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ORDER AND JUDGMENT*, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (JULY 28, 2025)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff-Appellant,

v.

MONTEZUMA COUNTY; MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS; MONTEZUMA COUNTY ASSESSOR,

Defendants-Appellees.

No. 24-1337
(D.C. No. 1:23-CV-02457-CNS-NRN)
(D. Colo.)

Before: BACHARACH, PHILLIPS, and FEDERICO, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

ORDER AND JUDGMENT

This is a case challenging a retroactive tax assessment imposed on corporate entities in Colorado. Plaintiff CO2 Committee, Inc. (the Committee) filed suit against Montezuma County, the Montezuma County Board of County Commissioners, and the Montezuma County Assessor (together, the County). The Committee sought damages, declaratory relief, and injunctive relief under 42 U.S.C. § 1983. The Committee alleged that it was improperly subjected to a retroactive tax assessment by the County and did not receive proper notice of this assessment. The district court, however, ruled that it lacked subject matter jurisdiction to hear the case. It granted the County's motion to dismiss, citing the Tax Injunction Act of 1937 (TIA), 28 U.S.C. § 1341, which precludes federal courts from adjudicating challenges to state taxes.

The Committee argues on appeal that it was never provided a remedy or an opportunity to pursue its case in state court because its case in state court was dismissed for lack of standing. It further alleges that the district court failed to accept as true all allegations in its complaint. After full consideration of these arguments, we affirm the district court's dismissal of the complaint.

I

The Committee filed this case in the United States District Court for the District of Colorado on the heels of more than a decade of previous court and state agency proceedings. The Committee's lawsuit is based on a retroactive tax assessment imposed on

the Committee's unit operator,[1] Kinder Morgan. The tax assessment arose from activities within the McElmo Dome Unit, a large deposit of carbon dioxide in Montezuma County, Colorado. The Committee alleges that its members own approximately an 11 percent interest in the McElmo Dome Unit, and that Kinder Morgan owns approximately 44 percent.

In an audit of the 2008 tax year, the County determined that Kinder Morgan's unit owed over $2 million in unpaid taxes based on a related party transaction conducted by Kinder Morgan.[2] The Committee alleges that Kinder Morgan then allocated the retroactive tax assessment to all nonoperating fractional interest owners, even though they played no role in the related party transaction conducted by Kinder Morgan, and thus the Committee should not be held responsible to pay the additional taxes. It further

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[1] A "unit" is "a consolidation of working interests that extract resources from a single geological reservoir." *Colorado Prop. Tax Adm'r v. CO2 Comm., Inc.*, 527 P.3d 371, 373 (Colo. 2023) (internal quotation marks omitted). Units are created to make the extraction process more efficient and coordinated, and although "the fractional interests in a unit may be owned by many entities, a single unit operator often handles the day-to-day operations." *Id.*

[2] As to the related party transaction, the Committee alleges that the County imposed a retroactive assessment because "Kinder Morgan, as a working interest owner, had impermissibly deducted transportation costs related to the Cortez Pipeline Company, a partnership in which Kinder Morgan was a 50% owner, thereby reducing its taxable income." Op. Br. at 11. The Committee further alleges that "[t]he additional taxes were not attributable to the Committee's members, who were unrelated to the Cortez Pipeline Company and permitted to deduct the full transportation costs." *Id.*

alleges that it did not receive notice of the retroactive tax assessment imposed by the County against the unit's nonoperating fractional interest owners.

Both the Committee and Kinder Morgan pursued state administrative challenges and then filed Colorado state court lawsuits protesting the $2 million retroactive tax assessment. Both of their cases reached the Colorado Supreme Court, which ruled first against Kinder Morgan and then against the Committee. In rejecting Kinder Morgan's challenge, the Colorado Supreme Court held the retroactive tax assessment was lawful. *Kinder Morgan CO2 Co. v. Montezuma Cnty. Bd. of Comm'rs*, 396 P.3d 657, 667-68 (Colo. 2017).

The Committee claims that it was only after this ruling, in November 2017, that it first became aware of the retroactive tax being imposed on its unit by the County, and that Kinder Morgan "encouraged" it to file suit challenging the tax imposed on Kinder Morgan, the unit operator. Op. Br. at 11-12.

The Committee filed a lawsuit in Colorado state court on October 1, 2018, seeking to challenge the retroactive assessment imposed on Kinder Morgan. *Id.* at 12-13. The Committee's state court challenge failed, however, because the Colorado Supreme Court held that "nonoperating fractional interest owners in an oil and gas unit" do not "have standing to independently challenge a retroactive assessment and property tax increase." *Colorado Prop. Tax Adm'r v. CO2 Comm., Inc.*, 527 P.3d 371, 375 (Colo. 2023). Instead, Colorado law "creates a representative system for oil and gas leaseholds and lands, in which the unit operator serves as the sole taxpayer." *Id.* at 378. Only the unit operator prepares and files an "Annual Statement." *Id.* at 373. Using the Annual Statement, the

county tax assessor then calculates the property taxes owed by the unit, and "[u]nit operators are responsible for collecting these taxes from all of the nonoperating fractional interest owners and remitting the total amount owed to the county treasurer." *Id.* at 374.

Because the Committee is not a "taxpayer" under these circumstances and is not listed on the Annual Statement filed by the unit operator, the Colorado Supreme Court held that "the only entity that receives notice" of the valuation or retroactive tax assessment under Colorado law "is the unit operator." *Id.* at 378. It further held that the Committee's "expansive[]" view—that every fractional interest owner must receive notice of any tax obligation imposed on a unit—is both unworkable and "illogical." *Id.* at 379. It would require every county tax assessor to "mail notices of preliminary findings to fractional interest owners"—even those "who are not identified in the Annual Statement." *Id.*

After losing before the Colorado Supreme Court, the Committee then filed suit in the District of Colorado.[3] The district court dismissed the case under the TIA, which broadly precludes a litigant from using the federal courts to challenge a state law tax. The district court held that the TIA divested it of federal subject matter jurisdiction, and it rejected the Committee's argument that the Colorado proceedings did not provide a "plain, speedy[,] and efficient remedy" to the Com-

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[3] As the Committee acknowledges, it filed an earlier lawsuit in 2018 in the District of Colorado to challenge the retroactive tax, which it dismissed without prejudice so it could pursue its state court strategy. Op. Br. at 13 n.1.

mittee as required by the TIA, 28 U.S.C. § 1341. The district court held the "plain, speedy, and efficient remedy" exception did not apply because the Committee and its unit operator (Kinder Morgan) had both been provided a "full hearing and judicial determination" of their claims for relief. *CO2 Comm., Inc. v. Montezuma Cnty.*, No. 1:23-cv-02457-CNS-NRN, 2024 WL 3520711, at *5 (D. Colo. July 24, 2024) (internal quotation marks omitted).

The Committee timely appeals the entry of final judgment, so we have jurisdiction under 28 U.S.C. § 1291.

II

We review de novo a district court's dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Audubon of Kansas, Inc. v. United States Dep't of Interior*, 67 F.4th 1093, 1108 (10th Cir. 2023). Because "federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction." *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 906 F.3d 926, 931 (10th Cir. 2018) (quoting *United States v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999)).

III

The Committee makes two arguments on appeal. It first contends that the district court erred because the Committee lacks a "plain, speedy, and efficient" remedy under Colorado state law, so the TIA does not preclude federal court jurisdiction over this case. Next, it argues that the district court erred by failing to take all facts alleged as true when reviewing the

Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. We address these arguments in turn.

A

The TIA states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy[,] and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. When it applies, the TIA divests federal courts from exercising jurisdiction over cases challenging taxes under state law. The TIA creates "a 'jurisdictional rule' and a 'broad jurisdictional barrier.'" *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1309 n.2 (10th Cir. 1999) (quoting *Arkansas v. Farm Credit Servs. of Cent. Arkansas*, 520 U.S. 821, 825 (1997)); *see also Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (explaining that the TIA is "a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes"). The TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Rosewell*, 450 U.S. at 522 (internal quotation marks omitted).

The TIA is a "broad limitation on federal court interference with state collection of taxes" that bars injunctive relief, "declaratory relief, and suits for damages as well." *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) (internal citation omitted). Congress passed the TIA nearly a century ago "to promote comity and to afford states the broadest independence, consistent with the federal constitution, in the administration of their affairs, particularly revenue raising."

Marcus, 170 F.3d at 1309 (quoting *Wright v. McClain*, 835 F.2d 143, 144 (6th Cir. 1987)); *see also Collins Holding Corp. v. Jasper Cnty.*, 123 F.3d 797, 799 (4th Cir. 1997) (advising that the TIA "reflects the importance of the taxing power to the operation of state governments" and the goal of preventing federal courts from interfering with state revenue collection).

Our first task in a case involving the TIA is to "determine whether the assessment at issue is a tax or a regulatory fee." *Marcus*, 170 F.3d at 1310-11. In this case, there is no dispute that the assessment challenged by the Committee is a tax, so "the [TIA] applies and operates to bar federal jurisdiction unless the state does not provide a plain, speedy and efficient remedy." *Id.* "The Supreme Court, however, has cautioned us to construe that exception narrowly." *Brooks*, 801 F.2d at 1240.

The Committee argues that the district court "never analyzed" whether Kinder Morgan's representative capacity to challenge the retroactive tax assessment met the requirements for a plain, speedy, and efficient remedy.[4] Op. Br. at 29. But the order granting the motion to dismiss addressed this issue directly. The district court held that although the Committee "maintains that its interests were not represented by Kinder Morgan, the Colorado Supreme Court determined that a unit operator had the power to raise these claims and that their failure to do so does not negate satisfaction of the procedural require-

[4] The Committee does not address why it did not challenge Kinder Morgan's attempt to collect an allegedly improper assessment against it that it says only Kinder Morgan was responsible for paying.

ments."[5] *CO2 Comm., Inc.*, 2024 WL 3520711, at *5 (citing *Liebhardt v. Dep't of Revenue*, 229 P.2d 655, 657 (Colo. 1951) ("The statute affords the taxpayer a plain, speedy, and adequate remedy and full opportunity to be heard. Failure to exhaust the statutory remedies afforded the taxpayer, constitutes a waiver of such objections which cannot now be asserted." (ellipses omitted)).

The Committee next alleges that it was entitled to, and did not receive, "a full hearing and judicial determination" and thus there was no "plain, speedy, and efficient" remedy in state court. The entitlement to a "full hearing and judicial determination" refers to the procedural process afforded, not the substantive outcome delivered by the state courts. *Cities Serv. Gas Co.*, 656 F.2d at 587 (citing *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981)).

In *Rosewell*, the "plaintiff received no substantive relief in the state court," but "[t]he Supreme Court held, nevertheless, that federal jurisdiction was barred" under the TIA. *Cities Serv. Gas Co.*, 656 F.2d at 587. The dissent in *Rosewell* "focused on the inadequacy of the state remedy because of the substance of that remedy." *Id.* "The majority, however, disagreed, and concluded that if minimal procedural remedies are available for the taxpayer to challenge the validity of the tax the federal court must abstain." *Id.*; *see also Folio v. City of Clarksburg*, 134 F.3d 1211, 1215 (4th Cir.

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[5] Moreover, Kinder Morgan argued repeatedly in the state proceedings that the Committee and other individual interest owners in the McElmo Dome Unit were the actual taxpayers and were not "related parties" to the Cortez Pipeline. *See, e.g.*, *CO2 Committee, Inc. v. Montezuma County*, No. 2018CV30100, 2019 WL 13276776, at *7 (Colo. Dist. Ct. June 11, 2019).

1998) (agreeing that "the [TIA] does not guarantee that the substantive relief sought by the taxpayer be certain or even likely").

The Committee insists that the TIA does not apply here because its case was dismissed for lack of standing. But the TIA "prohibit[s] federal court jurisdiction where a procedural remedy as opposed to a substantive remedy was available in the state court. Thus, it is not up to the court in which [the TIA] is applied or is brought into play to evaluate the strength of the remedy which is available." *Cities Serv. Gas Co.*, 656 F.2d at 587.

Moreover, even if the Committee cannot sue the County to contest the tax assessment levied against its unit operator, it may not be completely left out in the cold. Again, the Colorado tax statutes applicable to oil and gas leasehold and lands requires the unit operator to file the Annual Statement with the County. *Colorado Prop. Tax Adm'r*, 527 P.3d at 373 (citing Colo. Rev. Stat. § 39-7-101(1) (2022)). When taxes are assessed by the County, unit operators are responsible for collecting these taxes from all the nonoperating fractional interest owners and then paying the total amount owed to the County. *Id.* at 374 (citing Colo. Rev. Stat. § 39-10-106(2)). Given this statutory framework, the Committee pays Kinder Morgan, not the County. Thus, we see nothing from the state proceedings that would foreclose the Committee from seeking relief against the party who collected the tax payment from it (as in, Kinder Morgan, not the County). Nor does the Committee make any attempt to show why this potential remedy would be insufficient. *Salzer v. SSM Health Care of Oklahoma Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014) ("The

party invoking federal jurisdiction has the burden to establish that it is proper, and 'there is a presumption against its existence.'") (citation omitted).

Rosewell commands that principles of federalism must underlie our application of the TIA. *See* 450 U.S. at 522. With that in mind, we also recognize that sound policy supports the legal rationale behind the district court's dismissal of this case under the TIA. The Committee's position has virtually no limiting principle. If the Committee's lawsuit were to proceed in federal court, every fractional interest owner (no matter how small of a stake it holds) would be empowered to file a federal lawsuit and challenge the state taxes assessed on its unit operator, even though they are not listed on the Annual Statement, are not taxpayers under Colorado law, and likely could not have been easily notified or even located by county tax assessors. *See id*. at 527-28 (cautioning "how ominous would be the potential for havoc should federal injunctive relief be widely available" for challenges to state law taxes). That, in turn, could fracture Colorado's (and its counties') tax system, undermining state and county revenue and operations. *See id.* at 522 (explaining that "the principal motivating force behind the [TIA]" was "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes").

For all these reasons, we affirm the district court's ruling that the TIA bars the Committee's challenge.

B

We next reach the argument that the district court erred by failing to construe all allegations in the

complaint as true, as a facial attack to subject matter jurisdiction requires. This argument distorts the legal standard for a motion to dismiss. Generally, "[i]n addressing a facial attack, the district court must accept the allegations in the complaint as true." *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (quoting *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1303 (10th Cir. 2001)). But that rule applies only to "well-pled factual allegations." *Id.* at 1206. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The Committee directs us to two allegations in its complaint that it insists are factual: that (1) "Colorado's courts had denied standing to the Committee to challenge state law taxes," and (2) "the TIA could not bar its claims because, as documented by case law, there was no plain, speedy and efficient remedy for the Committee in Colorado's courts." Op. Br. at 39.

On the first allegation, this is the holding of the Colorado Supreme Court's decision against the Committee. No one, including the Committee or the district court in its order, disputes that the Colorado Supreme Court ruled that the Committee lacked standing. *See* Reply Br. at 9 ("The Colorado Supreme Court decided that the Committee lacks standing to challenge the County's retroactive assessment of increased property taxes." (citing *Colorado Prop. Tax Adm'r*, 527 P.3d at 380)).

On the second allegation, that the Committee allegedly lacked a "plain, speedy[,] and efficient" remedy under state law, this is a legal conclusion. *See Rosewell*, 450 U.S. at 505 (framing this question as an

issue of law). As a result, the district court was not required to accept it as true. *Iqbal*, 556 U.S. at 678; *see also Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (same).

We therefore find no error in the district court's analysis of the facial attack on the complaint regarding lack of subject matter jurisdiction. AFFIRMED.

Entered for the Court

/s/ Richard E.N. Federico
Circuit Judge

ORDER, U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO (JULY 24, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CO2 COMMITTEE, INC.,

Plaintiff,

v.

MONTEZUMA COUNTY, MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS, and MONTEZUMA COUNTY ASSESSOR,

Defendants.

Civil Action No. 1:23-cv-02457-CNS-NRN

Before: Charlotte N. SWEENEY, Judge.

ORDER

Before the Court is Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). ECF No. 17. The Court GRANTS the motion for the following reasons.

I. Facts

The McElmo Dome Unit (the Unit) is a large deposit of carbon dioxide located in Montezuma County. ECF No. 17 at 3. Plaintiff CO2 Committee, Inc. (the

Committee) is challenging retroactive tax assessments imposed by Montezuma County (the County) against the Unit's nonoperating fractional interest owners. ECF No. 1 (Complaint).

Oil and gas estates are often developed as a "unit," where multiple working interests extract resources from a single geological reservoir to promote efficiency. *Co. Prop. Tax Adm'r v. CO2 Comm., Inc.*, 527 P.3d 371, 373 (Colo. 2023) (citation omitted). Although multiple owners may hold interests in a unit, there is only one unit operator managing day-to-day operations. *Id.* (citation omitted). Kinder Morgan CO2 Company, LLP (Kinder Morgan) serves as the unit operator for the Unit.[1] ECF No. 17 at 3.

The Committee is a Colorado nonprofit corporation acting on behalf of its members, who are non-operating fractional interest owners in the Unit. These owners include the Small Share Working Interest Owners (SSWIOs). ECF No. 17 at 3. Mineral estate owners lease their right to extract oil and gas by creating a working interest where the lessee has the right to enter the land and extract minerals; fractional interest owners, like the SSWIOs, own a portion of the Unit's total working interest. *Co. Prop. Tax Adm'r*, 527 P.3d at 373. Non-operating fractional interest owners share ownership interests with other entities but do not operate the reservoir. *Id.* The Committee's members include fractional interest owners who own a collective 11.22% of the Unit; the SSWIOs' interest in the Unit is approximately 6%. ECF No. 1 at ¶ 1. Non-operating

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[1] An operator is "any person responsible for the day-to-day operation of a well by reason of contract, lease, or operating agreement." *Co. Prop. Tax Adm'r*, 527 P.3d at 373 (Colo. 2023).

fractional interest owners may either take their proportionate share of the extracted minerals to sell themselves or rely on another party to market the minerals while taking a proportionate share of the proceeds. *Id.*

Once a year, a unit operator prepares and files an "Annual Statement" with the county tax assessor. *See generally Co. Prop. Tax Adm'r*, 527 P.3d at 373-74; Colo. Rev. Stat. §§ 39-7-101(1)(d), 102(2), 106(2) (2022). In the Annual Statement, the unit operator calculates the unit's income and deducts certain operation costs. *Kinder Morgan CO2 Co., L.P. v. Montezuma Cty. Board. Of Comm'r.*, 396 P.3d 657, 661 (Colo. 2017). The County Assessor uses the Annual Statement to valuate the unit, calculate property taxes, and collect appropriate taxes from the unit's interest owners. *Id.* at 661-62. After receiving the Annual Statement, the County may conduct retroactive assessments against the unit to establish the value of the property at a given point in time. *See Co. Prop. Tax Adm'r*, 527 P.3d at 377. Unit operators are responsible for collecting the unit's property taxes from their non-operating fractional interest owners and remitting the total amount to the county treasurer. *Id.* at 374.

Here, the County conducted an audit of Kinder Morgan's Annual Statement for the 2008 tax year and determined that Kinder Morgan had improperly deducted operation costs relating to the operation of a pipeline within the Unit. ECF No. 17 at 5; ECF No. 1, ¶ 17. As a result of these assessments, the County retroactively increased the Unit's valuation by $57 million, increasing the overall tax liability of the Unit by over $2 million. ECF No. 17 at 5. Accordingly, Kinder Morgan allocated the retroactive tax assessment

to all non-operating fractional interest owners, including the SSWIOs. ECF No. 1, ¶ 25. The SSWIOs were responsible for paying approximately $500,000 of the $2 million retroactive tax liability. *Id.* Plaintiff alleges that the SSWIOs have no relation to the pipeline operations that caused the increased valuation, and so should not be responsible for the additional tax burden. ECF No. 1, ¶ 27.

II. Procedural History

For 13 years, Kinder Morgan and Plaintiff have challenged the County's retroactive assessments through numerous legal proceedings. ECF No. 17 at 2-3. Despite Kinder Morgan's involvement in previous lawsuits, Plaintiff proceeds alone in the present lawsuit, partially based on the advice of Kinder Morgan.[2]

In 2011, after paying the additional taxes owed to the County as a result of the County's 2009 retroactive assessment, Kinder Morgan petitioned the Board of County Commissioners to abate or refund the assessment. ECF No. 1 at ¶ 28. The Commissioner denied Kinder Morgan's petition. *Id.* Kinder Morgan then appealed the Commissioner's decision to the Board of Assessment Appeals. *Id.*, ¶ 29. The Board of Assessment Appeals affirmed the decision, concluding that

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[2] Defendants do not challenge the Committee's standing to bring this action and the Committee alleges that it is authorized to act on behalf of the Unit's SSWIOs. *See* ECF No. 20; ECF No. 17. Courts may address standing *sua sponte*. *United States v. Colorado Supreme Court*, 87 F.3d 1161, 1166 (10th Cir. 1996). However, because the Court does not have subject matter jurisdiction for other reasons, it does not need to conduct a standing analysis here.

the Montezuma County Assessor had authority to issue the retroactive assessment. *Id.*

Kinder Morgan appealed this denial to the Colorado Court of Appeals. *Id.*, ¶ 31. In 2015, the Colorado Court of Appeals affirmed the Board of Assessment Appeals' decision, holding that the Board of Assessment Appeals correctly denied Kinder Morgan's appeal of the Commissioner's decision. *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Board Of Comm'r.*, 399 P.3d 657 (Colo. App. 2017).

