DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: City and County Building 1437 Bannock Street Denver, CO 80202	DATE FILED: March 25, 2020 12:59 PM CASE NUMBER: 2019CV31306 ▲ COURT USE ONLY ▲
Plaintiffs: LARSON FRONT RANGE FARMS, LLC, L. & L., INC, IVAR LARSON and DONNA LARSON, v. Defendants: COLORADO OIL AND GAS CONSERVATION COMMISSION and EXTRACTION OIL AND GAS, INC.	Case Number: **19CV31306** Courtroom: **424**

ORDER Re: COLORADO OIL AND GAS CONVERSATION COMMISSION and EXTRACTION OIL AND GAS,INC'S MOTIONS TO DISMISS

This is before Court on Defendant Colorado Oil and Gas Conservation Commission's Motion to Dismiss Plaintiff's First, Fifth and Sixth Claims for Relief, as well as Extraction Oil and Gas, Inc.'s separately filed Motion to Dismiss. Upon consideration of the motions, the plaintiff's responses and the replies filed thereto, and having reviewed the Court's file and applicable authorities, and being advised in the premises, finds and orders as follows.

I. Background

This case is a judicial review action of the Colorado Oil and Gas Conservation Commission's ("the Commission") issuance of an order pooling mineral interests. As applicable to the Commission, the Amended Complaint seeks a declaration that purported leases of the mineral interests to Plaintiff L. & L., Inc. ("L & L) are valid and enforceable and that Defendant Extraction Oil and Gas ("Extraction") must pay L & L under those leases (First Claim for Relief); asserts that the Commission's "refusal to acknowledge the L & L leases and entry of the Pooling Order . . . constitutes deprivation of property without due process

of law (Fifth Claim for Relief); and claims that the Commission's "refusal to acknowledge the L & L leases and entry of the Pooling Order . . . constitutes a taking of property without just compensation. (Sixth Claim for Relief).

As applicable to Extraction, the Amended Complaint seeks a declaration that the purported leases of the mineral interests to L & L are valid and enforceable and that Extraction must pay L & L under those leases (First Claim for Relief); asserts that the Commission's Pooling Order was issued contrary to the requirements of the Administrative Procedure Act and is arbitrary, capricious and contrary to law (Second Claim for Relief); seeks a declaration that Extraction does not have condemnation authority and is required to compensate the plaintiffs for damages to their mineral rights (Third Claim for Relief); and asserts that Extraction's drilling into the plaintiff's mineral estate prior to the entry of the Pooling Order constitutes a trespass (Fourth Claim for Relief).

II. Procedural History and Facts

Ivar and Donna Larson are individuals who reside in Larimer County who own the surface and mineral estate covered by their residential property. (Amended Complaint, ¶ 17). The Larsons rent farmland adjacent to and north of their residential property from Larson Front Range Farms, Inc. (LFRF), which owns the surface and mineral estate in the subject property, as well as in adjacent property. (Amended Complaint, ¶¶ 18, 19.) The Larsons are members of LFRF. L & L is an oil and gas company (Amended Complaint, ¶ 20); Ivar Larson is its president. (Amended Complaint, ¶ 21.)

On April 12, 2018, Extraction filed multiple applications with the Commission to pool certain spacing units that contain the Larsons' mineral interests. (Amended Complaint, ¶ 29). The Larsons filed protests against the Extraction applications on May 24, 2018. (Amended Complaint, ¶ 42). On June 27, 2018, the Larsons and LFRF leased their respective mineral interests to L & L. (Amended Complaint, ¶¶ 39, 40). The hearing on Extraction's applications, originally scheduled for July 30 – August, was continued twice at the Larsons' request and once on Extraction's motion. (Amended Complaint, Exhibit 5, ¶¶ 10 – 16; 18). On November 15, 2018, the Larsons moved to stay the pooling proceedings, pending resolution of a related complaint for judicial review pending in Denver District Court. (Amended Complaint, Exhibit 5,¶ ¶ 22). The request was considered by a hearing officer at the Final Prehearing Conference on December 4, 2018 (Amended Complaint, Exhibit 5, ¶ 23) and by the Commission at the December 17 – 18 hearing. (Amended Complaint, Exhibit 5, ¶¶ 26 – 31).

