

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

IN THE MATTER OF THE)	Cause No. 535
PROMULGATION AND ESTABLISHMENT)	
OF FIELD RULES TO GOVERN)	Docket No. 180300216
OPERATIONS FOR THE NIOBRARA)	
FORMATION, UNNAMED FIELD, DENVER)	Type: SPACING
AND ADAMS COUNTIES, COLORADO.)	

AXIS EXPLORATION, LLC'S MOTION FOR LEAVE TO AMEND APPLICATION

Axis Exploration, LLC ("Axis"), by and through its attorneys, Welborn Sullivan Meck & Tooley, P.C., pursuant to Commission Rules 519 and C.R.C.P. 15(a), submits this Motion for Leave to Amend its Application at Docket No. 180300216, and in support thereof states:

CERTIFICATE OF CONFERRAL

The undersigned counsel certifies that he has conferred with counsel for the Aurora Convention Center Hotel, LLC, Aurora10 Land, LLC, and Rida High Point Land, LLC ("collectively ACCH") and is authorized to represent that ACCH opposes the relief requested herein.

A. Legal Standard

Pursuant to Commission Rule 519, where not inconsistent, the Commission Rules incorporate the Colorado Rules of Civil Procedure. COGCC Rule 519. Rule 15(a) governs the amendment of pleadings, and provides that where leave of court is required to amend a pleading, "leave shall be freely given when justice so requires." C.R.C.P. Rule 15(a). Upon a motion to amend, the trial court's discretion must be guided by the purposes of amendment, which is to ensure the just and speedy resolution of cases. *Civil Service Com'n v. Carney*, 97 P.3d 961 (Colo. 2004). Rule 15(a) explicitly reflects a liberal policy of allowing amendment, and courts are encouraged to look favorably on requests to amend. *Liscio v. Pinson*, 83 P.3d 1149 (Colo. App. 2003). In the absence of undue delay, bad faith by the movant, undue prejudice to the opposing party, or futility of the amendment, leave to amend a pleading should be freely given. *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. App. 2000).

B. Background

On January 18, 2018, Axis, formerly known as Bison Exploration, LLC, filed its application for spacing in Docket No. 180300216 (“Application”). The Application sought an order establishing a drilling and spacing unit, and approving up to sixteen horizontal wells within the unit, covering all of Section 2, all of Section 3, and the E½ of Section 4, Township 3 South, Range 66 West, 6th P.M. (the “Application Lands”). On May 25, 2018, Axis received a protest (“Protest”) to its Application from ACCH. Principally, the Protest requests that the Commission deny Axis’s Application “to avoid use of Protestants Property and its interests thereon.” See Protest, § B. ACCH’s real property interests lie in the SW¼ of Section 2 and the SE¼ of Section 3 of the Application Lands. See Protest ¶ 11; See also Protest, Exhibit A. Axis now seeks leave to amend its Application to include the W ½ of Section 4, Township 3 South, Range 66 West, 6th P.M., in which ACCH has no interest. Nevertheless, ACCH opposes the amendment to Axis’s Application. A copy of the proposed amendment is attached as Exhibit A to this motion.

C. Argument

I. *The Amendment will serve the interests of justice and ensure a just and speedy resolution of Axis’s spacing application.*

Axis seeks to amend its Application to include the W½ of Section 4, Township 3 South, Range 66 West, 6th P.M. for a drilling and spacing unit covering the following lands (“Amended Application Lands”):

Township 3 South, Range 66 West, 6th P.M.

Section 2: All

Section 3: All

Section 4: **All** ~~E½~~

If Axis is granted leave to amend its Application, then the contested issues raised in the Application and the Protest may proceed to a just and speedy resolution at the October 29-30, 2018 hearing of the Commission. But if leave to amend is denied, Axis still holds the right to file an application for the Amended Application Lands, as it is an owner within the amended unit boundary. See COGCC Rule 503.b.1. Preposterously, Axis would be forced to withdraw its Application, only to re-file a new application covering the same Amended Application Lands. However, Axis’s re-filed application could not be scheduled for hearing sooner than the December 18-19, 2018 hearing of the Commission. See COGCC Rule 506.a. Moreover, Axis’s re-filed application would also require ACCH to file a renewed protest at a date consistent with the December hearing. See COGCC Rule 509.a.(1). In effect, denial of leave to amend would completely re-set the status of these contested proceedings, resulting in unnecessary delay and a myriad

of repetitious paperwork and procedures so as to senselessly postpone their resolution, unnecessarily burden the parties, and bury the Commission staff in redundant paperwork. Therefore, to ensure the just and speedy resolution of Axis's spacing application, and to preserve the resources of the Commission staff, the Commission should grant leave to amend Axis's Application.