Kinder Morgan appealed the Colorado Court of Appeals decision to the Colorado Supreme Court. In 2016, the Colorado Supreme Court granted certiorari to address whether the Colorado Court of Appeals properly concluded that the legislature amended Colo. Rev. Stat. § 39-10-107(1) (2015) to permit retroactive assessment of property taxes on the value of oil and gas leaseholds omitted due to the underreporting of the selling price of oil and gas or the quantity sold. *Kinder Morgan CO2 Co., LP. V. Montezuma Cnty. Board of Comm'r.*, 26 WL 768449 (Colo. 2016). In 2017, the Colorado Supreme Court affirmed the Colorado Court of Appeals decision because (1) the statutory scheme authorized the Montezuma County Assessor's tax assessment; and (2) the Board of Assessment Appeals did not err in concluding that Kinder Morgan had underreported the selling price because it was not entitled to deduct certain transportation costs. *Kinder Morgan CO2 Co., L.P.*, 396 P.3d at 660.

In November 2017, after these unsuccessful appeals, Kinder Morgan encouraged Plaintiff to independently challenge the retroactive assessment. ECF No. 1, ¶ 34. Plaintiff describes Kinder Morgan's

suggestion as "the first notice [it] . . . received with respect to the retroactive assessment." *Id.*

The CO2 Committee requested that the Assistant Solicitor General issue a ruling establishing that the retroactive assessments did not apply to the SSWIOs. *Id.* This request was unsuccessful. *Id.* In January 2018, the Committee challenged the assessments in front of the County Assessor. *Id.*, ¶ 36. In April 2018, the County Assessor upheld the retroactive assessment. *Id.*, ¶ 39. In May 2018, the Committee petitioned for an appeal to the Board of Equalization. *Id.*, ¶ 39. This petition was denied because the Committee was not the designated taxpayer for the Unit. *Id.*, ¶ 40.

In October 2018, the Committee filed a complaint in the United States District Court for the District of Colorado. *CO2 Committee, Inc. v. Montezuma Cnty, et al.*, 18-cv-02502 (D. Colo. 2018) (unpublished). The Committee quickly moved to dismiss the federal complaint while it exhausted its opportunity for a "plain, speedy and efficient remedy" in state court. ECF No. 1, ¶¶ 45-46.

In November 2018, the Committee filed a complaint in the Motezuma County District Court. *Id.*, ¶ 46. The district court dismissed the case for lack of standing. *Id.*, ¶ 48. The Committee appealed to the Colorado Court of Appeals, which reversed the district court's order, holding that the Committee had standing. *Id.*, ¶ 49.

The County appealed this decision to the Colorado Supreme Court, which reversed the Colorado Court of Appeals decision and held that the Committee did not have standing. *See Co. Prop. Tax Adm'r*, 527 P.3d at 375. The Colorado Supreme Court concluded that

Colorado law creates a unique representative system in which a unit operator is the sole entity with standing to protest a retroactive tax assessment on the operator's unit. *Id.* at 373 (citing Colo. Rev. Stat. § 39-7-101). The Colorado Supreme Court held that the SSWIOs are not "taxpayer[s] as contemplated by the pertinent statutes," but rather that Kinder Morgan is the taxpayer. *Id.* at 380. Therefore, "[b]ecause [the CO2 Committee] lacked a legally protected interest, it lacked standing to challenge Montezuma County's retroactive assessment and increased property taxes." *Id.*

Following the Colorado Supreme Court's decision, Plaintiff filed a complaint with this Court alleging that the County violated the SSWIOs' due process rights under the Fifth and Fourteenth Amendments. ECF No. 1. The County moved to dismiss the Complaint, alleging that this Court lacks subject matter jurisdiction under the Tax Injunction Act (TIA) because the act "is a broad limitation on federal court inference with state collection of taxes." ECF No. 17. Additionally, the County argued that the Committee's claims are barred by the comity doctrine and res judicata. *Id.* at 13-14.

III. Legal Standard

To survive a Rule of Civil Procedure 12(b)(1) motion to dismiss, a plaintiff must demonstrate that the court has subject matter jurisdiction." *Audubon of Kan., v. U.S. Dep't of Interior*, 67 F.4th 1093, 1108 (10th Cir. 2023). "A Rule 12(b)(1) motion to dismiss only requires the court to determine whether it has authority to adjudicate the matter." *Kenney v. Helix TCS, Inc.*, 939 F.3d 1106, 1108 (10th Cir. 2019). "The party invoking federal jurisdiction has the burden to

establish that it is proper, and there is a presumption against its existence." *Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014) (internal quotations omitted).

A defendant may challenge subject matter jurisdiction under Federal Rule 12(b)(1) by the "facial[] attack [of] the complaint's allegations." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1000, 1002 (10th Cir. 1995). "Where, as here, a Rule 12(b)(1) motion constitutes a facial attack on the allegations of subject matter jurisdiction, the court presumes all the allegations contained in the complaint to be true." *Bernard v. Vermont*, No. 23-cv-00241-DDD-KAS, 2024 WL 760005, at 1 (D. Colo. Feb. 2, 2024).

IV. Analysis

Under the Tax Injunction Act, federal courts are barred from enjoining, suspending, or restraining the assessment or collection of state taxes. 28 U.S.C. § 1341; *Landowners United Advocacy Foundation, Inc. v. Cordova*, 822 F. App'x. 797, 799 (10th Cir. 2020). However, an exception exists: the jurisdictional bar does not apply if there is no "plain, speedy and efficient remedy [that] may be had in the courts of such state." *Id*. This exception is construed narrowly. *Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986).

The TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). Federal declaratory relief must be used narrowly and sparingly to avoid throwing the state tax administration "into disarray." *California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982).

This Court considers Plaintiff's four claims to establish whether it seeks to enjoin, suspend, or restrain the assessment, levy, or collection of any state tax.

First, Plaintiff alleges that the County deprived the SSWIOs of their due process rights "by failing to give them [the SSWIOs] notice of the audit and retroactive assessment of taxes" and by refusing to consider the SSWIOs' timely objections and petition for reimbursement of illegally collected taxes. ECF No. 1, ¶ 54. Plaintiff argues that the County "owe[s] all taxes, interest, attorney fee damages, related damages and punitive damages imposed on the Committee members" arising from the retroactive assessments. *Id.*, ¶ 55.

Second, Plaintiff seeks declaratory judgment recognizing the SSWIOs as taxpayers and declaring that their due process rights were violated. *Id.*, ¶ 56. The Committee also requests an injunction that requires the Assessor to (1) treat the SSWIOs as taxpayers; (2) prohibit retroactive assessments against the SSWIOs; (3) give notice of any retroactive assessment to the SSWIOs; and (4) adjust the next taxable returns of the SSWIOs. *Id.*

Third, Plaintiff claims misrepresentation and promissory estoppel, alleging that "Defendants and their attorney, by moving to dismiss [the SSWIOs'] complaint in federal court based on 28 U.S.C. § 1341, misrepresented the existence of a remedy in state court since their motion to dismiss the complaint filed in state court was based on no standing." *Id.*, ¶ 60.

Fourth, Plaintiff argues that the SSWIOs should be allowed a higher selling price in the Annual Statement submitted by the Unit Operator to the County.

Id., ¶¶ 70-72. Plaintiff argues that, based on current methods of calculation, the SSWIOs are entitled to damages equaling the amount of the annual assessments that the County made against the SSWIOs from 2008 to the present, plus interest. *Id.*

The plaintiff's first, second, and fourth claims seek to enjoin, suspend or restrain the assessment, levy or collection of Colorado state taxes. Enjoining the County's retroactive assessment "would deny [the State] the use of significant funds." *Hill v. Kemp*, 478 F.3d 1236, 1247 (10th Cir. 2007). Indeed, the retroactive assessment increased taxes by $2 million, placing responsibility for approximately half a million dollars on the SSWIOs. ECF No.1, ¶ 27. The relief sought here would implicate the exact federalism issues that the TIA was designed to ameliorate, as emphasized by the dependency of state budgets on local tax revenues. Therefore, this court is barred from hearing the first, second, and fourth claim unless Plaintiff proves that an exception to the TIA's bar applies.

An exception to the jurisdictional bar on federal courts enjoining, suspending, or restraining the assessment or collection of state taxes exists when federal courts determine that the state courts did not provide a "plain, speedy, and efficient remedy." *Landowners United Advoc. Found., Inc.*, 822 F. App'x. at 800 (quoting *Hill*, 478 F.3d at 1246). If the state court provides a plain, speedy, and efficient remedy, the claim must be dismissed from federal court for lack of subject matter jurisdiction. *Id.* The United States Supreme Court concluded that a "plain, speedy, and efficient" remedy exists if, under state law, there is a way for a taxpayer to present their constitutional claims while preserving the right to challenge the amount of tax due. *Id.*

Plaintiff failed to allege insufficient remedies in state court, so the exception to the jurisdictional bar does not apply here. Kinder Morgan and Plaintiff brought challenges to the County's retroactive assessment in state court, which establishes that the TIA's exception is not satisfied and so federal jurisdiction is barred. Kinder Morgan challenged the retroactive assessment directly with the County before appealing up to the Colorado Supreme Court. ECF No. 1, ¶ 28, 31.[3] After Kinder Morgan's challenges failed, Plaintiff challenged the retroactive assessments before appealing up to the Colorado Supreme Court. *Id.*, ¶¶ 35-51.

The challenges brought by Kinder Morgan and Plaintiff to the retroactive assessment meets the requirement that the remedy provide an opportunity for a "full hearing and judicial determination" of Plaintiff's claims. *See Cities Serv. Gas Co. v. Okla. Tax Comm'n*, 656 F.2d 584, 587 (10th Cir. 1981) (concluding that procedural requirements were satisfied when the state gave taxpayers the ability to challenge taxes with the state administration in addition to the ability to challenge taxes within state courts); *see Rosewell*, 450 U.S. at 514 (determining procedural require-

---

[3] Kinder Morgan was presented with opportunities to raise constitutional issues on behalf of its SSWIOs. *See Kinder Morgan CO2 Co., L.P.*, 399 P.3d at 741. Kinder Morgan's failure to further represent the interests of the Unit's SSWIOs does not negate the satisfaction of requirements under the TIA. *Liebhardt v. Dep't of Revenue*, 229 P.2d 655, 657 (Colo. 1951) ("The statute affords the taxpayer a plain, speedy and adequate remedy and full opportunity to be heard as to the quantum of the tax and the alleged irregularities leading up to the fixation of tax liability. Failure to . . . exhaust the statutory remedies afforded the taxpayer, constitutes a waiver of such objections which cannot now be asserted.").

ments were met through the opportunity for a "'full hearing and judicial determination," during which constitutional issues can be raised, appeal to higher state courts is authorized, and review is ultimately available in the Supreme Court).

Although Plaintiff maintains that its interests were not represented by Kinder Morgan, the Colorado Supreme Court determined that a unit operator had the power to raise these claims and that their failure to do so does not negate satisfaction of the procedural requirements. *See* ECF No. 1; ECF No. 18; *Co. Prop. Tax Adm'r*, 527 P.3d at 379 (stating that "the unit operator represents fractional interest owners at *every* stage of the property tax assessment process"); *Liebhardt v. Dep't of Revenue*, 229 P.2d 655, 657 (Colo. 1951) ("The statute affords the taxpayer a plain, speedy, and adequate remedy and full opportunity to be heard . . . . Failure to . . . exhaust the statutory remedies afforded the taxpayer, constitutes a waiver of such objections which cannot now be asserted.").

Under the TIA, this Court is barred from enjoining, suspending or restraining the assessment, levy, or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state. Plaintiff has failed to establish that a plain, speedy, and efficient remedy is impossible in state court. Therefore, this Court does not have subject matter jurisdiction and an analysis under the comity doctrine and res judicata is not necessary.

Plaintiff's third claim is invalid for two reasons: (1) Plaintiff makes no reference to legal authority when establishing that the defense's initial motion to dismiss constitutes misrepresentation or grounds for promissory estoppel; and (2) when a district court

dismisses all federal claims, "the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998); *see also* 28 U.S.C. § 1367(c)(3). Because this Court dismisses the relevant federal claims, the Court also declines to exercise supplemental jurisdiction over the state law claims.

V. Conclusion

Consistent with the foregoing analysis, Defendants' Motion to Dismiss is GRANTED. Each of Plaintiff's claims are dismissed without prejudice. *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 985 (10th Cir. 2019) (dismissal for lack of subject matter jurisdiction is generally without prejudice).

DATED this 24th day of July 2024.

BY THE COURT:

/s/ Charlotte N. Sweeney
United States District Judge

FINAL JUDGMENT, U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO (JULY 24, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CO2 COMMITTEE, INC.,

Plaintiff,

v.

MONTEZUMA COUNTY, MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS, and MONTEZUMA COUNTY ASSESSOR,

Defendants.

Civil Action No. 23-cv-02457-CNS-NRN

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the ORDER of U.S. District Judge Charlotte N. Sweeney issued on July 24, 2024, [ECF No. 22] it is

ORDERED that Defendants' Rule 12(b)(6) Motion to Dismiss [ECF No. 17] is GRANTED. It is

FURTHER ORDERED that each of Plaintiff's claims are DISMISSED without prejudice. It is

FURTHER ORDERED that this case is closed.

Dated at Denver, Colorado this 24th day of July, 2024.

FOR THE COURT:

Jeffrey P. Colwell
Clerk

By: /s/ J. Dynes
Deputy Clerk

MINUTE ORDER, U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO (JANUARY 25, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CO2 COMMITTEE, INC.,
a Colorado nonprofit corporation,

Plaintiff,

v.

MONTEZUMA COUNTY, MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS, and MONTEZUMA COUNTY ASSESSOR,

Defendants.

Civil Action No: 23-cv-02457-CNS-NRN

Before: N. Reid NEUREITER,
Magistrate Judge

COURTROOM MINUTES

TELEPHONIC SCHEDULING CONFERENCE

10:29 a.m. Court in session.

Court calls case. Appearances of counsel. Preliminary remarks by the Court.

Discussion regarding plaintiff's intent to file a joint motion to stay discovery pending a determination of the motion to dismiss.

For the reasons stated on the record, it is

ORDERED: The Court will not enter a scheduling order. Plaintiff's oral motion to stay discovery pending a determination of the motion to dismiss is GRANTED and all discovery is STAYED. In the event the motion to dismiss is denied, within 5 days of that decision, the parties shall contact the Chambers of Magistrate Judge Neureiter to reset the scheduling conference.

10:45 a.m. Court in recess.

Hearing concluded.

Total in-court time: 00:16

* To order transcripts of hearings, please contact either Patterson Transcription Company at (303) 755-4536 or AB Litigation Services at (303) 629-8534.

ORDER DENYING MOTION TO LEAVE TO ATTACH ADDITIONAL DOCUMENT TO PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (SEPTEMBER 12, 2025)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff-Appellant,

v.

MONTEZUMA COUNTY, et al.,

Defendants-Appellees.

No. 24-1337
(D.C. No. 1:23-CV-02457-CNS-NRN)
(D. Colo.)

Before: BACHARACH, PHILLIPS, and FEDERICO, Circuit Judges.

ORDER

This matter is before the court on Appellant's Motion for leave to attach additional document. Upon consideration, the motion is denied.

Entered for the Court

/s/ Christopher M. Wolpert
Clerk

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (SEPTEMBER 12, 2025)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff-Appellant,

v.

MONTEZUMA COUNTY, et al.,

Defendants-Appellees.

No. 24-1337
(D.C. No. 1:23-CV-02457-CNS-NRN)
(D. Colo.)

Before: BACHARACH, PHILLIPS, and FEDERICO, Circuit Judges.

ORDER

Appellant's petition for rehearing is denied.

The petition for rehearing en bane 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

/s/ Christopher M. Wolpert
Clerk

MANDATE, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (SEPTEMBER 22, 2025)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

Mr. Jeffrey P. Colwell
United States District Court for the District of Colorado
Office of the Clerk
Alfred A. Arraj U.S. Courthouse
901 19th Street
Denver, CO 80294-3589

RE: 24-1337, CO2 Committee v. Montezuma County, et al
Dist/Ag docket: 1:23-CV-02457-CNS-NRN

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's July 28, 2025 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court.

Please contact this office if you have questions.

Sincerely,

/s/ Christopher M. Wolpert
Clerk of Court

cc: John M. Cogswell
Nathan A. Keever
Madeleine P. Mayfield

DECISION OF BOARD OF ASSESSMENT APPEALS RELEVANT EXCERPTS (OCTOBER 18, 2013)

The subject property consists of land and leaseholds in the McElmo Dome (Montezuma and Dolores Counties) of the Permian Basin (Colorado, Texas, New Mexico, and Oklahoma). Carbon dioxide is the primary product of the various wells; recovered oil is used on site. The Cortez Pipeline Company owns the delivery pipeline; Kinder Morgan is its operator.

Respondent's assigned values and Petitioner's requested values are as follows:

	Respondent	Petitioner
Docket No. 60166	$53,699,340	$39,479,120
Docket No. 60167	$31,724,910	$23,323,780
Docket No. 60168	$40,663,430	$29,895,270
Docket No. 60169	$33,029,530	$24,282,920
Docket No. 60170	$48,151,320	$35,428,040
Docket No. 60171	$ 7,120,980	$ 5,235,260

The parties disagreed on two specific issues; retroactive assessment of actual values, and the deduction of transportation costs in valuation of oil/gas land and leaseholds.

Retroactive Assessment of Actual Values

After receipt of operation statements from Petitioner, the Assessor performed an audit resulting in actual value increases. Petitioner argued that the Assessor did not have the authority to retroactively increase values. According to Petitioner, Respondent may rely neither on the omitted property statutes, codified as Section 39-5-125(1) and 39-10-101(2)(a)(I), C.R.S., nor on the audit and review guidelines promulgated by the administrator under Section 39-2-109(1)(k), C.R.S. The Board did not find Petitioner's arguments convincing. It was most persuaded by Respondent's argument that Petitioner's taxes were retroactively increased pursuant to the audit guidelines delineated by the administrator in the ARL pursuant to Section 39-2-109(1)(k), C.R.S. This statute authorizes the property tax administrator to establish procedures for conducting audit and compliance review of oil and gas leasehold properties for property tax purposes:

> It is the duty of the property tax administrator, and the administrator shall have and exercise authority: (k) To prepare and publish guidelines, after consultation with the advisory committee to the property tax administrator and approval of the state board of equalization, concerning the audit and compliance review of oil and gas leasehold properties for property tax purposes, which shall be utilized by assessors, treasurers, and their agents. Such guidelines shall be subject to legislative review, the same as rules and regulations, pursuant to section 24-4-103(8)(d), C.R.S.

Exercising authority granted by Section 39-2-109(1)(k), C.R.S., the property tax administrator developed guidelines for auditing oil and gas leaseholds for property tax purposes. Under these guidelines, set out in 3 ARL § 6.52 et seq., the tax assessor and the county treasurer are expressly authorized: to review and audit oil and gas operator statements, 3 ARL § 6.52; to change the valuation of oil and gas leaseholds by issuing Special Notices of Valuation, 3 ARL §§ 6.54-56; and to issue a tax bill to cover the omitted taxes, 3 ARL § 6.57.

Accordingly, the Board finds that Respondent has the statutory authority to retroactively assess.

Transportation Deductions — Related Versus Unrelated Parties

C.R.S. 39-7-101 requires self- reporting (barrels of oil or quantity of gas) of the selling price at the wellhead (net taxable revenues after gathering, transportation, manufacturing, and processing). While the Assessor's Reference Library (ARL) provides methodologies for deductions of these costs, a significant argument exists regarding transportation costs based on the relationship between Petitioner (Kinder Morgan CO2 Company, L.P.) and the pipeline company (Cortez Pipeline Company).

"Related parties" is defined by the ARL as "individuals who are connected by blood or marriage; or partnerships; or business that are subsidiaries of the same parent company or are associated by one company controlling or holding ownership of the other company's stock or debt." 3 ARL 6.41.

Petitioner's witnesses, James Wuerth (President, Kinder Morgan CO2 Co., L.P.) and Matthew J. Salzman (Partner, Stinson Morrison Hecker LLP), argued that Kinder Morgan CO2 Company, L.P. and the Cortez Pipeline Company were unrelated. They noted that the pipeline company was founded in 1982 by unrelated parties:

> Cortez Pipeline Company at 50% (later Shell Cortez, then Shell CO2 Co. LLC);
>
> Mobil Cortez Pipeline Company at 37%;
>
> Continental Cortez Pipeline Company at 13%.

Mr. Wuerth acknowledged that Kinder Morgan later held a 20% interest in Shell and bought the remaining 80% in 2000. He also acknowledged Mr. Kinder's and Mr. Morgan's signatures as "officers" in the Cortez Pipeline Company's Partnership Agreement but added that Kinder Morgan did not exist as an independent entity at the time of the signing.

Petitioner applied the ARL' s Netback of Unrelated Party Charges (ARL) to value the price of the CO2 at the wellhead.

Respondent's witness, Mary Ellen Denomy, Certified Public Accountant, referenced Exhibit C (page 5, paragraph 1), which reported ownership of the Cortez Pipeline Company as of December 1, 2007:

> Kinder Morgan CO2 Company, L.P. at 50% (purchased from Shell); Mobil Cortez Pipeline, Inc. at 37% (subsidiary of Exxon Mobil); Cortez Vickers Pipeline Company at 13%.

