

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3726	DATE FILED: February 14, 2019 CASE NUMBER: 2018CV30924
Plaintiff: Board of County Commissioners of Boulder County, Colorado vs. Defendant: Crestone Peak Resources Operating LLC, a Delaware Limited Liability Company	▲ COURT USE ONLY ▲
	Case Number: 18CV30924 Division: 5 Courtroom: L
<p style="text-align: center;">ORDER RE: DEFENDANT’S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) and 12(b)(5)</p>	

This MATTER comes before the Court on a *Motion to Dismiss Plaintiff’s Complaint Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5)* (“*Motion*”) filed November 19, 2018 by Defendant Crestone Peak Resources Operating L.L.C. (“Crestone”)¹. Plaintiff here is The Board of County Commissioners of Boulder County (“the County”). Having carefully considered the *Motion*, responsive pleadings, and applicable law, the Court enters the following Order:

I. BACKGROUND

This action arises out of Crestone’s proposed plan to drill 140 wells across a 10-square-mile portion of Boulder County. *Complaint* at ¶ 15, filed September 25, 2018. Crestone’s plan is currently the subject of proceedings before the Colorado Oil and Gas Conservation Commission (“COGCC”). As part of those proceedings, “Crestone has filed applications for approval of a CDP, DSUs, Form 2As, and Form 2s covering the lands subject to this action.” *Boulder County’s Response to Motion to Dismiss* at 4, filed January 9, 2019. The COGCC has not made a final

¹ Crestone withdrew its motion pursuant to C.R.C.P. 12(b)(5) regarding Plaintiff’s Claims 1, 3, 4, and 5. *Defendant’s Reply in Support of Motion to Dismiss Plaintiff’s Complaint Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5)* at 2 n.1, filed January 25, 2019. Similarly, the County appears to accept Crestone’s contention that it is “not the successor lessor of the Lewis Leases,” and therefore filed an *Unopposed Motion to Dismiss Second, Seventh, and Fourteenth Claims* on January 9, 2019. Thus, this Order only addresses the Claims 6, 8–13, and 15–27.

decision regarding any of these applications. *Motion* at 9. Even if the COGCC approves all of Crestone's applications, the plan will be further scrutinized "by the County in its land use process." *Boulder County's Response to Motion to Dismiss* at 10. The County's administrative process has yet to begin.

The County alleges that, should it come to fruition, Crestone's plan will violate several contractual provisions and conservation easements. *Complaint* at ¶ 18. Relevant to this Order, the County asserts 12 claims requesting declaratory judgments, 6 claims for anticipatory breach of contract, and two statutory claims for threat of injury under C.R.S. § 38-30.5-108(2). *Boulder County's Response to Motion to Dismiss* at 6–7.

II. STANDARD OF REVIEW

"In response to a C.R.C.P. 12(b)(1) challenge, the plaintiff has the burden of proving subject matter jurisdiction." *Associated Government of Northwest Colorado v. Colorado Public Utilities Com'n*, 275 P.3d 646, 648 (Colo. 2012). The court "should exercise jurisdiction in such actions only if the case contains a currently justiciable issue or an existing legal controversy, rather than the mere possibility of a future claim." *Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008) (internal quotations omitted).

"[T]he doctrine of ripeness ensures that an issue is real, immediate, and fit for adjudication." *Id.* While courts will not consider cases where "the injury is speculative and may never occur," they "may find a conflict is ripe . . . even in the context of uncertain future facts so long as there is no uncertainty regarding the facts relevant to the dispute[.]" *Stell v. Boulder Cty. Dep't. of Soc. Servs.*, 92 P.3d 910, 914 (Colo. 2004).

III. ANALYSIS

The County asserts that it "does not ask the Court to review the CDP process at the COGCC," but instead couches its claims in terms of a contractual dispute. *Complaint* at ¶ 17. Therefore, it argues that "the twenty ripeness challenges pertain to claims that present current, real controversies that will be resolved by a judgment from this Court regardless of any actions taken by the COGCC[.]" *Boulder County's Response to Motion to Dismiss* at 5.

That argument is not persuasive, however, because the County fails to recognize that decisions made by both the COGCC and the County during regulatory proceedings may prevent the contractual dispute from ever materializing. The uncertain outcome of multiple regulatory proceedings renders this case as one where "the injury is speculative and may never occur." Importantly, it is immaterial here *why* Crestone's plans could be rejected or modified by either administrative process. What matters is that a rejection or material modification of the plans is

entirely possible. That possibility prevents an actual legal controversy from currently existing in this case.

The following analysis explains why all three categories of claims asserted by the County are premature and therefore unripe. Because the claims are unripe, the Court need not reach the question of whether the exhaustion doctrine applies.