While the Commission denied the motion to stay, it granted another continuance of the hearing to January 28 – 29, 2019. (Amended Complaint, Exhibit 5, ¶¶ 32 – 33).

Another Final Prehearing Conference was held on January 14, 2019, in advance of the hearing on the merits, scheduled for January 28 – 29, 2019. (Amended Complaint, Exhibit 5, ¶¶ 33, 35). On January 23, 2019, the hearing officer received an ex parte phone call from Ivar Larson. (Amended Complaint, Exhibit 5, ¶ 36). The following day, during a telephone conference with the parties, counsel for Mr. Larson informed the hearing officer that Larson had conveyed its mineral interest in the Application Lands to L & L, and that the Larsons were resting on their filings and did not plan on presenting argument at the January hearing. (Amended Complaint, Exhibit 5, ¶ 37). The leases, which were executed in June 2018, were recorded on December 13, 2018. (Amended Complaint, ¶ 41).

On the morning of the January 28 hearing, counsel for L & L, and Ivar Larson as president, appeared, affirmed that L & L was not a party to the Pooling Applications, and orally sought to intervene and stay or continue the proceedings. (Amended Complaint, Exhibit 5, ¶¶ 39 – 42). L & L informed the commission that, although the leases were executed in June 2018, it did not previously take action on the applications because it was hopeful that a deal could be reached with Extraction. (Amended Complaint, Exhibit 5, ¶ 44). Following deliberation, the Commission unanimously denied the motion to intervene because (1) the request was not timely in accordance with the Commission's rules; (2) L & L failed to satisfy the substantive requirements for a petition to intervene; and (3) Larson engaged in an abuse of process by using the Commission's procedures for obstruction or delay. (Amended Complaint, Exhibit 5, ¶¶ 46; 49 – 51).

Following a hearing on the merits, the Commission granted Extraction's pooling application; its Pooling Order was issued on February 27, 2019. (Amended Complaint, ¶ 45, Exhibit 5).

III. Motion to Dismiss

In considering a motion to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim upon which relief may be granted, the Court must accept as true all factual (but not legal) allegations in the Complaint and view those allegations in a light most favorable to the nonmoving party. *Semler v. Hellerstein,* 428 P.3d

555 (Colo. App. 2016). In resolving a Rule 12(b)(5) motion to dismiss, a court may consider only the facts alleged in the complaint, documents attached as exhibits or referenced in the complaint, and matters of which the court may take judicial notice. *Yadon v. Lowry*, 126 P.3d 332 (Colo. App. 2005).

In order to survive a motion to dismiss, the factual allegations of the complaint must be sufficient to state a right to relief "above the speculative level" and assert a claim that is legally plausible. *Warne*, *supra*, 373 P.3d at 591 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009). "'[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions,' and . . . 'only a complaint that states a plausible claim for relief survives a motion to dismiss.'" *Warne, supra*, 373 P.3d at 591 (quoting *Ashcroft, supra,* 556 U.S. at 678, 679). Under the plausibility standard, a party must make factual allegations "enough to raise a right to relief 'above the speculative level'" and "provide 'plausible grounds'" for relief. *Twombly*, 550 U.S. at 556.

"Plausibility" does not, however, equate to credibility or believability; those, to the contrary, are functions for the trier of fact. "Plausibility" does not, however, equate to credibility or believability; those, to the contrary, are functions for the trier of fact. It "is manifestly improper to import trial-stage evidentiary burdens into the pleading standard." *Garcia-Catalan v. United States*, 734 F.3d 100, 103 (1st Cir. 2013). "At the pleading stage, the plaintiff need not demonstrate that [it] is likely to prevail, but [its] claim must suggest 'more than a sheer possibility that a defendant has acted unlawfully.'" *Id.,* at 102-03 (internal citation omitted). In determining whether a complaint crosses the plausibility threshold, "the reviewing court [must] draw on its judicial experience and common sense." *Iqbal,* 556 U.S. at 679, 129 S.Ct. 1937.