Ms. Denomy, referencing Exhibit C, stated that the Cortez Pipeline Company "derived 98.2% and 96.2% of its transportation revenues, based on non-regulated tariffs, in 2007 and 2006, respectively, from the parents of two partners with partnership interests aggregating 87% in both 2007 and 2006." The parent companies with 87% interests were Kinder Morgan and Exxon Mobil.

Convinced that Kinder Morgan CO2 Company was a related party to the Cortez Pipeline Company, the Assessor applied the ARL's related party methodology in its assessment.

The Board finds that Kinder Morgan and the Cortez Pipeline Company were related parties. As of December 31, 2007, Petitioner owned 50% of the Cortez Pipeline Company, having purchased it from Shell. Financial statements are supportive. Per the ARL, a transportation deduction is not allowed.

Petitioner presented insufficient probative evidence and testimony to prove that the tax year 2008 valuation of the subject property was incorrect.

Order:

The petition is denied.

Appeal:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation for assessment of the county wherein the property is located, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provision of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, Respondent may petition the Court of Appeals for judicial review of such questions.

Section 39-10-114.5(2), C.R.S.

DATED and MAILED this 18th day of October, 2013.

BOARD OF ASSESSMENT APPEALS

/s/ Diane M. DeVries

/s/ James R. Meurer

/s/ MaryKay Kelley

I hereby certify that this is a true and correct copy of the decision of the Board Assessment Appeals.

/s/ Milla Lishchuk

COMPLAINT AND JURY DEMAND (SEPTEMBER 21, 2023)

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CO2 COMMITTEE, INC.,
a Colorado nonprofit corporation,

Plaintiff,

v.

MONTEZUMA COUNTY, MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS, and MONTEZUMA COUNTY ASSESSOR,

Defendants.

Civil Action No: 23-cv-02457-CNS-NRN

COMPLAINT AND JURY DEMAND

The Plaintiff, CO2 Committee, Inc. (the "Committee"), acting on behalf of its members who are taxpaying Small Share Working Interest Owners[1] (collectively "SSWIOs" or "members") in the McElmo Dome Unit ("Unit"), Dolores and Montezuma Counties, State of Colorado, who take their production in kind, complains that the Defendants (collectively hereafter

[1] Small Share Working Interest owners are those working interest owners who own less than 4% of the production of the Unit and are deemed to have difficulty in selling their production.

"Montezuma County") administered and violated tax laws in Colorado applicable to the SSWIOs and in the process took taxes from the SSWIOs they did not owe without due process and in violation of the Civil Rights Act, 42 U.S.C. § 1983, and the Fifth and Fourteenth Amendments to the Constitution of the United States, causing damages and justifying declaratory and injunctive relief as may be approved by the Court. The Unit is operated by Kinder Morgan CO2 Co., LP, as operator, which owns approximately 44% of the working interest in the Unit.

I. Parties

1. The Committee is a Colorado nonprofit corporation with its principal place of business at 22 E Main St, Cortez, Colorado 81321. The Committee is authorized to act on behalf of the SSWIOs, who are taxpaying non-operating owners in the Unit. The Committee is so authorized by its Articles of Incorporation approved by the United States District Court for the District of Colorado by order dated May 6, 2002 in Civil Action No. 96-cv-02451-ZLW-MJW. Its members include owners in the Unit whose interests aggregate 11.22% including the SSWIOs whose interests in the Unit are estimated at 6%.

2. Defendant Montezuma County is a political subdivision of the State of Colorado within the District of Colorado, organized under the laws of the State, and located in the southwestern part of Colorado.

3. Defendant Montezuma County Board Of County Commissioners is the governing body of the County of Montezuma.

4. Defendant Montezuma County Assessor exercises assessment authority over real and personal property within the County of Montezuma. Its offices are located at 140 West Main Street, Suite 3, Cortez, Colorado 81321.

II. Jurisdiction

5. The Court has jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 1341, and 28 U.S.C. § 1367. This Court has personal jurisdiction over Defendants because Montezuma County is a political subdivision of the State of Colorado and the remaining Defendants are subdivisions thereof.

6. The Court has jurisdiction under 28 U.S.C. § 1341 because the State of Colorado, acting by the Colorado Supreme Court, has denied the SSWIOs standing, and therefore "a plain, speedy and efficient remedy" that comprises "procedural criteria" including "a full hearing and judicial determination" is not available to the SSWIOs. The reasoning of the Colorado Supreme Court was that the Colorado General Assembly, according to a construction of statutes, Assessor's Reference Library ("ARL") regulations, and the views of the Colorado Tax Administrator, required that the operator alone was the "taxpayer" and the only entity with standing to protest or challenge taxes under Colorado law. This action is documented by the Colorado Supreme Court opinion issued on February 21, 2023 under Case No. 21SC393. Such opinion of the Colorado Supreme Court reversed the contrary opinion of the Colorado Court of Appeals in Case No. 19CA1798 which had reversed the Montezuma County District Court. The Colorado Supreme Court affirmed the Montezuma County District Court's order in Case No.

2018CV30100 (the "Order"), which dismissed the Committee's complaint in that court for lack of standing.

7. The Montezuma County District Court held that the operator was the taxpayer for challenging taxes subject to its acting as a fiduciary, and found as follows:

(1) "Defendant's motion to dismiss based on issue and claim preclusion is denied". Order at 12.

(2) "I find that Plaintiff in this case is a 'party with whom or in whose name a contract has been made for the benefit of another'. Plaintiff is a real party in interest under Rule 17(a) based upon Exhibit A attached to the Complaint. Plaintiff has the right to file this suit on behalf of its members". *Id*. at 13-14.

(3) "The more complex question is whether the members of Plaintiff are real parties in interest with standing to challenge the taxation of McElmo Dome Unit oil and gas interests by Montezuma County. The answer to this question is 'no'.

I find that Plaintiff is not a real party in interest and lacks standing to maintain this lawsuit – because the members of plaintiff are not real parties in interest with standing to bring this suit against Montezuma County." *Id*. at ¶ 14.

(4) Kinder Morgan is responsible under Colorado oil and gas taxation statutes for paying taxes on behalf of all interest owners in the McElmo Dome Unit." *Id*. at 14.

(5) "I find that non-operating interest owners have alleged an actual injury from the actions of Montezuma County *** [but] not 'to a legally protected or cognizable interest as contemplated by statutory or constitutional provisions'." *Id*. at 15.

(6) Under Colorado law, Montezuma County assesses taxes against the unit as a whole, and the unit operator, Kinder Morgan, is responsible for paying taxes assessed. Kinder Morgan, alone, as the operator, has the right to appeal and contest the assessment to the unit. Montezuma County is obligated by law to only deal with the unit operator and Montezuma County has no direct obligation towards or dealings with the non-operating interest owners. *Id*. at 15.

(7) At no point, in the taxation scheme promulgated by the Colorado legislature, does the county assessor or treasurer have any interaction with or obligation to the non-operating interest owners in the unit. *Id*. at 17.

(8) The law presumes that the unit operator will act in the best interest of the non-operating interest owners. *Id*. at 17.

(9) "This statutory scheme makes sense. The county assessor only receives one filing from the unit operator. The county assessor and treasurer only deal with the operator. The operator has the right to appeal and contest the assessment. The operator should act in

the best interests of the non-operating interest owners." *** *Id.* at 18.

"If the Colorado oil and gas taxation statutes need to be fixed or modified, it is a political, policy decision to be addressed by the Colorado legislature." *Id.* at 18.

(10) "Plaintiff does not have a plausible claim for relief against Montezuma County because Plaintiff does not have a "legally protected or cognizable interest as contemplated by statutory or constitutional provisions." The substantive law of the State of Colorado does not support the claims asserted by Plaintiff. Plaintiff's factual allegations do not, as a matter of law, support a claim for relief." *Id.* at 18-19.

(11) "Given the current law of the State of Colorado, which I am bound to follow, I find that Plaintiff and its non-operating interest owner members are without standing to challenge the method of taxation by Montezuma County. This case is hereby dismissed with prejudice pursuant to Rule 12(b)(5)." *Id.* at 19.

8. The Colorado Supreme Court, by virtue of its opinion, has denied the SSWIOs standing and therefore denied the remedy to which it is entitled under 28 U.S.C. § 1341 to challenge taxes assessed by Montezuma County. The SSWIOs have returned to this Court to provide a "plain, speedy and efficient remedy" with a full hearing and judicial determination of its complaint.

9. All supplementary claims herein are so related to claims in this action that they form part of the same case or controversy under Article III of the U.S. Constitution.

10. Venue is proper under 28 U.S.C. § 1391.

III. Relevant Colorado Tax Law

11. C.R.S. § 39-7-101 is the first step in the assessment of property taxes applicable to every person owning any oil or gas leasehold or lands within the state of Colorado whether a single lease or as a unit. In a unit, the operator is required to file with the assessor a statement no later than April 15th of each year. The information required in the statement is set forth in C.R.S. § 39-7-101(1)(a)-(f) on a form prescribed by the Administrator.

12. The taxes are assessed on each working interest owner (WIO) based upon his "selling price at the wellhead" times 87.5% or 75%, depending on circumstances. Such selling price for each WIO is its revenue after deducting transportation costs and other costs (the "net taxable return").

13. The operator is required to make a declaration under perjury that it has personally examined the statement and that such statement sets forth to the best of operator's knowledge, the information required; and also, that "no representations are made as to the accuracy of the value of any portion of the production from subject property that is taken in-kind by any owner other than the undersigned".

14. Non-operating working interest owners are authorized to submit to the operator by March 15th a report of their actual net taxable revenues received at

the wellhead, failing which the operator shall use its selling price for them. C.R.S. § 39-7-101(1.5). The SSWIOS have relied on the latter procedure in the past because Kinder Morgan reported its net taxable revenue after deducting 100% of its transportation costs and its net taxable revenue was very close to that of the SSWIOs.

15. The operator sends its statement to the assessor. C.R.S. § 39-5-121(1.5)(b). The assessor then determines the value of the leaseholds and lands for assessment based on the information contained in the April 15 statement for each owner. C.R.S. § 39-7-102. The assessor has the right and authority to obtain such information as is necessary to verify the statement filed by the operator. C.R.S. § 39-7-105.

16. Lastly, the assessor prepares a notice of valuation and sends it to the operator. The notice of valuation sets forth the taxes due from each owner by proportioning his net taxable return to the total net taxable returns of all owners. The total tax is levied against the Unit but the taxes of each WIO are allocated to him based on his share of total net taxable revenues and not his decimal share of his production in the Unit. The operator is obligated to collect taxes from the owners and pay them to the county.

17. Based on ARL ("Assessor's Reference Library") regulations but with statutory authority following *Kinder Morgan CO2 Co., L.P. v. Montezuma County Board of Commissioners*, 396 P.3d 657 (Colo. 2017) ("*KM2*"), the assessor made a retroactive assessment of Kinder Morgan in tax year 2008. The Assessor did this because WIOs, who owned part of the pipeline from the Unit to West Texas, were, by ARL regulation, not entitled to deduct the full tariff cost.

18. Kinder Morgan and ExxonMobil are the only owners that own part of the pipeline. All other WIOs were "unrelated" to the pipeline and were allowed to deduct 100% of the tariff.

19. Retroactive assessments are not authorized by statute. They are authorized by 3 ARL 6.52, being guidelines authorized by C.R.S. § 39-2-109(1)(k). The ARL authorizes an audit of taxpayers after notice to them and allows the assessor to change the valuation of oil and gas leaseholds for taxpayers by issuing a special notice of valuation pursuant to 3 ARL 6.52 and to issue a tax bill to cover the omitted taxes as permitted by 3 ARL 6.52 - 6.57. The Assessor's right to review and change valuations is also conditioned on "a letter to the taxpayers."

20. The Assessor delivered no notice or letter of its audit or retroactive assessment to the Committee SSWIOs. Further, there is no provision in the law or regulation that requires the assessor in retroactive assessments to deal solely with the operator.

21. The procedure regarding notices of valuation and appeals of valuation is to follow the schedule for personal property, C.R.S. § 39-7-102.5, and to deliver the same to the operator. There is no statutory law concerning where to deliver a special notice of valuation upon retroactive assessment. But, the ARL states that audits and retroactive assessments are applicable to "taxpayers" and "owners". The SSWIO taxpayer owners never received any notice of the audit or the special assessment as required by ARL and ensuing retroactive adjustment beginning with tax year 2008.

22. The assessor delivered the notice of assessment to the operator under the following circum-

stances, all in violation of the law after 1993: (1) operator never complied with C.R.S. § 39-7-101(1) when preparing the April 15 statement by omitting names of SSWIOs, addresses, net taxable returns and other information required, (2) Assessor never challenged operator's defective statement, and (3) Assessor never complied with C.R.S. § 39-10-106(1). Kinder Morgan allocated the retroactive tax to all WIOs in the same way as a Notice of Valuation in proportion to their decimal interest in the Unit and not their decimal interest based on net taxable returns as required. The amount of taxes assessed against SWWIO members is unknown but is estimated to be $125,000 per year over at least 4 years (2008-2011).

23. None of the provisions in the statutes or ARL permit the assessor to conduct an audit or retroactive valuation without notice to all applicable taxpayers. Such notice was not provided to the SSWIOs. The ARL also provided that only an owner had standing to file a protest of taxes. 2 ARL 5.2 The special notice of valuation contains in bold letters that the owner had "the right to protest your property value".

24. The major purpose of the retroactive assessment was to reduce the transportation costs applicable to Kinder Morgan because it was found to be a person related to Cortez Pipeline Company whose pipeline is the means of transportation of CO2 from the Unit to the marketplace. Because of the unlawful practices of the assessor, she treated all owners as related parties in such a manner to increase their valuation, even though they knew that all owners except Kinder Morgan and ExxonMobil had no interest in the Cortez Pipeline Company, were not related

parties and whose net taxable revenues reported on the 2008 April 15 statement were accurate.

25. In 2008, and likely for many years before and after, neither the operator nor the assessor complied with C.R.S. §§ 39-7-101(1), 39-10-106(1), and 39-5-121(1.5)(b). Had the assessor complied with the law, the operator would not have allocated retroactive taxes against the SSWIOs. Operator Kinder Morgan allocated the 2008 retroactive taxes among all WIOs because both assessor and operator illegally treated regular assessments as a levy against the Unit which worked well enough until WIOs were classified as "related" and "unrelated" parties. Until 2020 the notices of valuation and special notices of valuation were addressed to Kinder Morgan as "owner" or "Property Owner". The effect of this is that the operator used the decimal interest of these WIOs in the Unit to allocate taxes, not the proportion of net revenue return as required by C.R.S. § 39-10-106(1).

26. The assessor illegally treated the SSWIOs the same as Kinder Morgan with the effect that the SSWIOs were made to pay more taxes than they owed.

27. The assessor found that in 2008, that Kinder Morgan, as an owner, deducted more transportation costs that it was entitled to as a partial owner of the pipeline. Specifically, the audit resulted in an increased assessed valuation of $56,745,120 which increased taxes by $2,028,865. Kinder Morgan tried to get assessor to relieve the SSWIOs from the retroactive assessment as shown by various filings in the Supreme Court in *Kinder Morgan CO2, L.P. v. Montezuma County Board of Commissioners*, 396 P.3d 651 (Colo. 2017) ("*KM2*"). The assessor also refused every effort later

made by the Committee to obtain taxes its SSWIOs did not owe.

IV. Kinder Morgan Supreme Court Proceedings

28. Kinder Morgan disagreed with the retroactive assessment made in 2008. In due course, it paid the tax bill and then, in 2011, filed a petition with the Board of County Commissioners for abatement or refund. The Board of County Commissioners denied Kinder Morgan's petition.

29. Kinder Morgan then appealed to the Board of Assessment Appeals ("BAA"). The BAA upheld the Board of County Commissioners' denial of the Petition for Abatement or Refund.

30. The BAA found that retroactive assessments were appropriate as argued by Montezuma County and held:

> The Board finds that Kinder Morgan and the Cortez Pipeline Company were related parties. As of December 31, 2007, Petitioner owned 50% of the Cortez Pipeline Company, having purchased it from Shell. Financial statements are supportive. Per the ARL, a transportation deduction is not allowed. Petitioner presented insufficient probative evidence and testimony to prove that the tax year 2008 valuation of the subject property was incorrect.

31. Kinder Morgan appealed to the Colorado Court of Appeals which filed its decision on June 4, 2015. The Court of Appeals agreed, and affirmed the decision of the BAA that Montezuma County had the right to make retroactive assessments when value

was omitted from scheduled property, found that Kinder Morgan underpaid its taxes for the tax year 2008, and confirmed the assessor's adjustments to the transportation allowance because of the related party rules.

32. Kinder Morgan timely appealed the decision of the Court of Appeals to the Colorado Supreme Court (by petition for writ of certiorari). On June 19, 2017, the Supreme Court affirmed the judgment of the Court of Appeals. *KM*2

33. Kinder Morgan was the petitioner for the BAA, was the appellant before the Colorado Court of Appeals and was petitioner before the Colorado Supreme Court. None of these proceedings reflected any party other than Kinder Morgan. Nonetheless, both Kinder Morgan and the County treated the litigation as against the Unit as they had in the past.

34. On November 20, 2017, Kinder Morgan delivered a memorandum to the Committee's members in the McElmo Dome Unit explaining the foregoing litigation and included the following:

> Neither the Board nor any court has held that any interest owner in the Unit, other than Kinder Morgan, is a "related party" with Cortez Pipeline Company. However, the Assessor's retroactive assessments reduced the transportation deduction (and thereby increased the value and the resulting taxes) for the entire Unit, including the portion of the Unit for which interest owners other than Kinder Morgan are liable for property taxes. Kinder Morgan believes there is a strong argument that the reduction in the

> transportation deduction should not apply to the valuation of the portion of the Unit for which interest owners other than Kinder Morgan are liable for property taxes. However, this argument needs to be presented to the Board by the affected interested owners, not by Kinder Morgan . . . . Kinder Morgan recommends that any interest owner wishing to intervene in the appeals immediately retain legal counsel to advise the interest owner with respect to such intervention.

The foregoing memorandum was the first notice the Committee and its members received with respect to the retroactive assessment and payment of extra taxes.

35. Upon receipt of the foregoing memorandum, the Committee wrote a letter dated November 28, 2017 to the Assistant Solicitor General, Robert H. Dodd, requesting that the Colorado Property Tax Administrator (which was a party in *KM2* by intervention) (1) issue a ruling that its claims and those of Montezuma County do not apply to property taxes paid by Kinder Morgan on behalf of interest owners who are not related to Cortez Pipeline Company and (2) further order Montezuma County to take no action to recover retroactive property taxes from SSWIOs because they had already paid their taxes in full as "unrelated" parties. The request was denied.

36. Following the foregoing, the Committee contacted counsel for the operator who sent a letter dated January 4, 2018, which states, in part:

> Montezuma County issued retroactive assessments against the Unit for tax years

2008, 2009, and 2010. Kinder Morgan was required to pay those assessments, and has done so and made adjustments for the additional property taxes in prior billings to working interest owners.

* * *

On November 30, 2017, Montezuma County issued retroactive assessments against the Unit for tax year 2011. Kinder Morgan was required to pay those assessments, and has done so. Adjustments for the additional property taxes resulting from the retroactive assessments for tax year 2011 are included in the December billings to working interest owners.

No retroactive assessments for tax years subsequent to 2011 have been issued, but Kinder Morgan anticipates that such retroactive assessments will be issued. Kinder Morgan will advise interest owners of the issuance of any such retroactive assessments.

* * *

As noted in response to Request 3, above, Kinder Morgan was required to pay, and has paid, the retroactive assessments for tax years 2008 through 2011.

* * *

Kinder Morgan will continue to bill each or deduct from its payments to each Working Interest Owner, that owner's share of property taxes levied against the Unit in accordance with the provisions of the Unit Operating

Agreement.

(emphasis supplied)

V. Committee's Administrative Efforts to Recover Unlawful Taxes

37. On January 23, 2018, pursuant to C.R.S. § 39-5-122, the Committee filed an objection with the assessor complaining that she had wrongfully determined that the Committee SSWIOs had underreported their valuation beginning with the 2008 tax year for ad valorem tax purposes and, in furtherance of its expectation provided for in C.R.S. § 39-1-101.5, believed it should be accorded the respect and courtesy deserving in making the objection. On March 30, 2018, the Committee wrote another letter to the assessor complaining that the Committee had not received a response to its January 23, 2018 letter.

38. On April 12, 2018, the Committee received a letter from Montezuma County's attorney. The letter claimed Montezuma County was unable to establish that Committee members were "unrelated" to Cortez Pipeline, that a different ad valorem tax methodology should not be applied to the Committee members in place of the "related party" methodology approved, and that separate special notices of valuation have never been provided to the Committee's members and were not required.

39. On May 11, 2018, the Committee filed a Petition for Appeal to County Board of Equalization Under C.R.S. § 39-8-106 and Petition for Abatement.

40. On May 30, 2018, the Committee received a response to its Petition for Appeal to County Board of Equalization under C.R.S. § 39-8-106 and Petition for

Abatement Under C.R.S. § 39-1-113. Montezuma County's assessor's response was:

> The Montezuma County Assessor's office has not sent Notices of Value to your client, CO2 Committee, Inc. As your client is not identified as a Montezuma County taxpayer, we are not able to provide a hearing at the Board of Equalization. Thank you.

