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Court of Appeals, State of Colorado **2 East 14th Ave., Denver, CO 80203**	
Name & Address of Lower Court: District Court, Larimer County, Colorado **Trial Court Judge:** The Honorable Gregory M. Lammons **Case Number:** 2013CV31385	
Appellants: Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks **Defendant:** City of Fort Collins, Colorado v. **Appellee:** Colorado Oil & Gas Association	▲ **COURT USE ONLY** ▲
Attorneys for Appellee Colorado Oil & Gas Association: Name(s): Mark Mathews, #23749 Wayne F. Forman, #14082 Michael D. Hoke, #41034 Address: Brownstein Hyatt Farber Schreck, LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Phone Number: 303.223.1100 FAX Number: 303.223.1111 E-mail: mmathews@bhfs.com wforman@bhfs.com mhoke@bhfs.com	Case Number: 2014CA1991

COGA'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

Plaintiff-Appellee Colorado Oil & Gas Association ("COGA") respectfully submits this response in opposition to the Motion to Intervene (the "Motion") filed by intervenor applicants Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks (collectively, "Applicants").

I. APPLICANTS HAVE NO RIGHT TO INTERVENE IN THIS APPEAL BECAUSE THE INTERVENTION APPEAL PROTECTS THEIR INTERESTS.

Applicants filed a motion to intervene in the underlying litigation, which the district court denied, and Applicants have appealed the district court's denial of intervention in case number 2014CA780 (the "Intervention Appeal"). Briefing in the Intervention Appeal was completed on October 14, 2014, and Applicants did not request oral argument. With no remaining proceedings in the Intervention Appeal, that appeal is ripe for decision.

In this appeal on the underlying merits (the "Merits Appeal"), the City of Fort Collins (the "City") contends that the district court erred in granting summary judgment in favor of COGA regarding the validity of the City's five-year ban on hydraulic fracturing. The Merits Appeal is in its early stages. The record is not due until January 2015, and the Court has not set a briefing schedule.

Applicants have no right to end-run the Intervention Appeal and seek to intervene in the Merits Appeal. They cite no law entitling them to intervene in the Merits Appeal. To the contrary, a proposed intervenor that is properly denied

intervention is generally precluded from appealing the merits in the underlying case. *United States v. $129,374 in U.S. Currency*, 769 F.2d 583 (9th Cir. 1985) (proposed intervenor could not challenge district court's order granting summary judgment in light of court's holding which affirmed denial of motion to intervene); *United States v. S. Bend Cmty. Sch. Corp.*, 710 F.2d 394, 396 (7th Cir. 1983) (Posner, J.) ("[S]ince the [intervenors] were properly excluded from the lawsuit they do not have the rights of parties and therefore cannot as they wish to do appeal from . . . the consent decree."); 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3902.1 (2d ed. 1992) ("Persons denied intervention in the trial court clearly have standing to appeal the denial of intervention, but if intervention was properly denied have no greater right to appeal the judgment entered between others than other nonparties.").

Moreover, unless "extraordinary circumstances are present," a proposed intervenor "who was not a party of record before the trial court may not appeal that court's judgment." *$129,374 in U.S. Currency*, 769 F.2d at 590 (citations and internal quotation marks omitted). No such extraordinary circumstances exist here, and Applicants have not asserted any. In fact, the pendency and imminent resolution of the Intervention Appeal precludes any such assertion. Indeed, if the Intervention Appeal is decided before the Merits Appeal, which is likely,

Applicants will not be entitled to participate in the Merits Appeal regardless of the outcome in the Intervention Appeal.

On the one hand, if Applicants lose the Intervention Appeal, they cannot participate in the Merits Appeal because applicants that are properly denied intervention are precluded from appealing the merits in the underlying case. On the other hand, even if Applicants win the Intervention Appeal, Applicants still could not participle in the Merits Appeal, as the Merits Appeal would not continue. Instead, the case would be remanded to the district court for further proceedings, in which Applicants, COGA, and the City would all participate. *See Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 408 (Colo. 2011) (reversing the trial court's denial of the motion to intervene, vacating the trial court's declaratory judgment order, and ordering that the "proceedings must be reopened to give [the intervenor] an opportunity to be heard") (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135–36 (1967)); *Brennan v. Silvergate Dist. Lodge No. 50*, 503 F.2d 800, 803 (9th Cir. 1974) (noting that, "if the orders denying intervention are reversed, it would be necessary to reverse the judgments in order to afford [the proposed intervenor] full relief").

