BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF THE PROMULGATION AND ESTABLISHMENT OF FIELD RULES TO GOVERN OPERATIONS IN THE CODELL AND NIOBRARA FORMATIONS, WATTENBERG FIELD, BOULDER COUNTY, COLORADO.	)))))	CAUSE NO. 1 DOCKET NO. 170500189, 170500190, 170500191, and 170500192 TYPE: ADMINISTRATIVE

KERR-MCGEE OIL & GAS ONSHORE LP'S PRE-HEARING BRIEF

Kerr-McGee Oil & Gas Onshore LP ("Kerr-McGee"), Operator No. 47120, by and through its attorneys, Welborn Sullivan Meck & Tooley, P.C., submits this Pre-Hearing Brief in support of Kerr-McGee's Protest to Crestone Peak Resources Operating, LLC's ("Crestone") Amended Applications[1] ("Applications") in the above-captioned dockets.

INTRODUCTION

Kerr-McGee supports comprehensive development plans and recognizes the need to identify, discuss, and minimize potential adverse impacts to public health, safety, welfare, and the environment from oil and gas activities. Indeed, Kerr-McGee's own development plans are designed to facilitate coordinated and orderly drilling to efficiently and economically develop oil and gas resources, all while respecting the rights of all owners within the development area. At this time, Kerr-McGee takes no position on the propriety of Crestone's proposed Rule 216 Comprehensive Drilling Plan ("CDP") and is not necessarily opposed to a CDP for the Application Lands. Kerr-McGee is, however, opposed to Crestone's requested Rule 502.b.(1) variance, which, despite Crestone's characterization of it as a "temporary hold" and the Commission Staff's characterization of it as a "stay," is really an injunction that would prevent Kerr-McGee and other owners in the Application Lands from exercising rights to which they are legally entitled under the Colorado Oil and Gas Conservation Act (the "Act") and Commission Rules. Kerr-McGee's objection is directed at Crestone's attempt to prevent Kerr-McGee's exercise of its property rights while Crestone develops its CDP, a process which is entirely voluntary and does the grant of an injunction.

Enthusiasm for comprehensive development plans should not, however, trample the property and statutory rights of other owners. While Crestone offers that this is a "case of first impression" requiring Crestone's "creative thinking, ingenuity, cooperation and conversations with many different stakeholders" for the delicate re-entry into Boulder County, its requested injunction contravenes the Rules. The injunction

[1] Crestone filed four Amended Applications in the above-captioned dockets, all of which request the Rule 502.b.(1) variance to Rule 303. In addition to the variance, Docket No. 170500189 requests approval at a later hearing of a Rule 216 Comprehensive Drilling Plan and Docket Nos. 170500190-192 each request establishment of an approximately 2,560-acre drilling and spacing unit for the Application Lands.

proposed by Crestone is not the result of stakeholder collaboration. *See Crestone's Pre-Hearing Statement*, ¶ G. Indeed, Crestone never asked Kerr-McGee to refrain from filing Forms 2 Application for Permit to Drill and Forms 2A Oil and Gas Location Assessments ("APDs"). Kerr-McGee is, nonetheless, willing to work with Crestone to formulate an acceptable voluntary agreement among all owners rather than a forced injunction preventing all owners, except Crestone, from exercising their legal rights in the Application Lands. Crestone need only engage Kerr-McGee in meaningful discussions as expressly contemplated by Rule 216. Until April 19, 2017, Crestone had not even shared with Kerr-McGee the conceptual CDP. Now, having finally seen the conceptual CDP, Kerr-McGee restates its willingness to collaborate with Crestone on the CDP, as contemplated by Rule 216, and to refrain from filing APDs to give Crestone the opportunity to further develop its plan. Kerr-McGee continues to maintain, however, that Crestone's requested Rule 502.b.(1) injunction is improper because it places Crestone's interests above the other owners in the Application Lands. Crestone's Applications distort the applicable Colorado Oil and Gas Conservation Commission (the "Commission") Rules and seek unwarranted injunctive relief with no legal basis. Because Crestone is only seeking the variance at this time and has voluntarily continued all other requested relief for the Application Lands to a future hearing on an undetermined date, this Pre-Hearing Brief only addresses Crestone's request for a Rule 502.b. variance to Rule 303.