41. Montezuma County's right to retroactively assess the correct values is conditioned on its giving notice to the affected taxpayers. Montezuma County gave no notice to Committee SSWIOs that they were being subject to a retroactive assessment valuation.

42. Montezuma County illegally treated its retroactive assessment as against the Unit.

43. The Assessor has willfully and knowingly valued the taxable property of the Committee's SSWIOs contrary to her obligations under the law and is subject to the penalties provided therefor. C.R.S. § 39-5-126.

VI. Committee Complaint in Federal Court

44. On October 1, 2018, the Committee filed a complaint for violation of the Civil Rights Act substantially similar to this complaint which became Civil Action No. 18-cv-02502-RBJ.

45. On November 13, 2018, Montezuma County filed a motion to dismiss the Committee's complaint, arguing that it was prohibited by the Tax Injunction Act, 28 U.S.C. § 1341, and citing language therefrom stating that state court jurisdiction depended on a "plain, speedy and efficient remedy".

46. The Committee promptly moved to dismiss which was granted and, on November 30, 2018, filed a complaint in the Montezuma County District Court.

VII. Committee in Montezuma County District Court

47. Notwithstanding the County's understanding that Colorado law must provide a plain, speedy and efficient remedy to obtain jurisdiction over a federal claim, the County argued before the Montezuma County district court that the Committee had no standing.

48. After briefing, the district court agreed with the County and dismissed Committee's case for lack of standing based on Colorado law.

VIII. Committee in the Colorado Court of Appeals

49. On March 18, 2021 the Colorado Court of Appeals stated:

> In this oil and gas leasehold tax case, a division of the court of appeals considers whether a nonoperating fractional interest owner in an oil and gas unit who pays real property taxes on its leasehold interest has standing to claim that its due process rights were violated when it did not receive individual notice of or an opportunity to challenge a retroactive assessment and increased tax liability. The division concludes, as a matter of first impression, that a taxpaying nonoperating fractional interest owner who has been denied the panoply of rights afforded a

> taxpayer under the governing statutes and guidelines—including to receive notice of and to protest a retroactive assessment or to seek an abatement of a retroactively increased tax—has standing to claim a violation of those rights. The division reverses the district court's order dismissing the complaint for lack of standing.

IX. Committee in the Colorado Supreme Court

50. The Colorado Supreme Court, applying Colorado State law governing standing, overruled the Colorado Court of Appeals and affirmed the District Court's order concluding:

> . . . the court concludes that Article 7 of Title 39 creates a unique representative system in which a unit operator is the sole entity with standing to protest a retroactive assessment on the unit it operates. Because a unit operator is the sole point of contact through the reporting, notice, and taxpaying process, the court holds that the nonoperating fractional interest owners do not have a legally protected interest in the valuation and taxation of their oil and gas leaseholds and lands and, therefore, lack standing to challenge a retroactive assessment and property tax increase.

51. The Supreme Court disregarded Montezuma County's unconstitutional and illegal practices in violation of Colorado law and held that in a unit the "taxpayer" meant "operator", that the term "owner" meant the "operator" and that a "person" under C.R.S. § 39-5-122(2) meant an "operator".

First Claim for Relief (Damages)

52. The rights, privileges or immunities of the Committee SSWIOs secured by the Constitution include the right to notice and due process with respect to the actions of Montezuma County, acting by and through its Board of County Commissioners, and its Assessor to unlawfully retroactively assess taxes and take property from the Committee SSWIOs.

53. Defendants had a constitutional duty under 42 U.S.C. § 1983, and the Fifth Amendment and the Fourteenth Amendment to the United States Constitution, not to deprive the Committee SSWIOs of their rights, privileges or immunities by taking taxes from the Committee SSWIOs they did not owe.

54. Defendants' actions deprived Committee SSWIOs of their rights, privileges or immunities secured by the U.S. Constitution by unlawfully taxing them and depriving them of their constitutional right to due process by failing to give them notice of the audit and retroactive assessment of taxes and later by refusing to honor or consider their timely objections and petition for abatement and reimbursement of illegally collected taxes.

55. Defendants owe all taxes, interest, attorney fee damages, related damages and punitive damages imposed on the Committee members prior to 2023 plus interest (including tax years 2008, 2009, 2010 and 2011), based on a reduction in transportation costs as though such members were "related parties", including all reasonable attorney fees incurred by plaintiff fighting for standing after Defendants' representation to this Court that it was able to provide Committee SSWIOs "a plain, speedy and expedient

remedy" when all it did in the courts was to oppose that.

Second Claim for Relief (Declaratory Judgment and Injunction)

56. The Committee SSWIOs are entitled to a declaratory judgment that:

(a) Committee SSWIOs are taxpayers and, as taxpayers, are entitled to all rights of taxpayers under Colorado law.

(b) Defendants violated the Fifth and Fourteenth Amendments of the U.S. Constitution and the Civil Rights Act, 42 U.S.C. § 1983.

57. The Committee is entitled to a permanent injunction enjoining the Assessor to obey the following orders:

(a) The Assessor shall hereafter treat the Committee SSWIOs as taxpayers with all associated rights of taxpayers under the law.

(b) The Assessor shall not audit or retroactively assess taxes against the Committee SSWIOs, directly or indirectly, without actual notice delivered to each of them of their right to protest and appeal the retroactive assessment according to the U.S. Constitution and Colorado law.

(c) The Assessor shall never again retroactively assess Committee SSWIOs without prior notice, hearing and other due process rights.

(d) The Assessor during her compliance with C.R.S. § 39-10-106(1) shall adjust the net taxable returns of those SSWIOs who rely on

> C.R.S. § 39-7-101(1.5) to reflect a deduction of 100% of transportation costs if the operator uses its net taxable return for such SSWIOs where its net taxable returns reflect less than 100% of transportations costs.

Third Claim for Relief (Misrepresentation and Promissory Estoppel)

58. Defendants misrepresented material facts without reasonable cause in that their motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction filed in federal Civil Action No. 18-cv-02502-RBJ based on the Tax Injunction Act, 28 U.S.C. § 1341. The misrepresentation was that the Committee SSWIOs had standing in state court. After citing the provisions of the Act in its motion to dismiss, Defendants stated:

> The Act's prohibitions do not apply if "a plain, speedy and efficient remedy" is unavailable in state court. 28 U.S.C. § 1341. This exception is construed narrowly. Brooks, 801 Fed.2d at 1240. The requirement of "a plain, speedy and efficient remedy" is satisfied "if minimal procedural remedies are available for the taxpayer to challenge the validity of the tax . . . " *Id.*

59. Unstated but included in the foregoing language as a matter of law was the holding of *Rosewell v. La Salle National Bank*, 450 U.S. 503, 512, 514 (1981), that the Committee SSWIOs were entitled to a plain, speedy and efficient remedy with "a full hearing" and "judicial determination".

60. Defendants and their attorney, by moving to dismiss Committee SSWIOs complaint in federal court based on 28 USC § 1341, misrepresented the existence of a remedy in state court since their motion to dismiss the complaint filed in state court was based on no standing. The misrepresentation was made by Defendants and their counsel, either by intention or negligence, in the course of resolving a controversy over federal jurisdiction and was further made in the course of its business and for commercial purposes to save money.

61. Defendants, in the course of its business to convince the SSWIOs that the County did not wrongfully take money from them, represented to the SSWIOs that, under 28 USC § 1341, they had a remedy in state court to resolve relevant issues.

62. The SSWIOs justifiably relied on such misrepresentation and proceeded with litigation before the Montezuma County District Court.

63. The Committee, in reliance on the above representation and promise, promptly moved to dismiss the federal court complaint and filed another complaint in the Montezuma County District Court for the purpose of seeking relief from the county's imposition of an unlawful tax on the Committee SSWIOs.

64. Defendants' representation of a remedy in state court was a promise which was made because it reasonably expected the Committee would dismiss its federal court complaint and proceed in state court only to find there was no jurisdiction in state court. In fact, Defendants made a promise of a remedy in state court which the Committee reasonably expected would be performed by Defendants to avoid an injustice with

the effect that Defendants were estopped to claim that state courts did not have a remedy. As a result, Defendants are obligated to pay Committee SSWIOs damages for their misrepresentation of the existence of a remedy in Colorado.

65. Notwithstanding the foregoing, Defendants filed a motion to dismiss the complaint in the Montezuma County District Court on the grounds that the Committee SSWIOs were not taxpayers and had no standing to challenge county taxes imposed on the SSWIOs. The district court, after briefing, issued an order dismissing plaintiff's complaint on the grounds of standing thereby denying a plain, speedy and efficient remedy. The Committee found the order replete with misunderstandings of taxation applicable to units and believed the district court surely made a mistake of Colorado law. Thus, Committee's appealed to the Colorado Court of Appeals.

66. The Colorado Court of Appeals reversed the district court and found that the Committee was entitled to standing to challenge tax issues in litigation with Montezuma County.

67. The Committee fully expected that it could proceed with trial in the Montezuma County district court until petitions for writ of certiorari were filed and that of the Colorado tax administrator's petition was granted. Totally unexpected by the Committee, the Supreme Court affirmed the district court order of dismissal and reversed the opinion of the Colorado Court of Appeals. Committee expected the Supreme Court to affirm the Colorado Court of Appeals because the consequences of a contrary opinion would require that all challenges and protests to retroactive taxation in counties undertaken by non-operating working

interest owners in Colorado units would thereafter have to challenge taxes in federal court for lack of a remedy in Colorado state courts including administrative remedies.

68. As a result of the foregoing the Committee has incurred and paid substantial legal fees for which the county is liable as damages in addition to any other attorney fees and costs arising in this case.

Fourth Claim for Relief (Second Declaratory Judgment Claim)

69. CO2, produced from the McElmo Dome Unit is transported 500 miles to the Texas Permian Basin. This project was undertaken to promote the continuation of tertiary recovery or recycling projects and to conserve and avoid waste of oil and gas produced in the Permian Basin.

70. As a result of the foregoing, the assessor is obligated under C.R.S. § 39-7-102(2), to value production from CO2 gas leaseholds and lands or assessment undertaken to conserve and avoid waste of oil and gas in the Permian Basin at an amount equal to 75% of the selling price as defined at C.R.S. § 39-7-101(1)(d).

71. Since the beginning of production in 1984, upon information and belief, the operators of the Unit or the assessor or both have either been ignorant of the law or disregarded the law to have their actual selling price for tax purposes reduced to 75% rather than 87.5%.

72. Since the Committee SSWIOs have an independent relationship with Defendants insofar as challenging and protesting taxation is concerned, Committee SSWIOs are entitled to have their selling prices reduced to 75%. This is not a discretionary de-

termination by the Assessor but a requirement ("the assessor shall value").

73. The Committee SSWIOs are entitled to damages in the amount of 12.5% (87.5% - 75%) of the annual assessments made against the Committee SSWIOs from 2008 to the present plus interest.

Jury Demand

Plaintiff Demands a jury on all issues triable by jury

WHEREFORE, the Committee SSWIOs pray for judgment as follows:

1. On their First Claim for damages for violation of the Fifth and Fourteenth Amendments and Civil Rights Act § 1983 as set forth in paragraphs 52-55 of this Complaint.

2. On their Second Claim for violation of the Fifth and Fourteenth Amendments and Civil Rights Act § 1983 for declaratory judgment and injunction against Montezuma County as requested in paragraphs 56-57 of this Complaint.

3. On their Third Claim for damages for misrepresentation and estoppel as set forth in paragraphs 58-68 of this Complaint for such damages and attorney fees from prior litigation, for costs for wasted efforts to settle the case, for time to raise money to prosecute the Committee's claims, for punitive damages, and for such other damages to which they may be entitled.

4. On their Fourth Claim, for declaratory judgment that Committee SSWIOs are entitled to an assessment based on 75% and not 87.5% of the selling

price pursuant to C.R.S. § 39-7-102 and for damages as set forth in paragraph 70 of this Complaint.

5. For attorney's fees and costs and such other relief as to the Court seems just.

DATED this 21st day of September, 2023.

/s/ John M. Cogswell

Bar No. 2898
Cogswell law offices
PO BOX 705
Saratoga, WY 82331
PO Box 705
(303) 887-3923
JohnMCogswell@gmail.com

/s/ Brenton L. Gragg
Bar No. 52528
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout Street, Suite 1900
Denver, CO 80202
(303) 534-4499
BGragg@allen-vellone.com

Attorneys for Plaintiff

PLAINTIFFS' ADDRESS:
CO2 Committee, Inc.
c/o Leo Crowley
39513 N. Graham Way
Anthem, AZ 85086

APPELLANTS MOTION TO LEAVE TO ATTACH ADDITIONAL DOCUMENT (AUGUST 29, 2025)

Appellate Case No. 24-1337

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff-Appellant,

v.

MONTEZUMA COUNTY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the District of Colorado
Case No. 23CV2457-CNS-NRN
The Honorable Charlotte N. Sweeney

APPELLANTS MOTION TO LEAVE TO ATTACH ADDITIONAL DOCUMENT

Pursuant to 10th Circuit Rule 40.2(B), the Appellant moves for leave to attach a Special Notice of Valuation dated September 30, 2009 which was delivered by the assessor in Montezuma County to Kinder Morgan, a working interest owner. This document is central to understanding the Court's Order and Judg-

ment filed July 28, 2025 as Document 40-1. When delivered, there were six copies, one for each "Tax Area", namely 12010, 12012, 12023, 12025, 12026 and 12027. The form for NOV is "191-08/08". The reverse side is not available. Each copy is the same except for the "Schedule Number", "Legal Description", "Physical Location" and 'Numbers". Only one copy is needed for this case.

To save time a copy of Exhibit 1 is attached.

/s/ John M. Cogswell, Esq.
Cogswell Law Offices
206 Arapahoe Drive
Saratoga, WY 82331
Telephone: (303) 887-3923

Attorney for Appellant
CO2 Committee, Inc.

DATED: August 29, 2025

APPELLANT'S EXHIBIT 1
FOR PETITION FOR REHEARING EN BANC

Appellate Case No. 24-1337

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff-Appellant,

v.

MONTEZUMA COUNTY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the District of Colorado
Case No. 23CV2457-CNS-NRN
The Honorable Charlotte N. Sweeney

APPELLANT'S EXHIBIT 1
FOR PETITION FOR REHEARING EN BANC

/s/ John M. Cogswell, Esq.
Cogswell Law Offices
206 Arapahoe Drive
Saratoga, WY 82331
Telephone: (303) 887-3923

Attorney for Appellant
CO2 Committee, Inc.

OIL AND GAS LEASEHOLDS AND LANDS
SPECIAL NOTICE OF VALUATION

Date of Notice: 9/30/2009
Telephone: (970) 565-3428
Fax: (970) 565-1247
Office Hours: 8:30am-4:30pm

MONTEZUMA Assessor
109 WEST MAIN STREET ROOM 310
CORTEZ, CO 81321

SCHEDULE NUMBER 0100032

TAX YEAR 2008

TAX AREA 12010

PROPERTY OWNER

KINDER-MORGAN CO2, LP
PROPERTY TAX DEPARTMENT
500 DALLAS SUITE 1000
HOUSTON, TX 77002

LEGAL DESCRIPTION/PHYSICAL LOCATION

CO2 PRODUCTION CLUSTER D, CA,
COW CANYON, HD

PROPERTY CLASSIFI-CATION	**PRIOR ACTUAL/ PRODUCTION VALUE**	**ACTUAL/ PRODUCTION VALUE FOR TAX YEAR 2008**
PRIMARY PRODUC	0	7,120,980
PROD CO2	5,235,260	0
TOTAL	**5,235,260.00**	**7,120,980.00**

The assessed value of the property identified above will be entered on the tax warrant for the following reason(s): *Omitted production has been discovered.*

The value of oil and gas leaseholds and lands is based on the selling price of the prior year's production at the wellhead, § 39-7-102, C.R.S. Selling price at the wellhead is defined as the net taxable revenues realized by the taxpayer for sale of the oil or gas, whether such sale occurred at the wellhead or after gathering, transporting, manufacturing, and processing the product, § 39-7-101(1)(d), C.R.S.

The valuation for assessment (actual/production value) of oil and gas leaseholds and lands is 87.5% of primary production, and 75% of secondary and tertiary production, § 39-7-102, C.R.S. If you did not file a declaration schedule as required by § 39-7-101, C.R.S., the actual/production value for the tax year shown above is based on the best information available (BIA) pursuant to § 39-7-104, C.R.S.

The tax notice you receive will be based on the actual/production value for tax year 2008.

You have the right to protest the valuation of your property. Please refer to the reverse side of this notice for additional information.

DEFENDANTS' MOTION TO DISMISS
(DECEMBER 18, 2023)

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CO2 COMMITTEE, INC.,
a Colorado nonprofit corporation,

Plaintiff,

v.

MONTEZUMA COUNTY, MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS, MONTEZUMA COUNTY ASSESSOR,

Defendants.

Civil Action No. 1:23-cv-02457-NRN

DEFENDANTS' MOTION TO DISMISS

The Defendants, Montezuma County, Montezuma Board of County Commissioners, Montezuma County Assessor, (collectively "Montezuma County") move to dismiss the Plaintiff's complaint (ECF. # 1) under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. If the Court determines it does have jurisdiction over the subject matter, Montezuma County asks the Court to dismiss the complaint under the comity doctrine and pursuant to the principle of res judicata.

I. Issue

1. Plaintiff seeks an order enjoining Montezuma County from assessing certain property taxes, declaring Montezuma County's tax assessment procedures unconstitutional, and awarding a refund of property taxes. The issue presented in this motion is whether the Federal Court has subject matter jurisdiction to address Plaintiff's claims regarding local tax matters, and if it does whether that jurisdiction should be declining jurisdiction as a matter of comity, and lastly whether this case is barred by the doctrine of res judicata.

II. Summary of Argument

2. Plaintiff's tax interests were thoroughly and adequately represented by a representative company, Kinder Morgan CO2 Co., LLP ("Kinder Morgan"), before the Montezuma County Board of Commissioners, and at state administrative and judicial proceedings. Kinder Morgan appealed an adverse ruling by the Board of County Commissioners to the Colorado Board of Assessment Appeals. When it lost that appeal, Kinder Morgan appealed to the Colorado Court of Appeals and ultimately, the Colorado Supreme Court. *Kinder Morgan CO2 Co., L.P. v. Montezuma Ct. Bd. Of Comm'rs*, 399 P.3d 735 (Colo. App. 2015). *Kinder Morgan CO2 Co., L.P. v. Montezuma Cty. Bd. of Comm'rs*, 396 P.3d 657 (Colo. 2017).

3. After Kinder Morgan lost before the Colorado Supreme Court, Plaintiff filed a Federal lawsuit on the same issues. *CO2 Committee, Inc. v. Montezuma County, et al.*, 18-CV-02502 (U.S. District Court of Colorado). The Tax Injunction Act, 28 U.S.C. § 1341, generally provides that Federal Courts do not have

subject matter jurisdiction to address state and local tax issues, and Montezuma County filed a motion to dismiss on that basis. Plaintiff then dismissed its federal action, conceding that the Federal Court lacked subject matter jurisdiction pursuant to the Tax Injunction Act.

4. Plaintiff then filed a lawsuit in State court. The trial court dismissed that lawsuit for lack of standing. The Colorado Supreme Court ultimately held that Colorado's "representative system" precluded Plaintiff's standing argument and affirmed the trial court's dismissal of the action. *Colorado Property Tax Administrator v. CO2 Committee, Inc.*, 527 P. 3d 371 (Colo. 2023).

5. Despite its representative taking the underlying tax issues to the Colorado Supreme Court, and Plaintiff also taking its standing issue to the Colorado Supreme Court, Plaintiff now incorrectly contends that it did not have a remedy available in State Court. The Tax Injunction Act deprives this Court of subject matter jurisdiction. Additionally, the comity doctrine supports this Court deferring to state court when there is both Federal and state court jurisdiction, particularly where state tax systems are involved. Finally, the doctrine of res judicata prohibits this Court from hearing this matter, which has already been conclusively addressed in Colorado State Court.

III. Background

A. The Parties

6. Kinder Morgan CO2 Company, LP. is the operator of the McElmo Dome Unit, a large deposit of CO2 in Montezuma County and Dolores County in

southwestern Colorado. *Kinder Morgan CO2 Co., L.P. v. Montezuma Cty. Bd. of Comm'rs*, 396 P.3d 657, 662 (Colo. 2017). Plaintiff, CO2 Committee, Inc., is a Colorado nonprofit corporation, acting on behalf of its members who are Small Share Working Interest Owners ("SSWIOs") in the McElmo Dome unit. (ECF. # 1 at 1).

7. As the unit operator, Kinder Morgan is responsible under Colorado oil and gas taxation statutes for paying taxes assessed on behalf of all interest owners in the McElmo Dome unit. Under Colorado law, Montezuma County assesses against the unit as a whole. C.R.S. § 39-7-101. *Kinder Morgan CO2 Co.*, 396 P.3d at 662.

8. Under Colorado law, Kinder Morgan, alone, has the right to appeal and contest the assessment of oil and gas taxes. *Colorado Property Tax Administrator v. CO2 Committee, Inc.*, 527 P.3d 371, 380 (2023).

9. "In the oil and gas context, a 'unit' is a consolidation of working interests that extract resources from a single geological reservoir. Units are created for the purpose of efficiently extracting resources from the reservoir through coordinated engineering and operation, often by a single operator." *Kinder Morgan CO2*, 396 P.3d at 662 n.4.