II. *The Amendment will cause no prejudice to ACCH.*

The chief function of a complaint is to give notice. *Bridges v. Ingraham*, 223 P.2d 1051 (Colo. 1950). Since receipt of Axis's Application, which was mailed to all parties before January 26, 2018, ACCH has been on notice that Axis seeks an order establishing a drilling and spacing unit that includes ACCH's interests in Sections 2 and 3 of the Application Lands. ACCH's position has been clear from the beginning: Axis's proposed drilling and spacing unit should be revised to avoid their minerals in the Sections 2 and 3. Axis's Application has at all times included interests owned by ACCH, and its proposed amendment, which seeks to include lands within the unit where ACCH holds no interest, will not change ACCH's position or prejudice their ability to prepare their case. Moreover, the parties have not expended significant time or resources preparing for trial on the merits of Axis's un-amended Application: no case management order has been issued, no initial prehearing conference has been held, and the parties have not filed any pre-hearing motions or filings under Rule 527. Rather, the parties stand precisely in the same position that they did nearly nine months ago, and regardless of the amendment, ACCH has sufficient time to prepare a defense in support of its requested relief.

D. Conclusion

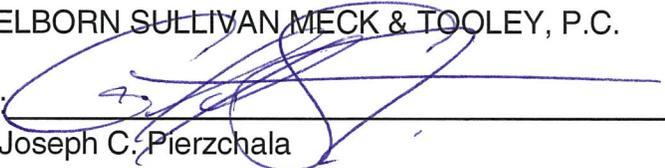
Axis's Application was originally scheduled for hearing on March 19, 2018. Since that date, it has been continued for six consecutive hearing cycles. Throughout this time period, the parties' positions are clear: Axis seeks a drilling and spacing unit that includes ACCH's interests, and ACCH objects. Denial of leave to amend the Application will only result in absurd procedural outcomes and frustrate the parties' right to a speedy resolution of the substantive issues at hand.

WHEREFORE, Axis Exploration, LLC respectfully requests that the Commission grant leave to leave to amend its Application at Docket No. 180300216, and award Axis such further relief as the Commission deems just and proper.

Dated this 19 day of September , 2018.

Respectfully submitted,

WELBORN SULLIVAN MECK & TOOLEY, P.C.

By: 

Joseph C. Pierzchala

Geoffrey W. Storm

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Applicant's Address:

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Attn: Pam Kingery, Land Advisor

Phone: 720-557-8300

CERTIFICATE OF SERVICE

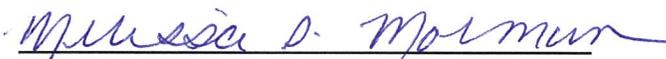
I hereby certify on this 19 day of September, 2018, I caused a true and correct copy of AXIS EXPLORATION, LLC'S MOTION FOR LEAVE TO AMEND APPLICATION to be served on:

Via electronic mail and courier

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Melissa A. Morman

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

IN THE MATTER OF THE PROMULGATION)	CAUSE NO. 535
AND ESTABLISHMENT OF FIELD RULES)	
TO GOVERN OPERATIONS FOR THE)	DOCKET NO. 180300216
NIOBRARA FORMATION, UNNAMED)	
FIELD, DENVER AND ADAMS)	TYPE: SPACING
COUNTIES, COLORADO)	

AURORA CONVENTION CENTER HOTEL, LLC, AURORA10 LAND, LLC, AND RIDA
HIGH POINT LAND, LLC'S RESPONSE IN OPPOSITION TO AXIS EXPLORATION,
LLC'S MOTION FOR LEAVE TO AMEND APPLICATION

Aurora Convention Center Hotel, LLC, Aurora10 Land, LLC, and RIDA High Point Land, LLC (collectively, "ACCH"), by and through their attorneys, Fairfield and Woods, P.C., hereby file their Response in Opposition to Axis Exploration LLC's ("Axis") Motion for Leave to Amend Application (the "Motion to Amend"), and in support state as follows:

