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| DISTRICT COURT, LARIMER COUNTY, COLORADO<br>201 La Porte Avenue, Suite 100<br>Fort Collins, Colorado 80521 | DATE FILED: March 6, 2014 3:21 PM<br>FILING ID: CB3CEC0468D4C<br>CASE NUMBER: 2013CV31385 |
| **Plaintiff:**<br><br>COLORADO OIL & GAS ASSOCIATION<br><br>v.<br><br>**Defendant:**<br><br>CITY OF FORT COLLINS, COLORADO | ▲ COURT USE ONLY ▲ |
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**RESPONSE IN OPPOSITION TO MEASURE PROPONENTS' MOTION TO INTERVENE AS DEFENDANTS**

Plaintiff Colorado Oil & Gas Association ("COGA"), by and through counsel, Brownstein Hyatt Farber Schreck, LLP, respectfully submits this response in opposition to Measure Proponents' Motion to Intervene as Defendants (the "Motion").

## INTRODUCTION

A majority of the citizens of the City of Fort Collins (the "City") recently voted to approve Ballot Measure 2A (the "Ballot Measure"), which bans for five years hydraulic fracturing and the storage of its waste products within the City. COGA contends in its Complaint that the Ballot Measure is preempted by the Oil and Gas Conservation Act and by the rules, regulations, and orders of the Colorado Oil and Gas Conservation Commission. COGA seeks a declaratory judgment that the Ballot Measure is unlawful. The City's Answer stated that the Ballot Measure is not a preempted local regulation but is instead a valid exercise of a home-rule city. Accordingly, the sole issue before the Court in this litigation is whether the Ballot Measure is preempted by state law.

Citizens for a Healthy Fort Collins, the Sierra Club, and Earthworks (jointly, "Applicants") filed a joint motion to intervene in this litigation under Rule 24 and a proposed motion to dismiss COGA's Complaint. Applicants argue that they should be co-defendants in this case because they were proponents for the Ballot Measure and have interests in protecting their health, safety, property, and property values—interests which are shared by every other citizen in the City. *Id.* Applicants also contend that their "inalienable rights" are tied to the Ballot Measure and that acceptance of their Motion "would provide greater justice to [them] by allowing them to state their position in defense" of the Ballot Measure. *Id.* at 2, 6, 9, 10.

Through their Motion, the affidavits accompanying the Motion, and their proposed motion to dismiss, Applicants seek to raise a number of tangential matters unrelated to the issue of preemption. For example, Applicants focus much of their attention on the history of oil and gas development in Colorado, discussing a "historic boom in oil and gas drilling," the number of

drilling permits issued over the past two decades, the number of active wells in the state, and the effect of oil and gas development on the "Colorado landscape" and its "peaceful plains." Proposed Mot. to Dismiss at 3, 4; Mot. at 5. They advance various arguments about the merits of hydraulic fracturing, and the affidavits express concerns that hydraulic fracturing creates noise, odors and health problems, affects the ozone and the environment, diminishes property values, and even causes earthquakes. *See generally* Mot.; Anderson Aff.; Baizel Aff.; Giddens Aff.; Holleman Aff.; Williams Aff. As further proof that Applicants seek to venture beyond the narrow legal issue in this case, Applicants claim that they will "add factual richness" and "descriptive richness that may otherwise be absent from this case." *Id.* at 10, 11. They also raise the issue of standing in their proposed motion to dismiss—which the City did not address in its Answer —and seek evidence regarding COGA's members. *See generally* Proposed Mot. to Dismiss.

The Court should deny Applicants' Motion for three reasons. First, Applicants' interests in the litigation are too generalized to support intervention and will not be impaired in their absence. Second, to the extent that Applicants have interests in the general subject matter of the litigation, those interests are adequately represented by the City. Finally, Applicants should not be allowed to permissively intervene because they intend to inject collateral and extrinsic issues that will unnecessarily complicate and delay resolution of this litigation.

