APPENDIX

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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELNA SEFCOVIC, LLC; WHITE RIVER ROYALTIES, LLC; JUHAN, LP; ROY ROYALTY, INC., individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

TEP ROCKY MOUNTAIN, LLC,

Defendant - Appellee.

CHARLES DEAN GONZALES; SUSANNAH GONZALES; TED L. VAUGHAN; HILDA VAUGHAN,

Objectors,

IVO LINDAUER; SIDNEY LINDAUER; RUTH LINDAUER; DIAMOND MINERALS,

Intervenors - Appellants,

and

THE LAW OFFICES OF GEORGE A. BARTON, PC,

Movant - Appellee.

No. 19-1121

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:17-CV-01990-MEH)

David G. Seely, Fleeson, Gooing, Coulson & Kitch, L.L.C., Wichita, Kansas (Thomas D. Kitch, Gregory J. Stucky, Ryan K. Meyer, Fleeson, Gooing, Coulson & Kitch, L.L.C., Wichita, Kansas; George Robert Miller, G. R. Miller, P.C., Durango, Colorado; and Nathan A. Keever, Dufford, Waldeck, Milburn & Krohn, LLP, Grand Junction, Colorado, with him on the briefs) for Intervenors−Appellants.

Christopher A. Chrisman, Holland & Hart LLP, Denver, Colorado (John F. Shepherd, P.C., Holland & Hart LLP, Denver, Colorado; George A. Barton and Stacy A. Burrows, Law Offices of George A. Barton, P.C., Overland Park, Kansas, with him on the brief), for Appellees.

Before **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

McHUGH, Circuit Judge.

This appeal arises out of a class action contract dispute. Appellants intervened in the district court, seeking to dismiss the action for lack of federal subject matter jurisdiction. Through two separate motions to dismiss, the briefing from both parties confused the bounds of federal subject matter jurisdiction and conflated that concept with the doctrines of abstention and comity, and with matters of venue and forum. Despite this misdirection, the district court properly exercised jurisdiction and rebuffed appellants' attempts to unwind nearly eighteen months of class action litigation. We affirm.

I. BACKGROUND

Appellee-defendant TEP Rocky Mountain, LLC ("TEP") operates wells that produce natural gas in Colorado. These wells are subject to various leases or royalty

agreements under which the owners of such instruments receive a share of profits from the sale of natural gas.

Appellant-intervenors Ivo Lindauer, Sidney Lindauer, Ruther Lindauer, and Diamond Minerals LLC (the "Lindauers" or the "Intervenors"), are the representatives for a class of royalty owners who filed suit in 2006 in Colorado state court (the "*Lindauer* class" or "*Lindauer* litigation"), alleging that TEP had underpaid royalties on various leases and royalty agreements. In 2008, TEP and the *Lindauer* class entered into a settlement agreement (the "*Lindauer* SA") purporting to "resolve all class claims relating to past calculation of royalt[ies]" and to "establish certain rules to govern future royalty" payments. App. at 411.

The *Lindauer* SA declared that the state court would retain "continuing jurisdiction" to enforce provisions of the settlement related to "the description of past and future royalty methodologies." App. at 427–28. The state court also issued a judgment (the "stipulated judgment" or "consent decree") certifying the class and approving the *Lindauer* SA. This stipulated judgment concluded that the *Lindauer* SA was "fair, adequate and reasonable" and stated that the parties "shall take any and all steps necessary to implement the [*Lindauer* SA] according to its terms and the terms of [the stipulated judgment]." App. at 447, 448. Finally, the stipulated judgment included the following provision:

> Without affecting the finality of this Final Judgment in any way, this Court shall retain continuing jurisdiction of this action to address any issues concerning implementation of the Settlement Agreement and enforcing this Final Judgment.

App. at 449.

Approximately eight years passed, seemingly free of incident. But on July 18, 2017, a subset of the *Lindauer* class (the "*Sefcovic* class")[1] initiated this action against TEP in Colorado state court, alleging that TEP had calculated and paid royalties in a manner inconsistent with the *Lindauer* SA and contrary to the underlying royalty agreements. TEP removed the case to federal court on August 17, 2017. The parties engaged in discovery and ultimately reached a proposed class settlement. One year later, on August 16, 2018, the district court[2] issued an order preliminarily approving the settlement and permitting the notice to be mailed to the *Sefcovic* class members.

Less than a month later, on September 14, 2018, the Lindauers filed a "Motion to Enforce Court Order and Settlement Agreement" in Garfield County District Court—the Colorado state court that had entered the stipulated judgment in the *Lindauer* litigation. That motion made no mention of the federal action alleging breaches of the *Lindauer* SA—initiated fourteen months prior and having reached preliminary approval of a class settlement agreement. The state court initially ordered TEP to show cause why it should not be held in contempt for breaching the terms of

[1] The *Sefcovic* class is composed of parties to the *Lindauer* SA with leases and royalty agreements falling into four of thirteen categories created in the *Lindauer* litigation.

[2] The *Sefcovic* class and TEP consented to the Magistrate Judge presiding over this matter. We therefore refer to the Magistrate Judge's orders as those of the district court.

the *Lindauer* SA but subsequently stayed the proceedings to "await [the federal district court's] ruling on pending motions." App. at 1039–40.

On September 28, 2018, the Lindauers filed a motion to intervene in the federal district court proceeding. Before the district court ruled on the motion to intervene, the Lindauers filed a motion to dismiss, arguing the court lacked subject matter jurisdiction based on the stipulated judgment's clause retaining "continuing jurisdiction" in the state court. The district court then "dismissed [the action] without prejudice based on [its] independent assessment of subject matter jurisdiction" and largely because of the state court's retention of jurisdiction over the *Lindauer* SA. App. at 1052. It therefore dismissed the Lindauers' motion to intervene as moot and vacated the fairness hearing on the proposed *Sefcovic* SA. App. at 1052–53.

TEP filed a motion to reconsider, arguing the district court's jurisdiction was proper despite the state court's retention of jurisdiction. The Lindauers filed a renewed motion to intervene, which the district court granted, and a renewed motion to dismiss, arguing again that the district court lacked subject matter jurisdiction and/or should have abstained from presiding over the case under *Younger* or *Colorado River* abstention.

The district court granted TEP's motion to reconsider and reinstated the case on January 23, 2019. In doing so, the district court clarified that in its original order it believed "dismissal would be appropriate here under principles of comity and wise judicial administration . . . akin to the doctrine set forth in *Colorado River*." App. at 1084. The court explained that

> (1) courts are authorized to retain jurisdiction over settlement agreements, and (2) when a court has done so, and that jurisdiction is explicitly (or implicitly under the totality of circumstances) exclusive, then (3) the doctrine of comity permits a court, even in the presence of subject matter jurisdiction, to defer to the settlement court in cases requiring the interpretation and enforcement of the settlement agreement.

App. at 1086 (footnote omitted). But because this doctrine is non-jurisdictional and thus "not an absolute obligation," the district court determined that dismissal was inappropriate for a variety of reasons, including that Intervenors were aware of this litigation but opted to intervene only after preliminary approval of the settlement agreement. App. at 1086.

The district court subsequently approved the *Sefcovic* SA,[3] and Intervenors timely appealed the district court's determination that it possessed subject matter jurisdiction.

II. DISCUSSION

In seeking dismissal of this action below, Intervenors relied primarily on two similar provisions appearing in the *Lindauer* SA and the stipulated judgment adopted by the state court. Those provisions declare that the state court retains "continuing jurisdiction" to enforce the *Lindauer* SA and the stipulated judgment. Intervenors argued below, and they maintain on appeal, that those provisions vest "exclusive jurisdiction over the parties and subject matter" in the state court. Aplt. Br. at 17.

[3] The district court approved the *Sefcovic* SA over the objections of several class members. Those objections form the basis of a separate appeal (Case No. 19-1120) heard by the same panel and resolved by a separate Order and Judgment issued concurrently with this Opinion.

Because many of their arguments rest in whole or in part on Intervenors' erroneous assertion that the district court was without subject matter jurisdiction, we begin with a discussion of subject matter jurisdiction. We then proceed to distinguish that concept from doctrines of abstention and matters of venue and forum, and conclude by applying these concepts to this appeal.

A. Subject Matter Jurisdiction

"Subject matter jurisdiction defines the court's authority to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)). "*Only Congress* may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (emphasis added) (citing U.S. Const. Art. III, § 1). Thus, the scope of a federal court's subject matter jurisdiction is governed exclusively by acts of Congress.[4] And when Congress grants subject matter jurisdiction, no other entity—not the litigants and not the states—can divest a federal court of the same.[5] *See*

[4] Congress, in turn, is constrained in the types of matters it can authorize the federal courts to adjudicate by Section 2 of Article III of the Constitution.

[5] Nor can a state court achieve the same result by enjoining federal proceedings. *See Donovan v. City of Dallas*, 377 U.S. 408, 412–13 (1964) ("While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions . . . ." (footnotes omitted)). One practical exception exists when parallel state and federal "suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation." *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939). Because only one tribunal can exercise control over the subject property, the rule, "applicable to both federal and state courts," is that "the court first

Marshall v. Marshall, 547 U.S. 293, 313 (2006) ("Jurisdiction is determined 'by the law of the court's creation and cannot be defeated by the extraterritorial operation of a [state] statute . . . , even though it created the right of action.'" (alterations in original) (quoting *Tenn. Coal, Iron, & R.R. Co. v. George*, 233 U.S. 354, 360 (1914))); *Ry. Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 286 (1871) ("Whenever a general rule as to property or personal rights . . . is established by State legislation . . . the jurisdiction of the [federal] court in such a case is not subject to State limitation."); *Odom v. Penske Truck Leasing Co., L.P.*, 893 F.3d 739, 742 (10th Cir. 2018) ("Congress alone defines the lower federal courts' subject-matter jurisdiction.").[6]

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assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other." *Id.* Both this action and the *Lindauer* action were brought in personam.

[6] *See also VanDesande v. United States*, 673 F.3d 1342, 1350 (Fed. Cir. 2012) (citing "the well-established rule that neither a court nor the parties has the power to alter a federal court's statutory grant of subject matter jurisdiction"); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982) ("[S]tate law may not control or limit the diversity jurisdiction of the federal courts. The district court's diversity jurisdiction is a creature of federal law under Article III and 28 U.S.C. § 1332(a). Pursuant to the supremacy clause, [§] 1332(a) preempts any contrary state law."); *Markham v. City of Newport News*, 292 F.2d 711, 716 (4th Cir. 1961) ("[A] court, in determining its own jurisdiction, must look to the constitution and laws of the sovereignty which created it. The laws of a state cannot enlarge or restrict the jurisdiction of the federal courts or those of any other state."); *McGarry v. Lentz*, 13 F.2d 51, 52 (6th Cir. 1926) ("Obviously, no state Legislative can regulate, limit, or control the jurisdiction of the federal courts, nor can the laws of any state preclude resort to the federal courts, nor confer exclusive jurisdiction upon a designated state court, in a class of cases of which the federal courts of equity have theretofore been accustomed to assume jurisdiction.").

That many of Congress's statutory grants of subject matter jurisdiction operate to create concurrent jurisdiction between state and federal courts is of no significance, at least so far as subject matter jurisdiction is concerned. Indeed, the Supreme Court "has repeatedly held that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)); *see also Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964) ("[W]here the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." (quoting *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939))).

B. Abstention

Nevertheless, the Supreme Court has counseled that a district court may, and sometimes must, abstain from hearing a matter that otherwise finds a statutory basis for subject matter jurisdiction. *See Exxon Mobil*, 544 U.S. at 292 ("Comity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation."). But when cases present circumstances implicating these doctrines, no question is raised as to the court's subject matter jurisdiction.[7] Rather, when a federal court may or

[7] In its first order dismissing the case for lack of subject matter jurisdiction, the district court indicated its belief that the Supreme Court and this court "routinely"

must abstain from exercising its unquestioned subject matter jurisdiction over a dispute, it does so pursuant to a power derived from the "historic discretion exercised by federal courts 'sitting in equity.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996).[8] But because of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," the Supreme Court has repeatedly cautioned that "[a]bstention from the exercise of federal jurisdiction is the exception, not the

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find that a district court "lacks" subject matter jurisdiction when *Younger* abstention applies. App. at 1044. Although the mandatory nature of *Younger* abstention is concededly confusing in this respect, we have taken care to clarify—in a case cited by the district court—that "*Younger* is a doctrine of abstention [that] . . . differs from a case in which the district court is barred at the outset from exercising its jurisdiction." *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1230 n.8 (10th Cir. 2013).

For the proposition that the Supreme Court uses jurisdiction interchangeably with abstention, the district court also cited to *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). But *Exxon Mobil* was not decided on abstention. Rather, *Exxon Mobil* involved the *Rooker-Feldman* doctrine, a principle that gives effect to the fact that Congress has authorized only the Supreme Court to exercise appellate review of state court judgments. *See Exxon Mobil*, 544 U.S. at 291 ("*Rooker* and *Feldman* exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority . . . ."). By enacting 28 U.S.C. § 1257, Congress placed a limitation on the subject matter jurisdiction of the lower federal courts to review state court judgments. Thus, when a federal action presents *Rooker-Feldman* circumstances, a district court is in fact without subject matter jurisdiction to adjudicate it.

[8] Due to this equitable origin, a federal court has "the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996). In an action for money damages that otherwise implicates the concerns underlying a particular abstention doctrine, a district court may do no more than stay the federal litigation while it awaits the state court's resolution of the state proceeding. *See id.* at 730–31.

rule." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976).

C. Private Agreements Preselecting Particular Fora or Venue

Finally, when a case finds subject matter jurisdiction and further does not implicate interests underlying the abstention doctrines, a federal district court may yet be required to give effect to the parties' prior agreement that any disputes between them be litigated in a particular venue or forum. An agreement of this sort has absolutely no bearing on a federal court's subject matter jurisdiction. Rather, when parties select in advance the exclusive venue and/or forum for the resolution of future disputes, and one party timely seeks enforcement of that agreement, federal courts give effect to these provisions through a transfer of venue (when the provision points to a different federal forum) or dismissal without prejudice under the doctrine of *forum non conveniens* (when the provision identifies a state or foreign forum).[9] *See Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 59–60 (2013).

[9] Appellees incorrectly suggest that the doctrine of *forum non conveniens* is limited to circumstances involving foreign courts or law. In support, appellees rely exclusively on cases that do not involve a purported forum selection clause. But Intervenors invoke *forum non conveniens* as a mechanism to enforce what they believe amounts to a forum selection clause—"the appropriate way to enforce a forum-selection clause pointing to a state . . . forum." *See Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 60 (2013). When used for this purpose, the *forum non conveniens* analysis relied on by appellees is "adjust[ed]" in significant respects, and the forum selection clause is "given controlling weight in all but the most exceptional cases." *Id.* at 63 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

D. Application

It is beyond reasoned dispute that the district court possessed subject matter jurisdiction in this case—Congress clearly authorized the district court to adjudicate this matter when it enacted the Class Action Fairness Act, 28 U.S.C. § 1332(d).[10] And, as the above principles dictate, the Colorado state court—no matter the language in the stipulated judgment approving the *Lindauer* SA—could not divest the federal district court of subject matter jurisdiction. Thus, contrary to the apparent misperceptions of both parties, the state and federal courts enjoy concurrent jurisdiction over this matter. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1557 (2017) (explaining that concurrent jurisdiction is a well-known term of art long employed by Congress and the courts to refer to subject matter jurisdiction); *id.* at 1553 (distinguishing venue provision of Federal Employers' Liability Act (FELA) from jurisdiction provision, and holding that the state and federal courts have concurrent jurisdiction over FELA claims).

Accordingly, the only inquiries remaining in this appeal are (1) whether the district court, pursuant to a doctrine of abstention or comity, should have stayed or dismissed this action in favor of the state court litigation, and (2) whether the district

[10] Intervenors do not dispute that this case meets the requirements of § 1332(d). But for the first time at any stage of this litigation, Intervenors assert in their reply brief that removal was untimely because TEP did not remove the *Lindauer* litigation to federal court in 2006, implicitly suggesting that TEP's failure to remove the *Lindauer* litigation precludes their removal of this action. This argument is waived, but even if it were not it would fail because this case and the *Lindauer* action are separate and distinct, and TEP was not barred from removing this case because it declined to remove *Lindauer*.

court abused its discretion in denying Intervenors' motion to dismiss based on *forum non conveniens*. We consider each question in turn.

1. *Younger* Abstention

The Intervenors urged the district court to abstain pursuant to the doctrines announced in *Younger v. Harris*, 401 U.S. 37 (1971), and *Colorado River*, 424 U.S. 800. On appeal, perhaps recognizing the broad discretion accorded a district court in deciding whether to abstain under *Colorado River*, the Intervenors abandon any reliance on that doctrine in favor of their argument that the district court was required to abstain under *Younger*. "We review de novo the district court's decision on whether to abstain under *Younger*." *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1221 (10th Cir. 2018).

Younger provides that a federal court must abstain from deciding a case otherwise within the scope of its jurisdiction in "certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). It applies to three categories of state cases: (1) "state criminal prosecutions," (2) "civil enforcement proceedings," and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 73 (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367–68 (1989)). Only "exceptional" circumstances merit *Younger* abstention, however, and in the ordinary case, the default rule applies: that "[T]he pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the

Federal court having jurisdiction." *Id.* (alterations in original) (quoting *Colorado River*, 424 U.S. at 817).

Category one—state criminal prosecutions—clearly does not apply to the state civil case. Nor does category two; the Supreme Court clarified in *Sprint Communications* that *Younger* extends to civil enforcement proceedings that are "akin to criminal prosecution." *Sprint Commc'ns*, 571 U.S. at 79 ("Our decisions applying *Younger* to instances of civil enforcement have generally concerned state proceedings 'akin to a criminal prosecution' in 'important respects.' Such enforcement actions are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act." (citations omitted) (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975))).

That leaves category three: "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 73. Before turning to the Intervenors' arguments in support of *Younger* abstention under this category, we first review cases exhibiting this class's paradigm characteristics. "The prototypical examples of situations falling within this third category are *Juidice v. Vail*, 430 U.S. 327 (1977), and *Pennzoil [Co. v. Texaco Inc.*, 481 U.S. 1 (1987)]." *Aaron v. O'Connor*, 914 F.3d 1010, 1016 (6th Cir. 2019).

In *Juidice*, a state court entered a default judgment against Vail, who failed to satisfy the judgment and later failed to appear at a hearing to "show cause why he should not be punished for contempt." 430 U.S. at 329. Juidice, a state court judge, entered orders holding Vail in contempt and ordering his arrest. *Id.* at 330. Vail and a

group of coplaintiffs also subject to state contempt proceedings brought suit in federal district court "to enjoin . . . the use of the statutory contempt procedures authorized by New York law and employed by [Juidice and other state court judges]." *Id.* The federal district court "permanently enjoin[ed] the operation of [those procedures]." *Id.* at 331.

The Supreme Court held that the federal district court should have abstained under *Younger* based on the "State's interest in the contempt process, through which it vindicates the regular operation of its judicial system" and because "federal-court interference with the State's contempt process" would be "'an offense . . . likely to be every bit as great as it would be were this a criminal proceeding.'" *Id.* at 335, 336 (quoting *Huffman*, 420 U.S. at 604). "The contempt power lies at the core of the administration of a State's judicial system," the Court explained, *id.* at 335, and interference with this process would both disrupt "the legitimate activities of the Stat[e]" and could be interpreted as "reflecting negatively upon the state courts' ability to enforce constitutional principles," *id.* at 336 (alteration in original) (first quoting *Younger*, 401 U.S. at 44; then quoting *Huffman*, 420 U.S. at 604).

