption analysis is an ad hoc determination made on a case-by-case basis on a fully developed evidentiary record. *Webb*, 295 P.3d at 486-87.[3] Therefore, Measure Proponents do not seek to use the Court as a forum to debate fracking, but instead wish to add necessary factual richness to the adjudication.

COGA challenges the moratorium on state preemption grounds. The Measure Proponents intend to defend on those grounds. Therefore, the Measure Proponents meet the requirement that an applicant's "claim or defense and the main action have a question of law or fact in common." C.R.C.P. 24(b)(2). According to Moore's Federal Practice, 6-24 § 24.11, the phrase "question of law or fact in common" should be read in the disjunctive. That is, the Measure Proponents need only show that they have a question of law *or* a question of fact in common with the main action and their claims or defenses. Measure Proponents meet this minimal burden. The Measure Proponents agree that main issue is whether the Colorado Oil and Gas Conservation Act preempts a temporary local fracking moratorium.

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[3] COGA asserts that the Measure Proponents have injected standing as a new or extrinsic issue not raised by the City in its Answer. However, on pg. 5 of the City's Answer, its fourth affirmative defense states, "Plaintiff's claims are barred in whole or in part by a lack of standing."

Allowing the Measure Proponents to intervene in this matter would in no way "open the floodgates" to other parties filing motions to intervene in this case. The Court need only look at the various fracking-related cases currently being litigated in Colorado to see that when the courts have allowed intervention of a citizen group, it has not led to additional motions to intervene being filed. *See Colorado Oil and Gas Ass'n v. City of Longmont*, 2013CV63 (District Court of Boulder County); *see also Colorado Oil and Gas Conservation Comm'n v. City of Longmont*, 2012CV702 (District Court of Boulder County).

Much like COGA and the City, the Measure Proponents have an interest in judicial economy and the prompt adjudication of this matter. The Measure Proponents are comprised of three separate groups that could have individually filed motions for intervention in this case. However, in an effort to streamline the process for all parties involved, Measure Proponents chose to file for intervention jointly. The Measure Proponents have no intention to join other parties, to file unnecessary motions, or delay the progression of this litigation.

Therefore, the Measure Proponents respectfully request the Court enter an order granting them intervention by right in this action as defendants. Alternatively, if the Court denies this request, the Measure Proponents request that the Court grant them permissive intervention.

DATED this 13th day of March, 2014.

Respectfully submitted,

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This document was filed electronically pursuant to C.R.C.P. 121 § 1-26. The original signed document is on file with the University of Denver Environmental Law Clinic.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2014, a true and correct copy of the above and foregoing **MEASURE PROPONENTS' MOTION TO INTERVENE** was served via the Integrated Colorado Courts E-Filing System (ICCES), on:

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