IV. Analysis

Pursuant to statute, and in order to "prevent or to assist in preventing waste, to avoid the drilling of unnecessary wells, or to protect correlative rights" the Commission is empowered to group mineral interests together into spacing units for the purposes of development. C.R.S. § 34-60-116. When there are two or more separately owned interests in all or part of a drilling unit, the owners of the interests may pool their interests for the development and operation of the drilling unit. C.R.S. § 30-60-116(6)(a). If the mineral owners in a spacing unit do not voluntarily agree to pool their interest, the Commission is empowered,

upon application, to enter an order pooling all interests in the drilling unit. C.R.S. § 34-60-116(6)(b)(I). A pooling order "shall be made after notice and a hearing and must be upon terms and conditions that are just and reasonable and that afford the owner of each tract or interest in the drilling unit the opportunity to recover or receive, without unnecessary expense, a just and equitable share" C.R.S. § 34-60-116(6)(b)(II). The Commission may not pool an unleased nonconsenting mineral owner unless it has received evidence that the unleased mineral owner has been timely tendered a reasonable offer, made in good faith, to lease upon terms no less favorable than those currently prevailing in the area at the time application for the order is made. C.R.S. § 34-60-116(7)(d)(I). If the Commission approves the pooling application, the terms upon which the profits and costs are allocated. C.R.S. § 34-60-116(7)(a).

1. First Claim for Relief

The plaintiffs' First Claim for Relief seeks a declaration that "the L & L leases are valid and have the full force of law; that "Extraction and the Commission had constructive and actual notice of L & L's ownership of the mineral interests at issue prior to entry of the Pooling Order; and that "to the extent the Pooling Order is valid, it operates only to pool L & L's 75% working interest rather than a 100% unleased working interest."

In its motion to dismiss, the Commission asserts that, to the extent a declaratory judgment is appropriate, it is only properly brought against Extraction, not the Commission. The Commission is statutorily empowered to pool interests; however it lacks jurisdiction to interpret or resolve contractual disputes. *See Chase v. Colorado Oil and Gas Conservation Com'n,* 184 P.3d 161 (Colo. App. 2012). While the plaintiffs may properly seek a declaration as to the validity of the leases, 184 P.3d at 168, such a legal determination has no bearing or affect as to the validity of the pooling order.

The Commission asserts, and the Court agrees, that a legal declaration as to the validity of the leases that determines whether the plaintiffs should be regarded as leased parties by virtue of the L & L leases, rather than as unleased nonconsenting parties, while affecting Extraction's ultimate payment calculations, does not affect the pooling order itself. Accordingly, to the extent the First Claim for Relief seeks a declaration as to the actions of the Commission or the validity of the pooling order, the claim is dismissed.

Extraction asserts that the claim should be dismissed because L & L lacks standing to assert any claim against it (or the Commission), and because no plaintiff can maintain that the L & L leases are valid because they terminated by their own terms. To establish standing, the plaintiff must have suffered an injury-in-fact to a legally protected interest. *Ainscough v. Owens,* 90 P.3d 851 (Colo. 2004). For reasons stated in section 2, *infra*, the Court finds Extraction's assertion that the plaintiffs lack standing because they did not "participate" in the "hearing" lacks merit. Extraction's assertion that the plaintiffs suffered no injury-in-fact because the L & L leases expired automatically by their own terms, while raising factual issues, does not equate to a finding at the pleading stage that the allegations in the Amended Complaint fail to meet the plausibility standard required to survive a motion to dismiss. Accordingly, Extraction's motion do dismiss the plaintiffs' First Claim for Relief is denied.

2. Second Claim for Relief

Extraction asserts that the plaintiff's claim under the Administrative Procedure Act must be dismissed because, by failing to personally appear at the hearing and instead relying upon written submissions, the plaintiffs waived their right to appeal the resulting final order.