A. Declaratory Judgment Claims

For a declaratory judgment to be appropriate, “the controversy presented must be current rather than one that may arise at some future time.” *Burkett v. Amoco Prod. Co.*, 85 P.3d 576, 578 (Colo. App. 2003). This is because a declaratory judgment “is not appropriate ‘where the dispute requires an interpretation in light of extrinsic facts which are not yet determinable.’” *Id.* (quoting *McDonald’s Corp. v. Rocky Mountain McDonald’s, Inc.*, 590 P.2d 519, 521 (Colo. App. 1979). Further, “the decision to grant an anticipatory declaratory judgment is within the sound discretion of the trial court[.]” *Id.*

The County argues that its declaratory judgment claims² “raise present, real legal uncertainties that have immediate consequences.” *Boulder County’s Response to Motion to Dismiss* at 11. In support of its argument, the County relies heavily on *Three Bells Ranch Associates v. Cache La Poudre Water Users Ass’n.*, 758 P.2d 164 (Colo. 1988).

That reliance is misguided. The defendant in *Three Bells Ranch* already had its mining and reclamation plans approved by the State prior to litigation. *Id.* at 166. For that reason, the court rejected the defendant company’s argument that its “plans may change.” *Id.* at 169. Instead, the court stated that “we must assume that the reclamation plan will be implemented in the manner represented in the application.” *Id.* That reasoning is logical, because for the plans to change, the company would have had to, by its own accord, redesign the plan, submit the new plan to the state, and hope the state approved the plan as changed.

Here, however, it is far more likely that Crestone’s plans actually do change – and not by its own choosing. It is well within the realm of possibility that approval from either or both the COGCC and the County will require material changes to the plan. Again, it is also possible that the plans are rejected entirely. For these reasons, *Three Bells Ranch* is not on point.

Rather, this case is more like *Burkett*. That case involved a dispute between the surface owner and the oil and gas company regarding the exact placement of wells, roads, and pipelines. 85 P.3d at 579. But because the defendant company in that case had not even filed for drilling

² Claims 13, 15–19, and 22–27.

approval with the COGCC, the court held that a declaratory judgment would be inappropriate. *Id.* at 579. While Crestone has already made its filings with the COGCC, *Burkett* is clear that “until [defendant] actually obtains the permit and the local approvals required before drilling can begin, there is no present conflict between the parties.” *Id.* As applied here, there is no conflict between the parties unless and until Crestone actual obtains the proper permits from the COGCC and approval from the County in its own administrative proceeding.

B. Anticipatory Breach of Contract Claims

An anticipatory breach of contract occurs when one party “manifests a definite and unequivocal intent that it will not perform as required by the contract.” *Technics, L.L.C. v. Acoustic Marketing Research, Inc.*, 179 P.3d 123, 126 (Colo. App. 2007). This requires “a present, positive, unequivocal refusal to perform the contract, not a mere threat to abandon its obligations under the contract.” *Lake Durango Water Co., Inc. v. Public Utilities Comm’n of Colorado*, 67 P.3d 12, 21 (Colo. 2003).

The County argues that its anticipatory breach claims³ are “not subject to ripeness disputes.” *Boulder County’s Response to Motion to Dismiss* at 13. However, it admits that a successful claim for anticipatory breach requires a “definite and unequivocal manifestation that a party will not perform as required by a contract.” *Id.* (internal quotations omitted).

Here, there are multiple regulatory processes that have yet to play out. The County’s process has not even been initiated. This makes it impossible for a “definite and unequivocal manifestation” that Crestone will breach any contract. The regulatory processes may severely limit or even outright deny Crestone’s plan. It is entirely possible that the plan will change in a manner that is material to this litigation.

C. Claims under C.R.S. § 38-30.5-108(2)

The County further argues that its statutory claims⁴ regarding conservation easements is appropriate here. Because the statute offers relief “whether that injury is ‘actual or threatened,’” it claims that judicial intervention is appropriate “before actual harm has occurred to conservation values on a protected parcel of land.” *Boulder County’s Response to Motion to Dismiss* at 15.

The County’s argument in that regard may well be true, but it is not relevant to the current issue. The problem the County has here is that, again, no “threat” is certain. Should

³ Claims 6, 8–12.

⁴ Claims 20–21.

Crestone's plans be rejected or materially modified by either the COGCC or the County, the "threat" may never materialize. For that reason, the County's statutory claims are premature.

V. CONCLUSION

In accordance with the foregoing analysis, Defendant's Motion to Dismiss Pursuant to 12(b)(1) and 12(b)(5) is GRANTED IN PART. Plaintiff's Claims 6, 8-13, and 15-27 are hereby DISMISSED WITHOUT PREJUDICE.

SO ORDERED this 14th day of February, 2019.

BY THE COURT



**Thomas F. Mulvahill
District Court Judge**