Kerr-McGee owns significant leasehold interests in the Application Lands[2] and, therefore, has the right, pursuant to Rule 303, to submit APDs for development of its interests in the Application Lands. Crestone's so-called "variance" would indefinitely enjoin Kerr-McGee and all other owners, except Crestone, from filing any APDs to develop their mineral or leasehold interests in those lands while Crestone develops its conceptual CDP. Crestone's request is contrary to the fundamental purpose of the Act and ignores Rule 216's express procedures for applying to establish a CDP. The Commission should be wary of establishing a precedent that is not only contrary to the intent of Rule 216, but one that would prevent operators from doing that which they are legally entitled. For the reasons discussed herein, Crestone's Applications requesting the "variances" should be denied.

APPLICABLE LAW

A. Interpretation of an Authority

This dispute centers on interpretation of Commission Rule 502.b.(1) and whether it may be employed to enjoin the activities of parties other than the party seeking the injunction. The Colorado Supreme Court's rules of statutory construction guide the analysis requiring that the Commission Rules be read in harmony with the Act. Questions of statutory interpretation are questions of law. *People v. Coleby*, 34 P.3d 422 (Colo. 2001). In reviewing the purpose and intent of a statute, courts look first to the plain language of the statute; words used should be given effect according to their

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[2] Kerr-McGee owns leasehold interests in the Application Lands, more specifically within Sections 1, 10, and 12, Township 1 North, Range 69 West, 6th P.M., and Sections 26, 34, 35, and 36, Township 2 North, Range 69 West, 6th P.M.

plain and ordinary meaning. *Farmers Croup, Inc, v. Williams*, 805 P.2d 419, 422 (Colo. 1991). A statute must be read in a manner that gives effect to the purpose underlying its enactment and that achieves a just and reasonable result consistent with that purpose. *Johnson v. Indus. Comm'n*, 761 P.2d 1140 (Colo. 1988). If statutory language is clear, its plain and ordinary meaning applies to effectuate its purpose.

B. Standard for Injunctive Relief

The "variance" that Crestone seeks is in practical effect a preliminary injunction. The power to grant a preliminary injunction "should be exercised sparingly and cautiously . . . ." *Bloom v. National Collegiate Athletic Ass'n*, 93 P.3d 621, 623 (Colo. App. 2004). A preliminary injunction is a fairness tool that preserves the status quo or protects a party's rights pending the final determination of a cause. *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004). Its purpose is to prevent irreparable harm prior to a decision on the merits of a case. *Id.* (Emphasis added). In considering a motion for a preliminary injunction, the trial court must find that the moving party has demonstrated (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury that may be prevented by injunctive relief; (3) lack of a plain, speedy, and adequate remedy at law; (4) no disservice to the public interest; (5) a balance of the equities in favor of the injunction; and (6) the injunction's preservation of the status quo pending a trial on the merits. *Id.* Unless each of the six criterion is met, injunctive relief must be denied. *Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007).

ARGUMENT

A. Crestone seeks an interpretation of COGCC Rules in conflict with the plain meaning of the Act.

i. Rule 502.b.(1) does not allow an applicant to enjoin other operators from applying for APDs pursuant to Rule 303.

Crestone's proposed reading of Rule 502.b.(1) would contravene the express terms and intent of the Rule. To be sure, Rule 502.b.(1) provides a vehicle whereby an operator or applicant may seek a variance to the Commission Rules as they apply to the operator or applicant itself. Rule 502.b.(1) states:

> Variances to any Commission rules, regulations, or orders may be granted in writing by the Director without a hearing upon written request by an operator to the Director, or by the Commission after hearing upon application. The operator or the applicant requesting the variance shall make a showing that it has made a good faith effort to comply, or is unable to comply with the specific requirements contained in the rules, regulations, or orders, from which it seeks a variance, including, without limitation, securing a waiver or an exception, if any, and that the requested

variance will not violate the basic intent of the Oil and Gas Conservation Act. (Emphasis added).

Rule 502.b.(1) is unambiguous. What Rule 502.b.(1) does not provide is the right for an applicant, by way of a variance, to seek to enjoin other owners from applying for APDs under Rule 303. Rather, the rule allows an operator or applicant to request a variance due to its inability to comply with Commission Rules. A variance to the rules pursuant to the plain language of Rule 502.b.(1) may be granted only if the applicant shows "that [the applicant] has made a good faith effort to comply, or is unable to comply with the specific requirements contained in the rules, regulations, or orders, from which it seeks a variance." Rule 502.b.(1). Per the express language of Rule 502.b.(1), an applicant may seek a variance to the rules only as the rules apply to the applicant. *Id.* Therefore, allowing Crestone's attempt to use Rule 502.b.(1) to prevent other operators from participating in oil and gas operations governed by Commission Rules and procedures would create an absurd and unjust result. *Id.*; *see also Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004)("[I]nterpretation leading to an illogical or absurd result will not be followed.").

