

<b>Court of Appeals, State of Colorado</b> <b>2 East 14th Ave, Denver, CO 80203</b>	
<b>Name &amp; Address of Lower Court</b> District Court, Larimer County, Colorado 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521 <b>Trial Court Judge:</b> The Honorable Gregory M. Lammons <b>Case Number:</b> 2013CV31385	
<b>Appellants:</b> CITIZENS FOR A HEALTHY FORT COLLINS, SIERRA CLUB, AND EARTHWORKS	
<b>Defendants:</b> CITY OF FORT COLLINS, COLORADO	
v.	
<b>Appellee:</b> COLORADO OIL & GAS ASSOCIATION	
<i>Attorneys for Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks ("Measure Proponents")</i> 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: 303.871.6140 FAX: 303.871.6847 E-mail: klynch@law.du.edu	<b>COURT USE ONLY</b> Case Number:
<b>NOTICE OF APPEAL</b>	

Appellants Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks (“Measure Proponents”) appeal Larimer County District Court Judge Gregory M. Lammons’s March 27, 2014 Order denying Measure Proponents’ Motion to Intervene in case number 2013CV31385.

## **I. NATURE OF THE CASE**

### **A. Nature of the Controversy:**

This appeal is from the denial of Measure Proponents’ intervention as defendants in a case where the Colorado Oil and Gas Association (“COGA”) has moved to invalidate the City of Fort Collins’ voter-approved moratorium on hydraulic fracturing. Measure Proponents live in and near the City of Fort Collins. They actively campaigned for Ballot Measure 2A, an ordinance that places a five year moratorium on fracking within Fort Collins. Although the City passed a resolution urging citizens not to vote for Measure 2A, on November 5, 2013, a majority of the citizens of Fort Collins voted in favor of the moratorium.

On February 13, 2014, Measure Proponents filed a motion to intervene. While the City never took a position on the Measure Proponents’ intervention, COGA openly opposed it. However, the trial court denied the motion to intervene.

The Measure Proponents seek to intervene to be able to protect their personal health, safety, and property values through the ballot initiative that they sponsored and the City tried to defeat. To have their interests adequately represented, Measure Proponents should be permitted to intervene as of right pursuant to Colo. R. Civ. P. 24(a)(2), or alternatively be granted permissive intervention pursuant to Colo. R. Civ. P. 24(b)(2).

B. Judgment Being Appealed and Statement of Jurisdiction

Pursuant to C.A.R. 4(a), Measure Proponents appeal Larimer County District Court Judge Gregory M. Lammons's March 27, 2014 Order denying Measure Proponents' Motion to Intervene.

The Court of Appeals has jurisdiction to hear this matter under C.R.S. § 13-4-102(1) and *Feigin v. Alexa Group, LTD.*, 19 P. 3d 23, 26 (Colo. 2001).

C. Issues Resolved Below

The Order below resolved only Measure Proponents' request for intervention as of right and request for permissive intervention.

D. Judgment Made Final for Purposes of Appeal

The Order directed the entry of final judgment for Measure Proponents' request for intervention as of right as well as permissive intervention. Both orders are final.

E. Date of Order

The Order being appealed is dated March 27, 2014. The Order was served electronically on the parties via the Integrated Colorado Court's E-filing System (ICCES).

F. Extensions

The trial court granted no extensions to file motions for post-trial relief, nor were any requested.

G. Date Motion for Post-Trial Relief was Filed

Because no motion for post-trial relief was filed, this is not applicable.

H. Date Motion for Post-Trial Relief was Denied

Because no motion for post-trial relief was filed, this is not applicable.

I. Notice of Appeal Extensions

There have been no motions to extend the time for filing a Notice of Appeal.

## **II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL**

Measure Proponents anticipate that its appeal will focus on whether the trial court erred in denying both intervention as of right and permissive intervention to a group, comprised of both resident and non-resident members, that sponsored and campaigned for a citizen initiated ballot measure when the defendant municipality both opposed the ballot measure and never asserted it would represent the group's interests.

## **III. TRANSCRIPT**

Because the Order being appealed was decided on briefing, no transcript or other evidence was taken before the District Court.

## **IV. PRE-ARGUMENT CONFERENCE**

Measure Proponents anticipate filing a C.A.R. 8 motion for a stay pending appeal. But Measure Proponents do not anticipate that a settlement will be reached between the parties. Therefore, Measure Proponents do not request a pre-argument conference.