Thus, because Applicants are fully protected without being allowed to intervene in the Merits Appeal, the Court should reject their requested intervention.[1]

II. NO GROUNDS FOR CONSOLIDATION EXIST.

The Intervention Appeal turns on whether the district court erred in denying Applicants' motion to intervene. The issue in the Merits Appeal is whether the district court correctly granted summary judgment in favor of COGA. There are therefore no overlapping issues in the two appeals, and there are no remaining proceedings or briefs due in the Intervention Appeal. Accordingly, there is nothing to "consolidate."

Further, Applicants have not cited any case law that supports consolidation of the Intervention Appeal and the Merits Appeal. They seek to rely on *Dillon Cos. v. Boulder*, 515 P.2d 627, 628 (Colo. 1973), but to no avail. *Dillon* is simply inapposite here. Unlike *Dillon*, where the city failed to appeal, the City in this case has appealed the district court's decision on the merits and is representing Applicants' interests. This case is further distinguishable because the factors that

[1] Applicants' interests are also adequately represented by the City in the context of C.R.C.P. 24(a)(2), and to the extent that the appendix to Applicants' Motion is applicable, COGA incorporates by reference its briefs regarding intervention in the district court in case number 2013CV31385 and in the Intervention Appeal.

the *Dillon* court relied upon for consolidation are not present here, that is, the parties and issues in the Intervention Appeal and the Merits Appeal are not the "same." And unlike *Dillon*, reversal of the Intervention Appeal would necessarily result in this case being remanded.

Consolidation is also inappropriate here as a practical matter. As set forth above, the Intervention Appeal is ready for a decision and will necessarily determine whether the Merits Appeal proceeds. It makes no sense to accept Applicants' suggestion and delay resolution of the Intervention Appeal by consolidating it with the Merits Appeal. That risks a tremendous waste of judicial resources in the event the Merits Appeal is mooted. Instead, the Court should reject Applicants' request for consolidation and proceed to resolve the Intervention Appeal.

III. APPLICANTS' NOTICE OF APPEAL SHOULD BE DISMISSED.

Applicants rely on Wright & Miller to support their filing of a "protective notice of appeal." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3902.1. However, the case which Wright & Miller cites for that language—*Brennan*, 503 F.2d 800—does not assist Applicants. In *Brennan*, the proposed intervenor appealed orders denying his applications to intervene and two final judgments. 503 F.2d at 803. The Ninth

Circuit held that, because the district court properly denied the proposed intervenor's motions to intervene, he never became a party to the action and, therefore, did not have standing to appeal the final judgment orders. *Id.* While the court treated the appeals from the judgments as "protective or precautionary," the court did not expound on that language nor permit the proposed intervenor to argue the merits since he was denied intervention. *Id.*

Thus, *Brennan* actually supports COGA's position that the Court should not permit Applicants to intervene since the Intervention Appeal should be decided before this appeal. As set forth above, briefing is closed in the Intervention Appeal, which is ripe for decision and which will determine whether this case gets remanded for further proceedings or proceeds without Applicants as a party. Accordingly, Applicants' request that the Court accept its proposed Notice of Appeal should be denied.

CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court deny Applicants' Motion and dismiss its Notice of Appeal.

Dated December 5, 2014

Brownstein Hyatt Farber Schreck, LLP

By: */s/ Mark J. Mathews*
Mark J. Mathews, #23749
Wayne F. Forman, #14082
Michael D. Hoke, #41034

ATTORNEYS FOR APPELLEE
COLORADO OIL & GAS
ASSOCIATION

CERTIFICATE OF SERVICE

I certify that on December 5, 2014, I electronically filed a true and correct copy of the foregoing **COGA'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE** with the Clerk of Court via the Colorado ICCES program which will send notification of such filing and service upon the following counsel of record:

Kevin Lynch
Brad Bartlett
2255 E. Evans Avenue
Suite 335
Denver, CO 80208

Stephen J. Roy, City Attorney
John R. Duval
City Hall West
300 La Porte Avenue
P. O. Box 580
Fort Collins, CO 80521

Barbara J.B. Green
John T. Sullivan
Sullivan Green Seavy LLC
3223 Arapahoe Avenue, Suite 300
Boulder, CO 80303

/s/ Paulette M. Chesson
Paulette M. Chesson, Paralegal

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