## ARGUMENT

### I. Applicants Have No Right to Intervene Under Rule 24(a)(2).

Upon a timely motion for intervention, an applicant may intervene as a matter of right under Rule 24(a)(2) when: (1) the applicant claims an interest relating to the property or

transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, and (2) the applicant's interest is not adequately represented by existing parties. C.R.C.P. 24(a)(2); *Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

### A. Applicants' Generalized Interests in the Litigation Do Not Support Intervention and Will Not Be Impaired or Impeded in Their Absence.

The interest factor must "be viewed as a prerequisite" for intervention. *Feigin*, 19 P.3d at 29 (citing *O'Hara Grp. Denver, Ltd. v. Marcor Housing Sys., Inc.*, 595 P.2d 679, 687 (Colo. 1979)). In the absence of a particularized interest or injury, citizens cannot intervene in litigation concerning laws that impact the general community. *See Denver Chapter of Colo. Motel Ass'n v. City & Cnty. of Denver*, 374 P.2d 494, 495 (Colo. 1962) (affirming the district court's order denying the taxpayers' application to intervene where the taxpayers "failed to show that they had any interest in the property involved"); *see also Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 246 (D.N.M. 2008)[1] ("An intervenor must specify a particularized interest rather than a generalized grievance. Intervenors are not permitted to raise interests or issues that fall outside of the issues raised in the lawsuit.") (citations and quotation marks omitted); *Concerned Citizens of Spring Creek Ranch v. Tips Up, LLC*, 185 P.3d 34, 40 (Wyo. 2008) ("[A]n applicant seeking intervention of right must present a significant protectable interest. A significant protectable interest is distinguished from . . . an interest shared by members of the public at large, or a mere concern in the outcome.") (citations omitted).

[1] Colorado courts rely upon federal intervention decisions, given the similarity in Colo. R. Civ. P. 24 and its federal counterpart. *See In re Scott's Estate*, 577 P.2d 311, 313 (Colo. App. 1978) ("Federal decisions have dealt extensively with . . . Fed. R. Civ. P. 24, which is substantially identical to the rule here in question. Reference to these cases for guidance is entirely appropriate.") (citing *Roosevelt v. Beau Monde Co.*, 384 P.2d 96 (Colo. 1963)).

In *Westlands Water District v. United States*, the court held that the Environmental Defense Fund's ("EDF") interest in water quality did not entitle it to intervene in an action for declaratory and injunctive relief. 700 F.2d 561 (9th Cir. 1983). There, a local water district sued the United States in connection with contracts between the parties regarding the delivery of water. *Id.* at 562. The EDF, a non-profit organization which, similar to the Applicants here, is "dedicated to the protection and rational use of natural resources and to the preservation and enhancement of the human environment," argued that it had an interest in the subject matter of the action by virtue of the fact that it had "long advocated an environmentally and economically sound water policy" in an area in northern California. *Id.* The court disagreed, noting that the EDF's general interest in water distribution was shared by "a substantial portion of the population of northern California" and that the "EDF's interest is not founded on the contracts at issue but rather is based on what it regards as enlightened public policy." *Id.* at 563. The court reasoned:

> [I]t is the contracts and not public policy that are at issue. What is disputed is the question, essentially one of law, as to the legal effect of the contracts . . . . EDF would have the District Court construe these contracts not in accordance with the rules of contract law but in the light of what it believes the public policy respecting water use ought to be. EDF's concerns should be addressed to the Executive or Legislative branches.

*Id.* (emphasis added).

Here, as in *Westlands*, Applicants have no particularized interests that bear on the single legal issue to be determined in this case—whether the Ballot Measure is preempted by state law. Applicants have stated that certain of them are impacted or may in the future be impacted by existing and proposed oil and gas operations. These claims do not articulate a specialized interest in the legal issue before the court, nor do they distinguish the Applicants from the

interests shared by many other citizens in the community. Applicants even acknowledge that their generalized interests are widely shared, arguing that the Ballot Measure "seeks to protect the citizens' inalienable rights." Mot. at 9 (emphasis added).