A. Introduction and Background

Axis, formerly known Bison Exploration, LLC, filed its original Application for an Order establishing an approximate 1,600-acre drilling and spacing unit, and establishing well location rules applicable to the drilling and producing of wells from the Niobrara formation covering certain lands in Sections 2, 3, and 4, Township 3 South, Range 66 West of the 6th P.M., unnamed field, Denver and Adams Counties, Colorado (the "Original Application"), on January 18, 2018. The Original Application is currently scheduled for a hearing on October 29 and 30, 2018.

On September 19, 2018, Axis filed its Motion to Amend and proposed Amended Application (the "Amended Application"), increasing the proposed size of its drilling and spacing unit to 1,906.96 acres, through the inclusion of the entire west half of Section 4, Township 3 South, Range 66 West of the 6th P.M. (hereafter referred to as the "Property, which reference includes the property from the Original Application). While the Motion to Amend notes that ACCH have no interest in the added land, it neither discusses ACCH's rights nor concerns raised in their Protest and Intervention, nor amends the application in any way other than adding an entire half section of land.

B. Argument

As the owners of the majority of mineral rights underlying ACHH's land contained in Axis' applications, and with executive power over the remaining minerals, and other correlative rights, in a portion of Section 2, Township 3 South, Range 66 West, ACCH opposes the Original and the proposed Amended Application.

Commission Rule 519 incorporates the Colorado Rules of Civil Procedure where not inconsistent. COGCC Rule 519. Colorado Rule of Civil Procedure 15(a) permits amendment of a complaint (or, in this case, an Application) with leave of court, and provides that such leave shall be freely given. C.R.C.P. 15(a). This leave to amend is not without limits, however. *Polk v. Denver Dist. Court*, 849 P.2d 23, 25 (Colo. 1993). Factors to consider in deciding on a motion to amend pleadings include but are not limited to whether the proposed amendment is the result of undue delay, bad faith or dilatory moves on the part of the movant, repeated failures to cure deficiencies through previous amendments, undue prejudice to opposing parties, and futility of amendment. *Id.* In any motion to amend pleadings, it is the movant that bears the burden of demonstrating a lack of knowledge, mistake, inadvertence, or other reason for failing to amend the claim earlier. *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267, 273 (Colo. App. 2000).

The desire to preserve a scheduled trial date is insufficient reason to deny a motion to amend a pleading. *Polk v. Denver Dist. Court*, 849 P.2d at 26. Conversely, so should the desire to preserve a scheduled hearing date not be permitted as the reason to allow for an amended application at such a late stage.

In the instant case, the desire to preserve the scheduled hearing is actually cited by Axis as a reason to permit amendment at this late stage: if Axis' Amended Application is accepted, then the October 29 and 30 hearing may proceed. Otherwise, Axis argues, a denial of its amendment will result in its having to withdraw and re-file its application, thereby losing its current hearing date and having to reschedule at a later time—until at least December 2018. The argued prejudicial effect of this withdrawal and re-filing will be “repetitious paperwork and procedures.” The issues raised in ACCH's Protest, however—including potential trespass to ACCH's surface and subsurface property rights, protection of development rights, protection of public health, safety, and welfare, and the wholesale inadequacy of the Original Application and the Amended Application to address mitigation of potential impacts to ACCH and its resources—are issues that deserve the full attention of the Commission and interested parties, and the minor inconvenience of having to refile some paperwork should not rise above a showing by the Commission that property rights are alive and well in Colorado.

Axis' first argument in the Motion to Amend is then belied by their second: the Original Application has been pending for nine months, but cannot wait another few months so that all interested parties can examine the Amended Application, including the additional land now sought to be added by Axis? Axis' Motion to Amend has failed to adequately show why it waited until *fewer than forty-five days before the hearing* on its Original Application to add an entire half-section of land, and why such addition must happen now, as opposed to withdrawing and re-filing its application. Permitting such an amendment now, and not allowing for a proper review of the land, stakeholder, and ownership interests brought in by such an amendment, leans dangerously toward pushing through applications before their full effects are realized.