In *Pennzoil*, after receiving an adverse $11 billion judgment in Texas state court, Texaco filed an action in federal district court "alleg[ing] that the Texas proceedings violated rights secured to Texaco by the Constitution and various federal statutes." *Pennzoil Co.*, 481 U.S. at 6. The district court determined Texaco had a "clear probability of success" and accordingly issued a preliminary injunction barring Pennzoil from attempting to collect its judgment through state court enforcement

processes. *Id.* at 8. "The principal issue," the Court explained, was "whether a federal district court lawfully may enjoin a plaintiff" who prevailed in state trial court "from executing the judgment in its favor." *Id.* at 3.

The Supreme Court held that the reasoning of *Juidice* required the district court to abstain under *Younger*. *Id.* at 13.

> Both *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained.

Id. at 13–14 (footnote omitted).

Thus, both *Juidice* and *Pennzoil* involved requests to directly or indirectly thwart state court compliance processes. *See Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1272 (10th Cir. 2002) ("*Younger* governs whenever the requested relief would interfere with the state court's ability to conduct proceedings, regardless of whether the relief targets the conduct of a proceeding directly."); *see also Zeeco, Inc. v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 17-CV-384-JED-FHM, 2017 WL 6539504, at *2 (N.D. Okla. Dec. 21, 2017) (unpublished) ("What *Younger*, *Juidice*, and *Pennzoil* have in common is that they all involved plaintiffs filing separate federal suits in an attempt to enjoin ongoing state proceedings.").

Here, there is no such interference. After the district court preliminarily approved the *Sefcovic* SA,[11] Intervenors moved in state court for an order requiring

[11] As the district court noted, counsel for the Intervenors admitted "that, although he was aware of this lawsuit within months of its filing, he decided to

TEP to "show cause why it should not be held in contempt of the [*Lindauer* SA]." App. at 705. Intervenors argue that because this motion could eventually result in "contempt proceedings under" Colorado law, the district court should have abstained pursuant to the third *Younger* category. Aplt. Reply Br. at 21. In so arguing, Intervenors suggest that the mere presence of contempt proceedings in state court required the district court to abstain under *Younger*.

But *Younger* does not mechanically require abstention whenever a state court conducts contempt proceedings in a related matter. Rather, as the above cases show, the "exceptional circumstances" requiring abstention under *Younger*'s third category are present only when the relief requested from the federal court would enjoin or otherwise interfere with such proceedings. *See Columbian Fin. Corp. v. Stork,* 811 F.3d 390, 393 (10th Cir. 2016) ("*Younger* requires federal courts to refrain from ruling when it could interfere with ongoing state proceedings."); *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (stating

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monitor what the outcome of the case would be, in order to determine what action would be [in] his clients' best interest." App. at 1088. After preliminary approval of the settlement agreement in this action, Intervenors first initiated contempt proceedings in state court, omitting any reference to the federal litigation in their motion for an order to show cause. In this regard, this case presents the opposite of the paradigmatic *Younger* scenario in which a litigant requests injunctive relief from a federal court to thwart the consequences of its loss in state court.

We hasten to add that TEP is not blameless with respect to litigation gamesmanship. Upon removal, TEP did not apprise the federal district court that the *Lindauer* SA was approved by a stipulated judgment that contained at least some indication the state court contemplated a continuing role in the settlement's enforcement.

Younger abstention is only appropriate if "the federal action would have the practical effect of enjoining the state proceedings").

To be sure, *Juidice* tells us that contempt proceedings are "uniquely in furtherance of the state courts' ability to perform their judicial functions." *See Sprint Commc'ns*, 571 U.S. at 78. But Intervenors have not articulated, and we cannot discern, any argument that the relief requested from the district court—approval of the class settlement agreement—operates to enjoin or in any way interfere with the state court's ability to pursue contempt proceedings against TEP. Indeed, when pressed at oral argument, counsel for the Intervenors conceded that the "the federal court d[id not do] anything to enjoin the state court from proceeding with [the contempt] motion." Oral Argument at 15:01–15:16. Nevertheless, counsel argued that *Younger* abstention applied because the federal court "exercised jurisdiction over the subject matter and entered an order that amended—effectively amended—the *Lindauer* settlement agreement." *Id.* Although this assertion may raise concerns relevant to the district court's permissive decision to defer to the state court's concurrent jurisdiction, it is insufficient to mandate *Younger* abstention. Stated simply, the "exceptional circumstances" requiring a court to abstain from exercising its subject matter jurisdiction are not present every time a federal court is asked to approve a private settlement agreement that resolves uncertainty flowing from an earlier settlement agreement resolving state court litigation. *See Sprint Commc'ns*, 571 U.S. at 78 ("[O]nly exceptional circumstances . . . justify a federal court's refusal to decide a case in deference to the States." (first alteration in original) (quoting *New*

Orleans Pub. Serv., Inc., 491 U.S. at 368)). Because Intervenors have not established that the district court's orders interfered with a civil proceeding "uniquely in furtherance of the state courts' ability to perform their judicial functions," the district court properly found that *Younger* abstention did not apply. *See id*.

2. *Forum Non Conveniens*

Finally, Intervenors suggest the district court should have dismissed this action under the doctrine of *forum non conveniens* because the *Lindauer* SA and/or its companion stipulated judgment embodied the parties' agreement to litigate their disputes exclusively in state court. We first review whether the *Lindauer* SA contains an exclusive forum selection provision[12] before analyzing the effect of similar language in the state court's stipulated judgment.

The *Lindauer* SA provides that the state court possesses "continuing jurisdiction" to enforce provisions of the settlement related to "the description of past and future royalty methodologies." App. at 427–28. Under settled Colorado and Tenth Circuit law,[13] this language does not create a mandatory forum selection clause.

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[12] We review the interpretation of a forum selection clause de novo, but review for abuse of discretion a district court's resolution of a motion to dismiss on *forum non conveniens* grounds. *Kelvion, Inc. v. PetroChina Can. Ltd.*, 918 F.3d 1088, 1092 (10th Cir. 2019).

[13] Because the *Lindauer* SA contains a choice-of-law provision declaring that Colorado law govern its interpretation, we apply Colorado law to interpret the forum selection provision. *See Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006) (giving effect to a choice-of-law provision in a contract for the purpose of interpreting its forum selection clause). But we cite to Tenth Circuit cases where

We have stated the general rule in interpreting forum selection clauses as follows:

> where venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.

K & V Sci. Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 314 F.3d 494, 499 (alterations in original) (quoting *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992)). Thus, our principal inquiry is whether the parties intended venue in the state court to be permissive or mandatory. *See Vanderbeek v. Vernon Corp.*, 25 P.3d 1242, 1247 (Colo. App. 2000), *aff'd*, 50 P.3d 866 (Colo. 2002) ("Contract language mandating suit in a different forum requires dismissal whereas language merely permitting suit in such forum does not."); *K & V Sci. Co.*, 314 F.3d at 498 ("This court and others have frequently classified forum selection clauses as either mandatory or permissive." (internal quotation marks omitted)).

To find indicia of exclusivity, Colorado courts do not require any specific incantation. *See Vanderbeek*, 25 P.3d at 1248 ("No specific language is required for a provision to be mandatory. The clause need only contain clear language showing that

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relevant because "there are no material discrepancies between Colorado law" and federal law with regard to the validity and interpretation of forum selection clauses. *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 320 (10th Cir. 1997); *see Vanderbeek v. Vernon Corp.*, 25 P.3d 1242, 1247 (Colo. App. 2000), *aff'd*, 50 P.3d 866 (Colo. 2002) (citing to both Tenth Circuit and Colorado case law).

the appropriate forum consists of that which has been designated."). For example, in *Vanderbeek*, the court considered a forum selection clause stating, "The Partners hereby expressly agree to submit any dispute or action arising between the Partners . . . to the jurisdiction of the state or federal courts found within the State of Delaware [or various other specified forums]." *Id.* at 1247. Although the clause did not include the words "shall," "exclusive," or "only," the court concluded that "the language reflects an effort of all of the partners to agree to the most convenient, reasonable, and mutually agreeable place for any lawsuit which may arise between or among them." *Id.* at 1247–48.

The putative forum selection clause in the *Lindauer* SA falls squarely outside the general rule. Although the provision specifies that the state court have "continuing jurisdiction" to enforce a portion of the *Lindauer* SA, it neither requires that "all" actions be brought there, nor places any restriction on the parties' ability to bring suit elsewhere. *See id.* at 1248 ("[P]ermissive forum selection clauses *authorize* suit in the designated forum, but do not *prohibit* litigation elsewhere." (emphasis added)). In short, the lack of any language suggesting exclusivity confirms that the parties bargained for a permissive, but not mandatory, forum selection clause.

But Intervenors argue for a different result because they sought enforcement not only of a forum selection provision in a private agreement, but also of a similar provision in the state court's judgment approving the *Lindauer* SA. That state court judgment—which, the parties agree, amounts to a stipulated judgment or consent decree—declares that "this Court shall retain continuing jurisdiction of this action to

address any issues concerning implementation of the Settlement Agreement and enforcing this Final Judgment." App. at 449. Intervenors urge that the two provisions be read *in pari materia*, apparently arguing that language insufficient to establish an exclusive forum selection clause in a private agreement does precisely that when adopted by a court as part of a consent decree. We disagree.

The Supreme Court has explained that "[c]onsent decrees and orders have attributes both of contracts and of judicial decrees." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). "Because of this dual character, consent decrees are treated as contracts for some purposes but not for others." *Id.* For enforcement purposes, however, the Court has directed that "a consent decree or order is to be construed . . . basically as a contract." *Id.* at 238. And by asking the district court to dismiss the action under *forum non conveniens* based on the consent decree, Intervenors undeniably sought "enforcement" of the jurisdiction-retention provision.

Our conclusion that the retention of jurisdiction provision be interpreted like an ordinary contract is bolstered by the fact that the state court merely adopted a proposed judgment jointly drafted by the parties and submitted alongside the settlement agreement. Indeed, the Intervenors relied on this fact below in urging the district court to find indicia of exclusivity and to hold the parties to their agreement:

> The parties reinforced the mandatory nature of their agreement that the Garfield County District Court would have jurisdiction over the *Lindauer* Settlement Agreement by attaching to that agreement the proposed form of judgment, in which the Garfield County District Court expressly retained

> jurisdiction. The court ultimately adopted that [proposed] form of judgment and retained jurisdiction.

App. at 522 n.3 (record citations omitted). Thus, by the Intervenors' own admission, the *parties* bargained for and drafted both provisions. We therefore see no reason to deviate from a contractual inquiry focusing on whether the parties intended that the provision be permissive or mandatory. And this conclusion is dispositive because, as with the provision in the *Lindauer* SA, the provision in the stipulated judgment contains no indication that the parties intended to bind themselves to litigate exclusively in the state court as required by Colorado law.

In summary, because neither the forum selection clause in the *Lindauer* SA nor the related language in the stipulated judgment is mandatory, the district court did not abuse its discretion in declining to dismiss this case under the doctrine of *forum non conveniens*.

III. CONCLUSION

For the reasons articulated, the district court properly determined that it possessed subject matter jurisdiction over this action, correctly declined to abstain under *Younger*, and rightly found "no indication that the parties contemplated [the state court] to [be] the exclusive forum" in which to litigate their contractual disputes. App. at 1089. The judgment is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01990-MEH

ELNA SEFCOVIC, LLC,
JUHAN, LP, and
ROY ROYALTY, INC., individually and on behalf of all others similarly situated,

Plaintiffs/Counter Defendants,

v.

TEP ROCKY MOUNTAIN, LLC,

Defendant/Counterclaimant.

ORDER

Michael E. Hegarty, United States Magistrate Judge.

This case proceeded without incident for over fourteen months and is set for a final fairness hearing on November 20, 2018. Recently, however, this Court's subject matter jurisdiction was challenged based on the interplay of two separate class actions: (1) a state court class action in Garfield County District Court, Colorado, which was filed by Ivo Lindauer, Sidney and Ruth Lindauer, and Diamond Minerals, LLC, individually and as Class Representatives (Case No. 2006 CV 317) ("the *Lindauer* class action") in 2006; and (2) this federal court class action, which was filed by a subclass of the state court class ("the *Sefcovic* class action") in 2017. The plaintiffs in both class actions seek to recover oil and gas royalties owed to them per the Settlement Agreement reached in the *Lindauer* class action. The defendant in the state and federal actions is the same, though its name has changed from Williams Production RMT Co. to TEP Rocky Mountain, LLC ("TEP").

Before the Court is a Motion to Dismiss on Jurisdictional Grounds [filed October 5, 2018; ECF No. 67], which was filed by the Class Representatives in the *Lindauer* class action. Those Class Representatives are non-parties here, so that motion was improvidently docketed. Nevertheless, I consider the issue of this Court's jurisdiction based on my "independent obligation to address . . . subject matter jurisdiction." *City of Albuquerque v. Soto Enter. Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017) (advising that a district court "can dismiss actions *sua sponte* for a lack of subject matter jurisdiction"). The parties are aware that I am considering this threshold jurisdictional issue. They have had an opportunity to address subject matter jurisdiction both in briefing and in oral argument, and I have carefully considered their positions. Because I find subject matter jurisdiction to be lacking based on abstention principles, I reluctantly dismiss this case. Unfortunately, I cannot disregard the authority that dictates this result, even though I am acutely aware of the time and resources the parties have expended to reach the proposed settlement in this case.

BACKGROUND

I. Factual Background

The flurry of recent briefing contains a detailed discussion of the origin of the *Lindauer* and *Sefcovic* class actions and how each set of plaintiffs seeks to recover based on the Settlement Agreement reached in the *Lindauer* class action. Because there does not seem to be any disagreement about the events preceding this lawsuit, I incorporate that background material here in the interest of efficiency. *See, e.g.*, TEP's Resp. in Opp'n to Intervenors' Mot. to Dismiss on Jurisdictional Grounds ("TEP's Resp.") 2–5 & Ex. 1, 3, 4, 9, ECF No. 88; Pls.' Resp. in Opp'n to Proposed Intervenors' Mot. to Dismiss on Jurisdictional Grounds 2, ECF No. 89 (incorporating TEP's factual background).

To summarize, the defendant in that case (who is also the defendant here) was accused of unlawfully deducting expenses from royalty payments. The plaintiffs in the *Sefcovic* class action, who were not the Class Representatives in state court, call themselves a "subclass" of the *Lindauer* class and allege a breach of the Settlement Agreement in the *Lindauer* class action. The *Sefcovic* class action has resulted in a new proposed class settlement. The opt-out date for the *Sefcovic* class action was October 8, 2018, though the Class Representatives in the *Lindauer* class action were granted an extension to mail a written election of exclusion to opt out, pending my ruling on the Motion to Dismiss. *See* Order, ECF No. 86.

II. Procedural History

On July 18, 2017, the plaintiffs in the *Sefcovic* class action filed their class action complaint against now-TEP in the District Court for the City and County of Denver, Colorado. ECF No. 3. TEP removed the case to this Court on August 17, 2017. ECF No. 1. The parties engaged in extensive informal discovery and ultimately reached a proposed Class Settlement. *See* Order ¶¶ 4–6, ECF No. 61. On August 16, 2018, this Court issued an Order Preliminarily Approving the Class Settlement. *See generally id.* The Court approved of the notice to be mailed to class members and instructed class counsel to accomplish the mailing within seven days. *Id.*

On September 14, the Class Representatives in the *Lindauer* class action filed a Motion to Enforce Court Order and Settlement Agreement Against TEP in Garfield County District Court. *See* Mot. to Intervene, Ex. C, ECF No. 64-3. The state court issued an Order to Show Cause, directing TEP to show cause why it should not be held in contempt and to explain "why it has not breached the terms of the Settlement and has not failed to comply with the Judgment." *Id.*, Ex. D, ECF No. 64-4. A phone hearing took place on October 23, 2018, and the state court stayed the

proceedings and set a status conference for January 4, 2019, to await this Court's rulings on pending motions.

On September 28, the Class Representatives in the *Lindauer* class action filed a Motion to Intervene in this Court, seeking intervention as of right pursuant to Federal Rule of Civil Procedure 24(a) or, in the alternative, permissive intervention under Rule 24(b). ECF No. 64. They move to intervene to "fulfill their ongoing obligation to protect the rights and interests of the *Lindauer* Plaintiff Class." *Id.* at 3. The *Sefcovic* plaintiffs and TEP responded to the Motion to Intervene on October 17, *see* ECF Nos. 76, 77. The opposition briefs stated that the parties do not oppose intervention to assert *individual* objections to final approval of the proposed class settlement (assuming intervention is even necessary), but they object to intervention to assert objections *on behalf of other class members*. *See* ECF Nos. 76, 77. The *Lindauer* Class Representatives filed their reply on October 30. ECF No. 90. Before any ruling on the Motion to Intervene, the *Lindauer* Class Representatives filed a Motion to Dismiss on jurisdictional grounds. ECF No. 67. The *Sefcovic* plaintiffs and TEP responded on October 26, *see* ECF Nos. 88, 89, and the *Lindauer* Class Representatives filed a reply on November 7, *see* ECF No. 97. In the interim, I held a Status Conference on October 22 to discuss the status of the case, the class, and the proposed settlement, as well as pending motions, briefing deadlines, and the propriety and necessity of intervention. *See* ECF No. 82. All parties attended, as did the putative intervenors.

Meanwhile, Plaintiffs have filed an Unopposed Motion for Leave to File Their Second Amended Class Action Complaint. ECF No. 87. And, with the fairness hearing looming, the parties in the *Sefcovic* class action have filed a Joint Motion for Final Approval of Class Settlement. ECF No. 92. In addition, Class Counsel for the *Sefcovic* plaintiffs has filed a Motion for an Award

of Attorneys' Fees, Expenses, and an Incentive Award Payment to Class Representatives. ECF No. 93.

Most recently, on November 2, several individuals (Charles and Susannah Gonzales and Ted and Hilda Vaughan, collectively, "Objectors") filed their Objections to Approval of Proposed *Sefcovic* Class Settlement and Notice of Intent to Appear at Final Approval Hearing. ECF No. 96. These Objectors claim that (1) the proposed settlement in this case sacrifices the interests of Subclass I members; (2) the notice provided was inadequate under Federal Rule of Civil Procedure 23(b)(3); (3) the proposed settlement is not reasonable; (4) the Motion to Enforce in state court is the superior method of enforcing the Settlement Agreement in the *Lindauer* class action; (5) the release contained within the proposed settlement is overly broad; (6) the proposed settlement improperly attempts to amend the Settlement Agreement in the *Lindauer* class action; and (7) the requested attorneys' fees are excessive. *See id.* Thus, the *Lindauer* Class Representatives are not alone in opposing the proposed settlement here.

ANALYSIS

I consider the issue of this Court's jurisdiction based on my "independent obligation to address . . . subject matter jurisdiction." *City of Albuquerque v. Soto Enter. Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017) (advising that a district court "can dismiss actions *sua sponte* for a lack of subject matter jurisdiction"). The parties have briefed this topic, *see* ECF Nos. 88, 89, and they presented argument during a Conference held on October 22, 2018, *see* ECF No. 82.