Moreover, while it may be true that Applicants supported the passage of the Ballot Measure, their involvement was limited exclusively to "the process of enacting the law," which is an interest insufficient to support intervention. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (holding that proponents of Proposition 8 did not have standing to appeal the district court's order declaring Proposition 8 unconstitutional because the proponents did not have an interest that was "distinguishable from the general interest of every citizen" once "the measure became a duly enacted constitutional amendment or statute") (internal citations and quotation marks omitted). The issues in this case have nothing to do with the adoption of the Ballot Measure, Applicants' interest in advocating for the passage of the Ballot Measure, or Applicants' arguments regarding the merits of or public policy behind hydraulic fracturing.

In sum, Applicants have only articulated a generalized interest in their "inalienable rights" (Mot. at 9), the merits of hydraulic fracturing, and advocacy for the Ballot Measure. None of these issues has anything to do with the narrow legal issue of preemption at issue here or gives Applicants any particularized status or right to intervene under Rule 24(a)(1).

### B. To the Extent that Applicants Have Any Interests in the Litigation, Those Interests Are Adequately Represented by the City.

Applicants also fail the second element of the intervention test because the City is adequately representing whatever interests Applicants have in the litigation. Colorado courts have held that, absent a "compelling showing" to the contrary, there is a presumption that "[r]epresentation by the governmental authorities is considered adequate." *Denver Chapter of*

*Colo. Motel Ass'n*, 374 P.2d at 496 (quoting 4 Moore's Federal Practice § 24.08 (2d ed. 1961)); *Feigin*, 19 P.3d at 32. "[A]dequate representation is presumed when, as is the case here, the would-be intervenor shares the same ultimate objective as a party to the lawsuit," even where the proposed intervenor might employ different legal strategies to achieve that objective. *Great Atl. & Pac. Tea Co., Inc. v. Town of E. Hampton*, 178 F.R.D. 39, 42 (E.D.N.Y. 1998); *accord Bumgarner v. Ute Indian Tribe of Uintah & Ouray Reservation*, 417 F.2d 1305, 1308–09 (10th Cir. 1969).

Thus, an applicant cannot make a "compelling showing" to overcome the presumption that the government is adequately representing the applicant's private interests simply by arguing that the applicant's interests are not identical to those of the government. *Feigin*, 19 P.3d at 31.[2] Instead, the applicant must show that its interest "is not represented at all," that "all existing parties are adverse," or other compelling circumstances such as fraud, collusion, bad faith, gross negligence, inattention, or nonfeasance. *Id.* (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909 (2d ed. 1986)); *accord Denver Chapter of Colo. Motel Ass'n*, 374 P.2d at 496 (holding that taxpayers had no right to intervene "where litigation is already in progress, being prosecuted or defended, or both, by the proper corporate officers of a city" and where there is an "absence of such factors as fraud, collusion, bad faith and the like.").

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[2] Applicants misquote the Colorado Supreme Court in *Cherokee Metropolitan District v. Meridian Service Metropolitan District*, 266 P.3d 401 (Colo. 2011), in claiming that "an intervenor is inadequately represented when the parties have similar, but not identical interests." Mot. at 4 (emphasis omitted). The court stated instead that, "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*, 266 P.3d at 407. Therefore, if the interests of the proposed intervenor are adequately represented, intervention is not warranted even if the parties do not have identical interests.