Here, Crestone's variance request fails to meet the express requirements of Rule 502.b.(1) because it has not alleged that Crestone has made a good faith effort to comply or is unable to comply with Rule 303. *See generally Applications.* Indeed, Crestone cannot allege a good faith effort or inability to comply because it is not seeking any variance to Rule 303 as it applies to Crestone. Rather, in a distortion of Rule 502.b(1), Crestone is seeking a variance that would apply to all operators except the Applicant (Crestone) in the Application Lands. Crestone's requested "variance" asks the Commission to indefinitely stop doing its job, which it is statutorily mandated to do,[3] by asking that it stay acceptance and processing of APDs from any owner except Crestone within the Application Lands while Crestone develops its CDP. Straining the Rule to allow for Crestone's sought relief would lead to an illogical and damaging result. *See, e.g., Frazier*, 90 P.3d at 811.

Crestone's Applications attempt to use Rule 502.b.(1) in a manner the Commission Rules and guiding Act do not intend. First, the Rules do not contain a procedural mechanism to support Crestone's request for an injunction. Rule 502.b.(1) must be read in harmony with the rest of the Act. Indeed, the requested relief is contrary to the express language and intent of the Act, to "[f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado . . . [and] [s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas . . . ." C.R.S. § 34-60-102(1)(a)(I), (III) (emphasis added). The Commission may not elevate the rights of Crestone over the coequal and correlative rights of all other owners to develop their minerals by enjoining all others from filing APDs. *Id.* This action inhibits rather than fosters development. As defined by C.R.S. § 34-60-103(7),

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[3] "[T]he Commission shall . . . [p]romulgate rules to establish a timely and efficient procedure for the review of applications for a permit to drill and applications for an order establishing or amending a drilling and spacing unit." C.R.S. § 34-60-106(11)(a)(I)(A).

"correlative rights" means that each owner and producer in a common pool or source of supply of oil and gas shall have an equal opportunity to obtain and produce his just and equitable share of the oil and gas underlying such pool or source of supply. The Applications ask the Commission, in violation of the Act, to take away the rights of other owners in the Application Lands to "protect" the single interest of Crestone. Such relief directly contravenes the Act's clear intent. *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006). For these reasons, the Applications should be denied.

ii. Rule 216 does not provide a mechanism to stop all other owners from developing their minerals while another owner attempts to develop and seek approval of a CDP.

Crestone's intended use of Rule 216 to exclude all other owners from developing their minerals while it attempts to develop and seek approval of a CDP is not supported by the plain language of the Rule. Indeed, engaging in the CDP process is entirely voluntary and the process is designed to facilitate collaboration between owners and agencies to resolve the very issues raised by Crestone's requested injunction. The process does not, however, justify, or even contemplate, enjoining other owners while an applicant pursues the CDP process.

Rule 216 expressly states that a CDP covering lands with multiple owners should take into account the planned operations of those other owners. *See* Rule 216.b. Moreover, Rule 216 contemplates the submission of a CDP by more than one operator. *See* Rule 216.d.(1). Given that a CDP for the twelve sections at issue could take years to develop, negotiate, and approve, Crestone's proposed freeze on other operators' APDs would lead to an unjust, absurd, and unreasonable result. *See* Order No. 1-143 (taking over two years to approve CDP); *Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011). Rule 216 does not empower the Commission to suspend the rights of all other owners in the Application Lands indefinitely while the CDP process plays out.

Rule 216's procedure for development and implementation of a CDP mandates a collaborative process. *See* Rule 216.d.(1)–(7). Rule 216 provides that an applicant "shall invite the Colorado Department of Public Health and Environment, the Colorado Parks and Wildlife, local governmental designee(s), and all surface owners to participate . . ." Kerr-McGee owns 1/3 of the minerals and significant surface in the Application Lands; yet, Crestone did not include Kerr-McGee in either of its two stakeholder meetings. In fact, there has been no formal consultation with Kerr-McGee.[4] Crestone asserts that it conducted consultation with the Commission staff, Colorado Department of Public Health and Environment, Boulder County, the Town of Erie, and Kenosha Farms Property Owners, all while failing to formally consult with arguably the most important stakeholders, the mineral owners who will be deeply affected by its Rule 502.b.(1) injunction. *See Crestone's Prehearing Statement*, ¶¶ 6–15. From all appearances, Crestone has deliberately excluded Kerr-McGee from stakeholder consultation and collaboration.

[4] Mere telephone discussions do not satisfy the consultation requirement. *Crestone's Prehearing Statement.* at ¶ 23.