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) dismissal is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015) (recognizing that

federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Id.* (quoting *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013)). Any such dismissal is without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006). A Rule 12(b)(1) motion to dismiss must be determined from the factual allegations in the complaint, without regard to mere conclusory allegations of jurisdiction. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction, *Butler v. Kempthorne*, 532 F.3d 1108, 1110 (10th Cir. 2008)—here, Plaintiffs.

The First Amended Class Action Complaint and Demand for Jury Trial ("Complaint") alleges, as its factual basis, that Defendant has "underpaid royalties owed [to Plaintiffs] under numerous leases and overriding royalty agreements which are subject to certain future royalty payment provision which are set forth in the class settlement agreement approved in 2008 by the Garfield County [Colorado] District Court in *Lindauer v. Williams Production RMT Co.*" Compl. ¶ 7, ECF No. 43. The Complaint further alleges that "[s]ince July 1, 2011, the Plaintiffs and the defined Subclasses were not properly paid royalties pursuant to their leases or overriding royalty agreements . . . which are subject to the *Lindauer* Class Settlement Agreement." *Id.* ¶ 8. The only claims brought in this action are for breach of the *Lindauer* Settlement Agreement's provision involving royalty payments.

In the *Lindauer* case, Section 5 of the Settlement Agreement addressed the manner in which the defendant was to calculate royalty payments. *See* Mot. to Dismiss, Ex. A, ¶ 5.1, ECF No.

67-1.[1] That same Section 5 stated, "Settlement Class Members are entitled to rely on the representations in this Section, as well as the description of past and future royalty methodologies in Sections 2 and 4. The Court has continuing jurisdiction to enforce this paragraph." *Id.* ¶ 5.2. The state court's judgment also contained the following statement about continuing jurisdiction: "Without affecting the finality of this Final Judgment in any way, this Court shall retain continuing jurisdiction of this action to address any issues concerning implementation of the Settlement Agreement and enforcing this Final Judgment." *Id.*, Ex. B at 8, ¶ 4, ECF No. 67-2. Presently, class counsel in the *Lindauer* case are pursuing relief in the state court to enforce the Settlement Agreement in light of the allegations made in this federal lawsuit. *See* Pls.' Resp. to Mot. to Dismiss, Ex. 1, ECF No. 89-1 (Motion to Enforce Court Order and Settlement Agreement Against TEP Rocky Mountain LLC, filed Sept. 14, 2018). The state court, on October 23, 2018, continued its consideration of a motion for contempt until January 4, 2019, in anticipation that I will have issued a decision on jurisdiction by that date. *See* TEP's Resp. to Mot. to Dismiss, Ex. 4, ECF No. 88-4.

The issue before me is whether the state court retained exclusive jurisdiction over an action alleging breach of the royalty payment provisions such that I should dismiss this case in deference to that court. I start with the proposition that "Congress alone defines the lower federal courts' subject matter jurisdiction." *Odom v. Penske Truck Leasing Co., L.P.*, 893 F.3d 739, 742 (10th Cir. 2018). Neither a state court nor the parties can create or destroy federal subject matter

[1] The Settlement Agreement is identified in the Complaint, *see* Compl. ¶ 7, and is referenced throughout the Complaint. Even though the Agreement is not attached to the Complaint, it is appropriate for me to consider it for Rule 12(b)(1) purposes. *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The Motion to Dismiss only attached excerpts from the Agreement, but a complete copy was attached to the Response to the Motion to Dismiss. *See* Pls.' Resp. to Mot. to Dismiss, Ex. 6, ECF No. 89-6.

jurisdiction. *City of Albuquerque*, 864 F.3d at 1093. The parties do not dispute that this Court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C § 1332(d)(2), and venue is proper in the District of Colorado.[2] Thus, the remaining question is whether there is any principle of abstention or comity that would require dismissal in deference to the state court.

First, did the state court retain "exclusive" jurisdiction? The United States Supreme Court, in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), recognized that when a *federal* court embodies a settlement agreement in its dismissal order *or* retains jurisdiction over the settlement contract when the parties so agree, such originating federal court has federal jurisdiction over any subsequent breach of settlement agreement action. *Id.* at 380–81. Absent these elements, "enforcement of the settlement agreement is for state courts [*i.e.*, in a separate breach of contract action], unless there is some independent basis for federal jurisdiction." *Id.* at 382. Importantly, the Court stated that "[e]nforcement of the settlement agreement . . . whether through award of damages or decree of specific performance, is more than just a continuation of the dismissed suit, and hence requires its own basis for jurisdiction." *Id.* at 378.

Application of this decision to the current case supports the proposition that the Garfield County District Court had the legal ability to retain jurisdiction over disputes arising under the Settlement Agreement, but does not answer three questions: (1) Did the language used by the state court and the parties in the *Lindauer* class action confer such authority?; and, if so, (2) is that

[2] In finding that this Court does not have subject matter jurisdiction despite the Class Action Fairness Act, I adopt the terminology used by the Supreme Court and the Tenth Circuit. Those courts routinely explain that a court "lacks" subject matter jurisdiction (or is precluded from exercising it) pursuant to the *Younger* abstention doctrine. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 281–82 (2005); *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1230–31 (10th Cir. 2013). Stated otherwise, it is not that subject matter jurisdiction does not technically exist; rather, it would be improper for the Court to exercise it.

retained jurisdiction exclusive?; and, if so, (3) should I defer to the state court and dismiss this action?

I could find no persuasive authority in the Tenth Circuit, and Plaintiffs do not address the first two questions in their briefing. *See* ECF No. 89. In arguing that this Court has jurisdiction, Defendant contends that *K&V Scientific Co v. BMW*, 314 F.3d 494 (10th Cir. 2002), is "[c]ontrolling." TEP's Resp. at 1. That decision dealt with a forum selection clause (in that case, the selected forum was Munich, Germany), which was contained in a confidentiality agreement. *See* 314 F.3d at 496 ("Jurisdiction for all and any disputes arising out of or in connection with this agreement is Munich. All and any disputes arising out of or in connection with this agreement are subject to the laws of the Federal Republic of Germany."). The Tenth Circuit applied the uniform approach taken by other circuits, which it described as "sound." *Id.* at 499–500. That is, when a venue clause is specified in a forum selection clause "with mandatory or obligatory language," it will be enforced; "where only jurisdiction is specified," it generally will not be enforced "unless there is some further language indicating the parties' intent to make venue exclusive." *K&V Scientific Co.*, 314 F.3d at 499 (quoting *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992)).

The context of *K&V Scientific Co.* was a motion to dismiss for improper venue. It dealt with location only, designating jurisdiction as "Munich"; it did not address which court could or would exercise jurisdiction. Nor did any of the scenarios outlined in that case to illustrate the mandatory/permissive dichotomy match up with the one here. *K&V Scientific Co.* is thus inapposite to the issue of whether the Garfield County District Court retained exclusive jurisdiction over a breach of settlement agreement lawsuit.

Various federal court decisions support the proposition that when a state court retains exclusive jurisdiction over a settlement agreement, any federal lawsuit within the scope of such jurisdiction should be dismissed. *See, e.g., Tomerlin v. Johns Hopkins Univ., Inc.*, 689 F. App'x 578, 578–79 (9th Cir. Apr. 24, 2017); *Weaver v. Aegon USA, LLC*, No. 4:14-cv-03436-RBH, 2015 WL 5691836, at *32 (D.S.C. Sept. 28, 2015); *Bar Codes Talk, Inc. v. GS1, Inc.*, No. 8:10-cv-1462-T-30MAP, 2010 WL 4510982, at *2 (M.D. Fla. Nov. 2, 2010). The converse is also true. In *Battle v. Liberty National Life Insurance Co.*, 877 F.2d 877, 880–83 (11th Cir. 1989), for instance, the court upheld a federal district court's injunction of state court proceedings "in aid of its jurisdiction" where plaintiffs in the state court litigation had been class members in a prior federal action that had settled. The court emphasized that the final judgment in the federal action was the result of seven years of lengthy, complicated antitrust litigation, which included weeks of court hearings and extensive discovery. *Id.* at 882.

Granted, the settlement agreements in these cases contained exclusivity language. But this principle has been applied in cases like this one too. In *Mercier v. Blankenship*, 662 F. Supp. 2d 562 (S.D. W. Va. 2009), the court addressed a final judgment containing almost identical language to the situation at bar: "Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation and enforcement of the terms of the Settlement and this Judgment; and (b) the Settling Parties for the purposes of implementing and enforcing the Stipulation and Judgment." *Id.* at 573. The court explained: "Such provisions are often found in court settlement orders, and are widely enforced. . . . As a preliminary matter, therefore, the court notes that it is wary of treading on matters properly reserved by another court for that court's review, such as whether the parties to a settlement approved by that court have complied with the terms of their agreement." *Id.* (citations omitted).

Likewise, in *Ultimate Creations, Inc. v. McMahon*, 300 F. App'x 528, 529 (9th Cir. 2008), a case that appears to be on all fours, the Ninth Circuit found that when a settlement agreement is entered into and put on the record in state court, with the state court explicitly retaining jurisdiction over future disputes that might arise regarding the settlement agreement, the state court has exclusive jurisdiction over such disputes. The appellate court also found that the word "exclusive jurisdiction" need not have been used in order for this to be true; there, the retention of jurisdiction, when viewed in context, implied exclusive jurisdiction in state court. *Id.* Finally, the court found that a defendant, in a settlement agreement, may constitutionally submit itself to the exclusive jurisdiction of a state court. *Id.* at 529–30.

Other courts have also found exclusive jurisdiction in the absence of specific exclusivity language. *See, e.g., United States v. Am. Soc'y of Composers, Authors & Publishers*, 32 F.3d 727, 731 (2d Cir. 1994) (finding that federal court retained exclusive jurisdiction where a consent decree provided that "[j]urisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof"); *Magnolia v. Conn. Gen. Life Ins. Co.*, 157 F. Supp. 2d 583, 587 (D. Md. 2001) (finding that the state court "intended to retain exclusive jurisdiction" where it retained jurisdiction "as to all matters" relating to the "enforcement and interpretation" of the settlement agreement and the final order, even though there was no express statement as to exclusivity); *see also Hankins v. CarMax, Inc.*, No. RDB-11-03685, 2012 WL 113824, at *5 (D. Md. Jan. 13, 2012) (stating, in deciding a motion to remand to state court, that "where parties agree

to submit all matters relating to an action or a settlement to a specific court, that court is given exclusive jurisdiction over those matters," even though the word "exclusive" was not used).

This approach is consistent with Colorado law: "It is familiar law that, once a court takes jurisdiction of an issue and of parties, it thereafter has exclusive jurisdiction of the subject and matters ancillary thereto." *Utils. Bd. of Lamar v. Se. Colo. Power Ass'n*, 468 P2d 36, 37 (Colo. 1970); *see also Nationwide Mut. Ins. Co. v. Mayer*, 833 P.2d 60, 61 (Colo. App. 1992) (stating that if dual actions are filed in Colorado state court, the action filed first has "priority of jurisdiction").

There is contrary, but not persuasive, authority. *See, e.g.*, *Byker v. Smith*, No. 16-cv-02034-JEO, 2018 WL 2389797, at *3 n.8 (N.D. Ala. May 25, 2018) ("Ms. Smith argues that this court lacks subject matter jurisdiction over this action because the Alabama state court retained jurisdiction to enforce the settlement agreement, . . . [but] [a]n action regarding an alleged breach of a settlement agreement is a new cause of action between the parties rather than a continuation of the underlying state court action. The parties did not agree under the terms of the settlement agreement that the Alabama state court would be the exclusive forum to resolve disputes regarding the agreement."). But the court in *Byker* did not cite any authority for this unsupported proposition.

I am firmly convinced the Garfield County District Court did intend to retain jurisdiction over the settlement agreement. (Indeed, it has since resolved two reserved issues.) My belief is bolstered by the jurisdictional statement in its Show Cause Order issued on September 28, 2018. *See* ECF No. 64-4. Paragraph 2 of that section makes clear that TEP "remains subject to the jurisdiction of the Court." *Id.* ¶ 2 (Jurisdiction section). Paragraph 3 then states: "This Court has the authority and jurisdiction to enforce its own orders and judgments. C.R.S. § 13-1-114(c) and *Miller v. EnCana Oil and Gas (USA), Inc.*, 405 P.3d 488, 493 (Colo. 2017)." ¶ 3, ECF No. 64-4.

Section 13-1-114(1)(c), in turn, provides that "[e]very court has power . . . [t]o compel obedience to its lawful judgments, orders, and process and to the lawful orders of its judge out of court in action or proceeding pending therein." And *Miller* holds that where "compliance with the settlement agreement became a part of the order of dismissal, the district court retains jurisdiction to give effect to the agreement." 405 P.3d at 493. Last, in Paragraph 4 of the Show Cause Order, the state court notes that "[t]his Court expressly retained continuing jurisdiction to implement and enforce the Settlement, together with its own orders related thereto, and in the Judgment entered March 20, 2009 in this Case." ¶ 4, ECF No. 64-4.

Whether the Garfield County District Court retained exclusive jurisdiction is admittedly a tricky question. In *Foley v. Wells Fargo Bank, N.A.*, 109 F. Supp. 3d 317 (D. Mass. 2015), the parties in the settlement agreement included language giving the Northern District of California exclusive jurisdiction over disputes, but the court order approving the settlement agreement omitted any reference to exclusive jurisdiction: "This Court [the Northern District of California] will retain continuing jurisdiction to interpret and enforce the settlement agreement." *Id.* at 324. The District of Massachusetts found that this omission meant that another federal court was not divested of jurisdiction over a breach of settlement agreement claim. On the other hand, the Ninth Circuit in *Flanagan v. Arnaiz*, 143 F.3d 540 (9th Cir. 1998), was faced with the following court order approving a settlement agreement: "The Court shall retain jurisdiction of this action for purposes of resolving any disputes that may arise in the future regarding the settlement agreement, its terms or the enforcement thereof." *Id.* at 543. The judgment contained a "materially identical provision." *Id.* The Ninth Circuit unambiguously stated that such a provision retaining jurisdiction over a settlement agreement "implies that the retention was meant to be exclusive." *Id.* at 545. It reasoned that "it would make no sense for the district court to retain jurisdiction to interpret and

apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment." *Id.*

As demonstrated above, a district court can retain exclusive jurisdiction without necessarily using the word "exclusive"; furthermore, I find the *Flanagan* reasoning to be very persuasive. In the end, I look at the whole picture to assess whether Garfield County District Court intended to retain exclusive jurisdiction over alleged breaches of the Settlement Agreement. In light of the complex nature of the *Lindauer* litigation, the resources expended by the Garfield County District Court, the involved mediation within that lawsuit officiated by former state district judge and Colorado Supreme Court Justice Willian Neighbors, the statement by the parties in the Settlement Agreement recognizing the continuing jurisdiction of the state district court, and that court's ultimate order retaining jurisdiction over "any issues concerning implementation of the Settlement Agreement and enforcing this Final Judgment" (which judgment incorporated the Settlement Agreement), I conclude that the state court action demonstrates an intent to retain exclusive jurisdiction over alleged breaches of the Settlement Agreement. Given this, should a federal court dismiss this action under any theory of abstention or comity? Based on the above-referenced cases and the following analysis, I believe the answer is yes.

In *Petoskey Investment Group, LLC v. Bear Creek Township*, No. 5:03-CV-14, 2005 WL 1796130 (W.D. Mich. July 27, 2005), the court relied on principles of equity, comity and federalism in stating that an alleged breach of a state court consent judgment, in the first instance, should be heard by the state court from which the judgment emanated, in light of the state court's retention of jurisdiction for purposes of interpreting the judgment. *Id.* at *9. Similarly, in *Weaver v. Aegon USA, LLC*, No. 4:14-cv-03436-RBH, 2015 WL 5691836 (D.S.C. Sept. 28, 2015), the court relied on principles of comity and federalism in deferring to a state court that had expressly

retained "'continuing and exclusive jurisdiction as to all matters relating to the administration, consummation, enforcement, and interpretation of the Settlement Agreement and [the] Final Judgment.'" *Id.* at *32.

Another decision relied on *Younger* abstention (*see Younger v. Harris*, 401 U.S. 37 (1971)) in dismissing a federal action. In *Dandar v. Church of Scientology Flag Service Organization, Inc.*, 619 F. App'x 945 (11th Cir. 2015), an attorney entered into a state court settlement to refrain from bring adversarial proceedings against a church. The settlement agreement provided that the state court would "retain jurisdiction to enforce" its terms. Thereafter the attorney filed a lawsuit against the church in federal court; and later, the church went back to the state court to enforce the agreement. The attorney filed a declaratory judgment action in federal court to enjoin the state court from proceeding. The Eleventh Circuit noted: "First, the [district] court properly determined that there is a state civil proceeding involving an order that is 'uniquely in furtherance of the state courts' ability to perform their judicial functions.' . . . Here, there is a pending state proceeding involving enforcement of a settlement agreement entered into in a state-court case. And that settlement agreement specifically provided that the state court retained jurisdiction to enforce its terms." *Id.* at 948. Because the federal court would interfere with a state court's administration of its duties by addressing the claims, the Eleventh Circuit affirmed the dismissal of the claims. *Id.* at 948–49.

The *Younger* doctrine directs a federal court to abstain from exercising jurisdiction when three conditions have been established: "First, there must be ongoing state . . . civil . . .proceedings. Second, the state court must offer an adequate forum to hear the federal plaintiff's claims from the federal lawsuit. Third, the state proceeding must involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies."

Taylor v. Jaquez, 126 F.3d 1294, 1297 (10th Cir. 1997). Here, the state court proceedings have been ongoing since 2006, with the state court resolving two reserved issues after the execution of the Settlement Agreement and the judgment. The state court is an adequate forum, given its previously handling of this case and its knowledge of this case and its intricacies. And the state court has a "vital" and "important" interest in enforcing its orders and judgments and maintaining the authority of its judicial system. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12–14 (1987).

I am acutely aware that federal courts have an obligation to hear cases for which they have jurisdiction, and that non-abstention remains the rule. But as demonstrated above, the overwhelming precedent from federal courts would favor deference to the state court under the circumstances of this case. The Garfield County District Court is an available forum for the parties to resolve the present dispute and is as capable as I am of entering the order that the parties seek, which would approve a resolution of the dispute that has arisen since the entry of the original Settlement Agreement and which would arguably amend that Agreement. Furthermore, that court is better informed about the nuances of the Settlement Agreement, having overseen it for well over a decade, and has expressly retained continuing jurisdiction. The state court's intimate familiarity will allow it to better assess the claims of the *Sefcovic* plaintiffs, as well as any objections to the proposed class settlement, within the context of the entire state court litigation.

CONCLUSION

The Motion to Dismiss on Jurisdictional Grounds [filed October 5, 2018; ECF No. 67] is **stricken** because it was filed by non-parties, as is the Reply Brief [filed November 7, 2018; ECF No. 97]. Nevertheless, this action is dismissed without prejudice based on my independent assessment of subject matter jurisdiction, which is informed by my independent research and the parties' thorough briefs and argument on this issue. In light of my ruling, the following motions

are **denied as moot**: Motion to Intervene [filed September 28, 2018; ECF No. 64]; Plaintiffs' Unopposed Motion for Leave to File Their Second Amended Class Action Complaint [filed October 26, 2018; ECF No. 87]; the Joint Motion for Final Approval of Class Settlement [filed October 30, 2018; ECF No. 92]; Class Counsel's Motion for an Award of Attorneys' Fees, Expenses, and an Incentive Award Payment to Class Representatives [filed October 30, 2018; ECF No. 93]; and the Unopposed Motion for Enlargement of Page Limitation [filed November 7, 2018; ECF No. 96]. The Final Fairness Hearing set for November 20, 2018, see ECF No. 60, is **vacated**.