Additionally, the City of Aurora is convening stakeholder meetings, including surface developers, landowners, and oil and gas developers, to develop a collaborative long-range development plan that will harmonize the City's growth plans with oil and gas development. The delays that Axis decries as unjust and unnecessary in this matter will actually go towards resolving many of the issues raised not only by ACCH in this matter, but by interested parties in

other matters as well. Rather than push through an Amended Application, without adequate time for interested parties to review the additional land and the myriad issues that may come along with the addition, the Commission should take the more reasonable step of denying the Motion to Amend, and allow all stakeholders the opportunity to work together on these issues.

There are a number of issues underlying Axis' Original and Amended Applications that have not been properly addressed. For example, Colorado Constitution, art. II § 14 provides that private property may not be taken for private use without consent of the owner, except for private ways of necessity. *Akin v. Four Corners Encampment*, 179 P.3d 139, 142 (Colo. App. 2007). A well boring, with the result of a trespass onto the private subsurface rights of a mineral owner, does not constitute such a private way of necessity, and the Amended Application does not indicate its purpose is public in nature. *See Id.* at 145-46 (finding that condemning and securing subsurface easements to access mineral rights is only proper for a public purpose, and not a private way of necessity).

The question of unintended legal ramifications is also left unanswered at this point. For example, if mineral and land owners are forced to lease their properties to another, is that lessee entitled to notice when the surface owner desires to include the property into a metropolitan district? *See Bill Barrett Corp. v. Lembke*, Court of Appeals No. 17CA1616, 2018 COA 134 (Colo. App. September 6, 2018).

Finally, Axis' applications raise questions on the meaning of fundamental property rights in Colorado, including a property owner's right to use and the right to exclude, and the right to extract, the right to determine the time and manner of extraction of its minerals and those it has executive rights over. Common law rules relating to trespass and other torts are implicated in cases such as this, and subsurface easements are necessary in order to avoid subsurface trespasses. *See, e.g. John W. Broomes, Spinning Straw into Gold: Refining and Redefining Lease Provisions for the Realities of Resource Play Operations*, 57 Rocky Mtn. Min. L. Inst. 26-1, 26-15 (2011); *see also XTO Energy, Inc. Goodwin*, 2017 Tex. App. LEXIS 9739, *8-10 (October 18, 2017) (discussing that ownership of property includes not just surface rights, but ownership of subsurface geological structures, and noting a distinction between earth surrounding hydrocarbons and earth embedded with hydrocarbons). It is these fundamental rights that ACCH seek to protect, and that Axis fails to address in their Applications.

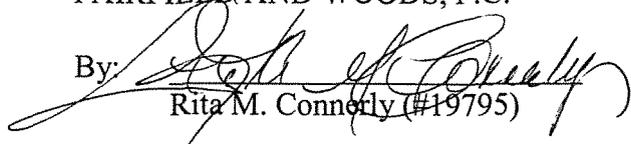
C. Conclusion

ACCH opposes Axis' Motion to Amend and its Amended Application as ill-timed and not allowing for sufficient review and input from interested and potentially interested parties. Axis is attempting to add a large swath of land to its application with the only justification being that permission to add the land now will preserve its hearing before the Commission, currently scheduled for October 29 and 30, 2018. ACCH further reaffirms and restates its objections to the Original and Amended Applications as insufficiently addressing the potential trespass to ACCH's surface and subsurface property rights, protection of development rights, protection of public health, safety, and welfare, and the wholesale inadequacy of the Original Application and the Amended Application to address mitigation of potential impacts to ACCH and its resources.

Dated this 20th day of September, 2018.

FAIRFIELD AND WOODS, P.C.

By:

A handwritten signature in black ink, appearing to read "Rita M. Connerly", written over a horizontal line.

Rita M. Connerly (#19795)

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CERTIFICATE OF SERVICE

I hereby certify on this 20th day of September, 2018, I caused a true and correct copy of the foregoing to be served on via electronic mail and courier on:

Colorado Oil and Gas Conservation Commission

ATTN: James Rouse, Michael Eden

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michael.eden@state.co.us

Joseph C. Pierzchala

Geoffrey W. Storm

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A handwritten signature in black ink, appearing to read "Andrew J. Helm", written over a horizontal line.