Before an application related to approval of a CDP may even be placed on the Commission's agenda, Rule 216 expressly requires that a CDP has first been "agreed to in writing by the operator(s). . . ." Rule 216.d.(4). Kerr-McGee has not agreed in writing to any version of the conceptual CDP. Nor has the Director made any determination as to whether Crestone's conceptual CDP is suitable. Crestone's assertion that it will later provide such a plan with terms consistent with those that Crestone has broadly described is not a substitute for the Rule's straightforward requirement of obtaining an agreed upon and Director-approved plan. Rule 216.d.(1), (4). The approved plan is necessary to ensure meaningful participation from other stakeholders prior to submission to the Commission. An injunction barring all other owners from proceeding with development plans, in the unknown interim while Crestone develops its own plan that has yet to be submitted is inconsistent with the language and intent of Rule 216 procedures . Thus, the Applications must be denied for failing to comply with Rule 216.d.'s threshold procedural requirements.

Crestone argues that because it plans to submit a CDP at some unspecified future date, the Commission should enjoin all other owners from developing their minerals to avoid "the potential for confusion or prejudice if any [APDs] are allowed to be filed and processed prior to the determination of Applicant's Comprehensive Drilling Plan." *Application in Docket No. 170500189*, ¶ 33 (emphasis in original). Crestone's concern of prejudice is perverse and self-serving. In reality, the only parties to be prejudiced by Crestone's requested Rule 502.b.(1) variance are the other owners in the Application Lands.

Crestone's intent appears to be a manipulation of the legal process without following the explicit procedural steps set forth in Rule 216.d. Allowing an operator to use Rule 216 to enjoin its competitors so that it may obtain control over large areas of land not only conflicts with the Commission Rules and Act, it sets a dangerous precedent across the state. An injunction is not the way to facilitate the CDP process. Crestone's Applications should be denied because they contradict the history and intent of the Commission Rules and the Act and would establish a precedent that ultimately damages the collaborative process and hinders the owners' needs to identify, discuss, and minimize potential adverse impacts to public health, safety, welfare, and the environment from oil and gas activities. If Crestone held 100% or nearly 100% of the working interest in the Application Lands, there might be some practical reason to justify the relief Crestone seeks. Crestone, however, has less than 38% of the working interest in the Application Lands and has not collaborated with the other owners of the mineral interests.

B. The Commission's jurisdictional authority does not authorize the relief sought.

To support its argument that the Commission has the authority to provide Crestone's requested relief, it cites C.R.S. § 34-60-105(1) and states: "[t]he Act expressly provides [the] Commission with jurisdiction 'over all persons and property, public and private, necessary to enforce the provisions of this article, and has the power to make and enforce rules, regulations, and orders pursuant to this article, and to do

whatever may be reasonably necessary to carry out the provisions of this article." However, reading Rule 502.b.(1) to grant an operator the unilateral right to enjoin other operators is wholly unreasonable and unnecessary to carry out the provisions of the Act. Such reading is contrary to the Act's mandate that the Commission safeguard, protect, and enforce coequal and correlative rights, as discussed above.

Further, Rule 216 expressly states that "[a]n operator's decisions to initiate and enter into a Comprehensive Drilling Plan are voluntary." Rule 216.a. (emphasis added). Here, Crestone elected to exercise its right to voluntarily initiate the CDP process—for its own benefit. Under the Rules, Crestone's choice cannot elevate its rights to pursue APDs over other operators in the lands. Another operator maintaining its right to file an APD, which none have yet, does not in any way prevent Crestone from pursuing its own CDP. Rather, the coequal rights of other operators to develop their mineral interests should encourage Crestone to collaborate with and involve other operators early on as part of the CDP process. Contrary to Rule 216's requirements, Crestone has not pursued legitimate consultation or collaboration with the other operators affected by its Applications. Additionally, given Boulder's stringent regulations, Crestone's concern that it cannot continue with its CDP unless all others, except Crestone, are enjoined from submitting APDs is a red herring. Boulder County has made it evident that approval of ADPs will be an exhaustive process. While a CDP may ultimately be the best way to proceed with development, given Boulder County's clear position on oil and gas development, there is no urgent need for the Commission to rush through approval of an unnecessary injunction. Ultimately, Crestone's Applications are a guise to elevate its rights all while continuing a *de facto* moratorium on all other operators on the Application Lands.