The decision in *Town of East Hampton* is instructive. The Town of East Hampton adopted a local zoning law restricting the establishment of large retail stores within the town. 178 F.R.D. at 41. The Great Atlantic & Pacific Tea Company filed suit, seeking a declaration that the zoning law was unconstitutional and that the Town had exceeded its legislative authority in passing the law. *Id.* An environmental group comprised of local citizens that "actively supported" the zoning law sought to intervene as a co-defendants with the Town. *Id.* The group argued that the Town would not adequately represent the group's interests because the Town had "differing concerns," such as perceived economic growth for the Town as a whole and stimulation of revenue, whereas the group was concerned with the environment and the character of the area. *Id.* at 43. The court denied the group's motion to intervene, finding that, "[e]ven accepting as true the Group's characterization of these differing concerns, the interests of the Group coincide with the interests of the Town in terms of the single legal issue to be determined by this lawsuit, i.e., the validity and constitutionality of the Superstore Law." *Id.*

Here, Applicants have not made a compelling showing that the City does not adequately represent their interests. As in *Town of East Hampton*, Applicants are a local citizens group and environmental organizations who "committed . . . support" to the Ballot Measure. Mot. at 7. Applicants do not contend that the City has engaged in fraud, collusion, bad faith, gross negligence, inattention, or nonfeasance. Applicants also do not argue that their interests are "not represented at all" and even acknowledge that the "City Council is obligated to defend the [C]ity in this lawsuit." Giddens Aff. ¶ 15; *accord Feigin*, 19 P.3d at 31 ("[I]f there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate.") (quoting 7C Charles Alan Wright, Arthur

R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909); *see also United States v. New York*, 820 F.2d 554, 558 (2d Cir. 1987) ("A state is presumed to represent the interests of its citizens . . . when it is acting in the lawsuit as a sovereign.") (citation omitted).

Instead, similar to the group in *Town of East Hampton*, Applicants argue that the City will not represent their interests because the City "has a duty to balance many competing interests" and must "generate revenue," whereas Applicants are concerned with, among other things, "enlisting humanity to protect and restore the quality of the natural and human environment," "the Colorado landscape," and "the character of the neighborhood." *Id.* at 2, 5, 7. While expressing such varying interests, Applicants admit that they and the City share the same goal in this litigation — a declaration that the Ballot Measure is not preempted by state law.

Applicants' reliance on *WildEarth Guardians v. U.S. Forest Service*, 573 F.3d 992 (10th Cir. 2009), *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001), and *Cherokee*, 266 P.3d 401, is misplaced. In *WildEarth Guardians*, the court held that the owner and operator of a mine could intervene in litigation affecting its own mine. 573 F.3d at 997. In the context of the mine operator's "direct economic stake in the subject of this litigation," the court found that the mine operator established inadequate representation by the government. *Id.* at 996–97. Similarly, in *Utah Ass'n of Counties*, the dispute centered around a specific national monument. 255 F.3d at 1248. The court noted that the "property that is the subject of plaintiffs' lawsuit is the monument itself" and that the intervenors' had a specific "interest in the continued existence of the monument and its reservation from public entry, both on the basis of their financial stake in the tourism the monument has created and on the basis of their desire to further their environmental and conservationist goals by preserving the undeveloped nature of the lands

encompassed by the monument." *Id.* at 1251. And in *Cherokee*, the intervenor and the defendant had a contract concerning certain water rights. 266 P.3d at 403. The court held that the intervenor's distinct contractual and "vested rights" might not be adequately represented by the defendant in litigation involving water rights related to the parties' contract. *Id.* at 405, 407.

In contrast, Applicants have not articulated any particularized interest in the Ballot Measure. Unlike *WildEarth Guardians* and *Utah Ass'n of Counties*, the Ballot Measure impacts hydraulic fracturing throughout the City, and does not focus on a particular property or financial interest unique to Applicants. Nor do Applicants contend that they have a contract right at stake, as did the intervenor in *Cherokee*. Instead, the Ballot Measure affects all of the City's land and citizens equally. Accordingly, Applicants' interests "coincide with the interests of the [City] in terms of the single legal issue to be determined by this lawsuit." *Town of E. Hampton*, 178 F.R.D. at 43.