Andrew J. Helm

STATE OF
COLORADO

Eden - DNR, Michael <michael.eden@state.co.us>

Dkt. No. 180300216 - Motion to Amend

1 message

Eden - DNR, Michael <michael.eden@state.co.us>

Mon, Sep 24, 2018 at 9:03 AM

To: "jpierzchala@wsmtlaw.com" <jpierzchala@wsmtlaw.com>, "gstorm@wsmtlaw.com" <gstorm@wsmtlaw.com>, "Rita M. Connerly" <rconnerly@fwlaw.com>, ahelm@fwlaw.com, Melissa <mmorman@wsmtlaw.com>
Cc: James Rouse - DNR <james.rouse@state.co.us>

Axis Exploration, LLC ("Axis" or "Applicant") seeks leave to amend its application in Dkt. No. 180300216 to add additional lands to the proposed drilling and spacing unit. Specifically, the original application sought to space Sections 2 and 3, and the E/2 of Section 4, Township 3 South, Range 66 West, 6th P.M., while the amended application seeks to space all of Sections 2, 3, and 4, Township 3 South, Range 66 West, 6th P.M. Aurora Convention Center Hotel, LLC, Aurora10 Land, LLC, and RIDA High Point Land, LLC (collectively "ACCH" or "Protestant") protests Axis's application and opposes Axis's motion to amend its application.

Axis argues that permitting the amended application will help ensure the just and speedy resolution of its application. Axis asserts that denying the motion to amend would force it to withdraw its current application only to file a new application, which would cause unnecessary delay, paperwork, and procedures. Axis also argues that Protestant holds no interests in the lands Axis seeks to add to the amended application (i.e., the W/2 of Section 4, Township 3 South, Range 66 West, 6th P.M.) and that the amended application therefore does not prejudice Protestant or even change its position.

ACCH argues that the desire to preserve a scheduled hearing date should not be permitted to allow for an amended application at such a late stage. Protestant argues that the Commission should deny the requested amendment so that interested parties have the time necessary to review the additional lands and any related issues. ACCH goes on to recite several concerns it has with the original and amended application.

Rule 15(a) of the Colorado Rules of Civil Procedure provides that where leave of court is required to amend a pleading, "leave shall be freely given when justice so requires." C.R.C.P. Rule 15(a). In the absence of undue delay, bad faith by the movant, undue prejudice to the opposing party, or futility of the amendment, leave to amend a pleading should be freely given. *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. App. 2000).

Here, Protestant has failed to set forth any valid reason why the amendment should not be granted. For example, Protestant is silent on how the proposed amendment will create undue delay or will prejudice ACCH. Indeed, the thrust of Protestant's argument is that Axis's amendment should be denied so that the hearing date is further delayed and interested parties have additional time to review the amended application. This is an insufficient reason to deny a motion to amend. The Commission's rules already require Applicant to provide notice of its amended application and set forth a period of time in which interested parties may file a protest.

Accordingly, Applicant's motion to amend its application is hereby granted.

Michael Eden, JD
Hearing Officer

**COLORADO**
Oil & Gas Conservation
Commission

Department of Natural Resources

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

IN THE MATTER OF THE PROMULGATION)	CAUSE NO. 535
AND ESTABLISHMENT OF FIELD RULES)	
TO GOVERN OPERATIONS FOR THE)	DOCKET NO. 180300216
NIOBARRA FORMATION, UNNAMED)	
FIELD, DENVER AND ADAMS)	TYPE: SPACING
COUNTIES, COLORADO)	

MOTION FOR CONTINUANCE

Aurora Convention Center Hotel, LLC, Aurora10 Land, LLC, and RIDA High Point Land, LLC (collectively, “ACCH”), by and through their attorneys, Fairfield and Woods, P.C., and pursuant to Commission Rule 519 and C.R.C.P. 121 § 1-11, hereby file this Motion for Continuance, and in support state as follows:

CERTIFICATE OF CONFERRAL

Counsel for ACCH conferred with counsel for Axis Exploration (“Axis”) regarding the subject matter of this Motion. Counsel indicates that Axis is opposed to the relief requested herein.