C. Crestone has not satisfied the elements for a preliminary injunction.

Even assuming *arguendo* that Rule 502.b.(1) allowed for preliminary injunctive relief, Crestone has not met its burden. The burden to establish the right to injunctive relief, if warranted, is high and the purpose of injunctive relief is to prevent irreparable harm prior to a decision on the merits. Crestone has not asserted, nor has it suffered, any irreparable harm that would justify the imposition of an injunction against all other owners. Crestone has not demonstrated that it can satisfy the six-part legal standard for the relief it seeks. As the moving party, Crestone has not demonstrated: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury that may be prevented by injunctive relief; (3) lack of a plain, speedy, and adequate remedy at law; (4) no disservice to the public interest; (5) a balance of the equities in favor of the injunction; and (6) the injunction's preservation of the status quo pending a trial on the merits. *See, e.g.*, *City of Golden*, 83 P.3d at 96. All six criterion must be met. *Gitlitz*, 171 P.3d at 1278.

Crestone's circumstance does not justify injunctive relief. Most significantly and contrary to the equitable considerations of injunctive relief set forth above, Crestone's request would upset, rather than preserve, the status quo, which is presently that all owners in the Application Lands enjoy the right, pursuant to Rule 303, to file APDs to

develop their mineral rights. Similarly, given the Act's mandate to protect the coequal rights of owners in the same pool, the balance of the equities favors denial of the injunction. Indeed, the public interest would actually be disserved by the Rule 502.b.(1) injunction because the Act expressly provides that "[i]t is in the public interest to . . . protect the coequal and correlative rights of owners and producers in a common source or pool of oil and gas . . . ." C.R.S. § 34-60-102(1)(a)(I), (III). Crestone's requested injunction would manifestly violate the Act by elevating Crestone's rights above others.

Crestone equally fails to meet the additional required elements of injunctive relief. Crestone makes no allegation that it lacks a plain, speedy, and adequate remedy at law nor does it allege the probability of success on the merits – that is to obtain Commission approval of its CDP at some future undetermined hearing; in fact, Crestone has not even submitted a signed and Director-approved CDP. Finally, the requested relief is unnecessary because Crestone has not shown that it will suffer irreparable harm if other owners are permitted to exercise their present right to file APDs on the Application Lands. Crestone's only allegation of harm is that if others are permitted to file APDs, there would be "potential confusion and prejudice." The possibility of harm alone is insufficient. *Board of County Com'rs, County of Eagle, State of Colo v. Fixed Base Operators, Inc.*, 939 P.2d 464, 467 (Colo. App. 1997)(" In exercising its discretion, the trial court must find that the moving party has demonstrated. . . a danger of real, immediate, and irreparable injury . . ."). By its own admission, Crestone's only alleged harm is not real, immediate, or irreparable.

Plainly, Crestone's argument does not meet any one of the six required elements of injunctive relief. For these reasons, the requested Rule 502.b.(1) variance should be denied.

CONCLUSION

There is simply no need for the injunction Crestone seeks. Given the Boulder County regulatory environment, there will be no APDs approved for the Application Lands in the foreseeable future; therefore, there is no rush to put in place, at the behest of Crestone, an illegal and unnecessary injunction on all others, save Crestone. Indeed, an injunction is contrary to the spirit of Rule 216, which is designed to encourage collaboration and negotiation among operators within the area covered by the conceptual CDP. Voluntary accords are precisely the type of collaboration that Rule 216 contemplates but Crestone has not even sought out. Should Crestone actually engage Kerr-McGee, as an owner and surface owner in the Applications Lands, in the formal stakeholder process as required under Rule 216, Crestone would find that the requested injunction is entirely unnecessary. This CDP is the first proposed in the Greater Wattenberg Area. Therefore, it is incumbent on the Commission and stakeholders to ensure the CDP is done right by following the law and the Commission Rules and ensuring that the rights of all interested parties are respected. Kerr-McGee stands ready and willing to engage, in good faith, in the Rule 216 collaborative process – Crestone just needs to extend the invitation. Amid the apparent enthusiasm for comprehensive development, the Commission must take care not to disregard the rights of other owners.

For the reasons herein, Crestone's Amended Applications for a variance, pursuant to Rule 502.b. to enjoin all other owners within the Application Lands from submitting Forms 2 and 2A pursuant to Rule 303, should be denied.

WHEREFORE, Kerr-McGee Oil & Gas Onshore LP respectfully requests that the Commission deny Crestone's Amended Applications for a Rule 502.b. variance to enjoin all other owners within the Application Lands from submitting Forms 2 and 2A pursuant to Rule 303 and award Kerr-McGee such further relief as the Commission deems just and proper.

DATED this 24th day of April, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 24, 2017, a true and correct copy of the foregoing KERR-MCGEE OIL & GAS ONSHORE LP'S PRE-HEARING BRIEF was sent by electronic mail to the following:

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