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DISTRICT COURT, LARIMER COUNTY, COLORADO Address: 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521 Phone: (970) 494-3500	
PLAINTIFF COLORADO OIL & GAS ASSOCIATION v. **DEFENDANT** CITY OF FORT COLLINS, COLORADO and **DEFENDANT INTERVENORS** CITIZENS FOR A HEALTHY FORT COLLINS, SIERRA CLUB, and EARTHWORKS	▲ COURT USE ONLY ▲ Case Number: 2013CV31385 Div.: 5B
Attorneys for Citizen Intervenors Names: Elizabeth Kutch (Student Attorney) Timothy O'Leary (Student Attorney) Gina Tincher (Student Attorney) Kevin J. Lynch (Professor and Supervising Attorney; CO Bar No. 39873) Address: Environmental Law Clinic University of Denver Sturm College of Law 2255 E. Evans Ave, Suite 335 Denver, CO 80208 Phone: (303) 871-6140 Fax: (303) 871-6847 E-mail: elc@law.du.edu	
[PROPOSED] MEASURE PROPONENTS' MOTION TO DISMISS COGA'S COMPLAINT	

COLO. R. CIV. P. 121 § 1-15(8) CERTIFICATION

Counsel for Citizens for a Healthy Fort Collins, the Sierra Club, and Earthworks (collectively, "Measure Proponents") have conferred with the Plaintiff, Colorado Oil and Gas Association ("COGA"), who opposes this motion. Additionally, counsel for Measure Proponents made contact with counsel for the City of Fort Collins on February 11 and 12, 2014. Counsel for Defendant City of Fort Collins advised that they would need "weeks" to determine their position on this matter.

INTRODUCTION

COGA asks this Court to take the extraordinary measure of invalidating the votes of 24,000 citizens, approximately 56% of the registered electorate of Fort Collins, not because of some procedural irregularity, but instead, because it disagrees with the outcome of the vote. Specifically, COGA claims that the five-year moratorium on fracking will harm their unidentified members, in an unidentified manner. COGA also claims that the moratorium will result in a variety of indirect harms to the organization itself.

For COGA to establish standing it must not only allege but supply evidence that "X company, a member of COGA, intends to frack X property located in Fort Collins during the moratorium." COGA's complaint fails to allege both that a company desires to frack in Fort Collins during the moratorium and the need to frack a mineral interest within the City. Therefore, COGA must now supply evidence to show that (*i)* it has a member, (*ii*) with interests in Fort Collins, (*iii*) that intends to frack, (*iv*) during the moratorium. Without this information, COGA has failed to establish the Court's subject matter jurisdiction and the complaint must be dismissed.

COGA's alleged harms to itself are too far removed from the Fracking Moratorium. Therefore, COGA must rely on its members' injuries to establish standing—a burden it has not met.

Because COGA has failed to allege which, if any, members have been injured as a result of the Fracking Moratorium, or alleged an injury for which the Fracking Moratorium is directly responsible, Measure Proponents request this Court to dismiss COGA's complaint.

STANDARD OF REVIEW

Because Colorado courts have addressed standing under both C.R.C.P. 12(b)(5) and 12(b)(1), Measure Proponents move to dismiss pursuant to both. The distinction between the two standards of review follows below.

"The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the statement of the claim for relief." *Dunlap v. Colo. Springs Cablevision, Inc*., 829 P.2d 1286, 1290 (Colo. 1992). When deciding a 12(b)(5) motion, courts must consider only matters stated in the complaint and must not go beyond the confines of the pleading. *English v. Griffith*, 99 P.3d 90, 92 (Colo. App. 2004). Additionally, courts take all "allegations as true and draw all inferences in the favor of the plaintiff." *Medina v. State,* 35 P.3d 443, 452 (Colo. 2001).

However, under C.R.C.P. 12(b)(1), the plaintiff bears the burden of establishing jurisdiction. *Id.* Therefore, the Court may make factual findings to assess if the plaintiff has

supplied sufficient evidence showing the court has subject matter jurisdiction and need not take the allegations of the plaintiff as true. *Id.*

LEGAL BACKGROUND

In Colorado, standing is established when: (1) the plaintiff suffers an injury in fact; and (2) the injury in fact is to a legally protected right. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). Additionally, an organization can assert standing on behalf of its members if the members would have standing to sue in their own right. *Conestoga Pines Homeowners Ass'n v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984).