10. Although the fractional interests in a unit may be owned by many entities, a single unit operator often handles the day-to-day operations. *Id.*

11. Once a year, every unit operator is responsible for preparing, signing, and filing a statement ("Annual Statement") with the local county assessor. C.R.S. § 39-7-101(1).

12. The Annual Statement must include, among other things, the "selling price of [oil or gas] at the wellhead," also known as the "net taxable revenues." C.R.S. § 39-7-101(1)(d).

13. The sale of unprocessed oil or gas, however, rarely occurs at the wellhead; instead, the oil or gas is typically gathered from multiple wells, processed, and transported away from the wellsite before sale. *Id.* at 661. "As a result, an operator typically, must estimate its 'selling price at the wellhead for purposes of section 39-7-101(1)(d) by deducting from its final, downstream selling price the costs of gathering, processing, and transporting the extracted material." *Id.* This calculation is known as the "netback." *Id.*

14. The netback depends, in part, on whether the parties providing the value-adding services are related to the operator or not. *Id.* If the party is related to the operator, then the operator can only deduct a portion of the cost paid. *Id.*

15. The assessor uses the Annual Statement to "value such oil and gas leaseholds and lands for assessment." C.R.S. § 39-7-102(1). The assessment is then used to calculate property taxes. C.R.S. §§ 39-7-101 to -102. *Kinder Morgan*, p. 661.

B. Kinder Morgan's Taxation Obligations

16. Under C.R.S. § 39-10-106(2), Kinder Morgan is obligated to pay property taxes on behalf of the Non-Operating Interest Owners.

17. Kinder Morgan is also required to provide the county assessor with an annual statement of the volume and wellhead price of the gas sold from the

unit. C.R.S. § 39-7-101; *Kinder Morgan CO2*, 396 P.3d at 661.

18. Montezuma County audited Kinder Morgan's annual statement for tax year 2008 and determined that Kinder Morgan had underreported the value of gas produced at the unit's leaseholds by improperly deducting certain costs, that it, as the unit operator, was not entitled to deduct. *Colorado Property Tax Administrator*, 527 P.3d at 374.

19. Therefore, Montezuma County retroactively increased its valuation by $57 million, which, in turn, increased the overall tax liability of the unit by more than $2 million. *Id.*

20. Kinder Morgan paid the additional tax bill and subsequently appealed the retroactive assessment. *Kinder Morgan*, 396 P. 3d at 667-68. Kinder Morgan then charged the fractional interest owners for their proportionate share of the taxes. *Colorado Property Tax Administrator*, 527 P.3d at 374.

21. Kinder Morgan challenged the retroactive assessment before the Board of County Commissioners for Montezuma County. The Board upheld the retroactive assessment. *Kinder Morgan*, 396 P.3d at 663.

22. Kinder Morgan then appealed to the Colorado Board of Assessment Appeals. After a two-day hearing, in which Kinder Morgan and the Montezuma County Board of Commissioners presented witnesses and documentary evidence, the Board of Assessment Appeals affirmed. *Id.*

23. Kinder Morgan then appealed the Board of Assessment Appeals' decision to the court of appeals, which likewise affirmed. *Id.*

24. In a published opinion, the court of appeals agreed that the Montezuma County assessor had statutory authority to issue the disputed assessment, concluding that House Bill 90-1018 "amended the property tax code to authorize retroactive property tax assessments on the value of oil and gas leaseholds and lands omitted due to underreporting of the selling price or quantity of oil and gas sold therefrom." *Kinder Morgan CO2 Co., L.P. v. Montezuma Ct. Bd. Of Comm'rs*, 399 P.3d 735, 741 (Colo. App. 2015).

25. Kinder Morgan then appealed to the Colorado Supreme Court claiming that the retroactive assessment attributable to the Non-Operating Interest Owners' interest was improper. The Supreme Court found against Kinder Morgan's claim and upheld the full retroactive assessment. *Id.*

C. Plaintiff's Requested Relief

26. Following the Supreme Court's denial of Kinder Morgan's claims for relief from the retroactive assessment, Plaintiff, filed a Federal lawsuit. See Civil Action No. 18-CV-02502. Upon receipt of defendants' motion to dismiss, Plaintiff filed a Notice of Dismissal, stating: "The reason for dismissal is the defendants are correct in their motion to dismiss that this Court has no jurisdiction by reason of the Tax Injunction Act which was overlooked by the plaintiff's counsel when he prepared the complaint." See 18-CV-02502, ECF #21.

27. The Plaintiff then filed its own action in state court and requested that Montezuma County refund to Kinder Morgan the portion of the same retroactive assessments attributable to the Non-Operating Interest Owners, claiming that Montezuma County violated its civil rights under 42 U.S.C. § 1983. *Colorado Property Tax Administrator v. CO2 Committee, Inc.*, 527 P.3d 371, 374 (2023). Montezuma County filed a motion to dismiss arguing that CO2's members did not have standing to seek abatement. *Id.*, p. 375.

28. The state trial court dismissed CO2's case for lack of standing. CO2 appealed and a division of the Colorado Court of Appeals reversed, concluding that CO2's members were taxpayers with standing to pursue the claims asserted in the complaint. *CO2 Comm., Inc. v. Montezuma Cnty.*, 491 P.3d 516, 521-22 (Colo. App. 2021).

29. The Colorado Supreme Court then reversed the division's judgment and held that nonoperating fractional interest owners lack standing to independently challenge a retroactive assessment and property tax increase assessed against a unitized oil and gas operation. *Colorado Property Tax Administrator v. CO2 Committee, Inc.* 527 P.3d at 375. The Court upheld Colorado's representative system where the unit operator is the sole point of contact for reporting, notice, and taxpaying purposes. *Id.* p. 378.

30. The Court referenced the various Colorado statutes outlining the unit operator's unique role and responsibilities in this representative tax system, stating:

> ""When a nonoperating fractional interest owner provides this information to the unit

> operator, the unit operator shall use this information to determine the selling price at the wellhead for the owner. *Id.*, thus giving the owner an opportunity to weigh in on the Annual Statement as to its proportionate share through the unit operator. Taxes for the unit are then determined based on the price reported by the unit operator. *See*. *Id.*; § 39-7-101(1); § 39-7-102(1); § 39-10-106(1). The plain language of section 39-5-121(1.5)(b) (I) further supports our conclusion that the General Assembly intended the unit operator to represent the nonoperating fractional interest owners in the taxpaying process: 'the assessor shall send the notice of valuation only to the operator.' (Emphasis added). Nonoperating fractional interest owners are thus not statutorily entitled to notice of valuation at the initial valuation." 527 P.3d at 378.

31. In finding a representative system in which the unit operator represents fractional interest at every stage of the property tax assessment process, the Court held:

> "Construing the statutory scheme as affording standing to nonoperating fractional interest owners in the audit and post-audit process would clearly contravene the legislative intent." *Id.* at 379.

32. Having lost at Colorado Supreme Court, Plaintiff once again is requesting relief in Federal Court. In its complaint, Plaintiff references the Tax Injunction Act, 28 U.S.C. § 1341, only this time Plaintiff contends that the Committee SSWIOs were

entitled to a "plain, speedy, and efficient remedy with 'a full hearing' and 'judicial determination.'" Plaintiff further claims that "Defendants and their attorney, by moving to dismiss Committee SSWIOs [prior] complaint in Federal Court based on 28 USC § 2341, misrepresented the existence of a remedy in state court since their motion to dismiss the complaint filed in state court was based on no standing. ECF #1, ¶ 65.

IV. Argument

A. F.R.C.P. 12(b)(1)—Lack of Jurisdiction

33. Motions to dismiss for lack of subject matter jurisdiction are governed by Rule 12(b)(1). *See* Fed. R. Civ. P. 12(b)(1). Because this motion presents "a facial attack on the complaint's allegations as to subject matter jurisdiction," the Court may accept the factual allegations in the complaint as true. *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). "The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002). "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

B. The Tax Injunction Act

34. The Tax Injunction Act (also the "Act" or the "TIA") "is a broad limitation on federal court interference with state collection of taxes . . . ." *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986). The TIA has the primary purpose of dramatically limiting fed-

eral district court jurisdiction. *Hill v. Kemp*, (C.A.10 Okla. 2007), 478 F.3d 1236, certiorari denied 128 S.Ct. 873, 552 U.S. 1096, 169 L.Ed.2d 725, certiorari denied 128 S.Ct. 884, 552 U.S. 1096, 169 L.Ed.2d 725.

35. TIA provides, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341. The Act is not limited to preventing injunctions, it "bars declaratory relief and suits for damages as well." *Brooks*, 801 F.2d at 1239 (citations omitted). The Act forbids declaratory relief that would have the effect of suspending or restraining "the assessment and collection of state taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). It forbids damage awards that are refunds of taxes collected. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1136 (2015) (Ginsburg, J., concurring); *Brooks*, 801 F.2d at 1239 (citing *Marvin F. Poer & Co. v. Ctys. of Alameda*, 725 F.2d 1234, 1236 (9th Cir. 1984)).

36. The "principal motivating force behind the Act" was a congressional desire "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522, 101 S.Ct. 1221, 1234, 67 L.Ed.2d 464 (1981). TIA was intended to prevent taxpayers from using federal courts to raise questions of state or federal tax law relating to the validity of particular taxes. *Osceola v. Florida Dept. of Revenue, C.A.11 (Fla.) 1990, 893 F.2d 1231*, certiorari denied 111 S.Ct. 674, 498 U.S. 1025, 112 L.Ed.2d 667.

37. Where there is doubt as to its applicability, the Supreme Court has directed that the Tax Injunction Act be interpreted consistent with its function of limiting federal intrusion into state matters. *Jefferson County v. Acker*, 527 U.S. 423, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999).

38. Civil rights actions, including those under 42 U.S.C. 1983, are not excepted from the TIA's broad prohibition. The fact that lessees of land owned by the United States based their action against county assessors and tax collectors to enjoin assessment of real estate taxes was based in part on § 1983 of Title 42 did not avoid the operation of this section. *Miller v. Bauer*, C.A.7 (Ind.) 1975, 517 F.2d 27. See also *Hickmann v. Wujick*, C.A.2 (N.Y.) 1973, 488 F.2d 875.

39. This section prohibiting enjoining, suspending or restraining assessment, levy or collection of state tax could not be avoided on theory that relief was sought under § 1983 of Title 42, and that no plain, speedy and efficient remedy was available in state courts.

40. While the Act's prohibitions do not apply if "a plain, speedy and efficient remedy" Is unavailable in state court. this exception is construed narrowly. *Brooks*, 801 F.2d at 1240. The requirement of "a plain, speedy and efficient remedy" is satisfied "if minimal procedural remedies are available for the taxpayer to challenge the validity of the tax . . . . " *Id.*

41. Pennsylvania law provided property owners with plain, speedy and efficient remedy for claimed due process flaws in county's process for appealing from property tax assessments, and thus § 1983 action in federal court was barred by Tax Injunction Act;

state had fully-developed administrative and judicial apparatus through which taxpayers could grieve their claims. *Gass v. County of Allegheny*, PA., C.A.3 (Pa.) 2004, 371 F.3d 134, certiorari denied 125 S.Ct. 497, 543 U.S. 987, 160 L.Ed.2d 371.

42. Though exhaustion is not generally required in actions under § 1983 of Title 42, where such statute collides with this section providing that district courts shall not enjoin, suspend or restrain assessment, levy or collection of any state tax where a plain, speedy and efficient remedy may be had in state courts, the latter specific congressional limitation on federal jurisdiction must prevail. *Bland v. McHann*, C.A.5 (Miss.) 1972, 463 F.2d 21, certiorari denied 93 S.Ct. 1438, 410 U.S. 966, 35 L.Ed.2d 700.

43. Assuming the factual allegations of the Plaintiff's complaint to be true, *see Holt*, 46 F.3d at 1002, the Tax Injunction Act prohibits the Court from exercising jurisdiction over the Plaintiff's claims. *See Brooks*, 801 F.2d at 1239-41.

44. Here, Plaintiff has asserted four claims for relief: (1) Plaintiff seeks damages for Defendants' "unlawfully taxing them" and "depriving them of their constitutional right to due process by failing to give notice of the audit and retroactive assessment of taxes." (ECF #1, 54). (2) Plaintiff seeks declaratory relief and an injunction regarding Plaintiff's rights as taxpayers, and against the retroactive assessment of taxes against Plaintiff (ECF #1, ¶ 57); (3) Plaintiff claims that Defendants "misrepresented material facts without reasonable cause in that their motion to dismiss under Rule 12(b)(1) for lack subject matter jurisdiction filed in Federal Civil Action No. 18-cv-02502-RBJ based on the Tax Injunction Act, 28 U.S.C.

§ 1341. The Plaintiff claims that the "misrepresentation was that the Committee SSWIOs had standing in state court. (ECF #1, ¶ 58); and, (4) Plaintiff seeks a declaratory judgment that Defendant Montezuma County Assessor value production from Plaintiff's gas leaseholds and lands "at an amount equal to 75% of the selling prices as defined at C.R.S. § 39-7-101(1)(d). (*ECF #1, ¶ 70*).

45. The Tax Injunction Act forbids the Court from awarding damages that amount to a refund of taxes collected. *See Brooks*, 801 F.2d at 1239; *Direct Mktg. Ass'n*, 135 S. Ct. at 1136 (Ginsburg, J., concurring).

46. Second, Plaintiff asks for a declaration that Montezuma's assessment and collection regime "violated the Fourteenth Amendment of the Constitution." (ECF. # 1 ¶ 41). The Act forbids the Court from entering this declaration because it would have the practical effect of restraining the assessment, levy, and collection of a tax under state law. *See Grace Brethren Church*, 457 U.S. at 408; *Brooks*, 801 F.2d at 1239.

47. Third, Plaintiff asks the Court to enter an injunction requiring Montezuma County to do certain things, and forbidding it from doing other things, that are part of the assessment, levy, and collection of taxes. ECF. # 1 ¶ 56(b). That is the core of the Tax Injunction Act's prohibition. *See Direct Mktg. Ass'n*, 135 S. Ct. at 1130.

48. Fourth, Plaintiff's claims that Defendants misrepresented the availability of a remedy in state court, and thereby induced Plaintiff to dismiss the 2018 Federal District Court action is wholly without

merit. Defendants in their Motion to Dismiss filed in case number 2018-cv-02502 merely asserted the jurisdictional bar present in the Tax Injunction Act and the comity doctrine as the basis for dismissing the Federal lawsuit, 2018-cv-02502, ECF # 20. Plaintiff's counsel, in turn, admitted that he had failed to consider the Tax Injunction Act when he filed his federal lawsuit, 2018-cv-02502, ECF # 21. Defendants never promised or even represented that the Plaintiff had standing in state court to assert its claims. Defendants never promised the Plaintiff success in state court. The fact that Plaintiff was unable to persuade the Colorado State Courts of their standing to challenge the tax assessments at issue, is not due to any misrepresentations by Defendants.

49. Because the Tax Injunction Act prohibits the Court from exercising jurisdiction over the plaintiff's claims, the complaint must be dismissed under FRCP 12(b)(1).

C. The Comity Doctrine

50. "[E]ven where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." *Rosewell v. LaSalle Nat. Bank*, 450U.S. 503, 525 n.33 (1981). "[T]he comity doctrine is more embracive than the Tax Injunction Act (TIA)." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 424 (2010). It prevents interference with aspects of state taxation beyond assessment, collection, and levy. *See Direct Mktg. Ass'n*, 135 S. Ct. at 1129-31, 1133-34; *see also Levin*, 560 U.S. at 422-24. "Under this doctrine, federal courts refrain from 'interfer[ing] . . . . with the fiscal operations of the state

governments in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.'" *Direct Mktg. Ass'n*, 135 S. Ct. at 1134 (quoting *Levin*, 560 U.S. at 422) (alteration in original). The comity doctrine bars plaintiffs from bringing actions under 42 U.S.C. § 1983 to "redress the allegedly unconstitutional administration of state tax systems." *Brooks*, 801 F.2d at 1242.

51. "Unlike the TIA, the comity doctrine is nonjurisdictional." *Direct Mktg. Ass'n*, 135 S. Ct. at 1134. Nevertheless, a motion to dismiss based on principles of abstention is also determined under Rule 12(b)(1). *See, e.g.*, *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1199 (W.D. Okla. 2017); *City of New York v. Milhelm Attea & Bros.*, 550 F. Supp. 2d 332, 341 (E.D.N.Y. 2008) ("A motion to dismiss based on the abstention doctrine is also considered as a motion made pursuant to Rule 12(b)(1)."); *but see Kilroy v. Mayhew*, 841 F. Supp. 2d 414, 416 (D. Me. 2012) ("Courts in this circuit have disagreed as to how the general rubric applies in the context of abstention doctrines.").

52. Even if the Tax Injunction Act did not deprive the Court of jurisdiction to hear the Plaintiff's claims, the Plaintiff's claims would still be barred by the comity doctrine. *See Brooks*, 801 F.2d at 1242. "Under this doctrine, federal courts refrain from 'interfer[ing] . . . with the fiscal operations of the state governments . . . in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Direct Mktg. Ass'n*, 135 S. Ct. at 1134 (quoting *Levin*, 560 U.S. at 422). To the extent a party has wrongfully been required to pay property taxes, Colorado law provides for adequate remedies. *See Kinder*

Morgan CO2, 396 P.3d at 662-63 (describing the state law process through which Kinder Morgan challenged the very same retroactive assessments the plaintiff seeks to put at issue in this case).

53. Therefore, because the Plaintiff's requested relief would interfere with the state system of taxation, it is barred by the comity doctrine. *See Brooks*, 801 F.2d at 1240-41.

D. Res Judicata

54. The subject matter of this lawsuit has already been litigated in the Colorado State court system. The trial court dismissed the case with prejudice. Ultimately, the Colorado Supreme Court affirmed the trial court's order dismissal of the case. *Colorado Property Tax Administrator*, 527 P.3d 371, 380.

55. The doctrine of res judicata prohibits the Federal Court from re-adjudicating a matter already decided in state court. To the extent that plaintiffs sought to re-litigate the validity of Mississippi Supreme Court's decision in federal district court, they were barred by doctrine of res judicata, and court of appeals on appeal from federal district court was foreclosed from reconsidering either state court's application of this section or state court's denial of attorney's fees. *Redd v. Lambert*, (C.A.5 Miss.1982), 674 F.2d 1032.

56. In the present case, Plaintiff's state taxation claims have been extensively litigated in Colorado State courts, first by the representative company, Kinder Morgan, and, then by Plaintiff directly seeking relief from Colorado courts. The Colorado Supreme

Court has decisively ruled against Plaintiff on these state taxation issues; the Federal court should not now re-litigate Plaintiff's claims.

V. Conclusion

Under the Tax Injunction Act, the Court does not have subject matter jurisdiction to hear Plaintiff's claims, and on this basis alone, the complaint must be dismissed. Additionally, the principles of comity and res judicata dictate against the Federal Court litigating a matter that has been conclusively decided in Colorado State Court. Therefore, Montezuma County requests that the Court dismiss the complaint.

Respectfully submitted December 18, 2023.

By: /s/ Nathan A. Keever
#24630
Richard B. Tuttle, #19015
DUFFORD WALDECK
744 Horizon Court, Suite 300
Grand Junction, Colorado 81506
Telephone: 970-241-5500
tuttle@dwmk.com
keever@dwmk.com

Attorneys for the Defendants

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS (JANUARY 8, 2024)

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CO2 COMMITTEE, INC.,
a Colorado nonprofit corporation,

Plaintiff,

v.

MONTEZUMA COUNTY, MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS, and MONTEZUMA COUNTY ASSESSOR,

Defendants.

Civil Action No. 23CV2457-CNS-NRN

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff CO2 Committee, Inc. ("Plaintiff" or "CO2") now submits its *Response* to *Defendants' Motion to Dismiss*, Docket No. 17, filed December 18, 2023.

I. Introduction

Defendants (collectively the "County") seek to dismiss Plaintiff's Complaint under Rule 12(b)(1) for lack

of subject matter jurisdiction, comity, and res judicata. Its Motion is a "facial attack" on the Court's subject matter jurisdiction because the Motion "questions the sufficiency of the complaint," so the Court must accept as true the factual allegations in the Complaint. *Holt v. U.S*, 46 F.3d 1000, 1002-03 (10th Cir. 1995) ("in reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true"), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425 (2001). Thus, in responding to the County's description of the case, the Complaint's allegations prevail over the County's alleged background.

II. Response to the County's Backgrounds Facts

As Plaintiff demonstrates below, the County's background facts are not accurate.

Motion ¶¶ 1-2. In response to the County's alleged background, CO2 does not seek a declaration that "Montezuma County's tax assessment procedures [are] unconstitutional," but instead that the County has not followed the law and has not administered the law as required by the law. Motion at ¶ 1; Complaint, ¶¶ 19-20. Moreover, and contrary to County's allegation, CO2's tax interests were not "thoroughly and adequately represented by a representative company, Kinder Morgan CO2 Co., LP ("Kinder Morgan")." Motion at ¶ 2. *Kinder Morgan CO2 Co., L.P. v. Montezuma Ct. Bd. Of Commis*, 396 P.3d 657 (Colo. 2017) ("KM2") involved a different issue: whether retroactive assessments were legal. Kinder Morgan was not acting in a representative capacity but was acting as a fractional interest owner. *See* Complaint ¶¶ 7.1, 8-24.

Motion ¶ 3. Contrary to County's allegation, CO2 moved to dismiss its 2018 federal action based upon the County's representation that CO2 had a remedy under Section 1341. See Complaint ¶¶ 55-65.