While Applicants suggest that the City might someday lose interest in defending the lawsuit or might decide not to pursue an appeal if this Court issues an adverse ruling, those possibilities exist in every lawsuit and do not afford Applicants a right to intervene. If those reservations were sufficient to show that the interests of a proposed intervenor are not adequately represented, that requirement would be effectively written out of the rule. *Town of E. Hampton*, 178 F.R.D. at 44 (rejecting the group's contention that it was inadequately represented because the Town might not appeal an adverse decision); *Freedom From Religion Found., Inc. v. Geithner*, 644 F.3d 836, 842 (9th Cir. 2011) (noting that, if the "mere possibility" that a government defendant might not appeal was enough to rebut the presumption of adequacy, then almost every case involving a government defendant would be subject to intervention as of

right); *United States v. Yonkers Bd. of Educ.*, 902 F.2d 213, 218 (2d Cir. 1990) ("If disagreement with an actual party over trial strategy, including over whether to challenge or appeal a court order, were sufficient basis for a proposed intervenor to claim that its interests were not adequately represented, the requirement would be rendered meaningless.").

Finally, Applicants make much of the fact that the City passed a resolution in October 2013 urging citizens to vote "no" on the Ballot Measure and assert that the resolution shows that the City's interests diverge from the interests of its citizens. Mot. at 8. However, the language in the October 2013 resolution, City of Fort Collins Res. 2013-085 (Oct. 1, 2013) (attached as Exhibit 1), belies Applicants' argument. The City's hesitation in supporting 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 to the detriment of the City, but could also establish legal precedents that would be damaging to the interests of other Colorado municipalities." *Id.* at 2. Despite the City Council's concern with the lawfulness of the Ballot Measure, it implicitly acknowledged that it would defend lawsuits challenging the authority of the City to adopt the measure, and indeed, the City has proceeded to vigorously defend this lawsuit. The City timely filed its Answer, in which it asserted affirmative defenses, and has engaged outside counsel to defend this case. It is the City's conduct, not its motives or views, that determines whether the City is adequately representing Applicants' interests, such as they are. *See Town of E. Hampton*, 178 F.R.D. at 43 ("The fact that the Group and the Town may have different motives behind their joint interest in defending the statute does not lead to the

conclusion that the Town will fail to pursue its defense of the Superstore Law with vigor.") (citations omitted).

Accordingly, Applicants' have not shown that they may intervene as a matter of right under Rule 24(a)(2).

## III. Applicants Should Not Be Permitted to Intervene Under Rule 24(b)(2)

Rule 24(b)(2) provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common," but only if the intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." C.R.C.P. 24(b)(2). A court should deny permission to intervene if the applicant seeks to inject collateral or extrinsic issues that will unnecessarily complicate or extend the litigation. *Grijalva v. Elkins*, 287 P.2d 970, 972 (Colo. 1955) (denying intervention where "new and essentially different questions of law and fact would be injected into the case"); *Moreno v. Commercial Sec. Bank*, 240 P.2d 118, 119 (Colo. 1952) ("It is the duty of courts to respect the integrity of the issues raised by the pleadings between the original parties and to prevent the injection of new issues by intervention.").

The Court should not permit Applicants to intervene because they seek to introduce new and extrinsic issues that will unnecessarily delay and complicate resolution of this litigation. COGA's Complaint requests a declaration that the Ballot Measure is preempted. In its Answer, the City alleges that the Ballot Measure was created and adopted in accordance with the Colorado Constitution (Answer ¶ 7) and that the Colorado Constitution prohibits COGA from asserting claims because the Ballot Measure supersedes any state law to the extent that there is a conflict. *Id.* at 5. There is no dispute between the two existing parties to the litigation that this

case turns on whether the Ballot Measure is preempted by or supersedes State law and regulation.