The plaintiff establishes the injury-in-fact element of standing if a regulatory scheme threatens to cause injury to the plaintiff's "present or imminent activities." *Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1053 (Colo. 1992). To satisfy the injury in fact element, the injury must be "direct and palpable," as opposed to indirect, remote, or uncertain. *O'Bryant v. Pub. Utils. Comm'n*, 778 P.2d 648, 653 (Colo. 1989). "Courts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur." *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Union Fire Ins. Co.*, 105 P.3d 653, 656 (Colo. 2005).

When addressing allegations of harm to an organization, the federal courts have held that an organization "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013). "And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable." *Id*.

To have standing to bring a declaratory judgment, the plaintiff must allege an injury in fact to a legally protected or cognizable interest. *Farmers Ins. Exch. v. Dist. Ct. for Fourth Jud. Dist.*, 862 P.2d 944, 947 (Colo. 1993). Additionally, "indirect and incidental pecuniary injury . . . is insufficient to confer standing." *Id*. (quoting *Wimberly*, 570 P.2d at 539).

FACTUAL BACKGROUND

In the past decade, Colorado has experienced a historic boom in oil and gas drilling. Between 2002 and 2013, there were a total of 55,445 new drilling permits issued by the Colorado Oil and Gas Conservation Commission. When compared to the 16,368 permits issued from 1991 to 2001, Colorado has seen an increase of more than 300 percent in the last ten years. This level of drilling far exceeds the peak of any previous period in Colorado's historically boom-and-bust energy industry. *See* Colo. Oil and Gas Conservation Comm'n., *Colo, Weekly & Monthly Oil & Gas Statistics*, Feb. 5, 2014, at 3, *available at* http://cogcc.state.co.us/Library/Statistics/CoWklyMnthlyOGStats.pdf (last visited Feb. 12,

2014). Currently, more than 51,824 active oil and gas wells cover Colorado's landscape. *Id*. at 11.

This drilling boom has transformed large areas of Colorado. The noise, pollution, and earth moving equipment associated with fracking has resulted in environmental damage, decreases in surface real estate values, and heightened risks of various health-related issues in nearby residents. *See* Food and Water Watch, *Fracking Colorado: Illusory Benefits, Hidden Costs*, Aug. 2013, *available at* http://documents.foodandwaterwatch.org/doc/Colorado_fracking_costs.pdf (last visited Feb. 12, 2014). These fracking effects have not gone unnoticed by the citizens of Fort Collins.

On November 5, 2013, the citizens of Fort Collins voted to protect their right to enjoy and defend their lives and liberties, to protect their property, and to seek and obtain their safety and happiness. They did this by voting to enact a five-year moratorium on fracking in the City of Fort Collins so that the effects of this industrial process on people, property, and the environment could be studied. Ballot Measure 2A, entitled "The Fort Collins Public Health, Safety, and Wellness Act" (hereinafter "Fracking Moratorium") declares its purpose to be,

> To protect property, property values, public health, safety and welfare by placing a five year moratorium on the use of hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Fort Collins in order to study the impacts of the process on the citizens of the City of Fort Collins.

Proposed Citizen Initiated Ordinance, http://www.fcgov.com/cityclerk/ballotlangfull-2013nov.php (last visited Feb. 12, 2014).

In this lawsuit, COGA seeks a declaratory judgment that the Fracking Moratorium is preempted by the Colorado Oil and Gas Conservation Act. COGA Compl. ¶ 54. Additionally, COGA seeks a permanent injunction enjoining the enforcement of the Fracking Moratorium. COGA Compl. ¶ 57. This motion does not address, and the Measure Proponents reserve, all arguments related to COGA's preemption assertions. Instead, this motion challenges COGA's standing.

ARGUMENT

COGA fails to sufficiently allege and substantiate standing on behalf of its members or itself.[1] Because standing is necessary to invoke the Court's jurisdiction, the Measure Proponents respectfully request the Court dismiss COGA's complaint.

I. COGA HAS FAILED TO MEET THE BURDEN FOR REPRESENTATIVE STANDING.

For COGA to establish standing through one of its members, it must both allege and supply evidence to show that (*i*) it has a member, (*ii*) with interests in Fort Collins, (*iii*) that intends to frack, (*iv*) during the moratorium.[2] Because COGA fails to even allege the third and fourth requirements, we will address those first.

A. COGA FAILS TO ALLEGE OR PROVIDE EVIDENCE THAT A MEMBER INTENDS TO FRACK IN FORT COLLINS *WHILE THE FRACKING MORATORIUM IS IN EFFECT*

COGA fails to allege that its members intend to frack during the moratorium. Because COGA must allege the Fracking Moratorium injures COGA or one of its members and because the Fracking Moratorium only lasts for five years, COGA must allege and provide evidence that a member intends to frack within Fort Collins during the moratorium. As COGA fails to do this, COGA has not established the Court's subject matter jurisdiction.