Waiver is the voluntary or intentional relinquishment of a known right. *See Magliocco v. Olson,* 762 P.2d 681 (Colo. App. 1987). Here, while the allegations in the Amended Complaint establish that the plaintiffs did not personally appear at the January 2018 final hearing, they actively opposed the applications as filed, submitted statements to be considered by the Commission, and ultimately advised the Commission that they were resting on their filings and did not plan on presenting additional argument at the hearing. Extraction has cited no statute, rule, or other authority that either precludes the Commission from considering a party's written submissions in lieu of live argument, or otherwise requires the personal appearance of a party at the scheduled hearing.

The Court therefore finds no merit to Extraction's narrow construction of the term "hearing" or its contention that, by choosing to rely upon its written statements, objections and submissions, the plaintiffs necessarily waived review of the Commission's order on judicial review.

3. Third Claim for Relief

The plaintiffs' seek in their Third Claim for Relief, a judicial determination that Extraction does not have eminent domain authority and that it must compensate them "for its damage to Plaintiffs' mineral rights." However, while the Amended Complaint asserts facts challenging the Commission's order, issued pursuant to section § 34-60-116, the Amended Complaint asserts no facts that plausibly supports a claim that any rights were acquired or deprived, through a governmental entity or otherwise, through the power of eminent domain. Moreover, for the reasons stated in section 5, *infra,* the Court finds and concludes that the statutory scheme established for the pooling of natural resources for development is neither a deprivation of property rights, a condemnation of property, or a governmental taking; rather, the pooling rules and procedures are a reasonable exercise of the state's inherent police power.

Accordingly, Extraction's motion to dismiss the Third Claim for Relief for failure to state a plausible claim is granted.

4. Fourth Claim for Relief

As the basis of their trespass claim, the plaintiffs assert that prior to and proximate to the time of the filing of the pooling applications Extraction, without notice or permission, began drilling operations that traveled into and through their mineral estate. (Amended Complaint ¶¶ 33 – 37). The plaintiffs further assert that completion of the wells forever reduced the pressure of oil and gas situate within their mineral estate and destroyed their ability to produce the minerals by an alternate fashion or by another producer. (Amended Complaint, ¶ 38). Extraction asserts that, accepting the truth the factual allegations, the plaintiffs nevertheless fail to state a claim for relief because the statute authorizing the Commission to regulate and pool the natural resources abrogates a claim for common-law trespass. The Court agrees.

Colorado's statute regarding the regulation of oil and gas development and the pooling interests is a reasonable and valid exercise of the state's police powers, which may necessarily circumscribe an individual's property rights in furtherance of the public policies underlying the statute. (*See* Section 5, *infra.*) The statute confers upon the Commission the jurisdiction "over all persons and property, public and private, necessary to enforce the provisions of [the statute]," and authorizes the Commission "to make and enforce rules, regulations, and orders" necessary to carry out the provisions of the statute. C.R.S. § 34-60-

105(1). The statute contemplates the drilling of an oil and gas well following the establishment of a spacing unit, and authorizes the pooling of nonconsenting unleased mineral owners after a well has already been drilled. C.R.S. § 34-60-116(3)(a); 34-60-116(7)(I). A pooling order, whether issued prior to or after the commencement of drilling, necessarily regulates the development of the mineral assets while apportioning the respective costs and benefits among the affected, albeit pooled, owners of the assets.

As such, the statute, at least as applicable to the facts as pled in the Amended Complaint, abrogate a common law claim for civil trespass. *See Continental Res., Inc. v. Farrar Oil Co.,* 559 N.W.2d 841 (N.D. 1997); *Texas Oil and Gas Corp. v. Rein,* 534 P.2d 1277 (Okla. 1974).

5. Fifth Claim for Relief

The plaintiffs' Fifth Claim for Relief asserts that the Commission's refusal to acknowledge the L & L leases, and its entry of the pooling order "effectively facilitates" Extraction's "taking of their mineral interests" without due process of law.