Dated and entered at Denver, Colorado, this 9th day of November, 2018.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01990-MEH

ELNA SEFCOVIC, LLC,
JUHAN, LP, and
ROY ROYALTY, INC., individually and on behalf of all others similarly situated,

Plaintiffs/Counter Defendants,

v.

TEP ROCKY MOUNTAIN, LLC,

Defendant/Counterclaimant.

ORDER ON PENDING MOTIONS

Michael E. Hegarty, United States Magistrate Judge.

Plaintiffs have filed an Unopposed Motion to Reconsider the Court's November 9, 2018 Order [filed November 20, 2018: ECF No. 100]. I held oral argument concerning this motion on January 14, 2019. I believe my original order is correct insofar as it recognized that the vast majority of relevant federal cases would, on a motion to remand or early motion to dismiss, defer subject matter jurisdiction under comity principles in a case involving a breach of settlement when the underlying agreement was made a part of a state court's final judgment, and that state court retained exclusive jurisdiction over the implementation of the settlement. However, because this case involves facts that dictate against the exercise of comity here, I **grant t**he motion. First, I will clarify the basis for my November 9, 2018 Order. Second, I will vacate the Order for the reasons stated herein.

I. BACKGROUND

This lawsuit involves an alleged breach of a formula for calculating mineral royalties, which formula was established in a 2008 settlement of a Garfield County, Colorado lawsuit. The case was removed to this Court from Denver County District Court on August 17, 2017. After the completion of class discovery, in August 2018, the parties moved for preliminary approval of a class settlement, provisional certification of an opt-out settlement class, approval of notice to class members, an order establishing opt-out and objection procedures, and the setting of a final hearing date to consider approval of the class settlement, attorney's fees, expenses and incentive awards. I granted this motion on August 16, 2018.

Thereafter, on October 5, 2018, certain plaintiffs from the Garfield County settlement who were not parties to this litigation attempted to intervene in this action and dismiss it. In my original Order, I granted dismissal of this action based on the facts that the Garfield County, Colorado District Court, in the prior settlement (the *Lindauer* case), the district judge entered an order in which she intended to retain exclusive jurisdiction over a court-adopted and stipulated settlement of a dispute over mineral royalty payments, and the parties' lawsuit here arises squarely under that settlement. The state court's Judgment, at the parties' request, gave approval to the class settlement agreement, ordered that the parties "shall take any and all steps necessary to implement the Settlement Agreement according to its terms and the terms of this Order," "barred and permanently enjoined" the class members "from commencing or prosecuting either directly . . . or in any capacity, any of the Settled Claims," and retain[ed] continuing jurisdiction of this action to address any issues concerning implementation of the Settlement Agreement and enforcing this Final

Judgment." ECF No. 67-2. As noted above, the present lawsuit involves as Plaintiffs some of the class members from the *Lindauer* case, as well as the defendant from *Lindauer*. These Plaintiffs contend that Defendant has not paid royalties consistent with the settlement and court order in *Lindauer*.

In the state court *Lindauer* suit, there is pending a motion to enforce (in a contempt proceeding) the *Lindauer* settlement agreement.

II. ANALYSIS

The principal argument in the Motion to Reconsider is that *Younger* abstention (*Younger v. Harris*, 401 U.S. 37 (1971)) does not apply to the facts of this case. However, although the proposed Intervenors' brief explains why *Younger* abstention *is* applicable here, *Younger* was not the basis for my decision. In my seventeen-page order, I discussed *Younger* for roughly one page, and only then because a cited case had relied on that doctrine.

Rather, I believed dismissal without prejudice was warranted under a long line of cases, many that were cited in the original order, in which one court gives deference to another court that previously issued a court-ordered settlement or consent decree resolving a case, when the parties to that prior resolution are attempting to have its terms interpreted by some other court. This is not an abstention doctrine, although in my Order I did reference "abstention principles." Order at 2. I now clarify that dismissal would be appropriate here under principles of comity and wise judicial administration. For that reason, my original order was more akin to the doctrine set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). That Court stated:

> Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of "(w)ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."

Id. at 817 (citations omitted). The Tenth Circuit has noted that a *Colorado River*-type dismissal is not abstention but rather "an exception to our jurisdictional mandate from Congress." *Rienhardt v. Kelly*, 164 F.3d 1296, 1303 (10th Cir. 1999). Incidentally, the *Colorado River* decision approved dismissal despite its recognition of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817 (language relied upon by the parties in their Motion for Reconsideration). I cite *Colorado River* primarily for the principle that, although to be used only in extremely unusual cases, there are judicially created exceptions to the exercise of subject matter jurisdiction. However, as with *Younger* abstention, in my original order I did not intend here to fit my decision squarely into the *Colorado River* or any other well-known Supreme Court doctrine. Rather, it was the doctrine of comity that most clearly supported the basis for dismissal in the original order.

The doctrine of comity "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Rhines v. Weber*, 544 U.S. 269, 274 (2005) (citation omitted). The doctrine "counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1126 (2015). The cases I cited in support of my original Order do not generally rely upon abstention, but on principles of comity. This type of comity is not dependent on a state-federal dichotomy, but on wise judicial administration among several jurisdictions. Cases supporting dismissal which I cited in my original Order involve federal courts dismissing cases in

deference to other federal courts as well as to state courts, and even state courts attempting to adjudicate matters contained in federal court orders approving settlements.[1] The common thread is that the parties in a prior case resolved their lawsuit with the assistance of the court (either with a consent decree or a court order adopting a settlement), which court explicitly retained jurisdiction (interpreted as intended to be exclusive) over disputes arising under the resolution. All but one decision cited in the original Order concluded that deference to the settlement court was appropriate.

Thus, I clarify my analysis in the original order as follows: (1) courts are authorized to retain jurisdiction over settlement agreements,[2] and (2) when a court has done so, and that jurisdiction is explicitly (or implicitly under the totality of circumstances) exclusive, then (3) the doctrine of comity permits a court, even in the presence of subject matter jurisdiction, to defer to the settlement court in cases requiring the interpretation and enforcement of the settlement agreement. Prior to oral argument concerning the Motion to Reconsider, I believed this case presented an appropriately narrow factual situation to qualify as one of those rare exceptions to the court's "virtually unflagging obligation" to exercise jurisdiction when it exists.

Comity in this context is not an absolute obligation. *Petoskey Inv. Grp., LLC v. Bear Creek Twp.*, 5:03-CV-14, 2005 WL 1796130, at *9 (W.D. Mich. July 27, 2005). Moreover, I believe any deferral here ought to rely upon considerations of wise judicial administration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14-15 (1983). As the Supreme Court noted in *Moses H. Cone Hosp.*, "the decision whether to dismiss a federal action because of parallel state-

[1] Of course, the doctrine of comity can also apply between state courts. *E.g., Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 493 (2003).
[2] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case." *Id.* at 15. There are three factors present in this case which, I believe after hearing the parties, counsel against dismissal.

First, in *every* case I could find in which comity or some other doctrine was cited in favor of dismissing or remanding a federal action in favor of a state court that had retained jurisdiction over a settlement, the matter was brought to the federal court's attention within weeks or a very few months after initiation of the case, before any substantive proceedings had transpired. *Tomerlin v. Johns Hopkins Univ., Inc*., 689 F. App'x 578, 578–79 (9th Cir. Apr. 24, 2017) (ninety days); *Ultimate Creations, Inc. v. McMahon*, 300 F. App'x 528, 529 (9th Cir. Nov. 17, 2008) (thirteen days); *Flanagan v. Arnaiz*, 143 F.3d 540 (9th Cir. 1998) (immediate motion to enjoin other lawsut); *Weaver v. Aegon USA, LLC*, No. 4:14-cv-03436-RBH, 2015 WL 5691836, at *32 (D.S.C. Sept. 28, 2015) (sixty days); *Hankins v. CarMax, Inc.*, No. RDB-11-03685, 2012 WL 113824, at *5 (D. Md. Jan. 13, 2012) (six days); *Bar Codes Talk, Inc. v. GS1, Inc*., No. 8:10-cv-1462-T-30MAP, 2010 WL 4510982, at *2 (M.D. Fla. Nov. 2, 2010) (thirty days); *Petoskey Inv. Grp. V. Bear Creek Township*, 2005 WL 1796130 (120 days); *LLC Magnolia v. Conn. Gen. Life Ins. Co.*, 157 F. Supp. 2d 583, 587 (D. Md. 2001) (twenty-one days). In contrast, the present case has been fully litigated; the parties have settled the case; the Court has given preliminary approval to the settlement; the time for objecting to the settlement has passed; and the only proceeding left is a fairness hearing. To jettison the case at this point would be a significant waste of public and private resources and certainly inconsistent with wise judicial administration.

Second, counsel for the proposed Intervenors here admitted at oral argument that, although he was aware of this lawsuit within months of its filing, he decided to monitor what the outcome of the case would be, in order to determine what action would be his clients' best interest. I do not believe a "wait and see" approach is consistent with counsel's argument that this Court has no subject matter jurisdiction and, further, this delay caused the parties here (and the Court) to expend substantial resources in the administration of the case. It appears from the case law that arguments concerning comity can be waived. *E.g.*, *Orazio v. Town of North Hempstead*, 426 F. Supp. 1144, 1147 (E.D.N.Y. 1977) ("comity . . . may be waived . . . [b]y not raising it"). If so, proposed Intervenors' actions have waived it here.

Finally, counsel for proposed Intervenors acknowledged at the hearing that the royalty payments required by the *Lindauer* settlement will likely endure for thirty to fifty years. He also acknowledged that, in light of the Colorado mandatory retirement age for judges, the judicial officer who issued the *Lindauer* judgment will not be presiding over this case for its duration (indeed, most likely not even for the next decade), so the case will pass to other judges who have no familiarity with the case or the settlement. I am skeptical of any court's authority to bind parties to one forum for all possible disputes arising out of the settlement for such an extended period of time, essentially in perpetuity. I can certainly understand retaining jurisdiction for a limited period to ensure the effective implementation of the settlement. However, at the time of the filing of this lawsuit, the settlement agreement had been in place for nearly a decade, there were no proceedings pending in the *Lindauer* case (and apparently had not been any for years), and the parties to this lawsuit, who were parties in *Lindauer* and who were diverse in citizenship, litigated this breach of contract action (which satisfied the amount in controversy requirement) without challenging

subject matter jurisdiction after removal from state court. The federal courts are as capable of interpreting settlement agreements (and, in fact, do so on a regular basis) as the state courts.

Other arguments raised by the proposed Intervenors are not persuasive. Beyond the exclusive jurisdiction argument, proposed Intervenors raise the doctrine of *forum non conveniens*. For the same reasons as relied upon in granting reconsideration herein, I do believe consideration of the relevant factors would lead to the same conclusion. In the unique circumstance of a decades-long payout of oil and gas royalties, there is no indication that the parties contemplated Garfield County to the exclusive forum for the rest of their respective lives.

Next, proposed intervenors raise *Younger* abstention, but I believe the third required element, interference with important state interests, is not present. Although the parties represent that, a year after this case was filed and removed, the *Lindauer* class plaintiffs filed a motion in the state court under Colo. R. Civ. P. 107 (civil contempt) to enforce the settlement agreement, this Court is not enjoining that proceeding in any manner. As noted above, the federal courts are an adequate alternative forum, when subject matter jurisdiction exists, to interpret an eleven-year-old contract. While it is true that "[a] State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest," *Juidice v. Vail*, 430 U.S. 327, 335 (1977), this Court, unlike in cases such as *Juidice*, in not "interfer[ing] in a case where the proceedings were already pending in a state court." *Id.*

In addition, proposed Intervenors cite the *Colorado River* doctrine, addressed above. For all the reasons stated herein, I do not believe consideration of wise judicial administration,

conservation of judicial resources, and comprehensive disposition of litigation have any force here, when the case is at its end.

Finally, proposed Intervenors argue that the Plaintiffs in this case are not the real parties in interest in this dispute, because they are not the class representatives from the *Lindauer* litigation. Plaintiffs here allege damages to their own financial interests and are, as a matter of law, real parties in interest under Fed. R. Civ. P. 17(a). Proposed Intervenors cite no principle of law requiring that all beneficiaries to every settlement agreement must be present in any subsequent lawsuit concerning the interpretation of that agreement. Under proposed Intervenors' argument, if the original class representatives from *Lindauer* choose not to file a lawsuit alleging that they are being denied royalties under the settlement agreement, no one in the class could. That is not correct.

Therefore, for the foregoing reasons, "[o]n this non-jurisdictional prudential matter, [I] do not dismiss this case on comity grounds." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1134 (10th Cir. 2016). The Court will **vacate** its order of dismissal.

III. CONCLUSION

The Unopposed Motion to Reconsider the Court's November 9, 2018 Order [filed November 20, 2018: ECF No. 100] is **granted.** This Court's order dismissing this action [filed November 9, 2018; ECF No. 98] is **vacated**. **The Clerk is directed to reopen this case.** The parties are directed to file a status report concerning their proposal for conducting the fairness hearing and dismissing this case.

Dated and entered at Denver, Colorado, this 23rd day of January, 2019.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01990-MEH

ELNA SEFCOVIC, LLC, WHITE RIVER ROYALTIES, LLC, JUHAN, LP and ROY ROYALTY, INC., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TEP ROCKY MOUNTAIN, LLC,

Defendant.

ORDER ON CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND INCENTIVE AWARD PAYMENTS TO THE CLASS REPRESENTATIVES

This matter comes before the Court on Class Counsel's motion for an award of attorneys' fees, litigation expenses, and incentive payments to three Class Representatives, filed on October 30, 2018. ECF No. 93. The Court has considered Class Counsel's motion, the memorandum in support thereof, the exhibits and declarations submitted in support of the motion, the arguments presented by Class Counsel at the final approval hearing before the Court on February 20, 2019, and all other statements in the record relating to the requested attorneys' fees, litigation expenses, and the requested Class Representative incentive awards. The Court further notes that Defendant TEP Rocky Mountain, LLC ("TEP") has taken no position with regard to this motion. The motion is **granted** as follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the foregoing, the Court finds and concludes as follows:

1. Pursuant to the Settlement Agreement between the Plaintiffs and TEP, TEP has agreed to resolve the Class members' claims for royalty underpayments on TEP's natural gas production through May 31, 2018 for the amount of $10,025,308. After taking into account the opt-out credit to which TEP is entitled because of the election of certain Class members to exclude themselves from the Settlement Class, the Net Settlement Fund, before subtraction of litigation expenses, is $7,991,505.33.

2. In addition to the Net Settlement Fund payment, TEP will implement a future royalty calculation method for its calculation and payment of royalties on natural gas produced and sold on and after June 1, 2018 to the members of Subclass I and Subclass IV.

3. Class Counsel request reimbursement of $104,915.95 for litigation expenses. This includes $95,615.95 for litigation expenses that Class Counsel incurred through October 30, 2018, as well as $9,300.00 in additional litigation expenses that Class Counsel expect to incur in the further handling of this class litigation and class settlement administration.

4. The Court finds that the litigation expenses for which Class Counsel seek reimbursement has been reasonably incurred by Class Counsel in the prosecution of this litigation, and that the estimated future expenses will be reasonably incurred in the further handling of this litigation by Class Counsel. The Court therefore approves Class Counsel's request for reimbursement of litigation expenses in the amount of $104,915.95.

5. Class Counsel seek attorneys' fees of $2,627,600.00, which equal 33.33 percent of the $7,883,589.38 Net Class Settlement amount, after subtracting: (1) the requested litigation expenses of $104,915.95; and (2) the $3,000.00 escrow agent expense associated with administering the Class Settlement Fund.

6. The Class Settlement Agreement creates a "common fund" for payments to the Settlement Class members. Under Tenth Circuit case law, attorneys' fees in common fund cases are generally awarded based on a reasonable percentage of the fund created. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *Gottlieb v. Barry*, 43 F.3d 474, 482-83 (10th Cir. 1994). In *Brown*, the Tenth Circuit held that determining an attorneys' fee award based on a percentage of a common fund is warranted, particularly where the common fund has been created as a result of class counsel's efforts. 838 F.2d at 454.

7. In determining whether Class Counsel's request for an award of attorneys' fees equal to one-third of the Net Settlement Fund, minus expenses, is warranted, the Tenth Circuit directs that the twelve factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), should be considered in a common fund case. *Id.* An evaluation of the most pertinent *Johnson* factors confirms that Class Counsel's request for an award of attorneys' fees is reasonable, and should be approved.

8. In Brown, the Tenth Circuit recognized that the Johnson factor to be given the greatest weight is the monetary result achieved for the benefit of the class, which is often considered to be "decisive." *Brown*, 838 F.2d at 456. Here, the monetary results Class Counsel have recovered for the benefit of the Class in this case are very good compared to the amount in dispute, which supports Class Counsel's fee request.

9. Two other *Johnson* factors to consider are the "customary fee" and the fees awarded in similar class action cases. *Brown*, 838 F.2d at 454-55. In numerous other class action royalty underpayment cases, in which this Court or Colorado state courts have awarded attorneys' fees to class counsel from a settlement fund, the fees awarded generally have been for one-third of the class settlement fund, or sometimes a higher percentage of the settlement fund. (*See* Exhibits 2-7 attached to Class Counsel's memorandum in support of their motion for attorneys' fees). Thus, Class Counsel's requested attorneys' fees in this case are clearly in

accordance with the customary attorneys' fee awards to class counsel in similar Colorado royalty underpayment class action cases.

10. Another *Johnson* factor is the time and labor involved. Class Counsel's time value lodestar in this case, through October 30, 2018, is in the amount of $1,815,980.00. In addition, Class Counsel estimate that Class Counsel will incur $98,750.00 in additional hourly rate lodestar through the completion of this litigation. Thus, Class Counsel's total hourly rate lodestar for this class action litigation is estimated to be approximately $1,919,105.00. Class Counsel's attorneys' fee request of $2,627,600.00 therefore represents a "multiplier" of approximately 1.37 times Class Counsel's $1,919,105.00 lodestar amount. This 1.37 multiplier is comparable to the lodestar multipliers which have been consistently awarded by judges in the District of Colorado. *See Davis v. Crilly*, 292 F. Supp. 3d 1167, 1174 (D. Colo. 2018); *Shaulis v. Falcon Subsidiary, LLC*, 2018 WL 4620388, at *2 (D. Colo. Sept. 26, 2018). Thus, the time and labor devoted by Class Counsel fully supports Class Counsel's requested attorneys' fee award.

11. An additional factor supporting Class Counsel's requested attorneys' fee award is that Class Counsel have represented each of the Class Representatives on a contingent fee basis, under which Class Counsel's contingent fee is one-third of the net recovery obtained, after subtraction of the client's share of litigation expenses. The fact that Class Counsel represented the Class Representatives on a contingent fee basis meant that Class Counsel were at risk for both their time investment and their investment of substantial amounts in litigation expenses. The significant litigation risks faced by Class Counsel at the outset of this case further supports Class Counsel's fee request. *See Lucas v. Kmart Corp.*, 2006 WL 2729260, at * 6 (D. Colo. July 27, 2006).