## **V. COUNSEL FOR THE PARTIES**

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*Attorneys for the Plaintiff, Colorado Oil and Gas Association*

**VI. Appendices**

1. A Copy of the District Court's Order dated March 27, 2014 denying Measure Proponents' Motion to Intervene is attached as Appendix 1.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th of April, 2014, a true and correct copy of the above and foregoing **MEASURE PROPONENTS' NOTICE OF APPEAL** was served via the Integrated Colorado Courts E-Filing System (ICCES), on:

Larimer County District Court  
201 Laporte Avenue, Suite 100  
Fort Collins, CO 80521

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Kevin J. Lynch # 39873



*This document was filed electronically pursuant to C.A.R. 25(e). The original signed document is on file with the University of Denver Environmental Law Clinic.*

APPENDIX 1

Order dated March 27, 2014 denying Measure Proponents' intervention.

DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO  
201 LAPORTE AVENUE, SUITE 100  
FORT COLLINS, CO 80521-2761  
PHONE: (970) 498-6100

DATE FILED: March 27, 2014  
CASE NUMBER: 2013CV31385

**Plaintiff:** Colorado Oil and Gas Association

v.

**Defendant:** City of Fort Collins, Colorado

▲ FOR COURT USE ▲

Case No. 13CV31385  
Courtroom: 5B

### Order Denying Motion to Intervene

This matter comes before the Court on Proponents' Motion to Intervene. After reviewing the Motion, the Response, the Reply and the applicable law, the Court finds and orders:

#### Background

The Colorado Oil and Gas Association ("Plaintiff") brought suit against the City of Fort Collins ("City") challenging the validity of Ballot Measure 2A ("Measure"). The Measure, which places a moratorium on hydraulic fracturing and the storage of hydraulic fracturing waste products within the City for five years, was passed by voters of the City on November 5, 2013. The Plaintiff argues that the Colorado Oil and Gas Conservation Act preempts the Measure and requests the Court enter a permanent injunction against its implementation.

In response to the Complaint, the City filed an Answer, which alleges that the Measure is a "valid exercise of the power of the City of Fort Collins and its citizens." Answer ¶ 51. The Answer also requests the Court not enter a permanent injunction against the Measure. *Id.* ¶¶ 56-59. Finally, the Answer asserts as affirmative defenses that Plaintiff failed to state a claim upon which relief can be granted, that Plaintiff lacks standing, and that the Plaintiff's claims are barred by the Colorado Constitution. *Id.* at 5.

Members of Healthy Fort Collins, the Sierra Club, and Earthworks ("Proponents") move to intervene, pursuant to C.R.C.P. 24(a) and (b). Concurrently

with the Motion to Intervene, Proponents filed a Proposed Motion to Dismiss which, like the City's Answer, alleges that Plaintiff lacks standing.

### **Law and Analysis: Intervention as of Right**

Under C.R.C.P. 24(a), a party is entitled to intervene in a pending action as a matter of right when: (1) the application is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest; and (4) the applicant's interest is not adequately represented by existing parties. *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

To determine whether a proposed intervenor is adequately represented by existing parties, the Colorado Supreme Court has mandated the following: "If [the intervenor's] interest is identical to that of one of the present parties, or if 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. *Id.* at 31 (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1909, 318-19 (2d ed.1986)). Indeed, "[r]epresentation by the governmental authorities is considered adequate in the absence of gross negligence or bad faith on their part." *Denver Chapter of Colorado Motel Ass'n v. City & Cnty. of Denver*, 374 P.2d 494, 496 (Colo. 1962) (quoting Moore's Federal Practice, 2d ed., at § 24.08).

Here, the City represents identical interests to the Proponents: both seek to defend the validity of the Measure. The City's interest in protecting its rights as a home rule city and to protect the health and welfare of the residents of Fort Collins coincides directly with the Proponents' interest to defend the Measure they helped passed.

Further, Proponents have not made any showing that the City has engaged in gross negligence or bad faith. Quite to the contrary, the City has hired outside counsel for the sole purpose of defending the Measure and has raised affirmative defenses in its Answer. Within the Answer, the City alleges that the Plaintiff lacks standing. The Proponents Motion to Dismiss asserts the same argument.

Therefore, Proponents are not entitled to intervene under C.R.C.P. 24(a).

### **Law and Analysis: Permissive Intervention**

Pursuant to C.R.C.P. 24(b) the Court may allow a party to intervene "when an applicant's claim and the original cause of action present common questions of law or fact, so long as the intervention will not unduly delay or prejudice the rights of the original parties." *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1998). A trial court has considerable discretion in granting or denying the motion. *Id.*

The Intervenors have failed to show how their Intervention will help advance the case or assist the Court further in making the Court's determinations. Preemption is a legal issue that is largely defined by existing law.

The request for permissive intervention is denied.

**Conclusion**

The Court denies Proponents' request to intervene under C.R.C.P. 24(a) and (b).

Dated: March 27, 2014.

BY THE COURT:

  
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Gregory M. Lammons  
District Court Judge