Although the plaintiffs seek to couch their due process claim as a challenge to the administrative process that resulted in the approval of the pooling applications, the necessary prerequisite for such a constitutional due process challenge is governmental action with respect to property rights that amounts to a deprivation, without requisite due process. *See Eason v. Board of County Com'rs,* 70 P.3d 600 (Colo. App. 2003). The United States Supreme Court has consistently held that a state may adopt reasonable regulations to prevent economic and physical waste of natural resources, to protect the correlative rights of owners, and to secure equitable apportionment of resources among landowners. *See, e.g., Cities serv. Gas Co. v. Peerless Oil & Gas,* 340 U.S. 179 (1950); *Hunter v. McHugh,* 320 U.S. 222 (1943).

Neither the Supreme Court, nor any federal or state court, has determined that a statute regulating natural deposits of oil and gas or provides for a unitization or pooling scheme for such resources to be an unconstitutional taking without just compensation. *See Ohio Oil Co. v. Indiana,* 177 U.S. 190 (1900); *Kerns v. Chesapeake Exploration,* 762 Fed. Appx 289 (6th Cir. 2019); *Gawenis v. Ark. Oil & Gas,* 464 S.W.3d 453 (Ark. 2015); *Sylvania Corp. v. Kilborne,* 271 N.E. 2d 524 (N.Y. 1971); *Patterson v. Stanolind Oil and Gas Co,* 77

P.2d 83 (Okla. 1938). Rather, such jurisdictions have upheld the state's pooling procedures as a proper exercise of its inherent police powers.

Among the explicit public policy interests underlying the pooling statute are the regulation of the development of natural resources in a manner that protects public health, safety and welfare; protecting the public and private interests against waste in the production and utilization of oil and gas; and to safeguard and "enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production therefrom. C.R.S. § 34-60-102(1)(a); *see Voss v. Lundvall Bros.,* 1061, 1065 – 66 (Colo. 1992).

Unlike a governmental taking, the statutory does not deprive owners of their property interests but, rather, establishes a scheme that manages the development of resources while ensuring that all owners receive a fair and proportionate share of both the costs and the benefits resulting from the production of the pooled interests. *See Aztec Minerals Corp. v. Romer,* 940 P.2d 1025 (Colo. App. 1996)("when there is a conflict between an assertion that one is deprived of property without due process of law and a reasonable exercise of the police power, the later takes precedence and a 'violation of due process' cannot be asserted to stay the legitimate exercise of police power).

Accordingly, the plaintiffs' Fifth Claim for Relief, which the Court construes as a facial challenge to the pooling statute, fails to state a state a claim for a constitutional due process violation, and must be dismissed.

6. Sixth Claim for Relief

Akin to the allegations in the Fifth Claim for Relief, the plaintiffs assert in their Sixth Claim for Relief that, by refusing to acknowledge the L & L leases, the Commission deprived them of the use, enjoyment, and power of disposition of their property without just compensation. For the reasons stated in relation to the Fifth Claim for Relief, the Court finds that the statutory scheme is neither a governmental taking or a deprivation of individual property rights, but is rather a reasonable exercise of the state's police powers in the public interest. Accordingly, the claim, which the Court construes as a facial challenge to the pooling statute, fails to state a claim for an unconstitutional taking without just compensation, and must be dismissed.

V. Conclusion and Order

For the foregoing reasons, Extraction's motion to dismiss the plaintiff's First Claim for Relief is **denied**; the Court finds the claim for relief inapplicable to the Commission.

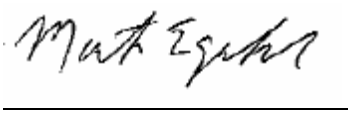
Extraction's motion to dismiss the plaintiff's Second Claim for Relief is **denied**.

Extraction's motion to dismiss the plaintiff's Third and Fourth Claims for Relief is **granted**.

The Commission's motion to dismiss the plaintiff's Fifth and Sixth Claims for Relief is **granted.**

Dated this 25th day of March, 2020.

BY THE COURT:



Martin F. Egelhoff
District Court Judge