12. Based on the foregoing, the Court finds that an analysis of the relevant *Johnson* factors confirms that an award of attorneys' fees to Class Counsel in the amount of $2,627,600 is warranted.

13. Class Counsel are also requesting approval of incentive awards totaling $15,000.00 for three Class Representatives, as follows: $5,000 to Elna Sefcovic, LLC; $5,000 to Juhan, LP; and $5,000 to Roy Royalty, Inc. Each Class Representative has been actively involved in working with Class Counsel during this litigation process by providing documents and information to Class Counsel and in consulting with Class Counsel regarding various aspects of this litigation. The purpose of incentive awards is to encourage people with significant claims to pursue actions on behalf of others similarly situated. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003). Numerous courts have recognized that incentive awards are an efficient and productive way of encouraging members of a class to become class representatives, and rewarding individual efforts taken on behalf of a class. *See Hadix v. Johnson*, 323 F.3d 895, 897 (6th Cir. 2003); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000).

14. Consistent with the foregoing, this Court finds that the request for incentive awards to the Class Representatives, in the total amount of $15,000.00, is reasonable and consistent with incentive awards in other class action litigation. *See, Cook v. Niedert*, 142 F.2d 1004, 1016 (7th Cir. 1998) (approving incentive award of $25,000 for named plaintiff whose settlement was valued at $13 million dollars).

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Class Counsel are awarded the sum of $104,915.95 in reimbursement for litigation expenses which they have incurred and which they reasonably expect to incur through the conclusion of this litigation.

2. Class Counsel are awarded attorneys' fees in the requested amount of $2,627,600.00.

3. Incentive awards to three Class Representatives are hereby approved in the total amount of $15,000.00 to be paid as follows: $5,000 to Elna Sefcovic, LLC; $5,000 to Juhan, LP; and $5,000 to Roy Royalty, Inc.

4. The attorneys' fees and litigation expenses awarded to Class Counsel should be paid from the Class Settlement Escrow account.

SO ORDERED.

DATED: March 15, 2019.

s/Michael E. Hegarty
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
United States Magistrate Judge Michael E. Hegarty

Civil Action No. 17-cv-01990-MEH

ELNA SEFCOVIC, LLC,
WHITE RIVER ROYALTIES, LLC,
JUHAN, LP, and
ROY ROYALTY, INC., individually and on behalf of all others individually situated,

Plaintiffs,

v.

TEP ROCKY MOUNTAIN LLC,

Defendant.

ORDER APPROVING CLASS SETTLEMENT AND FINAL JUDGMENT

The parties have filed a "Joint Motion for Final Approval of Class Settlement." ECF No. 92. After extensive briefing and a full fairness hearing on the merits of the proposed settlement, the Court enters its findings and conclusions as follows:

A. On July 18, 2017, Plaintiffs Elna Sefcovic, LLC and Juhan, LP filed a Class Action Complaint against TEP Rocky Mountain, LLC (TEP), TRDC LLC, and G2X Resources LLC ("the *Sefcovic* Case") in the District Court for the City and County of Denver, Colorado, alleging generally that TEP underpaid royalties to Plaintiffs and similarly situated royalty and overriding royalty owners over a six-year period. These underpayments were alleged to be in breach of the Plaintiffs' royalty instruments and the terms of a class action settlement agreement reached in 2008 in *Lindauer v. Williams*

Production RMT Co., 2006-CV-317 (Garfield County, Colorado District Court) ("the *Lindauer* Settlement Agreement"). TEP denies that it underpaid royalties.

B. On August 17, 2017, TEP removed the *Sefcovic* Case to this Court. Plaintiffs voluntarily dismissed TRDC LLC and G2X Resources LLC on September 26, 2017. TEP filed its Answer and Counterclaim on September 28, 2017. Plaintiffs filed their First Amended Class Action Complaint and Demand for Jury Trial on February 22, 2018, to which TEP filed its Answer and Counterclaim on March 8, 2018. Plaintiffs filed their Second Amended Class Action Complaint and Demand for Jury Trial on January 29, 2019 (adding White River Royalties, LLC as a named Plaintiff), to which TEP filed its Answer and Counterclaim on February 11, 2019.

C. On August 13, 2018, the Parties filed their Joint Motion for Order (1) Preliminarily Approving Class Settlement, (2) Provisionally Certifying Opt-Out Settlement Class, (3) Approving Notice to Class Members, (4) Establishing Opt Out and Objection Procedures, and (5) Setting a Final Hearing Date to Consider Final Approval of the Class Settlement, Attorneys' Fees, Expenses, and Incentive Awards (ECF No. 56). In the proposed settlement ("the Settlement Agreement"), TEP agreed to pay over $10 million to resolve the class' royalty underpayment claims on TEP's production and sale of natural gas (and natural gas liquids) since July 2011, extending to TEP's royalty payments prior to June 1, 2018. In addition, TEP also agreed to a method of calculating royalties paid on or after June 1, 2018 to certain owners under particular royalty instruments.

D. On August 16, 2018, this Court granted the Plaintiffs' and Defendant's ("the Parties") joint motion to provisionally certify, for settlement purposes, the proposed Class and its four Subclasses ("the Settlement Class") under Fed. R. Civ. P. 23(a) and (b)(3) ("the

Preliminary Order"). ECF No. 61. In the Preliminary Order, the Court found that each of the requirements for certification of a Rule 23(b)(3) Class has been satisfied in this case. The Court further found preliminarily that, among other things, the Settlement Agreement was fair, reasonable and adequate. The Order directed that notice of the proposed Settlement Agreement be mailed to the Settlement Class. The Court also set a final fairness hearing date. Thereafter, TEP paid $10,025,308.00 into an escrow account maintained by Bank of Oklahoma Financial ("the Settlement Amount"), representing the total settlement funds identified in Paragraph 2 of the Settlement Agreement.

E. A Notice informing the certified Class of the certification of this case as a class action and of the proposed Settlement Agreement was mailed to approximately 643 members of the Class on August 21, 2018. The Notice informed the members of the Class of their right to exclude themselves from the Settlement Class. Thirty-six individuals and entities elected to exclude themselves from the Settlement Class. The excluded entities and individuals ("the Settlement Class Excluded Individuals and Entities") are not part of the Settlement Class on whose behalf the proposed Class Settlement has been negotiated.

F. On October 30, 2018, the Parties filed their Joint Motion for Final Approval of Class Settlement seeking approval of a settlement of certain claims existing between the Settlement Class and TEP ("the Released Claims"). The extent of the Released Claims is discussed in the Settlement Agreement and, more specifically, in Paragraph 6 of the Settlement Agreement (limiting releases to calculation of royalties paid by TEP prior to June 1, 2018).

G. The Settlement Class is defined as follows:

All persons and entities to whom TEP has paid royalties and/or overriding royalties, and deducted post-production costs from those royalties and/or overriding royalties, including

owners whose royalties currently are held in suspense, since July 1, 2011, on natural gas production from any well subject to the oil and gas lease agreements which the settling parties in the Lindauer Settlement identified as Category 2, Category 3, Category 5, and Category 11 instruments.

The proposed Settlement Agreement divides the Settlement Class into four Subclasses, as follows:

Subclass 1: Elna Sefcovic, LLC, White River Royalties, LLC, and all persons and entities to whom TEP has paid royalties, and deducted post-production costs from those royalties, including owners whose royalties currently are held in suspense, since July 1, 2011, on natural gas production from any well subject to the oil and gas lease agreements which the settling parties in the Lindauer Settlement identified as either Category 2 or Category 3 royalty instruments.

Subclass 2: Juhan, LP, and all persons and entities to whom TEP has paid royalties and/or overriding royalties, and deducted post production costs from those royalties and/or overriding royalties, including owners whose royalties currently are held in suspense, since July 1, 2011, on natural gas production from any well subject to the oil and gas lease agreements which the settling parties in the Lindauer Settlement identified as Category 5 instruments, and that currently are identified by TEP as Category 5 instruments.

Subclass 3: Roy Royalty, Inc., Juhan, LP, and all persons and entities to whom TEP has paid royalties and/or overriding royalties, and deducted post-production costs from those royalties and/or overriding royalties, including owners whose royalties currently are held in suspense, since July 1, 2011, on natural gas production from any well subject to the oil and gas lease agreements which the settling parties in the Lindauer Settlement identified as Category 11 instruments, and that currently are identified by TEP as Category 11 instruments.

Subclass 4: Juhan, LP, and all persons and entities to whom TEP has paid royalties and/or overriding royalties, and deducted post production costs from those royalties and/or overriding royalties, including owners whose royalties currently are held in suspense, since July 1, 2011, on natural gas production from any well subject to the oil and gas lease agreements which the settling parties in the Lindauer Settlement identified as Category 5 or 11 instruments, but that currently are not identified by TEP as exclusively Category 5 or Category 11 instruments.

H. Attached as Exhibit A to the joint motion for preliminary approval of the settlement (ECF No. 56) is the Settlement Agreement describing the Released Claims that are being settled and setting forth the terms of the Parties' Settlement Agreement. The Settlement

Agreement is attached hereto as Exhibit 1 and its terms, including the definitions, are incorporated into this Order Approving Final Settlement as if fully set forth herein.

I. In accordance with the Court's Preliminary Order, Plaintiffs caused to be mailed to potential members of the Settlement Class a notice ("the Settlement Notice") in the form approved by the Court in the Preliminary Order. The Court finds that the Settlement Notice provided to potential members of the Settlement Class constituted the best and most practicable notice under the circumstances and included individual notice to all members of the Settlement Class who could be identified by reasonable effort, thereby complying fully with due process and Rule 23 of the Federal Rules of Civil Procedure.

J. On February 20, 2019, the Court held a hearing on the proposed Settlement Agreement, at which time all interested persons were given an opportunity to be heard. The Court entertained extensive argument, both in briefs and in several hearings including the fairness hearing, from attorneys representing both non-Class members (individuals or entities who were class members in the decade-old *Lindauer* settlement in state court) and attorneys for individuals and entities who voluntarily excluded themselves from this Settlement Class. The Court also received testimony from accounting experts. The principal argument advanced by the settlement objectors is the uncertainty of future obligations by the Settlement Class to incur deductions from their royalty payments based on post-production costs. However, based on the evidence presented to me, those uncertainties have always been present even since the decade-old *Lindauer* settlement that preceded this case; the royalty holders are aware of those uncertainties and still believe this Settlement Agreement is in their best interests; and this Settlement Agreement does not preclude future legal

action based on alleged wrongful conduct of TEP in calculating future royalty payments. Therefore, this argument is not a basis to reject an otherwise fair and just settlement.

K. The Court has read and considered all submissions in connection with the Settlement Agreement. Having done so, the Court has determined that approval of the Settlement Agreement (1) will bestow a substantial economic benefit on the Settlement Class, (2) will result in substantial savings in time and money to the litigants and the Court; (3) will further the interests of justice; (4) is the product of good faith arm's length negotiations between the Parties who are represented by very experienced and capable counsel; (5) was negotiated in a case involving serious questions of law and fact, including TEP's argument that it was entitled to an offset of ad valorem taxes from the Settlement Class members, which placed the ultimate outcome of the litigation in doubt; (6) will further the Settlement Class members' interest in immediate recovery as opposed to waiting for the outcome of protracted litigation; and (7) has been considered by the Settlement Class members, who overwhelmingly believe it is in their best interests to enter into the Settlement Agreement.

NOW, THEREFORE, GOOD CAUSE APPEARING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Joint Motion for Final Approval of Class Settlement, ECF No. 92, is **granted**.
2. The Settlement Agreement, including the terms defined therein, is incorporated herein. The Court has jurisdiction over the subject matter of this litigation and all parties to this litigation, including all members of the Settlement Class.
3. The certified Settlement Class and Subclasses are defined for purposes of the Agreement and this Order Approving Final Settlement as set forth in Paragraphs D, E, and G above. There are questions of law and fact common to the Settlement Class and Subclasses. The claims of the Plaintiff class representatives are typical of the claims of

the Settlement Class and Subclasses. The Plaintiff class representatives will fairly and adequately protect the interests of the Settlement Class and Subclasses. The prerequisites to maintain this action as a class action set forth in Fed. R. Civ. P. 23(a) are met.

4. The questions of law and fact common to all members of the Settlement Class and Subclasses predominate over questions, if any, affecting only individual members, and a class action is superior to any other available method for the fair and efficient adjudication of the controversy. The requirements of Fed. R. Civ. P. 23(b)(3) are met. Accordingly, the Settlement Class and Subclasses identified above are certified pursuant to Fed. R. Civ. P. 23(b)(3).

5. Plaintiffs Elna Sefcovic, LLC, White River Royalties, LLC, Juhan LP, and Roy Royalty, Inc, are designated as the Class Representatives. George A. Barton and Stacy A. Burrows of the Law Offices of George A. Barton, P.C. are designated as Class Counsel.

6. This Settlement Agreement was made in good faith and its terms are fair, reasonable and adequate as to the Settlement Class and Subclasses. Therefore, the Settlement Agreement is approved in all respects, and shall be binding upon, and inure to the benefit of, all members of the Settlement Class and Subclasses.

7. The Settlement Class Excluded Individuals and Entities are not bound by either the Agreement or Order Approving Final Settlement and may pursue their own individual remedies, if any, as to any of the Released Claims.

8. Mutual Releases, Covenants and Warranties.

Release by TEP. Upon the occurrence of the Approval Event and the release and distribution of the Settlement Funds from the Escrow Account pursuant to Paragraphs 2 and 5 of the Settlement Agreement, TEP, for itself and its agents, officers, directors, partners, partnerships, parents, shareholders, employees, consultants, subsidiaries, affiliates, insurers, successors and assigns, fully and forever releases and discharges the Settlement Class, and each of them, from any and all Released Claims, except for rights and obligations created by this Settlement Agreement. It is understood and agreed that this Release extends to, but is not limited to, the counterclaim asserted by TEP.

Release by Settlement Class Members. Upon the occurrence of the Approval Event and the release of the Settlement Funds from the Escrow Account pursuant to Paragraphs 2 and 5 of the Settlement Agreement, the Settlement Class and Subclasses, and each of them, for themselves and their respective heirs, agents, officers, directors, shareholders, employees, consultants, joint venturers, partners, members, legal representatives, successors and assigns, fully and forever release and discharge TEP from any and all Released Claims, except for the rights and obligations created by this Settlement Agreement.

9. No Release of Non-Parties. Nothing herein shall operate or be construed to release any claims the Parties may have against any person or entity who is not a party hereto.

10. This action and any and all claims, actions or causes of action alleged by Plaintiffs, individually and on behalf of the Settlement Class members against TEP, and any and all counterclaims, actions or causes of action alleged by TEP against the Settlement Class members, are dismissed with prejudice.

11. Neither this Order Approving Final Settlement, the Settlement Agreement, nor any document referred to herein nor any action taken pursuant to -- or to carry out -- the Settlement Agreement may be used as an admission by or against TEP of any fact, claim, assertion, matter, contention, fault, culpability, obligation, wrongdoing or liability whatsoever. The Settlement Agreement and its exhibits may be filed in any subsequent action against or by Settlement Class members or TEP to support a defense of res judicata, collateral estoppel, release, or other theory of claim preclusion, issue preclusion or similar defense.

12. Allocation of the Settlement Amount shall proceed as stated in the Settlement Agreement. Specifically, payments shall be made pursuant to the Final Distribution Schedule, which represents the Settlement Class members' proportionate share of the Settlement Amount defined in Paragraph 2 of the Settlement Agreement, less the amounts awarded for attorneys' fees and expenses, as well as incentive award payments, made by separate order. The Court approves the Final Distribution Schedule and the manner in which the Final Distribution Schedule was prepared. Class Counsel shall distribute payments to the Class members consistent with the Final Distribution Schedule, as provided in Paragraph 5 of the Settlement Agreement.

13. The Court has, by separate order, granted Class Counsel's Motion for an Award of Attorneys' Fees, Expenses, and an Incentive Award Payment to Class Representatives (ECF No. 93). The amount of attorneys' fees and expenses awarded to Class Counsel shall be distributed to Class Counsel from the Escrow Account pursuant to the terms of the Escrow Agreement. If this Order Approving Final Settlement is reversed on appeal, Class Counsel shall be jointly obligated to refund to TEP the amount of

attorneys' fees and expenses paid, with statutory interest, within 15 days of the date of such reversal. If the amount of attorneys' fees or expenses is reduced on appeal, Class Counsel and their law firms shall be jointly obligated to refund to the Escrow Account the difference between the amount paid to them pursuant to this Paragraph 12 and the amount ultimately awarded, with statutory interest, within 30 days of the date of the order or decision reducing the amount of fees or expenses awarded. TEP shall have no liability to the Settlement Class and Subclasses, the Settlement Class members, or Class Counsel to pay any funds in addition to the Settlement Funds paid.

14. The Court reserves jurisdiction over this matter, the Parties, and all counsel herein, without affecting the finality of this Order Approving Final Settlement, including over (a) implementing, administering and enforcing this Settlement and any award or distribution from the Settlement Funds; (b) disposition of the Settlement Funds; and (c) other matters related or ancillary to the foregoing.

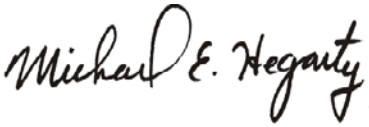
15. Nothing set forth in this Order Approving Final Settlement shall be construed to modify or limit the terms of the Agreement, but rather, the Agreement and this Order Approving Final Settlement are to be construed together as one Settlement between the Parties.

16. The Settlement and this Order Approving Final Settlement shall have no res judicata, collateral estoppel, or other preclusive effect as to any claims other than the Released Claims.

SO ORDERED.

DATED this 15th day of March, 2019, in Denver, Colorado.

BY THE COURT:



Michael E. Hegarty
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
United States Magistrate Judge Michael E. Hegarty

Civil Action No. 17-cv-01990-MEH

ELNA SEFCOVIC, LLC,
WHITE RIVER ROYALTIES, LLC,
JUHAN, LP, and
ROY ROYALTY, INC., individually and on behalf of all others individually situated,

Plaintiffs,

v.

TEP ROCKY MOUNTAIN LLC,

Defendant.

ORDER ON PENDING MOTIONS

In light of the Order Approving Final Settlement, the Renewed Motion to Intervene [filed February 4, 2019; ECF No. 118] is **denied as moot**.

In addition, the Court finds that, pursuant to 28 U.S.C. § 636(c), the "Objection to the Magistrate's 'Order' Striking Election of Non-Consent and Objections to the Magistrate's 'Order' Reversing Order Dismissing Case" filed by the putative intervenors [ECF No. 119] is improperly filed in this case and, thus, is **stricken**. On August 13, 2018, the Plaintiffs and Defendant filed a "Joint Notice of Unanimous Consent to the Jurisdiction of Magistrate Judge, and Joint Motion for Entry of an Order of Reference under 28 U.S.C. § 636(c)(1)" (ECF No. 57) and Chief Judge Marcia S. Krieger issued the Order of Reference the same day (ECF No. 58). Since that time, the case has proceeded pursuant to 28 U.S.C. § 636(c). This Court's order striking the putative intervenors' Magistrate Judge Consent Election form (ECF No. 117) was proper, given that the putative

intervenors were not "parties" in this case, eligible to elect whether to consent to the jurisdiction of a magistrate judge. *See* 28 U.S.C. § 636(c)(1) ("Upon the consent of the *parties*, a full-time United States Magistrate Judge … may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case ….") (emphasis added). To the extent that a party has any "objection" to an order of a Magistrate Judge serving under § 636(c), the party may "appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. § 636(c)(3).