Motion ¶ 5. Contrary to County's allegation, CO2 did not take "the underlying tax issues to the Colorado Supreme Court" and did not take its standing issue to the Colorado Supreme Court. CO2 relied on the opinion of the Colorado Court of Appeals and it was the County and the State Tax Administrator who took standing to the Colorado Supreme Court.

Motion ¶ 7. Contrary to County's allegation, the County does not assess "against the unit as a whole." C.R.S. § 39-7-101(1) requires an assessment against each and every fractional interest owner. *See also* C.R.S. § 39-10-106(1).

Motion ¶ 8. Contrary to County's allegation, under Colorado law, each and every taxpayer has the right to appeal and contest the assessment of oil and gas taxes. However, the Colorado Supreme Court has construed statutes to confine this right to the operator of a Unit.

Motion ¶ 12. Contrary to County's allegation, the annual statement does not provide a single 'selling price' but must include the price applicable to each and every working interest owner. C.R.S. § 39-7-101(1)(d)(e); Complaint ¶¶ 10-13.

Motion ¶ 14. Contrary to County's allegation, the net back for each taxpayer (fractional working interest owner) depends on its selling price and its transportation costs because each owner may have different selling prices. Complaint at ¶ 12. Further, each owner who is not related to the pipeline has a different

transportation cost compared to the owners who are related to the pipeline (Kinder Morgan and ExxonMobil). Complaint ¶¶ 12-14, 17-18.

Motion ¶¶ 16 and 18. The County's allegations in paragraphs 16 and 18 are misleading. Concerning paragraph 16 of the Motion, Kinder Morgan, as operator, is obligated to collect from the fractional interest owners their share of the assessed taxes and remit those taxes, when collected by the operator, to the county treasurer. Concerning paragraph 18 of the Motion, assuming the audit covered all Unit volumes and prices for the tax year 2008, the only values underreported were those of Kinder Morgan and ExxonMobil. These entities deducted more transportation costs than they were entitled to because of their relationship with the pipeline. The County admits that Kinder Morgan, "as the unit operator, was not entitled to deduct" certain costs (transportation costs). Motion at ¶ 18. Had the assessor complied with C.R.S. § 39-10-106(1), she would have established that CO2 members had no duty to pay more taxes.

Motion ¶ 19. Concerning paragraph 19, the retroactive assessment proceeding was asserted against Kinder Morgan as a fractional interest owner and its taxes were $2,028,865. The increase in value did not increase "the overall tax liability of the unit . . . ". See Complaint ¶¶ 19-24.

Motion ¶ 20. Concerning paragraph 20, both Kinder Morgan (as operator) and the County treated the assessment process as affecting the entire unit, but that is in violation of Colorado assessment law. The operator was not involved in *KM2* even though Kinder Morgan and the assessor wrongfully thought the County's retroactive assessment was against the

Unit rather than each working interest owner related to the pipeline. The County so thinks to this day. Complaint at ¶¶ 19-24.

Motion ¶¶ 21-25 (there are two paragraph 23's). All statements here refer to Kinder Morgan as fractional interest owner and, as such, it did not proceed on behalf of the Unit in any respect. By their own error, both Kinder Morgan and the assessor wrongfully treated the case as against the Unit and not the owners. *KM2* was solely against Kinder Morgan.

Motion ¶ 28. Contrary to County's allegation, the state trial court's dismissal for lack of standing was subject to the operator acting as a fiduciary on behalf of all working interest owners. Complaint ¶ 4(8) and (9).

Motion ¶ 30. The citation to the Colorado Supreme Court was correct as to a regular annual assessments, but there is no statute providing that this is proper as to a retroactive assessment where notice is legally required but was not given. Complaint ¶ 48.

Motion ¶ 31. The County's allegation that "the unit operator represents fractional interest(s) at every stage of the property tax assessment process" is incorrect because that process does not include challenges to the assessment after the assessment process was completed. Nonetheless, the language of the Colorado Supreme Court states that the legislative intent, as construed, extends beyond the assessment process.

Motion ¶ 32. The County's allegation that CO2's motion to dismiss in the 2018 proceeding "was based on no standing" is incorrect. CO2's motion was based on 28 U.S.C. § 1341. Specifically, CO2 believed that there was no federal jurisdiction because, at that time,

it appeared Colorado courts provided a plain, speedy, and efficient remedy based on the language in the County's motion to dismiss the 2018 proceeding.

Motion ¶ 49. The County denies it made a promise that Colorado provided a remedy of the sort described in 28 U.S.C. § 1341, but the County made a promise that there was a remedy by filing its motion to dismiss based on 28 U.S.C. § 1341. Complaint at ¶¶ 55-65.

III. Summary of Argument

The Court has subject matter jurisdiction and the County's argument that Plaintiff's claims are prohibited by 28 U.S.C. § 1341 is wrong. First, CO2 has pled a federal question under 42 U.S.C. § 1983, resulting in federal question jurisdiction. Second, because Plaintiff's claims involve state tax issues, 28 U.S.C. § 1341, The Tax Injunction Act ("TIA"), applies. Third, by order of the Colorado Supreme Court, CO2 has no standing in Colorado state courts to challenge the practices described in the Complaint, so it cannot obtain a remedy. Without any remedy available to it in Colorado Courts, much less one that is "plain, speedy, and efficient," the TIA does not bar these proceedings, and this Court has subject matter jurisdiction over Plaintiff's claims.

The County's argument that this proceeding is barred by the comity doctrine and res judicata similarly fail. The comity doctrine cannot bar Plaintiff's claims because Plaintiff has no remedy in state court, which is required for the comity doctrine to apply. However, both the comity doctrine and the TIA recognize that Plaintiff has a right to a remedy somewhere, and when state court is unavailable, the TIA and comity doctrine (and equity) allow for Plaintiff to bring its

claims here. Finally, res judicata does not bar Plaintiff's claims because Plaintiff does not challenge the Colorado Supreme Court's no-standing order.

IV. Argument

A. This Court has Federal Question Subject Matter Jurisdiction

As alleged in the Complaint, the County took money from the CO2's taxpaying, non-operating working interest owners in the Unit who take in kind without notice or due process and in violation of Colorado law, 42 U.S.C. § 1983, and the Fifth and the Fourteenth Amendments. *See* Complaint, and particularly ¶¶ 8-24, 49-54 (First and Second Claims). Here, because "federal law creates the cause of action," this Court has original jurisdiction under 28 U.S.C. § 1331. *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1232 (10th Cir. 2006).

B. The Tax Injunction Act Does not Bar Plaintiff's Claims

The TIA provides as follows:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. Notwithstanding federal question jurisdiction, the County claims CO2's First and Second Claims are barred by the TIA". Not so. The Court should deny the County's Motion because the relief CO2 seeks in its First and Second Claims cannot be had in Colorado state courts where CO2 lacks standing,

depriving it of a remedy altogether. Because CO2 is entitled to a remedy but Colorado state courts do not provide a remedy, the TIA does not bar CO2's claims.

As the County notes, the language "enjoin, suspend or restrain the assessment, levy or collection of any tax" includes declaratory as well as injunctive relief. *California v. Grace Brethren Churc*h, 457 U.S. 393, 411 (1982). This means the Court can bar more claims than were in the TIA and decline jurisdiction if the state courts provide a "plain, speedy and efficient remedy," but *only* if they do so. In this case, the Court cannot send CO2's First and Second Claims to Colorado's state court because they (non-operating taxpaying working interest owners) have no standing. Complaint ¶¶ 1, 7(11), 36, 37, 45, 46, 47 and 48.

One cannot have a remedy without standing. *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (judicial power requires "that litigants have standing"). To have standing, there must be a remedy that will redress the individual plaintiffs' injuries. *Id*. at 2116. Likewise, to deny standing, a court necessarily determines there is no remedy available.

The Colorado Supreme Court determined Co2 does not have standing because it construed Colorado's property tax scheme as requiring the operator of a Unit to look after other Unit working interest owners.[1]

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[1] The irony is that the operator has no standing either because such use invokes third party standing in violation of the prudential standing rule. *Hill v. Warsewa*, 947 F.3d 1305, 1309-10 (2020) ("under the prudential standing doctrine, a party may not 'rest its claims' on the rights of third parties where it cannot 'assert a valid right to relief of its own'") *Id*. at 1309-10. Colorado follows the same rule. *City of Greenwood Village v. Petitioners, et al.*, 3 P.3d 427, 436 (2000) ("Colorado's standing requirement,

This means that taxpaying, non-operating working interest owners in the Unit have no remedy to redress personal injuries "fairly traceable to the defendant's allegedly unlawful conduct . . . " *Id.* at 2112. This being the case, CO2's First and Second Claims are not barred by the TIA because CO2 has no "plain, speedy and efficient remedy" that comprises "procedural criteria" including "a full hearing and judicial determination of the controversy[.]" *Rosewell v. La Salle National Bank*, 450 U.S. 503, 512-513 (1981). Because CO2 has a federal claim and the TIA does not bar jurisdiction, this Court has jurisdiction over CO2's First and Second Claims.[2]

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like that employed in the federal courts, embraces both constitutional and prudential concerns") and "the prudential prong of our standing test requires the plaintiff to demonstrate that injury he or she has suffered is to a legally protected right * * * if the claim is brought by someone other than one at whom the constitutional [or statutory] protection is aimed, the claim not be an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate . . . " *Id.* at 437.

[2] The operator's prudential standing is further muddled in this case by the Colorado Supreme Court because it affirmed, without comment, the district court order which said, "the law presumes that the unit operator will act in the best interests of the non-operating interest owners". Complaint ¶ 4(8) and (9). Yet, Kinder Morgan as operator is by no means a fiduciary under the applicable Unit Operating Agreement. CO2 appealed this issue before the Colorado Court of Appeals. Since that court ruled that CO2 had standing there was no need to address this issue. Upon the Colorado Supreme Court's opinion, CO2 requested that this issue be remanded to the Court of Appeals for consideration, but that request was denied. Further, Colorado Supreme Court impliedly found standing when the *KM2* case was brought by Kinder Morgan as a fractional interest owner (just like CO2's members), but is also the operator. *Kinder Morgan CO2 Co., L.P. v. Montezuma County Board of Commissioners*, 396 P.3d 657 (Colo. 2017).

The County's comments (Motion ¶¶ 34-38) on the TIA neither cite nor reveal any law other than what the Court can find in *Rosewell*, supra, *Cities Service Gas Co., v Oklahoma Tax Commission*, 656 F.2d 584 (10th Cir. August 1981), Fair Assessment in *Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (December 1981), *Grace Brethren Church*, supra (June 1982), *Brooks*, supra (September 1986) and *Direct Marketing Association v. Brohl*, 135 Sup.Ct. 1124 (2015). None of this is contrary to the uncontested fact that CO2—as opposed to a third-party operator—has no remedy in Colorado state courts.

The County misconstrues the TIA. This is confirmed when it argues without citation that the TIA "could not be avoided on theory that relief was sought under § 1983 of Title 42, and that no plain, speedy and efficient remedy was available in state courts." Motion at ¶ 39. This is exactly contrary to the TIA. *Sacks Bros. Loan Co. v. Cunningham*, 578 F.2d 172, 175 (7th Cir. 1978) ("as has been implicitly recognized in numerous cases, the purposes of [the TIA] are satisfied if the taxpayer can prove, based on state statutes or case law, that the state courts would not entertain its challenge.") (citation omitted).

This Court is obligated to accept jurisdiction where jurisdiction otherwise exists and the claims are not barred by the TIA. Congress granted federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), and "no more right to decline the exercise of jurisdiction which is given, than

to usurp that which is not." *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821); *CNSP, Inc. v. City of Santa Fe*, 753 F. App'x 584, 588 (10th Cir. 2018) ("We recognize, as we must, the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.") (unpublished) (citation and internal quotation omitted).

The notion that *Brooks* construed the *Roswell* standard narrowly does not help the County. *Brooks* cites *Rosewell* and relies on its language. All cases cited by the County in paragraphs 40-41 of its Motion support CO2's position.

In paragraph 44, the County clearly misunderstands the law, again stating:

> Assuming the factual allegations of the Plaintiff's complaint to be true . . . , the Tax Injunction Act prohibits the Court from exercising jurisdiction over the Plaintiff's claims. See *Brooks*, 801 F.2d at 1239-41.

The County's problem is that there is nothing in *Brooks* that support its position. At page 1239, *Brooks* confirms the TIA extends not only to "enjoin, suspend or restrain the assessment, levy or collection" but to injunction and declaratory claims as well. But in *Brooks* at 1240, the court confirmed that the § 1341 bar "does not apply unless 'a plain, speedy and efficient remedy may be had in the courts of such state'" *Brooks*, 801 F.2d at 1240. CO2 has no remedy in Colorado, Complaint at ¶ 8, and County makes no argument that there is a remedy. The *Brooks* court then stated that in *Rosewell* "the [Supreme] Court concluded that if minimal procedural remedies are available for the taxpayer to challenge the validity of the tax,

the federal court must abstain." *Brooks*, 801 F.2d at 1240. *Brooks* then cites a First Circuit case which defines "certain minimal procedural criteria" as stated in *Rosewell*:

> Thus, Supreme Court in *Rosewell* upheld a state court refund procedure because it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax,

Id. (quoting *Carrier Corp. v. Perez*, 677 F.2d 162, 165–66 (1st Cir.1982) (bold added).

The County argues in Motion ¶ 46 that "[t]he Tax Injunction Act forbids the Court from awarding damages that amount to a refund of tax collected," but this is contrary to the holding in *Rosewell* described above. Also *Brooks* at 1239 and *Direct Marketing Association*, supra, are not to the contrary. Nowhere does the County argue that Colorado courts provide a remedy for CO2 which, if true, would bar the Court from hearing CO2's case. In like manner, in Motion paragraph 47, the County makes the same argument with respect to a declaration as opposed to an injunction but does not deal with remedy whatsoever. The same applies to the County's Motion at paragraph 48.

The Court has a "strict duty" to accept jurisdiction over CO2's claims provided there is no remedy in Colorado state courts. *Brooks,* 801 F.2d at 1240; *Cunningham*, 578 F.2d at 175; *Quackenbush*, 517 U.S. at 716. CO2 has no "plain, speedy and efficient remedy" in Colorado's courts because Colorado's tax laws deny CO2 standing to challenge them. 28 U.S.C. § 1341; Complaint at ¶¶ 6-8. The County makes no

argument that any remedy is available except in this Court.

C. The Comity Doctrine does not Bar Plaintiff's Claims

The County argues that CO2's claims are barred by the comity doctrine, but the argument fails for the same reason as its argument concerning the TIA: The comity doctrine does not apply where a litigant lacks standing to challenge an issue in state court.

In *Brooks*, the court dismissed the case because there existed "a plain, speedy and efficient remedy in the state courts similar to that sought in the federal court." *Brooks*, 801 F.2d at 1240. The court then noted that "the doctrine of comity also provides a basis for arriving at the same conclusion." *Id*. at 1240-41. In reaching that conclusion, the court "held that the principle of comity itself bars federal courts from granting injunctive as well as declaratory relief in state tax cases." *Id*. at 1241 (citing *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 116 (1981)). *Fair Assessment* noted that "[e]ven after enactment of Section 1341 it was upon this comity that we relied in holding that federal courts, in exercising the discretion that attends requests for equitable relief, may not even render declaratory judgments as to the constitutionality of state tax laws." *Fair Assessment* 454 U.S. at 103 (citing *Great Lakes Dredge & Dock Co v. Huffman*, 319 U.S. 293 (1943)). *Fair Assessment* concluded that "our comity cases have thus far barred federal courts from granting injunctive and declaratory relief in state tax cases." *Id*. at 107. However, after discussing the complexities of TIA and the principle of comity, the *Fair Assessment* court concluded:

> . . . we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate and complete, and may ultimately seek review of the state decisions in this Court.

Id. at 116 (emphasis added).

Thus, the court, giving effect to the equity behind comity and TIA, ruled that the principles of comity and TIA were each subject to the requirement that the states have plain, speedy and efficient remedies. If no such remedies are available, the federal court should take the case. *Brooks* concluded with reference to *Fair Assessment* that both comity and the TIA require the federal court to remit cases "to their state remedies [only] if their federal rights will not thereby be lost". *Brooks*, 801 F.2d at 1240 (citing *Fair Assessment*, 454 U.S. at 116 n. 8). The County has made no case that CO2 has a remedy in Colorado state courts and thus this Court should find that it has jurisdiction otherwise CO2's "federal rights will [ ] thereby be lost." *Fair Assessment*, 454 U.S. at 116 n. 8.

D. Res Judicata Does not Bar Plaintiff's Claims

The County claims that res judicata bars Plaintiff's claims because the Colorado Supreme Court ultimately decided against CO2. Motion at ¶¶ 55-57. This argument misconstrues what the state court decided: Colorado's state courts concluded that Colorado's statutes do not provide CO2 standing to challenge the admin-

istration of Colorado's tax laws, not that the way the County administered Colorado's tax laws were lawful and faithful to the Constitution. Complaint at ¶¶ 6-8.[3] The Colorado Supreme Court determined that "[t]o hold that fractional interest owners have standing in the audit and protest process in light of [the Colorado General Assembly's later] amendment would clearly contravene the intent of the General Assembly," so it "conclude[d] that the 'taxpayer' as contemplated by the pertinent statutes and the ARL's audit procedures must be the unit operator." *Colorado Prop. Tax Adm'r v. CO2 Comm., Inc.*, 2023 CO 8, ¶¶ 45-46, *reh'g denied* (Apr. 24, 2023). Accordingly, "[b]ecause" that court determined "CO2 lacks a legally protected interest" under Colorado's tax laws, it concluded CO2 "lacks standing to challenge Montezuma County's retroactive assessment and increased property taxes" under Colorado's tax code. *Id* at ¶ 47. This holding confirms that CO2 lacks standing to bring its claims in Colorado state court under Colorado's tax laws (thus the inapplicability of the TIA and comity doctrine), but it says nothing about whether CO2's federal constitutional rights have been violated by the way those tax laws were implemented and administered. CO2 is not challenging whether it has standing under Colorado's tax laws in Colorado state courts (it does not); it is challenging whether the way the tax was administered violates its federal rights (it does). The Colorado Supreme Court never reached the issue of whether CO2's rights were violated because it held CO2 did not have

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[3] Notably, order dismissing Plaintiff's state court complaint expressly rejected the County's argument that Kinder Morgan's prior litigation barred Plaintiff's claims under res judicata. Complaint at ¶ 7.1.

standing to request a decision concerning that relief. *See CO2 Comm., Inc.*, 2023 CO 8.

E. This Court has Supplemental Jurisdiction Over CO2's Third and Fourth Claims Under 28 U.S.C. § 1367

The Court has jurisdiction over CO2's Third and Fourth claims by reason of 28 U.S.C. § 1367 and the allegations in paragraph 6 of the Complaint. At paragraph 52 of the Motion, the County argues that its motion to dismiss applies to CO2's Third Claim, presumably for failure to state a claim under Rule 12(b)(1) (lack of jurisdiction).

The County cites cases involving the primary jurisdiction doctrine which applies to cases which can be in both the state court and the federal court. To avoid conflicting orders, one court or the other should abstain and defer to the other. This theory cannot apply here because CO2 has no standing in Colorado state courts so there can be no conflicting orders. See *Sierra Club v. Chesapeake Operating, LLC*, 248 F.Supp.3d 1194, 1199 (W.D. Okla. 2017). In *Sierra Club*, the federal court abstained from a case also in state court. That is not the case here, where only the federal action is pending.

V. Conclusion

The Court should deny the County's Motion to Dismiss.

DATED this 8th day January, 2024.

COGSWELL LAW OFFICES

/s/ John M. Cogswell
PO Box 705
Saratoga, WY 82331
(303) 887-3923

ALLEN VELLONE WOLF
HELFRICH & FACTOR P.C.

/s/ Brenton Gragg
1600 Stout Street, Suite 1900
Denver, CO 80202
(303) 534-4499

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS (ECF #17) (JANUARY 22, 2024)

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 1:23-cv-02457-NRN

CO2 COMMITTEE, INC.,
a Colorado nonprofit corporation,

Plaintiff,

v.

MONTEZUMA COUNTY, MONTEZUMA COUNTY BOARD OF COUNTY COMMISSIONERS, MONTEZUMA COUNTY ASSESSOR,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS (ECF #17)

The Defendants, Montezuma County, Montezuma Board of County Commissioners, Montezuma County Assessor, (collectively "Montezuma County") submit their reply in support of the Motion to Dismiss (ECF # 17) and state:

SUMMARY OF ARGUMENT

The Tax Injunction Act, 28 U.S.C. § 1341, deprives this Court of subject matter jurisdiction and the comity doctrine supports this Court deferring to Colorado state court where there is both Federal and state court jurisdiction, particularly where a state tax system is involved. Further, this specific state tax case has already been conclusively addressed by the Colorado Supreme Court in *Kinder Morgan CO2., LP v. Montezuma County Board Of Commissioners*, 396 P.3d 657 (2017) and *Property Tax Administrator v. CO2*, 527 P.3d 371 (2023).