MOTION

A. Introduction

Axis, formerly known as Bison Exploration, LLC, filed its original Application for an Order establishing an approximate 1,600-acre drilling and spacing unit, and establishing well location rules applicable to the drilling and producing of wells from the Niobrara formation covering certain lands in Sections 2, 3, and 4, Township 3 South, Range 66 West of the 6th P.M., unnamed field, Denver and Adams Counties, Colorado (the “Original Application”), on January 18, 2018. Axis requested numerous extensions and continuances regarding its Original Application, including extensions for filing of case documents such as the proposed Case Management Order. In August 2018 Counsel for ACCH sought times from Axis’ counsel to confer on the Case Management Order and other issues involved in this matter, with no response.

On September 19, 2018, Axis filed a Motion to Amend and proposed Amended Application (the “Amended Application”), increasing the proposed size of its drilling and spacing unit to 1,906.96 acres, through the inclusion of the entire west half of Section 4, Township 3 South, Range 66 West of the 6th P.M. The Hearing Officer for the Colorado Oil and Gas Conservation Commission (the “COGCC”) granted Axis’ Motion to Amend on Monday, September 24, 2018. The Amended Application is currently scheduled for a hearing on October 29 and 30, 2018.

B. Argument

Commission Rule 519 incorporates the Colorado Rules of Civil Procedure where not inconsistent. COGCC Rule 519. Colorado Rule of Civil Procedure 121 § 1-11 permits a continuance for good cause. C.R.C.P. 121 § 1-11. Factors to consider in granting or denying a continuance include whether it will result in anxiety in litigants, uncertainty for lawyers, loss or deterioration of evidence, or a waste of court resources. *Todd v. Bear Valley Village Apts.*, 980 P.2d 973, 976 (Colo. 1999).

Good cause for a continuance exists in this matter in order to fully allow interested parties and other stakeholders the time to explore and discuss all development issues in the affected areas. ACCH submits that these interested parties are in the midst of stakeholder meetings hosted by the City of Aurora, and facilitated by Matt LePore, in order to discuss compatible surface and subsurface drilling and development operations in the aerotropolis area, which lies south of Denver International Airport. In this area: Aurora and Denver have an intergovernmental agreement to collaborate on marketing and land planning; Aurora and the State are working on economic development activities within a regional tourism zone; and Aurora and Adams County have joined to create a regional transportation authority to develop a regional road network. ACCH asks that these stakeholder meetings be allowed to meaningfully continue, rather than rushing to a hearing to preemptively identify a drilling and spacing unit before collaborative discussions are concluded.

Axis has expressed no reason warranting an expedited schedule in this case, other than a desire to have an expedited schedule. The fact that Axis has requested numerous continuances since filing its Original Application, requested an extension to file its motion to Amend its Application, requested a continuance to extend the filing date for the Case Management Order, and was unable to respond to an August 20th communication from ACCH's counsel requesting times to confer on the Case Management Order evidences that the schedule is simply too tight. These delays, occasioned by Axis, should not now require an expedited schedule. If this application was of paramount importance, Axis would have filed its Amended Application and worked with ACCH much earlier to prepare a Case Management Order with a more reasonable schedule for the Commission and the Parties.

C. Conclusion

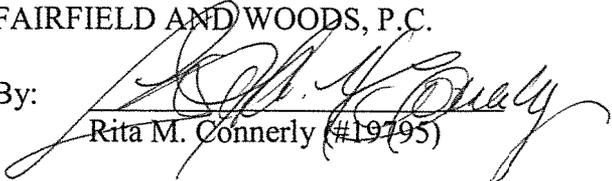
A continuance of the hearing date in this matter will not result in anxiety among the litigants, uncertainty for lawyers, loss or deterioration of evidence, or a waste of resources. Instead, a continuance will allow all stakeholders and interested parties the opportunity to fully examine and discuss what is proposed, how it fits into a greater development plan for the area, and how the parties may work together for everyone's benefit. Accordingly, good cause exists to continue the hearing in this matter to a later date.

WHEREFORE, ACCH respectfully requests the COGCC grant this Motion for Continuance, vacate the hearing currently set for October 29 and 30, 2018, and for such other and further relief as deemed just and proper.

Dated this 26th day of September, 2018.

FAIRFIELD AND WOODS, P.C.

By:

A handwritten signature in black ink, appearing to read "Rita M. Connerly", written over a horizontal line.

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Andrew J. Helm