Accordingly, the putative intervenors' "[Motion] for Hearing on their Objection to the Magistrate's 'Order' Striking Election of Non-Consent, and Objections to the Magistrate's 'Order' Reversing Order Dismissing Case [filed February 7, 2019; ECF No. 120] and the Joint Motion to Strike Improper Objection to Court's Orders [filed February 7, 2019; ECF No. 121] are **denied as moot**.

SO ORDERED.

DATED this 15th day of March, 2019, in Denver, Colorado.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge

FILED
United States Court of Appeals
Tenth Circuit

May 15, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELNA SEFCOVIC, LLC, et al.,

Plaintiffs - Appellees,

v.

TEP ROCKY MOUNTAIN, LLC,

Defendant - Appellee.

CHARLES DEAN GONZALES, et al.,

Objectors,

IVO LINDAUER, et al.,

Intervenors - Appellants,

and

THE LAW OFFICES OF GEORGE A. BARTON, PC,

Movant - Appellee.

No. 19-1121
(D.C. No. 1:17-CV-01990-MEH)
(D. Colo.)

ORDER

Before **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

March 18, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELNA SEFCOVIC, LLC; WHITE RIVER ROYALTIES, LLC; JUHAN, LP; ROY ROYALTY, INC., individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

TEP ROCKY MOUNTAIN, LLC,

Defendant - Appellee.

CHARLES DEAN GONZALES; SUSANNAH GONZALES; TED L. VAUGHAN; HILDA M. VAUGHAN,

Objectors,

IVO LINDAUER; SIDNEY LINDAUER; RUTH LINDAUER; DIAMOND MINERALS,

Intervenors - Appellants,

and

THE LAW OFFICES OF GEORGE A. BARTON, PC,

Movant - Appellee.

No. 19-1121
(D.C. No. 1:17-CV-01990-MEH)
(D. Colo.)

JUDGMENT

Before **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

DISTRICT COURT, GARFIELD COUNTY, COLORADO 109 8th Street, Glenwood Springs, CO 81601 Telephone: (970) 945-5075	DATE FILED: October 17, 2008 CASE NUMBER: 2006CV317
Plaintiffs: IVO LINDAUER, SIDNEY and RUTH LINDAUER, and DIAMOND MINERALS, LLC, on behalf of themselves and all others similarly situated, v. **Defendant:** WILLIAMS PRODUCTION RMT COMPANY	☐ COURT USE ONLY ☐ Case Number: 2006cv317 Div.: Ctrm.:
SETTLEMENT AGREEMENT	

This Agreement is made between Plaintiffs Ivo Lindauer, Sidney and Ruth Lindauer, and Diamond Minerals, LLC, on behalf of themselves and all others similarly situated, and Defendant Williams Production RMT Company, effective June 1, 2008.

RECITALS

WHEREAS, on September 20, 2006, Plaintiffs filed suit in Colorado State District Court for Garfield County, Colorado ("Court"), Case No. 2006CV317, alleging that Defendant has underpaid royalty and overriding royalty interest owners on gas production in Garfield County, Colorado, and has not made refunds of excess ad valorem tax withholding for certain years.

WHEREAS, Plaintiffs seek to bring this suit as a class action on behalf of all other royalty and overriding royalty owners who are similarly situated.

WHEREAS, Defendant denies the allegations that it has underpaid royalty and overriding royalty and maintains that it was in the process of determining the ad valorem tax refunds when the lawsuit was filed.

WHEREAS, the parties recognize that they will expend substantial resources in continuing this litigation and agree that settlement of most of the claims raised is in their respective interests.

WHEREAS, the parties have been able to agree to settlement of all but two distinct and severable claims in this litigation, and as to those two claims, have agreed on the manner in which those claims should be resolved by the Court.

WHEREAS, subject to the two Reserved Claims described below, the parties desire by this Agreement to (1) resolve all class claims relating to past calculation of royalty and overriding royalty, (2) establish certain rules to govern future royalty and overriding royalty payments so as to avoid or minimize disputes over royalty payments in the future, and (3) resolve all claims relating to past withholding for ad valorem tax payments, and establish a procedure for refunds of any such excess withholding in the future.

WHEREAS, after substantial discovery relating to the claims and defenses (including information obtained in two prior cases that were tried in the Garfield County district court involving other royalty owners), the parties participated in a mediation conducted by former Colorado Supreme Court Justice William D. Neighbors on April 3, 2007, and thereafter continued to exchange documents, voluminous accounting data, and other relevant information before reaching this Agreement.

NOW, THEREFORE, IT IS HEREBY AGREED by the Settling Parties that, subject to final approval by the Court and the entry of Judgment as to the Settled Claims, the class claims of the Settlement Class Members other than the two Reserved Claims described below be settled and dismissed with prejudice, subject to the following terms and conditions:

SECTION 1

1. DEFINITIONS

As used in the Settlement Agreement and the Exhibits hereto, the following terms have the meanings specified below.

1.1 "Action" means the class action identified in the caption of this Settlement Agreement.

1.2 "Administrative Expenses" means the reasonable expenses incurred in providing notice to the Plaintiff Class, including costs of printing, publishing and mailing the Notice, as well as expenses incurred by Class Counsel in locating members of Plaintiff Class and performing the activities referred to in paragraph 8.10.

1.3 "Class Counsel" means Nathan A. Keever of Dufford, Waldeck, Milburn & Krohn, L.L.P.; G.R. Miller of Miller, Agro & Robbins, LLC; and Thomas D. Kitch, Gregory J. Stucky, and David G. Seely of Fleeson, Gooing, Coulson & Kitch, LLC.

1.4 "Class Representatives" means Ivo Lindauer, Sidney and Ruth Lindauer, and Diamond Minerals, LLC.

1.5 "Class Wells" means the wells located on or with production allocated to the oil and gas leases listed on Exhibit A.

1.6 "Deduction" means any monetary or volumetric deduction taken by Williams when calculating and paying royalty or overriding royalty to any member of the Plaintiff Class since September 2000 for costs attributed to operations between the initial point(s) of measurement of gas produced from the Class Wells to the point of access into a Mainline

Transmission Pipeline.

1.7 "Distribution Check" means a check payable to a Settlement Class Member in the net amount owed to such Settlement Class Member pursuant to this Agreement.

1.8 "Distribution Date" means the date on which the Distribution Check is sent to each Settlement Class Member.

1.9 "Effective Date" means the date on which the Court's Judgment for the Settled Claims becomes Final and Unappealable as set forth in paragraph 1.12.

1.10 "Fairness Hearing" means the hearing to be held before the Court at which an order in a form substantially similar to Exhibit F hereto shall be presented for approval.

1.11 "Final Distribution Schedule" means a schedule that shows the net amount due each Settlement Class Member under Section 3 of this Settlement Agreement, after prorata reduction for any award of attorney's fees and expenses and Administrative Expenses.

1.12 "Final and Unappealable Judgment" means the following: If no appeal from the Judgment has been filed, the Judgment becomes "Final and Unappealable" upon the expiration of the time under Colorado Appellate Rule 4(a) for filing a notice of appeal from the Judgment. If a timely appeal from the Judgment is filed and either the Judgment is affirmed or the appeal is dismissed, the Judgment becomes "Final and Unappealable" upon the earlier of (i) the filing of no petition for writ of certiorari after such affirmance or dismissal within the time for filing such a petition, or (ii) expiration of the time for rehearing of the denial or dismissal of such a petition after such affirmance or dismissal, or (iii) expiration of the time for seeking rehearing of the Supreme Court's affirmance of such affirmance or dismissal.

1.13 "Judgment" means the order in a form substantially similar to Exhibit F hereto.

1.14 "Leasehold Estates" means those leasehold interests that Williams has owned or operated in Garfield County, Colorado, at any time during the period from September 2000 through May 2008. Those leases are listed under the categories set forth on Exhibit A.

1.15 "Mainline Transmission Pipeline" means the transmission pipelines indicated below, and transmission pipelines located downstream of those pipelines. The parties agree that the following pipelines in the Piceance Basin qualify as Mainline Transmission Pipelines: CIG, NWPL, Questar, TransColorado, Wyoming Interstate Gas, PSCO as specified below (including the interests in that pipeline owned by Public Service Company and Rocky Mountain Natural Gas), and Rockies Express. The parties also agree that gathering pipeline systems in the Piceance Basin, such as Williams' Grand Valley Gathering System and the gathering system operated by Canyon Gas Resources and/or Energy Transfers, do not qualify as a Mainline Transmission Pipeline. The parties further agree that to the extent the PSCO pipeline is connected directly to Williams' wells and operates like the Grand Valley Gathering System, then that portion of the PSCO pipeline does not qualify as a Mainline Transmission Pipeline. (The portion of the PSCO pipeline into which the Grand Valley Gathering System delivers gas does qualify as a Mainline Transmission Pipeline.) With respect to pipeline systems not identified in this paragraph (or not yet constructed), the parties agree that a pipeline that collects gas directly from many wells and then delivers the gas to a common collection point in the field or brings gas to a Plant is not a Mainline Transmission Pipeline; however, a pipeline that transports the gas beyond common collection points in the field towards end use or downstream markets for the gas without processing or treatment of the gas after entry into that pipeline (and after any compression required to bring the gas to the equivalent levels of pressure maintained on the above listed

transmission pipelines) is a Mainline Transmission Pipeline, regardless of whether the pipeline is regulated by the Federal Energy Regulatory Commission.

1.16 "Natural Gas Liquids" or "NGLs" means liquid hydrocarbons recovered or obtained by or on behalf of Williams from the gas after the gas is measured at or near the well. It includes liquid hydrocarbons recovered from the Grand Valley Gathering System and the Plants.

1.17 "Net Settlement Fund" means the Settlement Amount less all amounts approved by the Court for payment of (i) attorneys' fees and expenses to Class Counsel, and (ii) Administrative Expenses.

1.18 "Notice" means the notice as approved by the Court at the Preliminary Approval Hearing pursuant to C.R.C.P. 23 (c)(2). A proposed Notice is attached as Exhibit B.

1.19 "Opt-Out Claimant" means a member of the Plaintiff Class who submits a timely and valid request for exclusion in accordance with the Preliminary Order, and who does not revoke that request for exclusion in writing at least seven (7) days before the Fairness Hearing.

1.20 "Plaintiff Class" means all royalty owners, including overriding royalty interest owners, who have been entitled to receive royalty payments under oil and gas leases located in Garfield County, Colorado, owned in whole or in part, or operated by, Williams at any time during the period from September 20, 2000, through May 31, 2008. Excluded from the "Plaintiff Class" are the following:

(a) The United States of America insofar as its mineral interests are managed by the Minerals Management Service;

(b) Indian Tribes and their allottees;

(c) Parties to prior settlement agreements with Williams relating to payment of royalty (Puckett Land Company);

(d) Royalty owners in oil and gas leases that provide a specific formula for payment of royalty tied to an index price, but only to the extent they receive royalty under such leases (the oil and gas lease dated July 20, 2005 between Mary Anne Bosely, *et al.* as "Lessor" and Williams as "Lessee," and the oil and gas lease dated May 9, 2006, between Jonathon H. Wellendorf and Diana L. Wellendorf as "Lessor" and Williams as "Lessee");

(e) Parties who have previously litigated royalty payment issues with Williams, for the time period covered by the judgments entered in those cases (Joan L Savage and William F. Clough);

(f) the Meriam Zela Grynberg Trust, the Rachel Susan Grynberg Trust, and the Stephen Mark Grynberg Trust, which are plaintiffs asserting royalty payment claims in *Grynberg v. Williams*, Civil Action No. 02-CV-5167, pending in the Denver District Court;

(g) EnCana Oil & Gas (USA) Inc., ExxonMobil, and Chevron USA (but these royalty owners will be given an opportunity to opt in to the Plaintiff Class);

(h) Williams Production RMT Company and Barrett Resources Corporation and any of their affiliates; and

(i) The legal representatives, heirs, successors, or assigns of any excluded party.

1.21 "Plants" means Williams' existing and future plants in the Piceance Basin which treat or process gas from the Class Wells.

1.22 "Preliminary Approval Hearing" means the hearing to be held before the Court at which an Order in a form substantially similar to Exhibit E hereto shall be presented for approval.

1.23 "Preliminary Distribution Schedule" means a schedule created by Williams that shows the amount due each member of Plaintiff Class under Section 3 of this Agreement, without (i) deletion of Opt-Out Claimants, and (ii) prorata reduction for any award of attorney's fees and expenses and Administration Expenses. The Preliminary Distribution Schedule shall also identify the category of the Royalty Instrument(s) associated with each class member as well as the name and most current identification number assigned to each such member by Williams in the normal course of business.

1.24 "Preliminary Order" means the order in a form substantially similar to Exhibit E hereto.

1.25 "Released Parties" means Williams and all other working interest owners in the Class Wells for whom Williams has paid royalty or overriding royalty and for whom Williams makes Settlement Payments to members of Plaintiff Class, as well as the past and present employees, officers, directors, representatives, agents, attorneys, parents, affiliates, subsidiaries, stockholders, predecessors, successors and assigns of Williams and all such working interest owners.

1.26 "Reserved Claims" means the two claims not resolved by this Settlement Agreement and reserved for resolution by the Court, as more particularly described in Section 7 of this Agreement.

1.27 "Royalty Instruments" means all oil and gas leases creating royalty interests and all other contracts or instruments creating overriding royalty interests, covering lands in Garfield

County, Colorado, under which Williams is or has been a lessee during the period from September, 2000 through May 31, 2008, and in which a Settlement Class Member owns or has previously owned an interest.

1.28 "Royalty Instrument Categorization" means the categorization of Royalty Instruments set forth in Exhibit A.

1.29 "Settled Claims" means any and all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever, known or unknown, suspected or unsuspected, asserted or unasserted, that might have been asserted prior hereto or in the future, directly, representatively, derivatively, or otherwise by the members of the Plaintiff Class based on any facts, circumstances, transactions, events, occurrences, statements, acts, omissions, failures to act, conflicts of interest, tortious acts, intentional acts, negligent acts, grossly negligent acts, acts of unjust enrichment, breaches of express provisions, breaches of implied covenants or any other duties arising under the leases or overriding royalty instruments, or breach of other statutory or common law duties which occurred at any time, which were or could have been properly alleged under Colorado Rule of Civil Procedure 23 by the Class Representatives on behalf of the Plaintiff Class arising from payment of royalty or overriding royalty by Williams, or the withholding of ad valorem taxes, except for the two Reserved Claims.

1.30 "Settlement Amount" means the total amount of Settlement Payments, prior to any reduction for amounts awarded by the Court for Class Counsel's attorneys' fees, litigation costs, expenses, and Administrative Expenses.

1.31 "Settlement Class Members" means all members of the Plaintiff Class except Opt-Out Claimants.

1.32 "Settlement Payments" means those payments described in Section 3 of this Settlement Agreement.

1.33 "Settling Parties" means Class Representatives and Williams.

1.34 "Statutory Interest" means the rate of 8%, compounded annually, pursuant to C.R.S. § 5-12-102.

1.35 "Transition Date" means the last day of Williams' accounting month in which the Court executes Exhibit E.

1.36 "Weighted Average Sales Price" or "WASP" means all proceeds Williams and any affiliate receives for the applicable production month from third parties in arms-length transactions for all products, including residue gas, unprocessed gas, and NGL's, allocated to each applicable grouping of Class Wells whose production Williams has appropriately assigned to an accounting sales pool, divided by the total volume related to each such sales pool (on an Mmbtu basis in the case of residue gas and unprocessed gas, and gallons or barrels in the case of NGLs). There is or will be a separate WASP for residue gas, unprocessed gas, and NGLs. With respect to any products that Williams has used or stored, Williams will calculate and pay royalty based on the WASP received in the month of production for the same types of products, less applicable deductions permitted under Section 4.

1.37 "Williams" means Williams Production RMT Company, together with its affiliated persons and entities, and includes Barrett Resources Corporation, which merged into Williams in 2001.

SECTION 2

2. PAST AND PRESENT ROYALTY PAYMENT METHODOLOGIES

Subject to any mistakes or miscalculations that Williams has made in its accounting (which Williams will be correcting under Section 3 of this Agreement), Williams makes the following representations of fact:

2.1 From September 2000 until merging with Williams in August 2001, Barrett Resources calculated royalties by starting with an arm's-length sales price and then deducting all expenses incurred between the wellhead and the point of sale, including but not limited to Deductions, which included a fee for utilizing its wholly-owned Grand Valley Gathering System (GVGS). During this period, the GVGS fee was $0.22 per mcf plus a 2.5% fuel charge.

2.2 Effective with September 2001 production, Williams stopped taking Deductions. For production from September 2001 through December 2005, Williams paid royalties by calculating a Weighted Average Sales Price (or "WASP") for the residue gas and unprocessed gas. Williams applied the WASP to the volumes of gas measured at each wellhead and only deducted third-party fees which it actually incurred to move the gas on one or more Mainline Transmission Pipelines to the point of sale or consumption.

2.3 From January 2006 production until the Effective Date, Williams has included NGLs when calculating royalties on gas that is processed. Williams allocates NGLs back to the wells based on gas analyses performed for each well, so that each well producing processed gas shares proportionately in the NGL recovery. Williams then calculates the residue gas volume for each well based on the total volume of gas measured at the wellhead less the Mmbtu's removed as NGLs. Williams calculates royalty on the residue gas by applying the WASP for residue gas and

deducting only transportation costs incurred to move the gas on Mainline Transmission Pipelines. Williams calculates royalty on the NGLs based on the applicable WASP for NGLs, less any transportation costs incurred beyond the Plants.

2.4 From January 2006 production to the Effective Date, Williams has not deducted processing costs, including any volumetric reductions for Plant fuel, which it has incurred to extract NGLs; before this lawsuit was filed, however, it had been engaged in the planning necessary for it to begin deducting such costs from its royalty payments.

SECTION 3

3. SETTLEMENT PAYMENTS FOR PAST PRODUCTION

3.1 With respect to all Royalty Instruments except those in categories 1, 2, 3 and 13 on Exhibit A, Williams will pay Settlement Class Members for all Deductions taken in calculating royalty from the September 2000 accounting month to the Transition Date. Williams will compute and pay Statutory Interest on the principal amount of each Deduction, from the date upon which it was taken until the Transition Date. After the Transition Date, Williams will compute and pay interest at the rate of 4% simple interest until the Distribution Date.