Applicants do not hide the fact that the basis for their attempt to intervene is not limited to the preemption of the Ballot Measure and even admit that they will advance interests that are not currently at issue in the litigation. Mot. at 10 ("[Applicants] will argue that the moratorium helps protect their inalienable rights—an assertion that was not raised by the City in its answer."). Applicants also argue that their intervention would "provide greater justice to [them] by allowing them to state their position in defense" of the Ballot Measure and that they will "add factual richness" and "descriptive richness" that may otherwise be absent from this case. *Id.* at 10, 11. The "factual and descriptive richness" that Applicants seek to provide includes:

- "Colorado has recently faced a major influx of oil and gas drilling. For example, from 1991 till 2001 there were 16,368 new permits issued. From 2002 till 2013, 55,445 new drilling permits have been issued – an increase of more than 300 percent. Mot. at 5.
- "Currently, more than 51,824 active oil and gas wells cover Colorado's landscape." Proposed Mot. to Dismiss at 4.
- "This drilling boom transforms the Colorado landscape, replacing the peaceful plains with noise, chemical pollution, and earth moving equipment." Mot. at 5.
- "This level of drilling far exceeds the peak of any previous period in Colorado's historically boom-and-bust energy industry." Proposed Mot. to Dismiss at 3.
- "[T]he Fracking Moratorium seeks to protect the citizens' inalienable rights . . . ." Mot. at 9.
- "[Applicants'] entire strategy will be to maintain the [Ballot Measure] until better study of the industrial process is completed, ensuring fracking does not destroy their members' property, health, and wellness." *Id.*

Applicants' arguments reflect their intention to convert this case into a public forum to debate the policy issue of whether the risks associated with hydraulic fracturing outweigh its benefits. While the public debate in which Applicants hope to engage may be useful to policy makers who have the authority to regulate hydraulic fracturing, those issues are clearly beyond the scope of this litigation. Applicants are free to pursue those interests in other forums, but they should not be permitted to pursue them here. *See United States v. Metro. Dist. Comm'n*, 147 F.R.D. 1, 6 (D. Mass. 1993) (denying permissive intervention to one group because allowing the group "to intervene would open the floodgates to innumerable others" whose interests could be similarly impacted by the controversy between the original parties, thereby changing "the nature and course of the litigation . . . and caus[ing] the existing parties undue delay") (citations and internal quotation marks omitted). COGA's claim presents a straightforward issue of law, and COGA is entitled to prompt adjudication of that claim.

Finally, despite having little or no relevance to the legal issue pending before this Court, allowing Applicants to raise the types of factual issues set forth in their Motion and affidavits would greatly increase the costs and burdens of the litigation for both parties. It would require COGA to present rebuttal testimony and anecdotal evidence from fact witnesses with contrary experiences and opinions, retain rebuttal experts, and engage in a substantial amount of additional pre-trial discovery. Accordingly, it would extend the time required to prepare the case for trial, extend the time required for the trial itself, and significantly delay the resolution of the case. In such instances, intervention should be denied. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 949 (9th Cir. 2009) (holding that denial of a public interest organization's motion for permissive intervention was warranted in an action concerning

whether a ballot proposition to amend the California constitution to ban same-sex marriage was unconstitutional, where allowing multiple parties to engage in discovery on substantially similar issues might very well delay the proceedings and where differences between the applicant and the existing party were "rooted in style and degree, not the ultimate bottom line").

The facts Applicants intend to interject in this action are irrelevant to the sole legal issue being addressed in this litigation, and their involvement will unnecessarily expand and delay the proceedings. Accordingly, Applicants' request for permissive intervention should be denied.

## CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court deny Applicants' Motion to Intervene.

DATED: March 6, 2013.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March 2014, I filed the foregoing **RESPONSE IN OPPOSITION TO MEASURE PROPONENTS' MOTION TO INTERVENE AS DEFENDANTS** with the clerk of Court via ICCES which will send notification of such filing to the following:

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