ARGUMENT

1. Plaintiff argues in its Response to the Motion to Dismiss that because the Colorado state courts have determined that Plaintiff does not have standing to challenge the state taxes at issue, the Federal Tax Injunction Act ("TIA") does not bar this Federal lawsuit challenging Colorado's tax practices. Plaintiff's Response includes the following assertions:

- "CO2 has no standing in Colorado state courts to challenge the practices described in the Complaint, so it cannot obtain a remedy. Without any remedy available to it in Colorado courts, much less one that is 'plain, speedy, and efficient,' the TIA does not bar these proceedings, and this Court has subject matter jurisdiction over Plaintiff's claims." Response, p 5.
- "Because CO2 is entitled to a remedy but Colorado state courts do not provide a

remedy, the TIA does not bar CO2's claims." Response, p.6.

- "The Colorado Supreme Court determined CO2 does not have standing because it construed Colorado's property tax scheme as requiring the operator of a Unit to look after other Unit working interest owners. This means that taxpaying, non-operating working interest owners in the Unit have no remedy to redress personal injuries 'fairly traceable to the defendants' allegedly unlawful conduct . . . . " Response, pp. 7-8.
- "CO2 has no 'plain, speedy and efficient remedy' in Colorado's courts because Colorado's tax laws deny CO2 standing to challenge them." Response, pp. 10-11.

2. The lack of standing for Plaintiff in Colorado state court does not overcome the jurisdictional bar of TIA in Federal court. Colorado's taxation laws have established a representative system to challenge any assessed taxes. The Colorado Supreme Court has affirmed Colorado's system of representation in the taxpaying system. "The plain language of [C.R.S.] section 39-5-121(1.5)(b) further supports our conclusion that the General Assembly intended the unit operator to represent the nonoperating fractional interest owners in the taxpaying process." *Colorado Property Tax Administrator v. CO2 Committee, Inc.* 527 P.3d 371, 378 (2023).

3. This is not the only example of a party not having standing to challenge a property tax assessment in Colorado. In *Traer Creek-EXWMT LLC v. Eagle County Board of Equalization*, 401 P.3d 569, (Colo.

App. 2017), the Court held that a lessee of real property had no standing to challenge the property's valuation. In Traer-Creek, the Court determined that "owners" with standing to challenge property valuations meant fee owners to whom the assessor sent valuation notices. *Id.*, p. 572.

4. To fail to recognize a state's representative system is to open the floodgates to Federal jurisdiction for members of many represented classes, including lessees and corporate shareholders. This result is exactly what the TIA is intended to discourage. *Miller v. Baurer*, C.A. 7 (Ind) 1975, 517 F.2d 27 (the fact that lessees of land owned by the United States based their action against county assessors and tax collectors to enjoin assessment of real estate taxes did not void TIA's broad prohibition). *Franchise Tax Bd. Of California, v. Alcan Aluminium Ltd.*, 493 U.S. 331, 110 S.Ct. 661, 107 L.Ed.2d 696 (1990) (even though foreign corporations which were sole shareholders of domestic corporations conducting business in California lacked standing to challenge California state franchise tax, their federal challenge to the California tax structure was nonetheless barred under the TIA).

5. In the present case, not only has Colorado established a representative system for the assessment, collection, and appeal of the property taxes at issue, Plaintiff's interests were actually asserted and adjudicated in Colorado courts by its representative, the oil and gas unit operator, Kinder Morgan CO2, LP. The state litigation resulted in the Colorado Supreme Court's 2018 holding in *Kinder Morgan CO2., LP v. Montezuma County Board Of Commissioners*, supra. *Kinder Morgan CO2 involved* the unit operator's challenge to Colorado's statutory scheme including

retroactive taxation where an operator underreports the selling price at the wellhead of the oil and gas it produces. The Court affirmed the retroactive tax assessment. *Kinder Morgan CO2*, 396 P.2d at 660.

6. After the 2018 *Kinder Morgan* opinion, Plaintiff then filed its first Complaint in the United States District Court for the District of Colorado. See 18-CV-1571. In that Complaint, Plaintiff alleged that "Montezuma County has denied Plaintiff and its members due process of law by not giving them notice of a retroactive assessment which directly affected them and resulted in assessment of tax against them that is not permitted by law." Plaintiff dismissed the Complaint on the basis that "this Court has no jurisdiction by reason of the Tax Injunction Act . . . " See 18-CV-1571, Plaintiff's Notice of Dismissal.

7. Following the voluntary dismissal of its first Federal Complaint, Plaintiff re-filed the case in state court. The Colorado Supreme Court ultimately ruled against Plaintiff in 2023, in *Colorado Property Tax Administrator v. CO2 Committee, Inc.*, supra, finding that Plaintiff has no standing and that Colorado established a representative system for oil and gas interests. Still not satisfied with this second Colorado Supreme Court holding, Plaintiff now claims in the current Federal Complaint, "This holding confirms that CO2 lacks standing to bring its claims in Colorado state court under Colorado's tax laws (thus the inapplicability of the TIA and comity doctrine), but it says nothing about whether the way the tax was administered violates its federal rights (it does) [emphasis added]. Response, p. 13.

8. Defendants submit that this sort of generalized attack on the administration of state tax laws is

exactly what TIA intended to prohibit. TIA is broadly interpreted to prohibit use of equity powers of federal courts in cases involving state tax matters. *Berry v. Alameda Board of Sup'rs*, (N. D. Cal. 1990) 753 F.Supp. 1508, 1511: "By phrasing their attack on the state tax limitation in federal Constitutional terms, plaintiffs do not change the required analysis. In enacting the Act, Congress made explicit the preexisting federal equity practice of noninterference with states' internal economy and administration. Citing *Moe v. Kooetenai Tribes*, 425 U.S. 463, 470, 96 S.Ct. 1634, 1640, 48 L.Ed 2d 96 (1976)."

9. The allegation that Plaintiff's "federal constitutional rights have been violated" is wholly unsubstantiated in the pleadings in this case, including the Proposed Scheduling Order (Disputed) recently submitted in advance of the January 25, 2024 Scheduling Conference. In the Statement of Claims and Defenses, Plaintiff claims that "Defendants administered Colorado's tax laws unlawfully by increasing the taxes attributable to Plaintiff's members when Plaintiff's members were not responsible for such taxes." See page 3 of Proposed Scheduling Order. Plaintiff further asserts in the Proposed Order, "Defendants violated the rights of Plaintiff's members through unlawful taxation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." *Id.*, page 4.

10. Plaintiff's bald allegation of violations of the "Fifth and Fourteenth Violations" are insufficient to create Federal question jurisdiction, particularly in light of TIA's overriding objective of limiting Federal interference with local and state tax matters. *Rosewell*, 450 U.S. at 522.

11. Further, where there is doubt as to its applicability, the Supreme Court has directed that TIA be interpreted consistent with its function of limiting federal intrusion into state matters. *Jefferson County v. Acker*, 527 U.S. 423, 119 S.Ct. 2069, 144 L.Ed. 2d 408 (1999).

12. Plaintiff's Response also clarifies that there is indeed a lack of Federal question jurisdiction. Plaintiff states in its Response that the present action is *not* based on a claim of unconstitutionality: "In Response to the County's alleged background, CO2 does not seek a declaration that 'Montezuma County's tax assessment procedures [are] unconstitutional,' but that the County has not followed the law and has not administered the law as required by the law." Response, p. 2. This is exactly what the TIA intended to prevent, i.e., the Federal courts needlessly litigating state and local tax issues, and substituting Federal court decision-making and legal interpretation for that of state courts.

13. Plaintiff argues that there is Federal question subject matter jurisdiction because "the County took money from the CO2's taxpaying, non-operating working interest owners in the Unit who take in kind without notice or due process and in violation of Colorado law, 42 U.S.C. 1983, and the Fifth and the Fourteenth Amendments." Response, p. 6. However, Plaintiff's attempt to claim a due process violation is misguided and has already been rejected by the Colorado Supreme Court. *Colorado Property Tax Administrator*, 527 P.3d at 378.

14. The TIA serves as a jurisdictional bar, independent of whether the Federal courts would provide a better forum for litigating Plaintiff's claims. "Neither

the judicial decisions nor section 1341 (TIA) requires that the state remedy be the best remedy available or even equal to or better than the remedy which might be available in the federal courts." *Bland v. McHann*, 463 F.2d 21, 29 (5th Cir. 1972), cert. denied 410 U.S. 966, 93 S.CT. 1438, 35. L.Ed 2d 700 (1973).

15. The United States Supreme Court has explained its general position regarding TIA, stating that, "if injunctive relief from state taxes were available, 'state tax administration might be thrown into disarray,' and [d]uring the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.'" *See Rosewell v. LaSalle National Bank*, 450 U.S. 503, 527, 101 S.Ct. 1221, 1236, 67 L.Ed.2d 464 (1981) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n. 17, 91 S.Ct. 674, 699 n. 17, 27 L.Ed.2d 701 (1971)).

16. The Court in *Rosewell* further elaborated on the legal rationale behind TIA: "The statute 'has its roots in equity practice, in principles of federalism and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully v. Griffin, Inc.*, 429 U.S. [68, 73, 97 S.Ct. 210, 222, 50 L.Ed. 2d 227 (1976). This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." 450 U.S. 503, 522.

17. TIA was intended to prevent taxpayers from using federal courts to raise questions of state or federal tax law relating to the validity of particular taxes. *Osceola v. Florida Dept. of Revenue*, C.A.11 (Fla.) 1990, 893 F.2d 1231, certiorari denied 111 S.Ct. 674, 498 U.S. 1025, 112 L.Ed.2d 667. And, yet, this is exactly what Plaintiff requests the Federal court do in this case, i.e., re-litigate a Colorado court decision on state and local tax issues.

18. Correspondingly, if there is no Constitutional issue at stake, what is the basis for Federal jurisdiction? Plaintiff has never alleged diversity jurisdiction in this case, and in fact, there is no diversity as all the parties are based in Colorado. Since there is no Constitutional issue at stake, no independent Federal question, and no diversity, the Federal courts have no jurisdiction to hear the case.

19. The Defendants further rely on the comity doctrine to bar Federal court jurisdiction, and noted in the Motion to Dismiss that "the Comity Doctrine is more embracive than the Tax Injunction Act (TIA). *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 424 (2010). In its Response to the Motion to Dismiss, Plaintiff argues, "The comity doctrine does not apply where a litigant lacks standing to challenge an issue in state court."

20. The Plaintiff's argument is not only an overstatement, it is wrongly dismissive of a state's ability to determine standing in state court. Colorado has established a representative system for taxation in this matter, and the representative has been provided due process and standing to challenge the assessed taxes. *Colorado Property Tax Administrator*, 527 P.3d at 378.

21. The allegation that Plaintiff's "federal constitutional rights have been violated" is wholly unsubstantiated in the pleadings in this case, including the Proposed Scheduling Order (Disputed) recently submitted in advance of the January 25, 2024 Scheduling Conference. In the Statement of Claims and Defenses, Plaintiff claims that "Defendants administered Colorado's tax laws unlawfully by increasing the taxes attributable to Plaintiff's members when Plaintiff's members were not responsible for such taxes." See page 3 of Proposed Scheduling Order. Plaintiff further asserts in the Proposed Order, "Defendants violated the rights of Plaintiff's members through unlawful taxation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." *Id.*, page 4.

22. Plaintiffs bald allegation of violations of the "Fifth and Fourteenth Violations" are insufficient to create Federal question jurisdiction, particularly in light of TIA's overriding objective of limiting Federal interference with local and state tax matters. *Rosewell*, 450 U.S. at 522.

CONCLUSION

Defendants previously filed a lawsuit in Federal District Court challenging Colorado's tax assessment system. *See CO2 Committee, Inc. v. Montezuma County, et al.*, 18-CV-02502 (U.S. District Court of Colorado). That case was dismissed when Plaintiff conceded that the Federal court lacked subject matter jurisdiction pursuant to TIA. TIA, along with the doctrines of comity and res judicata, support the dismissal of the present action.

Respectfully submitted January 22, 2024.

By: /s/ Nathan A. Keever
#24630
Richard B. Tuttle, #19015
DUFFORD WALDECK
744 Horizon Court, Suite 300
Grand Junction, Colorado 81506
Telephone: 970-241-5500
tuttle@dwmk.com
keever@dwmk.com
Attorneys for the Defendants

APPELLANT'S OPENING BRIEF
(DECEMBER 13, 2024)

Appellate Case No. 24-1337

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff-Appellant,

v.

MONTEZUMA COUNTY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado
Case No. 23CV2457-CNS-NRN
The Honorable Charlotte N. Sweeney

John M. Cogswell, Esq.
Cogswell Law Offices
PO Box 705
Saratoga, WY 82331
Telephone: (303) 887-3923

Brenton Gragg, Esq.
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout Street, Suite 1900
Denver, CO 80202
Telephone: (303) 534-4499

Facsimile: (303) 893-8332

Attorneys for Appellant CO2 Committee, Inc.

Oral Argument is Requested

I. Statement of Prior or Related Appeals

There have been no prior or related appeals in this matter to the United States Court of Appeals for the Tenth Circuit.

II. Statement of Jurisdiction

The District Court had federal question jurisdiction under 28 U.S.C. § 1331 because the CO2 Committee, Inc. brought its first and second claims for relief under 42 U.S.C. § 1983. The District Court had supplemental jurisdiction concerning the CO2 Committee, Inc.'s state law claims under 28 U.S.C. § 1367.

This Court has jurisdiction to hear this appear under 28 U.S.C. § 1291 because the order from which the CO2 Committee, Inc. appeals is a final order. The District Court granted Defendants-Appellees' Motion to Dismiss on July 24, 2024, through its "Order," attached as Attachment 1, and entered final judgment on July 24, 2024, through its Final Judgment, attached as Attachment 2. Appellant timely appealed the Order and Final Judgment on August 23, 2024.

III. Statement of Issue Presented for Review and Applicable Standard of Review

1. Whether the District Court erred in finding that the CO2 Committee, Inc. had failed to show the lack of a plain, speedy, and efficient remedy in Colorado Courts such that 28 U.S.C. § 1341 deprived the District Court of subject matter jurisdiction. This

Court reviews dismissal under 28 U.S.C. § 1341 de novo. *Chamber of Com. of US. v. Edmondson,* 594 F.3d 742, 761 (10th Cir. 2010).

2. Whether the District Court erred in failing to determine whether the State of Colorado provided a "plain" and "efficient remedy" under 28 U.S.C. § 1341 through the actions of a third party, Kinder Morgan, Co2 Co., L.P. This Court reviews dismissal under 28 U.S.C. § 1341 de novo. *Chamber of Com. of US. v. Edmondson,* 594 F.3d 742, 761 (10th Cir. 2010).

3. Whether the District Court erred in failing to apply the facial attack standard and construe the jurisdictional allegations in the Co2 Committee, Inc.'s Complaint as true when Appellees moved to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) and 28 U.S.C. § 1341. This Court reviews dismissal for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) de novo. *Safe Streets All. v. Hickenlooper,* 859 F.3d 865, 877 (10th Cir. 2017).

IV. Statement of the Case

A. Background: The McElmo Dome Unit

The McElmo Dome Unit (the "Unit") in Montezuma and Delores Counties, Colorado, is a deposit of pure carbon dioxide from which carbon dioxide is extracted, compressed, and transported for sale. *See* Aplt. App. at 9; *Colorado Prop. Tax Adm'r v. CO2 Comm., Inc.,* 2023 CO 8, ¶ 2. Kinder Morgan, Cot Co., L.P. ("Kinder Morgan") owns approximately 44% of all working interests in the Unit, operates the Unit as its operator, and owns an interest in the Cortez Pipeline Company, which transports carbon dioxide from the Unit to the marketplace. Aplt. App. at 10. The CO2 Committee,

Inc. (the "Committee"), a Colorado nonprofit corporation, comprises some of the nonoperating, small share working interest owners ("SSWIOs") who take production from the Unit in kind. *Id.* at 9. The Committee's members own an aggregate interest of 11.22% in the Unit. *Id.* at 10. The SSWIOs, which include some working interest owners ("WIO") other than those who are members of the Committee, and the two large working interest owners, including Kinder Morgan, collectively own 100% of the Unit. *CO2 Comm.,* ¶ 11.

The SSWIOs who take production in kind pay taxes according to their production and price under C.R.S. §§ 39-7-101(1)(e) and 39-10-106(1). WIOs other than the operator may submit a report to the operator by March 15 detailing their selling price and values received for the prior year. Aplt. App. at 14 ¶ 14. If the operator receives no such report from a WIO, the operator's selling price is applied to that *WIO. Id.* This process allows each WIO the opportunity to ensure it is taxed the right amount, as its selling price may vary from the operator's. By April 15 of each year, the operator submits a statement to the county assessor containing the information required by C.R.S. § 39-7-101(1), which includes the name, address, and fractional interest of each WIO and the proportionate share of total Unit revenue attributable to each WIO. *Id.* at 13 ¶ 11. In turn, the Assessor proportions net returns compared to the total net returns as required by C.R.S. § 39-10-106(1) to determine the taxes owed by each WIO. *Id.* at 14-15 ¶ 16.

B. Kinder Morgan litigates the Assessor's retroactive assessment.

In 2008, the Montezuma County Assessor (the "Assessor") increased the property tax for Kinder Morgan, as a fractional interest owner, through a retroactive assessment. Aplt. App. at 17 ¶ 27. The Assessor determined that $2,028,865.00 in taxes were due because Kinder Morgan, as a working interest owner, had impermissibly deducted transportation costs related to the Cortez Pipeline Company, a partnership in which Kinder Morgan was a 50% owner, thereby reducing its taxable income. Aplt. App. at 17-18 ¶ 27. The additional taxes were not attributable to the Committee's members, who were unrelated to the Cortez Pipeline Company and permitted to deduct the full transportation costs. *Id.* at 19 ¶ 34. Nevertheless, the disallowance of the transportation deduction increased the valuation of the entire Unit. *Id.* Kinder Morgan, as a working interest owner, challenged the retroactive assessment beginning in 2008, which culminated in *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Commissioners, 2017 CO 72* ("KM2"). Ultimately, the Colorado Supreme Court held that the retroactive assessment was lawful. *Id.* at 17-18 ¶ 27.

C. The Committee challenges the tax as applied to the Committee's members after receiving notice of the same in November 2017.

After KM2 concluded, Kinder Morgan sent the SSWIOs a memorandum concerning the retroactive assessment. *Id.* at 19 ¶ 34. This November 2017 memorandum was the first notice the Committee received of the additional tax liability being asserted against it;

the Assessor had not provided notice of the retroactive assessment to the Committee or that the assessment would apply to the Unit instead of only Kinder Morgan. *Id*. In the memorandum, Kinder Morgan encouraged the SSWIOs to challenge the application of the assessments to them, noting that neither the Board of Assessment Appeals "nor any court has held that no interest owner in the Unit, other than Kinder Morgan, is a 'related party' with Cortez Pipeline Company." *Id*.

After receiving notice of the assessment from Kinder Morgan, the Committee used all legal avenues possible to challenge the taxes as applied to them—the Committee's members were not related to the Cortez Pipeline Company, so there was no reason for the Committee to pay additional taxes. The Committee first filed an objection with the Assessor. Aplt. App. at 21 ¶¶ 37-38. The Assessor did not respond initially, but after the Committee persisted, the Assessor claimed it could not determine the Committee should be treated any differently than Kinder Morgan, and further claimed that it owed no notice to the Committee concerning the assessment because the Committee was not a taxpayer. *Id.* The Committee then appealed to the County Board of

Equalization Appeals, who likewise did not consider the Committee to be a taxpayer deserving notice of the assessment and the opportunity to challenge it. Aplt. App. at 21 ¶¶ 39-40. After failing to obtain any relief from the Assessor and County Board of Equalization Appeals, the Committee turned to Colorado's courts.[1]

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[1] In the interim, the Committee filed a challenge to the assessment in the United States District Court for the District of

On October 1, 2018, the Committee filed a complaint against Montezuma County, the Montezuma County Board of County Commissioners, Montezuma County Board of Equalization, the Montezuma County Assessor, and Montezuma County Treasurer in the District Court for the County of Montezuma, commencing Case No. 2018CV30100, styled *CO2 Committee, Inc. v. Montezuma County, et al.* Aplt. App. at 11 ¶¶ 6-7, 22-23 ¶¶ 47-48. The defendants in that proceeding moved to dismiss the Committee's complaint for lack of standing and based on claim and issue preclusion. *See id.* Conditioned on the presumption that Kinder Morgan acted as a fiduciary, the state district court granted the motion to dismiss based on standing, holding that the operator (Kinder Morgan) was the only taxpayer for purposes of challenging taxes, but denied the motion to the extent it was based on claim and issue preclusion. Aplt. App. at 11 ¶¶ 6-7, 22-23 ¶¶ 47-48.

The Committee then appealed to the Court of Appeals, commencing Case No. 19CA1798. *Id.* at 23 ¶ 49. In a thorough and careful opinion, the Colorado Court of Appeals reversed the state district court. *Id.* It found that the Committee had standing to challenge the Assessor's purported assessment being applied to the Committee. *CO2 Committee, Inc. v. Montezuma County, et al.,* 491 P.3d 516 (Colo. App 2021). However, when it reached that conclusion, one of the Committee's

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Colorado, Case No. 18CV2502-RBJ, styled *CO2 Committee Inc. v. Montezuma County, et al.* Montezuma County sought to dismiss the complaint in that case under 28 U.S.C. § 1341, and after reviewing the statute, the Committee voluntarily dismissed the proceeding without prejudice to pursue its remedies in state court, beleiving at the time that such a remedy existed.

appellate issues remained resolved: whether the state district court's assumption that the operator was a fiduciary was correct. *See id.*

Both the Montezuma County defendants and, through a motion to intervene, the Colorado Property Tax Administrator (the "Administrator") petitioned for writ of certiorari before the Colorado Supreme Court. The Supreme Court denied the Montezuma County defendants' petition and granted the Administrator's petition. *See Colorado Property Tax Administrator v. CO2 Committee, Inc.,* 527 P.3d 371 (Colo. 2023). The Administrator's petition for certiorari sought review concerning "Whether the court of appeals erred in holding that nonoperating fractional interest owners in an oil and gas unit have standing to separately challenge a retroactive assessment of tax on the unit, apart from the designated unit operator." *Id.* at 375 n.2.