3.2 With respect to all Royalty Instruments for the September 2000 accounting month through the December 2005 production month, Williams will pay Settlement Class Members 75% of the additional value of NGLs recovered downstream of the initial measurement point at or near each Class Well, for each such well, as compared to the original payment of royalty on those Mmbtus based on a residue gas price. Williams will compute and pay royalty on the additional value of the NGLs as follows. Step 1: For each month of the period covered by this paragraph 3.2, Williams will first calculate the Mmbtus of wellhead production that were recovered and sold

as NGLs. Step 2: Williams will then compare the proceeds received from the sale of NGLs for that month with the value used to pay royalty on the Mmbtus recovered as NGLs (*i.e.*, the Mmbtus recovered as NGLs times the residue gas price). Step 3: Williams will multiply the difference between NGL value and residue gas value computed in Step 2 by 75%. Step 4: Williams will then divide the resulting number in Step 3 by total wellhead Mmbtus for that month (thus obtaining the value per wellhead Mmbtu for calculation of additional royalty). Step 5: Williams will multiply the resulting numbers in Step 4 by the wellhead Mmbtus for that month for each well. Step 6: Finally, for each well, Williams will multiply the answer from Step 5 times a Settlement Class Member's royalty percentage interest in wellhead Mmbtus for that month (which will yield the principal amount of additional royalty to be paid each month). In making calculations of additional royalty under this paragraph, Williams will not subtract any costs incurred at the Plants. In addition, for any months in which the original royalty value of the Mmbtus recovered and sold as NGLs is higher than the value calculated under this paragraph, Williams will not make any negative adjustments or otherwise reduce the total amount of additional royalty to be paid under this paragraph. Williams will pay Statutory Interest on the principal amount calculated each month under this paragraph from the date such amount would have been due until the Transition Date. After the Transition Date, interest will accrue at the rate of 4% simple interest until the Distribution Date.

3.3 With respect to all Royalty Instruments, Williams will reimburse all Settlement Class Members any amounts withheld from royalty payments for ad valorem taxes for the years 2000, 2001, and 2004, in excess of the taxes actually paid by Williams on behalf of each such royalty owner, together with Statutory Interest, beginning the month after the tax payment was due and continuing through the date of disbursement. (During the pendency of this litigation,

Williams has repeatedly expressed its intent to repay any excess ad valorem withholdings to its royalty owners, whether or not a settlement agreement was reached or approved and whether or not a particular royalty owner was covered by such agreement.)

3.4 With respect to all Royalty Instruments, Williams will also correct any errors discovered in the accounting for the period from the September 2000 accounting month to the Transition Date, including its prior use of index pricing to establish royalty value, to the extent those errors have not previously been corrected. Williams will pay Statutory Interest on any amounts found to be due, calculated from the date of the error until the Transition Date. After the Transition Date, interest will accrue at the rate of 4% simple interest until the Distribution Date.

3.5 With respect to any Royalty Instruments in category 12 on Exhibit A, Williams will refund any deductions (including transportation on Mainline Transmission Pipelines) taken in calculating royalty for the period from the September 2000 accounting month to the Transition Date. Williams will pay Statutory Interest on any amounts found to be due, calculated from the date the deduction was taken until the Transition Date. After the Transition Date, interest will accrue at the rate of 4% simple interest until the Distribution Date.

3.6 The amounts calculated above will be proportionately reduced by an amount awarded by the Court for Class Counsel's attorneys' fees, litigation costs, and Administrative Expenses.

3.7 The provisions in paragraph 3.1 relating to category 2 and 3 leases are not intended to represent an agreement by Class Representatives that Deductions are allowed by those leases. It appears that the Deductions in question were taken before any leases in those categories were issued by any member of the Plaintiff Class and therefore resolution of whether category 2 and 3 leases allow Deductions is not necessary for determination of settlement payments for past

production.

SECTION 4

4. FUTURE ROYALTY PAYMENTS

With respect to monthly royalty payments made after the Effective Date, Williams agrees to pay Settlement Class Members in the following manner:

4.1 With respect to all Royalty Instruments except those in categories 1, 2, 3, 12 and 13 on Exhibit A, Williams will not take any Deductions (except for processing deductions allowed by paragraph 4.4), regardless of (a) whether the costs relate to activities on or off the Leasehold Estates (except when the applicable Royalty Instrument expressly provides that no royalty is due on fuel consumed by Williams for lease operations on the Leasehold Estate), (b) what entity provides such services or how it is paid, and (c) where or how title to the gas is transferred.

4.2 With respect to Royalty Instruments in categories 2 and 3 on Exhibit A, nothing herein prohibits Williams from taking any Deductions it claims it is entitled to take under the terms of such Royalty Instruments, and nothing herein prohibits any Settlement Class Member from challenging such deductions.

4.3 With respect to Royalty Instruments in category 12 on Exhibit A, Williams will not take any deductions (including third party transportation) in calculating royalty, except to the extent it fractionates NGLs into component products, in which case paragraph 4.6 will apply.

4.4 With respect to all Royalty Instruments, Williams will account for the value of NGLs extracted from the gas (using the methodology described in paragraph 2.3). With respect

to all Royalty Instruments except those in categories 8, 9, 11, 12 and 13 on Exhibit A, in accounting for the value of NGLs extracted from the gas, Williams shall be permitted to deduct 50% of the amount allowed as a processing deduction under the regulations of the Mineral Management Service (the processing deduction will be limited to those costs incurred within a processing plant and will not exceed 1/3 of the value of the NGLs, since the MMS limit on processing costs is 2/3 of the value of the NGLs), but under no circumstances shall Williams be entitled to take any other Deduction when making such calculation. If Williams transports NGLs to sales points beyond the tailgate of a Plant, Williams can deduct such transportation costs when calculating royalties thereon. If Williams fractionates NGLs and sells the component products, royalty on the fractionated products will be determined by paragraph 4.6.

With respect to Royalty Instruments in categories 8, 9, and 11 on Exhibit A, the Plaintiff Class reserves the right to argue that such Royalty Instruments prohibit any or all deductions described in the first paragraph of this Section 4.4 when litigating the Reserved Claim described in paragraph 7.2.

With respect to Royalty Instruments in category 13 on Exhibit A, Williams will be permitted to deduct the same processing costs as allowed under federal leases.

Nothing herein precludes any royalty owner(s) from contending in any subsequent litigation that, when creating a second marketable product in the form of NGLs or subsequent fractionated products, Williams has failed to enhance (or increase proportionally) the total royalties received by such royalty owner(s).

4.5 Subject to the Reserved Claims, under all Royalty Instruments except those in categories 8, 9, 11 and 12 on Exhibit A, Williams shall be entitled to deduct a proportionate amount of any costs it actually incurs to transport gas in a Mainline Transmission Pipeline to

downstream sales points, including demand or reservation charges, commodity charges, and fuel charges; provided, however, that no such credit shall be permitted unless the Settlement Class Members also received the benefit of the price actually paid for such gas at such location. Williams will not, however, deduct unused demand or reservation charges in calculating royalty, but shall be permitted to contend that such charges should be considered in determining whether Williams has "enhanced" the value of the gas, as described in Section 7.

4.6 If Williams transports NGLs to Conway or Bushton, Kansas, or other locations and Williams then fractionates such NGLs and sells the fractionated components, Williams will pay royalty on the fractionated components (ethane, propane, normal butane, iso-butane and natural gasoline) attributable to a well in which a Settlement Class Member has an interest, based on the published Mt. Belvieu, Texas "non-TET" monthly average Oil Price Information Service ("OPIS") prices in effect for the then current production month, less transportation tariffs and fractionation fees (and the cost of extracting NGLs as allowed under paragraph 4.4). If the Mt. Belvieu, Texas "non-TET" OPIS prices cease to be published, Williams will pay royalty on fractionated products using a replacement price as published in OPIS. Upon request, Williams will provide the applicable OPIS prices to any Settlement Class Member

4.7 As provided by Colorado law, Williams will withhold from royalty payments amounts to cover the royalty or overriding royalty owner's estimated share of severance, ad valorem, and conservation taxes. Williams will withhold for ad valorem taxes based on the latest tax rate from Garfield County multiplied by 87.5%. Each quarter, Williams will review the withholding rate to determine if it is still an accurate estimate and make adjustments accordingly. With respect to withholding for ad valorem taxes, Williams will reimburse royalty owners for any excess withholding within 90 days after receiving the bill for ad valorem taxes from Garfield

County. If Williams does not make the refunds by that date, it will pay Statutory Interest until the refunds are made.

4.8 Williams and the Settlement Class Members shall be bound prospectively by the royalty methodology set forth in this Section 4 of this Settlement Agreement.

SECTION 5

5. REPRESENTATIONS CONCERNING ROYALTY PAYMENTS

5.1 Taking into account the Settlement Payments in Section 4 to Settlement Class Members, Williams represents that, for the period beginning with the September 2000 accounting month:

(a) it has properly accounted for all volumes of gas extracted, sold or used from the Class Wells on the basis of Mmbtu's measured at the wellhead, and will do so in the future, on the basis on Mmbtus at the initial measurement point at or near each Class Well;

(b) except for those Royalty Instruments in categories 1, 2, 3 and 13 on Exhibit A and except for the processing deduction described in paragraph 4.4, Williams has not taken and will not take any Deductions;

(c) Williams has used and will use in the future the Weighted Average Sales Price to calculate royalty payments, except as provided in paragraph 4.6 relating to future sales of fractionated products.

5.2 Settlement Class Members are entitled to rely on the representations in this Section, as well as the description of past and future royalty methodologies in Sections 2 and 4.

The Court has continuing jurisdiction to enforce this paragraph.

SECTION 6

6. RETROACTIVE ADJUSTMENTS

6.1 Except with respect to the Reserved Claims, this Agreement is intended to settle all class claims (the Settled Claims) for the period ending with the Transition Date, and Williams shall not make any retroactive debit adjustments with respect to the Settled Claims for production to the Transition Date.

6.2 Williams may make appropriate retroactive adjustments in the ordinary course of business related to matters other than the Settled Claims, subject to the right of the affected royalty owner(s) to object thereto.

SECTION 7

7. CLAIMS NOT RESOLVED BY THIS SETTLEMENT AGREEMENT

7.1 This Settlement Agreement resolves all claims for all Royalty Instruments held by the Plaintiff Class, except one distinct claim that relates only to Royalty Instruments in categories 8, 9 and 11 on Exhibit A, and one distinct claim that relates to Royalty Instruments in categories 5, 6 and 7 on Exhibit A. These two unresolved claims are referred to as the Reserved Claims.

7.2 The first Reserved Claim is whether Williams is entitled to deduct a pro-share of any expenses incurred beyond the tailgates of the Plants when calculating royalties under the Royalty Instruments in categories 8, 9 and 11 on Exhibit A. The Plaintiff Class contends that these instruments expressly prohibit the deduction of such expenses, and Williams contends that those royalty instruments are subject to the same rules as silent leases under *Rogers v. Westerman*

Farm Co., 29 P.3d 887 (Colo. 2001). (The Plaintiff Class also specifically reserves the right to argue that the Royalty Instruments in Categories 8, 9 and 11 on Exhibit A prohibit Williams from deducting any processing costs when paying royalties on NGLs.) If the Plaintiff Class does not prevail on this Reserved Claim, these Royalty Instruments will be subject to the outcome of the second Reserved Claim.

7.3 The second Reserved Claim is whether Williams can establish that it has "enhanced" or proportionately increased the value of (and royalties paid on) gas produced prior to the Transition Date under Royalty Instruments in categories 5, 6 and 7 on Exhibit A by transporting that gas on a Mainline Transmission Pipeline to the points of sale (and deducting a pro-rata share of those transportation costs in calculating royalty).

When this claim is being adjudicated, the Plaintiff Class stipulates that it will claim that (1) the gas is marketable and has reached the commercial marketplace when it arrives at one or more locations used by the publication Inside FERC to establish the CIG-Rocky Mountain, the Northwest Pipeline-Rocky Mountain, and the Questar Pipeline-Rocky Mountain Index Prices; (2) the volume weighted average of these three Indexes is the best available evidence for determining whether Williams has met the test for determining if it has enhanced the royalties paid to the Plaintiff Class by incurring expenses to transport the gas to points of sale beyond these locations; and (3) for gas not entering one of those three pipelines (such as gas being transported on the TransColorado or PSCO pipelines), they will not claim that Williams must transport the gas to sales locations in New Mexico or Wyoming in order to render the gas marketable (and at a commercial marketplace) under Colorado law.

While this claim is being adjudicated, Williams stipulates that it will claim that (1) the gas is first marketable and at the location of the commercial marketplace when it reaches one of the

outlets of the Plants or the entry to a Mainline Transmission Pipeline, and (2) that the value to be used to determine whether the "enhancement" test has been met are the prices received for the gas at those locations.

The second Reserved Claim will include two principal sub-issues: the location of the first commercial marketplace (for purposes of determining enhancement, not whether the gas is marketable under *Rogers v. Westerman Farm*); and the period used to determine whether enhancement has been achieved.

7.4 Nothing contained in this section shall bar or otherwise prejudice Williams' right to contend that an "enhancement" test does not exist under Colorado law or that the test is different from the one that the Plaintiff Class contends exists. In addition, notwithstanding Williams' agreement in paragraph 4.5 to pay royalty in the future without deducting unused demand or reservation charges on Mainline Transmission Pipelines, Williams will be permitted to contend that such unused demand or reservation charges should be considered by the Court when determining whether Williams has satisfied any enhancement test that may apply.

7.5 In litigation of the Reserved Claims, evidence relating to the Settled Claims will be inadmissible and the Plaintiff Class will not seek to introduce evidence, testimony or argument relating to those claims.

7.6 The Reserved Claims are strictly limited to claims for breach of contract and are confined to the time period from and after the September 2000 accounting month. The Plaintiff Class will release all other claims, including claims for moratory interest on the Reserved Claims. Williams agrees that, if the Plaintiff Class obtains judgment on one or both of the Reserved Claims for damages commencing with the September 2000 accounting month, it will pay

Statutory Interest on the amount awarded.

7.7 The Reserved Claims will be tried to or otherwise resolved by the Court, without a jury.

7.8 Except as set forth in this Section 7, nothing contained in this Settlement Agreement shall alter whatever obligation Williams may have under the "enhancement" test. Nothing contained herein precludes any member of the Plaintiff Class from contending that Williams has failed to meet the "enhancement test" with reference to gas produced after the Transition Date.

7.9 Williams agrees to support certification of the plaintiff class(es) under C.R.C.P. 23 with respect to the Reserved Claims.

SECTION 8

8. IMPLEMENTATION OF THE SETTLEMENT AGREEMENT AND DISTRIBUTION OF THE SETTLEMENT FUND

8.1 Within forty-five (45) days of the execution of this Agreement, Williams will supplement accounting information previously provided to Class Counsel to show the paid history royalty accounting information for the Plaintiff Class from and after the September 2000 accounting month. Class Counsel may use that information only for purposes of this litigation and shall otherwise preserve the confidentiality of any such information designated as confidential.

8.2 As soon as practicable after this Settlement Agreement has been executed, counsel for the parties shall jointly submit to the Court the Motion substantially in the form as Exhibit C.

8.3 At the Preliminary Approval Hearing, the Settling Parties shall jointly urge the

Court to enter an Order substantially similar in form to Exhibit D.

8.4 At least forty-five (45) days before the Fairness Hearing, Williams will provide Class Counsel with a copy of the Preliminary Distribution Schedule for review and shall file it with the Court. Within fifteen (15) days after the Fairness Hearing, Williams will provide Class Counsel and the Court with a copy of the Final Distribution Schedule.

8.5 At the Fairness Hearing, counsel for the parties shall jointly move the Court for entry of the Judgment substantially in the form attached as Exhibit E. Williams will also present the Preliminary Distribution Schedule for the Court's approval.

8.6 Within fifteen (15) days from the Effective Date, Williams shall (1) distribute the Net Settlement Fund, in accordance with the Final Distribution Schedule in the form as approved by the Court at the Fairness Hearing, by mailing the Distribution Checks to Settlement Class Members at the most current addresses then reasonably available, with each Distribution Check accompanied by a transmittal letter in the form attached as Exhibit G; and (2) shall pay to Class Counsel the attorneys' fees and costs and Administrative Expenses assessed by the Court.

8.7 Within ten (10) business days after the Distribution Date, Williams will file an affidavit certifying that the checks were sent to the Settlement Class Members in the amounts set forth on the Final Distribution Schedule.

8.8 One hundred (100) days after the Distribution Date, Williams will file an accounting of the Distribution Checks, showing (1) the Distribution Checks that have been cashed; (2) the Distribution Checks that have been returned to Williams; (3) the Distribution Checks that have not been returned but remain uncashed; and (4) all available information relating to the Distribution Checks described in (2) and (3).

8.9 Thereafter, the Court shall enter any further orders it deems proper in connection with the disposition of such remaining portion of the Net Settlement Fund, including, but not limited to, directing Class Counsel to take reasonable steps to distribute such remaining portion of the Net Settlement Fund to the proper Settlement Class Members or their successors or assigns.

8.10 Any portion of the Net Settlement Fund that remains after reasonable efforts have been exhausted to distribute the Net Settlement Fund to Settlement Class Members or their successors or assigns shall become the property of Williams.

8.11 If any Settlement Class Member receives a Distribution Check to which such Settlement Class Member is not entitled, that Settlement Class Member shall refund the amount of such Distribution Check to the Net Settlement Fund.

8.12 No Settlement Class Member shall have any claim against the Settling Parties or their respective counsel based on distributions made in accordance with the Final Distribution Schedule approved by the Court at the Fairness Hearing.

SECTION 9

9. UNDERTAKINGS OF THE SETTLING PARTIES

9.1 The Settling Parties agree to deal in good faith in implementing this Settlement Agreement and agree to cooperate and exercise their best efforts to the extent necessary to effectuate and implement all of its terms and conditions, as quickly as possible, by taking all actions contemplated by this Settlement Agreement, including its Exhibits.

9.2 The Class Representatives agree to participate as Settlement Class Members and agree to not request exclusion.

9.3 The Settling Parties agree to affirmatively present their support for final judicial approval of this Settlement Agreement.

9.4 The Settling Parties agree not to encourage in any way any member of the Plaintiff Class to become an Opt-Out Claimant or discourage any member of Plaintiff Class or any party with the right to opt in from participating in this settlement as a Settlement Class Member.

9.5 The Settling Parties agree to waive any right to appeal or collaterally attack the Judgment entered pursuant to this Settlement Agreement.

9.6 In proceedings before the Court and before any appellate courts, if necessary, the Settling Parties agree affirmatively to present support for certification of a Plaintiff Class (including, as appropriate, subclasses) and for final judicial approval of this Settlement Agreement.

SECTION 10

10. ATTORNEYS' FEES AND EXPENSES

10.1 Class Counsel shall apply to the Court for (i) reimbursement of their reasonable litigation expenses; (ii) reimbursement of Administrative Expenses; and (iii) an award of attorneys' fees of 25% of the Settlement Amount after reduction of (i) and (ii) above. Such award and reimbursements shall be paid out of the Settlement Amount as provided herein.

10.2 Williams will take no position regarding the award of fees and reimbursement of expenses.

10.3 This Settlement Agreement is not contingent upon the Court's approval of Class Counsel's application for attorneys' fees and expenses.

SECTION 11

11. TAXES

Class Representatives and Settlement Class Members shall be responsible for filing any tax returns and for paying any taxes that may be due on their proportionate share of the Net Settlement Fund. Williams shall have no liability or responsibility for paying any taxes with respect to amounts paid under this Settlement Agreement.

SECTION 12

12. EXCESSIVE OPT-OUT CLAIMANTS

If greater than twenty percent (20%) of the members of the Plaintiff Class request to exclude themselves pursuant to the Notice, Williams shall have the right to terminate the Settlement Agreement, in which event the provisions of Section 14 of this Settlement Agreement shall govern.