Under C.R.C.P. 12(b)(5), the Court accepts all of COGA's allegations as true. *See Medina*, 53 P.3d at 452. COGA alleges the Fracking Moratorium "adversely affects and injures COGA members' present and/or future oil and gas activities within the City, including the drilling of wells . . . and the extension of horizontal wellbores . . . ." COGA Compl. ¶ 44.

Even assuming COGA has members with present or future plans to frack in Fort Collins, COGA does not establish that this would occur **during the moratorium.** Due to the limited duration of the Fracking Moratorium, without a specific allegation of a time when a member plans to frack, there is no guarantee that the moratorium would disrupt those

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[1] The Measure Proponents anticipate COGA will argue that it is not required to apply for a permit to frack before requesting declaratory relief from the Court. However, until COGA establishes standing, through more than the hypothetical harms alleged in the complaint, it is not entitled to declaratory relief. *See Farmers Ins.*, 862 P.2d at 947.

[2] Measure Proponents focus on allegations surrounding fracking within Fort Collins because it is our understanding that storage of fracking wastes coincides with fracking. If COGA wishes to establish standing through the storage ban portion of the Fracking Moratorium, it must provide evidence that a member wishes to store fracking wastes within the City of Fort Collins during the Fracking Moratorium.

plans. For example, if the member plans to frack a well in six years, then the member has suffered no injury and lacks standing.

Finally, under C.R.C.P. 12(b)(1), COGA must support any allegation so that the Court can be sure an actual controversy exists that is proper for adjudication. *See Medina*, 53 P.3d at 452. Therefore, COGA needs to supply the Court with evidence that one of its members plans to frack in Fort Collins during the Fracking Moratorium to survive this motion to dismiss.

B. ALSO, COGA FAILS TO ALLEGE OR PROVIDE EVIDENCE THAT A MEMBER *INTENDS TO FRACK ITS MINERAL INTERESTS*

COGA fails to allege that COGA's members intend to frack their mineral interests. Because COGA has to allege the Fracking Moratorium injures COGA or one of its members and the moratorium only limits the use of fracking within Fort Collins, COGA must allege and provide evidence that a member intends to frack an interest, not just that a member has an interest. As COGA fails to allege this and has yet to produce evidence, COGA has not established the Court's subject matter jurisdiction.

Under C.R.C.P. 12(b)(5), the Court accepts all of COGA's allegations as true. COGA alleges that it has members who operate wells within and under the City's territorial jurisdiction. COGA Compl. ¶ 5. Yet, if COGA's members currently operate producing wells within Fort Collins, then those wells would have already been fracked and the moratorium does not affect them.

Additionally, COGA alleges that "fracking is a well stimulation technique that is essential to extract oil and gas from tight sand and shale formations . . . in **Larimer County**." COGA Compl. ¶ 31 (emphasis added). As fracking is specifically used in the extraction of oil and gas in tight sand and shale formations, fracking would only be needed if a tight sand or shale deposit is beneath the City of Fort Collins. However, COGA has failed to allege that the deposit beneath Fort Collins is a tight sand or shale deposit. Therefore, COGA has not sufficiently alleged the inability to frack harms its members because COGA has not alleged any information about the geologic formations under the City of Fort Collins.

In addition to COGA's burden of alleging a member intends to frack, under C.R.C.P. 12(b)(1), COGA must present evidence that its members intend to frack a mineral interest. COGA has not supplied an affidavit or any other evidence to show that its unspecified member will frack the mineral interest. Without this, the Court lacks sufficient evidence that a member of COGA intends to frack a mineral interest.

C. FINALLY, COGA FAILS TO PROVIDE EVIDENCE THAT IT *HAS A MEMBER WITH MINERAL INTERESTS IN FORT COLLINS*

COGA's allegations, if taken as true, are enough to show that it has members with mineral interests in the City. However, because it did not allege that any of those members intended to frack those interests during the moratorium, it must now come forward with more specific evidence of which members have mineral interests within Fort Collins. C.R.C.P. 12(b)(1) requires COGA to supply evidence that the Court has subject matter jurisdiction. *Medina*, 53 P.3d at 452. COGA alleges "COGA members include (a) companies and individuals engaged in the exploration, production, and development of oil and gas in Colorado, (b) companies and individuals who have leaseholds interests within or under the City's territorial jurisdiction, and (c) companies and individuals who operate wells within and under the City's territorial jurisdiction." COGA Compl. ¶ 5. However, without further evidence of both a member and the member's interest within the City, the Court's subject matter jurisdiction is not established. COGA may cure this deficiency by filing an affidavit stating, "company X, a member of COGA, intends to frack within the City of Fort Collins during the Fracking Moratorium."