SECTION 13

13. CONDITIONS OF SETTLEMENT

13.1 This Agreement shall be effective only on the condition that all of the following events occur:

(a) The Court enters the Preliminary Order, substantially in the form of Exhibit E;

(b) The Court enters the Judgment, substantially in the form of Exhibit F, and

(c) There is an Effective Date.

13.2 Upon the occurrence of all of the events referenced in Section 13.1 above, all Settlement Class Members shall be deemed to have: (a) dismissed the Action against Williams with prejudice as to the Settled Claims, and (b) acknowledged full and complete satisfaction of, and fully, finally and forever settled, released and discharged the Settled Claims against Released Parties.

SECTION 14

14. NON-OCCURRENCE OF CONDITIONS OF SETTLEMENT

14.1 In the event that the conditions of settlement, as provided in Section 13.1 above, are not satisfied:

(a) This Settlement Agreement shall terminate;

(b) Any Judgment entered pursuant to this Settlement Agreement shall be vacated;

(c) The litigation commenced by Plaintiffs' Complaint shall proceed as if this Settlement Agreement had never been executed;

(d) The certification of the Settlement Class (whether conditional or final) shall be vacated and the Action shall proceed as though the Settlement Class had never been certified; and

(e) This Settlement Agreement may not be used in this Action or otherwise for any purpose, including whether the case should properly be certified as a class action pursuant to C.R.C.P. 23.

SECTION 15

15. NO ADMISSION OF LIABILITY

The settlement embodied in this Settlement Agreement is made to compromise and settle the Action without further litigation. It is not, and it should not be interpreted as, an admission of any liability or wrongdoing by Williams, nor should it be construed as an admission of any strength or weakness in the claims against Williams. Williams denies any wrongdoing or liability.

SECTION 16

16. MISCELLANEOUS

16.1 Each of the Settling Parties has relied upon its own counsel's advice in entering into this Settlement Agreement and not upon the advice of any other party's counsel.

16.2 The Settling Parties and their counsel have mutually contributed to the preparation of this Settlement Agreement and the Exhibits thereto. Consequently, no provision of this Agreement or the Exhibits shall be construed against any party because that party or its counsel drafted the provision.

16.3 All of the Exhibits to this Settlement Agreement are material and integral parts hereof, and they are fully incorporated herein by reference. The Exhibits to this Settlement Agreement are as follows:

Exhibit A – List of Class Royalty Instruments and Categorization Thereof;

Exhibit B – Notice of Class Action and Proposed Settlement;

Exhibit C – Joint Motion 1) to Enter an Order Certifying a Plaintiff Class, Preliminarily Approving Settlement Agreement, Approving Form of Notice, and Scheduling Fairness Hearing, and 2) to Establish a Hearing Date for the Joint Motion;

Exhibit D – Order Establishing Hearing Date;

Exhibit E – Order Certifying a Plaintiff Class, Preliminarily Approving Settlement Agreement, Approving Form of Notice, and Scheduling Fairness Hearing;

Exhibit F – Judgment; and,

Exhibit G – Transmittal Notice to Accompany Distribution Checks.

16.4 The placement of any particular lease in the lease categories on Exhibit A, or the treatment of such categories in this Settlement Agreement, shall not be used as a basis for advancing any position with respect to the resolution of the Reserved Claim described in paragraph 7.2; provided, however, that in the proceedings on the Reserved Claim, the parties can make arguments about different lease language in the categories on Exhibit A.

16.5 If Williams voluntarily makes any payment to EnCana Oil & Gas (USA) Inc., ExxonMobil, or Chevron U.S.A. in connection with Deductions from the September 2000 accounting month to the Transition Date, such payment will not exceed any payment those companies would have received under this Agreement.

16.6 Overriding royalty instruments will be initially treated as falling within category 5 on Exhibit A, except for overriding royalty instruments placed in a different category on the attached Exhibit A. Category 5 includes leases and other royalty instruments that are silent on allocation of costs under *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001). However, the Notice of Class Action and Proposed Settlement (attached as Exhibit B) will give Plaintiff

Class members who believe their overriding royalty instrument expressly addresses cost deductions the opportunity to provide a copy of their instrument to Class Counsel for review and determination as to the appropriate category under Exhibit A. If the Settling Parties cannot agree on the appropriate category for an overriding royalty (including any new categories that may be necessary), they will submit the issue to the Court for determination.

16.7 This Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of the Settling Parties or their successors in interest.

16.8 This Settlement Agreement may be executed in multiple counterparts.

16.9 This Settlement Agreement and the Exhibits hereto constitute the entire agreement among the Settling Parties.

16.10 The provisions of this Settlement Agreement shall, where possible, be interpreted in a manner to sustain their legality and enforceability.

16.11 A waiver by one party to this Agreement of the breach of any provision shall not constitute a waiver of any other prior or subsequent breach of the same or any other provision.

16.12 This Settlement Agreement (including the Exhibits hereto) and all documents relating hereto shall be construed and interpreted under the laws of the State of Colorado.

16.13 This Settlement Agreement and the Exhibits thereto shall be binding upon and inure to the benefit of, successors and assigns of the parties, including Settlement Class Members.

The Settling Parties hereby approve this Settlement Agreement on the dates indicated below.

PLAINTIFFS AND CLASS REPRESENTATIVES

Date: 10/6/08

By: Ivo E. Lindauer
Ivo Lindauer

Date: 10/10/08

By: Sidney Lindauer
Sidney Lindauer

Date: 10-10-08

By: Ruth Lindauer
Ruth Lindauer

Date: 10/10/08

By: Sidney R. Lindauer
Diamond Minerals, LLC

WILLIAMS PRODUCTION RMT COMPANY

Date: 10/7/08

By: Ralph Hill

APPROVED:

DUFFORD, WALDECK, MILBURN & KROHN, LLP

By _____
Nathan A. Keever

G.R. MILLER, P.C.
FLEESON, GOOING, COULSON & KITCH, LLC
Thomas D. Kitch
Gregory J. Stucky
David G. Seely

CLASS COUNSEL

HOLLAND & HART LLP

By _____
John F. Shepherd, P.C.

ATTORNEYS FOR DEFENDANT

DISTRICT COURT, GARFIELD COUNTY, COLORADO 109 8th Street, Glenwood Springs, CO 81601 Telephone: (970) 945-5075	
Plaintiffs: IVO LINDAUER, SIDNEY and RUTH LINDAUER, and DIAMOND MINERALS, LLC, on behalf of themselves and all others similarly situated, v. **Defendant:** WILLIAMS PRODUCTION RMT COMPANY	▲ COURT USE ONLY ▲ Case Number: 2006cv317 Div.: Ctrm.:

JUDGMENT

On this 20th day of March, 2009, this case comes on for hearing to consider: (1) certification of a plaintiff class pursuant to C.R.C.P. 23; (2) approval of the Settlement Agreement dated effective June 1, 2008; (3) approval of the Distribution Schedule; and (4) approval of the amount of attorneys' fees and expenses. Plaintiffs and Plaintiff Class appear by and through Nathan A. Keever of Dufford, Waldeck, Milburn & Krohn, LLP, Grand Junction, Colorado, G.R. Miller of G.R. Miller, P.C., Durango, Colorado, and Thomas D. Kitch, Gregory J. Stucky and David G. Seely of Fleeson, Gooing, Coulson & Kitch, L.L.C., Wichita, Kansas. Defendant appears by and through John F. Shepherd of Holland & Hart LLP, Denver, Colorado.

A. CERTIFICATION OF PLAINTIFF CLASS

The parties requested the Court's consideration, pursuant to C.R.C.P. 23, of the creation of a Plaintiff Class, described as follows:

> All royalty owners, including overriding royalty interest owners, who have been entitled to receive royalty payments under oil and gas leases located in Garfield County, Colorado, owned in whole or in part, or operated by, Williams

Production RMT Company (including its predecessor, Barrett Resources Corporation) at any time during the period from September 20, 2000, through May 31, 2008. Excluded from the "Plaintiff Class" are the following:

(a) The United States of America insofar as its mineral interests are managed by the Minerals Management Service;

(b) Indian Tribes and their allottees;

(c) Parties to prior settlement agreements with Williams relating to payment of royalty (Puckett Land Company);

(d) Royalty owners in oil and gas leases that provide a specific formula for payment of royalty tied to an index price, but only to the extent they receive royalty under such leases (the oil and gas lease dated July 20, 2005 between Mary Anne Bosely, *et al.* as "Lessor" and Williams as "Lessee," and the oil and gas lease dated May 9, 2006, between Jonathon H. Wellendorf and Diana L. Wellendorf as "Lessor" and Williams as "Lessee");

(e) Parties who have previously litigated royalty payment issues with Williams, for the time period covered by the judgments entered in those cases (Joan L Savage and William F. Clough);

(f) the Meriam Zela Grynberg Trust, the Rachel Susan Grynberg Trust, and the Stephen Mark Grynberg Trust, which are plaintiffs asserting royalty payment claims in Grynberg v. Williams, Civil Action No. 02-CV-5167, pending in the Denver District Court;

(g) EnCana Oil & Gas (USA) Inc., ExxonMobil, and Chevron USA (but these royalty owners will be given an opportunity to opt in to the Plaintiff Class);

(h) Williams Production RMT Company and Barrett Resources Corporation and any of their affiliates; and

(i) The legal representatives, heirs, successors, or assigns of any excluded party.

After hearing statements of counsel, after taking into account matters contained in the Court file, and after otherwise being duly advised of pertinent circumstances, the Court makes the following findings:

1. There are several hundred members of Plaintiff Class and their joinder would be impracticable. There are questions of law and fact common to the Plaintiff

Class. The claims of the Class Representatives are typical of the claims of the Plaintiff Class. The Class Representatives will fairly and adequately protect the interests of the Plaintiff Class. The prerequisites to maintain this action as a class action set forth in C.R.C.P. 23(a) are met.

2. The questions of law and fact common to all members of the Plaintiff Class predominate over questions, if any, affecting only individual members, and a class action is superior to any other available method for the fair and efficient adjudication of the controversy. The requirements of C.R.C.P. 23(b)(3) are met. Accordingly, a Plaintiff Class should be certified pursuant to C.R.C.P 23(b)(3).

3. Plaintiffs Sidney Lindauer, Ruth Lindauer, and Ivo Lindauer, residents of Garfield County, Colorado, and Plaintiff Diamond Minerals, LLC, a Colorado limited liability company with its principal office in Garfield County, Colorado, should be designated as the Class Representatives.

4. Nathan A. Keever of Dufford, Waldeck, Milburn & Krohn, LLP, Grand Junction, Colorado, G.R. Miller of G.R. Miller, P.C., Durango, Colorado, and Thomas D. Kitch, Gregory J. Stucky and David G. Seely of Fleeson, Gooing, Coulson & Kitch, L.L.C., Wichita, Kansas, should be designated as Class Counsel.

B. APPROVAL OF SETTLEMENT AGREEMENT

The parties requested the Court to give final approval to the Settlement Agreement, which the Court conditionally approved on October 21, 2008.

After hearing statements of counsel, after being advised by certain Class Representatives concerning the proposed settlement, after taking into account matters

contained in the Court file, and after otherwise being duly advised of pertinent circumstances, the Court makes the following findings:

1. The definitions in Section 1 of the Settlement Agreement are incorporated by reference.

2. Pursuant to the Order entered on October 21, 2008, affidavits of mailing and publication, filed with the Court, demonstrate that Class Counsel has complied with this Court's directions with respect to the Notice. Counsel mailed the Notice approved by this Court to all members of the Plaintiff Class who could be reasonably identified. In addition, the Notice was published in the Denver Post, the Glenwood Post, and the Grand Junction Sentinel. The notice to Class Members and the manner of disseminating such notice comply with due process and with C.R.C.P. 23.

3. Pursuant to C.R.C.P. 23(c)(2) and the terms of the Notice, members of the Plaintiff Class have been provided with the opportunity to exclude themselves from the Plaintiff Class. The persons, firms and corporations listed on Exhibit A attached hereto have opted out of the Plaintiff Class and are excluded from the Plaintiff Class.

4. Plaintiffs and Plaintiffs' Counsel entered into the Settlement Agreement: (i) after taking into account the uncertainties, risks and potential delays associated with the continued prosecution of the Action, including those involved in securing a final judgment that would be favorable to the Plaintiff Class and not be disturbed on appeal; (ii) after taking into account the substantial benefits that will be received as a result of the settlement; and (iii) after having concluded that the settlement provided for herein confers substantial benefits on the members of the Plaintiff Class, and is fair, just, reasonable, adequate and in the best interests of the Plaintiff Class.

5. Defendant has denied and continues to deny any liability in the Action (except with respect to refunds of ad valorem tax withholding). Defendant asserted and continues to assert many defenses. Defendant entered into the settlement in order to put to rest the present controversy between Plaintiffs, the Plaintiff Class and Defendant and to avoid the further expense, inconvenience and disruption of defending against the Action. Defendant has also taken into account the uncertainty and risks inherent in any litigation, especially in complex cases like the Action, and the fact that substantial amounts of time, energy and resources of Defendant have been and, unless this settlement is consummated, will continue to be, devoted to the defense of this Action.

6. The Court finds that a class action settlement should be approved only if it is fair, reasonable and adequate after comparing the terms of the settlement with the likely results of litigation.

7. The Court finds that the settlement as set forth in the Settlement Agreement was arrived at through arms-length and vigorous and extensive negotiations between Plaintiffs' Counsel and counsel for the Defendant.

8. The Court finds that the settlement as set forth in the Settlement Agreement was arrived at in good faith and was based on a realistic appraisal by the parties and their counsel of the difficulties inherent in a case of this magnitude and complexity.

9. The Court recognizes that if this settlement as set forth in the Settlement Agreement had not been reached, even if the Plaintiff Class had prevailed, any recovery would have been delayed for a lengthy period of time given the high probability of an appeal and, in the event of a reversal or modification, a further delay resulting from another lengthy trial.

10. Based upon the evidence presented, the arguments of counsel, and the entire record of this case, the Court concludes that the Settlement Agreement is fair, adequate and reasonable and, accordingly, the Settlement Agreement and the terms of the settlement contained therein should be and hereby are finally approved.

C. APPROVAL OF THE DISTRIBUTION SCHEDULES

Defendant presented to the Court the Preliminary Distribution Schedule, and explained the manner in which the Preliminary Distribution Schedule has been prepared and how the Final Distribution Schedule will be prepared. The parties jointly requested the Court to approve the Preliminary Distribution Schedule and the method for preparation of the Final Distribution Schedule.

The Court finds that the Preliminary Distribution Schedule should be approved, and the Court approves of the manner in which the Final Distribution Schedule is to be prepared. The Court further finds that, within fifteen (15) days of the date of this Fairness Hearing, Defendant should file the Final Distribution Schedule with the Court under seal and shall also file a version of the Final Distribution Schedule (without names of the members of the Plaintiff Class but by the most current identification number of each such member assigned to it by Defendant in its normal course of business) with the Court. The Court further finds that, within five (5) days of the receipt of the Final Distribution Schedule from Defendant, Class Counsel should post the Final Payment Schedule (without names of the members of the Plaintiff Class but by the most current identification number of each such member assigned to it by Defendant in its normal course of business) on the web

site: www.fleeson.com. Defendant shall issue Distribution Checks in accordance with the Final Distribution Schedule.

D. AWARD OF FEES, EXPENSES, AND ADMINISTRATIVE EXPENSES.

The Class Counsel requested that their application for attorneys fees, expenses and Administrative Expenses be approved.

After hearing statements of Class Counsel, after considering testimony in connection therewith, after taking into account matters contained in the Court file, and after otherwise being duly advised of pertinent circumstances, the Court finds that Class Counsel should be:

1. Reimbursed the sum of $74,989.36 for litigation costs and expenses;

2. Reimbursed the sum of $21,680.80 for Administrative Expenses;

3. Awarded reasonable attorneys' fees in the amount of twenty-five percent (25%) of the Settlement Fund, after subtracting the above expenses;

and directs that such fees and expenses be paid to Plaintiffs' Counsel from the Settlement Fund.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The findings herein shall be the Order of the Court.

2. The parties shall take any and all steps necessary to implement the Settlement Agreement according to its terms and the terms of this Order.

3. The Settled Claims through the date of this Judgment are fully and completely settled, discharged, and released. Upon Williams' issuance of the Distribution Checks, Settlement Class members are deemed conclusively to have released

and settled the Settled Claims. All such members of the Plaintiff Class are barred and permanently enjoined from commencing or prosecuting either directly, representatively, derivatively or in any capacity, any of the Settled Claims against the Released Parties.

4. Without affecting the finality of this Final Judgment in any way, this Court shall retain continuing jurisdiction of this action to address any issues concerning implementation of the Settlement Agreement and enforcing this Final Judgment.

CERTIFICATION UNDER C.R.C.P. 54(b)

The Court's approval of the Settlement Agreement and issuance of this Judgment finally resolves all claims in this litigation, except for the two Reserved Claims. The Court hereby finds pursuant to C.R.C.P. 54(b) that there is no just reason for delay, and that final judgment as to the Settled Claims should be issued.

The two Reserved claims are easily separable from the Settled Claims. There is little or no likelihood that a reviewing court would have to consider the same issues more than once. Delaying entry of final judgment for the Settled Claims would serve no purpose. If anything, certification of this judgment as final will serve the litigants' interest in distributing the settlement fund for the Settled Claims, and in having the Settled Claims conclusively resolved. Accordingly, the time to appeal this Judgment and resolution of the Settled Claims begins to run upon issuance of the Judgment.

Signed this 20th day of March, 2009.

Dese K. Lynch

JUDGE DENISE K. LYNCH

Lindauer et al. v. Williams

Opt Outs

	Date Signed	Owner Number	Owner Name
1	December 22, 2008	432250-1	Betty V. Stewart
2	December 26, 2008	437063-1	Edward J. Hoaglund Ida L. Hoaglund
3	February 2, 2009	406815	EOG Resources, Inc.
4	January 9, 2009	444261	Judy Harris
5	January 15, 2009	433188-2	Carbon Energy Corp, A Subsidiary of Evergreen/Now Pioneer Natural Resources USA, Inc.
6	January 15, 2009	403162	Pioneer Natural Resources USA Inc.
7	January 20, 2009	446813-1	Marcus Medved
8	January 21, 2009	451759-1	RME Petroleum, n/k/a Anadarko E&P Company, LP - Thomas P. Goresen
9	January 21, 2009	430436	Anadarko E&P Co LP a/k/a RME Petroleum Co
10	January 21, 2009	433723-1	Charlene M. Miller
11	January 23, 2009	474284	Arletta M. Fortik
12	January 23, 2009	452716-1	Rozann M. Tanner
13	January 26, 2009	484396	Clough Energy Co, LLC
14	January 29, 2009	479123	Linda Laphan Brown
15	January 30, 2009	440265-1	Green Liv Tr Dtd 4/28/00
16	January 30, 2009	448925-2	Myco Industries, Inc.
17	January 30, 2009	430946-1	Abo Petroleum Corporation
18	January 30, 2009	477603-1	Lindell Scarrow
19	January 30, 2009	457182	Yates Drilling Company
20	January 30, 2009	400050	Yates Petroleum Company
21	January 30, 2009	442463-1	Janice J. Baum
22	January 30, 2009	440140	GMW Company
TOTAL			