II. COGA'S INJURIES ALLEGED ON BEHALF OF ITSELF ARE TOO REMOVED FROM THE FRACKING MORATORIUM TO SATISFY THE INJURY REQUIREMENT OF STANDING.

The doctrine of standing would be rendered meaningless if COGA's speculative, indirect, self-inflicted harms were deemed sufficient injuries to bring suit. Colorado requires COGA's injury to be "direct and palpable," not indirect, remote or uncertain. *O'Bryant*, 778 P.2d at 653. COGA alleges that the Fracking Moratorium has or will force COGA to raise membership dues to fund this litigation and that the Fracking Moratorium has or will cause a decrease in the organization's membership. COGA Compl. ¶¶ 40, 41. These hypothetical injuries are not a direct result from the moratorium and require the Court to assume that one of COGA's members suffered a legally recognized injury.

First, both a potential decrease in membership and a possible increase in membership dues to fund this litigation are speculative injuries that fail to satisfy the imminent injury requirement of standing. *Bowen/Edwards*, 830 P.3d at 1053. The Colorado Supreme Court has held that courts should refuse to consider uncertain future matters that may never occur. *Nat'l Union Fire Ins.*, 105 P.3d at 656. Without evidence to show these injures have occurred or will occur in the **immediate** future, the Court should deem them too speculative to adjudicate.

Second, even if COGA provides sufficient evidence to show these hypothetical injuries are imminent, both funding litigation and losing members are "injuries" that are at best, indirectly related to the Fracking Moratorium. As held by the Colorado Supreme Court, standing is not conveyed to COGA by an "injury that is overly indirect or incidental to

the defendant's actions." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). COGA provides no evidence that shows but for the Fracking Moratorium in Fort Collins, these companies would have joined COGA (or would not have left COGA). Also, COGA does not submit financial reports sufficient to support a finding that the Fracking Moratorium, and not COGA's independent decision to litigate, has caused its economic injury.[3] Rather, COGA alleges indirect harms, improperly shifting the Court's attention from the real issue of standing– whether the Fracking Moratorium injures any COGA members by interfering with their concrete plans to frack in Fort Collins during the moratorium. Any financial burden or fluctuation in membership is irrelevant for determining if COGA has standing. Either the moratorium impacts one of COGA's members giving the organization standing, or no member is impacted, in which case any indirect harm to the organization in insufficient to convey standing.

Finally, federal courts have refused to acknowledge that self-manufactured injuries based on hypothetical future harms are sufficient to satisfy standing. *Clapper*, 133 S. Ct. at 1143. Here, COGA claims the Fracking Moratorium "has economically impacted the organization because COGA has or will be required to increase member dues in order to respond to the City's ban on fracking through litigation and other means." COGA Compl. ¶ 40. However, unless the moratorium harms one of its members, COGA has manufactured this economic harm by "choosing to make expenditures" based on speculative future harms. *See Clapper*, 133 S. Ct. at 1143. For COGA's alleged economic harm to serve as an injury in fact, COGA must first bring forward evidence to show that the moratorium injured one of its members. COGA has not brought forward this evidence.

CONCLUSION

COGA neither provided evidence nor alleged that the Fracking Moratorium prevented one of its members from taking action on their concrete plans to frack in Fort Collins during the moratorium. Additionally, COGA only alleged hypothetical injuries to itself that are, at best, indirectly related to the Fracking Moratorium. Because COGA has failed to allege or provide evidence of an injury in fact to a legally protected interest, and thus, failed to prove standing on behalf of its members or itself, Measure Proponents respectfully request this Court dismiss COGA's unsubstantiated complaint.

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[3] It is Measure Proponents' understanding that COGA does not own or develop its own mineral interests, but instead is a "Colorado nonprofit corporation and nationally recognized trade association whose purpose is to foster and promote the beneficial, efficient, responsible, and environmentally sound development, production, and use of Colorado's oil and gas." COGA Compl. ¶ 1.

Respectfully submitted, this 13th day February, 2014.

/s Kevin Lynch
Kevin Lynch (Professor and
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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.