D. The Colorado Supreme Court's Decision

In its 2023 opinion, the Colorado Supreme Court affirmed the district court's order dismissing the complaint, reversed the opinion of the Court of Appeals, and ruled that the Committee did not have standing. *Id.* at 380. It further ruled that the operator's participation in the assessment of taxes with the County as part of a representative system also applied to protesting taxes and required the operator look out for other interest holders. *Id.* The Colorado Supreme Court did not determine, as the Committee requested through its petition, whether the operator of a unit was a fiduciary concerning non-operating working interest owners challenging taxes. *See id.*

Through its opinion, the Colorado Supreme Court ruled that working interest owners other than the operator of a unit were not "taxpayers" with the right to challenge taxes imposed upon them unlawfully. *Id.* It reasoned that, under Colorado's oil and gas taxation statutes, each of the terms "any person" under C.R.S. § 39-5-122(2), "owners" under the Assessor's Reference Library, and 'taxpayer' as contemplated by the pertinent statutes and the ARL's audit procedures must be the unit operator." *Id.* at 378-380. Thus, because the Committee had no "legally protected interest" under Colorado's oil and gas taxation scheme, the Colorado Supreme Court ruled that the Committee had no standing to challenge the taxes assessed against it. *Id.* at 380.

E. Proceedings in the United States District Court

After being denied standing to challenge the taxes assessed against it in Colorado's courts and left without a remedy, the Committee filed its Complaint and Jury Demand in the United States District Court for the District of Colorado, commencing *CO2 Committee, Inc. v. Montezuma County et al.,* Case No. 23CV2457. Aplt. App. at 9. Montezuma County, the Montezuma County Board of County Commissioners, and the Montezuma County Assessor (together, the "County") moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, arguing that 28 U.S.C. 1341 (the "TIA") deprived the District Court of subject matter jurisdiction, and that the doctrines of comity and res judicata otherwise barred the Committee's claims. Aplt. App. at 36. After the County's motion was fully briefed, the District Court granted the County's motion under the TIA, reasoning that the

County had a sufficient remedy in Colorado's state courts, so the TIA barred the Committee's claims. Order at 10-11. The District Court found that the Kinder Morgan's lawsuit was remedy for the Committee, and that because the Committee had filed suit, it had a plain, speedy and efficient remedy regardless of whether it had standing in state court. *Id.* The Committee now appeals.

V. Summary of Argument

Since at least 2008, the County has violated Colorado law, especially C.R.S. § 39-7-101(1)(e) and § 39-10-106(1). Had it complied with these laws, there would be no litigation. However, the County's noncompliance with Colorado law resulted in the County imposing taxes on the Committee's members that they did not owe. After it sought a plain, speedy and efficient remedy in state court, the Committee was denied standing to seek any remedy. Then it sought relief in the District Court. The District Court wrongfully found that it lacked subject matter jurisdiction because of an illusory "remedy" it saw in state court. It also failed to construe the Committee's jurisdictional allegations as true as required by a facial attack on subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and this Court's case law, instead impermissibly relying on the County's motion to dismiss. This Court should reverse the District Court's Order.

The TIA provides that, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. When it granted the County's motion to dismiss, the District Court

concluded that the Committee had "failed to allege insufficient remedies in state court, so the exception to jurisdictional bar" within the TIA did "not apply" in this case. Order, at 10. It further held that the Committee, "has failed to establish that a plain, speedy, and efficient remedy is impossible in state court." *Id.* at 12.

The District Court's conclusion that the Committee had failed to allege insufficient remedies was inaccurate. Aplt. App. at 11 ¶ 6. But its conclusion that the Committee had not established the lack of an available remedy, much less one that is "plain, speedy and efficient," was error as a matter of law because the Committee lacked standing in state court, so no remedy was available to it at all. 28 U.S.C. § 1341.

For the same reason, the comity doctrine would not have supported dismissing the complaint. Dismissal under that doctrine is subject to a standard that is the functional equivalent of the TIA's standard, requiring a state court that will provide a "plain, adequate, and complete remedy." Because there is no such remedy to be had in Colorado's courts, comity is inapplicable. Res judicata cannot bar the Committee's claims either. Res judicata only applies where there has been a final judgment on the merits of a claim. Here, where the Committee's claims were dismissed for lack of standing, there is no final judgment on the merits to support res judicata.

Even if the Committee possessed a remedy through the Unit's operator, Kinder Morgan, such a remedy would deprive the Committee of notice of a threat to its legally protected interests. It would also require the Committee to depend on the efforts of Kinder Morgan, a third party, to defend the Committee's

rights when the Committee was not permitted to defend itself. And even if Kinder Morgan were a fiduciary for the Committee, the question courts consider for purposes of the TIA is whether the person held liable for taxes has a plain, speedy and efficient remedy, not third parties. Thus, the purported remedy through Kinder Morgan, the Unit's operator, would not be either "plain" or "efficient" within the meaning of the TIA.

Finally, the District Court erred when it failed to construe the Committee's factual, jurisdictional allegations as true when considering the County's motion to dismiss for lack of subject matter jurisdiction. The District Court was required to take the Committee's allegations as true because, as the District Court acknowledged, the County brought a facial attack to subject matter jurisdiction. Instead, the District Court largely relied on the County's motion to dismiss when framing the factual background for its Order, which was improper.

VI. Argument

A. The District Court erred in finding that the Committee possessed a plain, speedy and efficient remedy in Colorado's courts such that 28 U.S.C. § 1341 barred subject matter jurisdiction.

i. Colorado's courts denied the Committee standing to challenge the taxes levied against it, and therefore denied the Committee a remedy, so the TM cannot bar jurisdiction.

Without standing, a litigant has no "right to raise a legal claim," and a court will not "decide a case on the merits" or grant a party relief without it. *Colorado Prop. Tax Adm'r v. CO2 Comm., Inc.,* 2023 CO 8, ¶ 19; *California v. Texas,* 593 U.S. 659, 668-69 (2021) (quoting *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342, (2006)) (internal quotation marks omitted). Without standing, a litigant cannot obtain a remedy. *CO2 Comm., Inc.,* 2023 CO 8, ¶¶ 19-20.

Following Kinder Morgan's challenge in state court (KM2), the Committee was informed about the retroactive assessment. The Committee then sought a remedy in Colorado's courts. Aplt. App. at pp. 12-13 ¶¶ 6-8, pp. 21-23 ¶¶ 37-51; *Colorado Prop. Tax Adm'r v. CO2 Comm., Inc.,* 2023 CO 8, ¶¶ 11-16, *reh'g denied* (Apr. 24, 2023). In those proceedings, Colorado's Supreme Court analyzed whether Colorado's statutory scheme provided the Committee with a remedy, and therefore, whether the Committee had standing to challenge the way the County treated it, as a non-taxpayer. *CO2 Comm., Inc.,* ¶¶ 17-47. Colorado's Supreme

Court interpreted Colorado's statutory scheme not to provide the Committee with a remedy as a nonoperating, taxpaying fractional interest owner, instead requiring the operator, Kinder Morgan, to address any challenges. *Id.* Therefore, it ruled that the Committee did not have standing to challenge the County's actions. *Id.* at ¶ 47. Specifically, the court determined that the Committee "lacks a legally protected interest" that would provide it standing because Colorado's "statutory system . . . designates the unit operator as the representative for the fractional interest owners throughout the unitized oil and gas property tax process." *Id.* This process extended to challenges to assessments and taxes. *Id.*

Thus, the Colorado Supreme Court determined that the Committee did not have a "right to raise a legal claim" as it concerned the taxes the County imposed, including those affecting the Committee (or any other nonoperating, taxpaying fractional interest owner), for Kinder Morgan's improper deductions. *Id.* at ¶¶ 19, 47 (citations omitted). Under the construction of Colorado's highest court, Colorado's statutes only give an operator the right to raise a legal claim concerning those taxes. Nonoperating working interest owners must pay the taxes imposed on them, but Colorado's courts deny them the right and remedy to challenge unlawful taxes; such right and remedy are reserved for the unit operator alone. *Id.*

Nevertheless, the District Court concluded that the Committee "ha[d] failed to establish a plain, speedy, and efficient remedy is impossible in state court." Order at 12. It is unclear what remained for the Committee to do to establish the impossibility. It had alleged that no notice or opportunity to be heard

was due to it under Colorado's laws. Aplt. App. at pp. 21-22 ¶¶ 38, 40-41. It had brought a challenge in state court seeking a remedy and been denied standing to protect even its federal rights. *CO2 Comm., Inc.,* 2023 CO 8, ¶ 14 (acknowledging the Committee's 42 U.S.C. § 1983 claim), ¶ 47. After being denied standing to obtain a remedy by Colorado's highest court, it pled that fact in its complaint.[2] Aplt. App. at 23, ¶¶ 48-51.

The District Court erred because the Committee's allegations showed the fact that there was no remedy available to it in Colorado's courts, much less one that is "plain, speedy and efficient." *Id.;* 28 U.S.C. § 1341. Colorado's highest court has spoken and concluded that they do not. *CO2 Comm., Inc.,* 2023 CO 8 at ¶ 47. It is only in circumstances where state courts allow taxpayers to challenge taxes that there is a remedy and the TIA bars federal jurisdiction. *Tully v. Griffin, Inc.,* 429 U.S. 68, 76 (1976) (concluding that TIA barred jurisdiction because "New York provide[ded] a 'plain, speedy and efficient' means for the redress" of claims because of the availability of "preliminary relief in declaratory judgment actions in general . . . [and] in cases involving the collection of taxes" in particular); *Sacks Bros. Loan Co. v. Cunningham,* 578 F.2d 172, 175 (7th Cir. 1978) ("the taxpayer was unable to prove that the state courts would not entertain its challenge and thus was unable to prove that the bar of Section 1341 should not apply."). But where state courts do

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[2] As described below, this is significant because the County's motion to dismiss was a facial attack on the Committee's Complaint. *See* Order at 7. Thus, the issue was whether the allegations in the Complaint were sufficient, given that the District Court was required to construe them as true for purposes of the motion to dismiss. *See* Section VI.C, *infra*.

not provide a remedy, the TIA cannot bar jurisdiction. *Garrett v. Bamford,* 538 F.2d 63, 72 (3d Cir. 1976) ("we hold that . . . Pennsylvania law does not provide a 'plain, speedy and efficient remedy.' Thus, a federal action seeking injunctive relief to alleviate the alleged discrimination is not barred by 28 U.S.C. § 1341.").

Unlike the litigants seeking relief from state taxes in *Tully* and *Cunningham,* the Committee was able to show that the "state courts would not entertain its challenge." *Cunningham,* 578 F.2d at 175. This was sufficient to avoid dismissal under the TIA because the Committee showed that a remedy was unavailable in state court. *Id.* ("as has been implicitly recognized in numerous cases, the purposes of that Act are satisfied if the taxpayer can prove, based on state statutes or case law, that the state courts would not entertain its challenge.") (citing *Bamford,* 538 F.2d at 68); Order at 12. It is only when a "taxpayer's federal rights receive full consideration, [that] the remedy is adequate," but here, the Committee's federal rights, though raised, were never considered by Colorado's courts because it did not have standing to raise them. *Burris v. City of Little Rock,* 941 F.2d 717, 720 (8th Cir. 1991) (citing *Rosewell v. LaSalle Nat. Bank,* 450 U.S. 503 (1981)); *CO2 Comm., Inc.,* 2023 CO 8, ¶ 14. Because the Committee demonstrated through case law and alleged in its Complaint that there was no plain, speedy and efficient remedy in state court, the District Court erred in dismissing the Committee's Complaint under the TIA. *Cunningham,* 578 F.2d at 175.

ii. The Committee had no standing to pursue a remedy in Colorado's courts, so the comity doctrine cannot apply, and the Committee does not challenge the lack of standing in Colorado's courts, so res judicator cannot apply.

The comity doctrine bars claims concerning state taxes from federal courts when state court "remedies are plain, adequate, and complete . . . ." *Fair Assessment in Real Est. Ass'n, Inc. v. McNary,* 454 U.S. 100, 116 (1981). This standard is not functionally different from the TIA's "plan, speedy and efficient" requirement. *Id.* at n.8 ("We discern no significant difference, for purposes of the principles recognized in this case, between remedies which are 'plain, adequate, and complete,' . . . and those which are 'plain, speedy and efficient'") (citations omitted). "Both phrases refer to the obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost." *Id.* In other words, "the comity doctrine's standard of 'plain, adequate, and complete' and the Tax Injunction Act's standard of 'plain, speedy and efficient' are functionally equivalent." *Guertin v. City of Eastport,* 143 F. Supp. 2d 67, 70 (D. Me. 2001) (citing *Fair Assessment,* 454 U.S. at 116). Under either standard, a taxpayer must receive a "full hearing and judicial determination" and be able to raise its constitutional objections. *Id.* (citing *Rosewell,* 450 U.S. at 514).

Because the comity doctrine and the TIA's requirements are functionally equivalent, the comity doctrine cannot bar the Committee's claims for the same reason the TIA cannot bar its claims. The Committee has

no standing to challenge state taxes in Colorado's courts, and Colorado's courts will not address its constitutional challenges to those taxes. *CO2 Comm., Inc.,* ¶¶ 14, 47. Without standing there is no remedy to be had by the Committee at all, much less one that is "plain, adequate, and complete." *Fair Assessment,* 454 U.S. 100, 116 n.8. The Committee has been denied a full hearing and judicial determination concerning the merits of its challenge, and the federal rights it asserted in state court proceedings were dismissed with its challenge. *CO2 Comm., Inc.,* 2023 CO 8, ¶¶ 14, 47. Because the Committee cannot receive a full hearing and judicial determination of its claims in Colorado's courts, and its federal rights will be lost absent a hearing in federal court, comity cannot bar its claim in federal courts. *See Rosewell,* 450 U.S. 503 at 514.

Res judicata cannot bar the Committee's claims either. Res judicata requires, among other things, a final judgment on the merits of a claim. *Federated Dept Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). Dismissal for lack of standing is not a final judgment on the merits, so it cannot support res judicata. *Warth v. Seldin,* 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiffs contention that particular conduct is illegal") (citing *Flast v. Cohen,* 392 U.S. 83, 99 (1968)); *The Am. C.L. Union of New Mexico v. Santillanes,* 546 F.3d 1313, 1319 (10th Cir. 2008) ("Standing is not a proxy for ruling on the merits and is determined at the outset of the lawsuit."); *Batterman v. Wells Fargo Ag Credit Corp.,* 802

P.2d 1112, 1118 (Colo. App. 1990) ("The dismissal of a suit for lack of standing is also not 'on the merits' of the underlying substantive claim . . . Rather, standing is an analytical prerequisite to reaching the merits of a suit") (citation omitted).

The Colorado Supreme Court determined that the Committee lacked standing in Colorado's courts to bring its challenge. *CO2 Comm., Inc.,* 2023 CO 8, ¶ 47. Whether under Colorado or federal law, that ruling was not on the merits "of the underlying substantive claim" because it was based on a lack of standing. *Warth,* 422 U.S. at 500; *Santillanes,* 546 F.3d at 1319; *Batterman,* 802 P.2d at 1118. Because there is not final judgment on the merits of the Committee's substantive claim, res judicata does not apply.[3] *Moitie,* 452 U.S. at 398.

B. The District Court erred when it concluded that a third-party's mere ability to bring suit on behalf of another comprised a plan, speedy, and efficient remedy under the TIA.

The District Court did not address whether the TIA's requirements of a "plan, speedy and efficient remedy" were satisfied by a Kinder Morgan's lawsuit, and instead assumed that they were. Order at 11. Citing to *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Commissioners,* Kinder Morgan's challenge

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[3] Moreover, as alleged in the Committee's Complaint, the state district court that dismissed the Committee's complaint leading up to the Colorado Supreme Court proceedings expressly rejected the argument that the Committee's claims were barred by res judicata in state court. Aplt. App. at p. 11, ¶ 7(1).

to the retroactive assessment against it (alone) and finding that it (alone) was a "related party" concerning the Cortez Pipeline Company, the District Court reasoned that the Committee's interests were represented by Kinder Morgan. 399 P.3d 735, 741 (Colo. App. 2015), *aff'd,* 396 P.3d 657; Order at 10 n.3. The District Court further claimed that Kinder Morgan had the opportunity to raise constitutional challenges on behalf of the Committee within those proceedings, though it acknowledged that the Committee did not receive notice of them until after they concluded. Order at 5, 10 n.3. The District Court never analyzed whether being forced to rely on the litigation of Kinder Morgan met the requirement of a plan, speedy and efficient remedy, nor whether the TIA would be satisfied if the one against whom taxes are assessed only learns of the challenged tax after the fact.

In concluding that the TIA's requirements were satisfied by Kinder Morgan's purported representation in KM2, the District Court necessarily concluded that notice and the opportunity to be heard afforded to someone other than the Committee was sufficient for a "plan, speedy and efficient remedy" available to the Committee. In other words, the District Court found that the Committee had a sufficient remedy through a third party's lawsuit over an issue no one informed the Committee of and which the Committee had no reason to think involved it. In KM2, Kinder Morgan sought relief concerning only its interests, and the retroactive assessment and related party finding as applied to it; the proceedings did not concern the Committee's interests. *See Kinder Morgan CO2,* 399 P.3d 735. As discussed *supra*, no remedy, that is, "the 'legal means to recover a right . . . or obtain redress for . . . a

wrong,' was available to the Committee itself. *Rosewell,* 450 U.S. at 516. But just as importantly, even if it could have obtained a remedy through Kinder Morgan, such a remedy would not have been plain or efficient for the Committee.

i. If a remedy was available to the Committee through Kinder Morgan, that remedy was neither "plain" nor "efficient."

"[P]lain means 'clear' or 'manifest.'" *Rosewell,* 450 U.S. at 516. Uncertainty concerning a remedy means the remedy is not "plain" and "lifts the bar to federal court jurisdiction." *Id.* at 516-17. Here, the Committee's purported remedy through Kinder Morgan could not have been clear or manifest because the Committee was never informed that there was an injury for which it needed a remedy until after the opportunity to challenge it was gone. Aplt. App. at 19 ¶ 23. Colorado does not require or provide for notice and the opportunity to be heard to be afforded to a taxpayer such as the Committee because the Committee is not a "taxpayer" within the Colorado Supreme Court's construction of Colorado's oil and gas statutes. *CO2 Comm., Inc.,* 2023 CO 8, ¶ 47. This does not mean that the Committee is not liable for taxes, or that the County could not collect directly from the Committee; the Committee is liable for those taxes and the County may collect from the Committee if it does not pay. *CO2 Comm., Inc.,* 2023 CO 8, ¶ 30 (quoting C.R.S. § 39-10-106(4)(a)). However, because of Colorado's representative system as construed by Colorado's Supreme Court, no one must tell the Committee about the taxes being assessed against it, and the Committee may not challenge those taxes. *Id.* at ¶ 47.

Notice and the opportunity to be heard are procedural criteria for state courts that must be available for the Committee to have a remedy. *Rosewell,* 450 U.S. at 512. By depriving the Committee of notice and the opportunity to be heard through their interpretation of Colorado's oil and gas statutes, Colorado's courts have deprived it of the "minimal procedural criteria" required of state court remedies by the TIA. *Id.* The TIA is no bar when these minimal procedural criteria are not available. *See Id.*

A remedy cannot be "clear" or "manifest" when the very existence of potential wrongs are altogether withheld. And in Colorado, it is permissible for retroactive assessments for which a SSWIO is liable to be effectively withheld. *CO2 Comm., Inc.,* 2023 CO 8, ¶ 30 (quoting C.R.S. § 39-10-106(4)(a)), ¶ 47. The procedure Colorado's highest court deemed sufficient effectively concealed both the remedy and the need for it because the Committee was due no notice. The District Court erred when it assumed that there existed a "plain" remedy when there existed no requirement to give the Committee notice that its constitutional rights needed defending, especially when it must rely on someone else to defend them. Such a remedy is not merely uncertain but entirely speculative.[4]

The remedy the District Court assumed through Kinder Morgan could not have been "efficient" either.

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[4] Moreover, it is worth noting that Kinder Morgan did not raise constitutional issues on behalf of the Committee in its proceedings. *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Commissioners,* 399 P.3d 735, 741 (Colo. App. 2015). Thus, the District Court concluded that the Committee had waived its constitutional claims in the lawsuit of another about which it had no notice before it concluded. Order at 10 n.3.

"[E]fficient means 'characterized by effective activity[.]'" *Rosewell,* 450 U.S. at 516. Requiring a "multiplicity of suits" or "imposing unusual hardship[s] . . . requiring ineffectual activity or an unnecessary expenditure of time or energy" undermine the efficiency of a remedy. *Id.* at 518. The District Court made no finding that the TIA's efficiency requirement was met, and it cannot be.

The District Court claimed that the Committee was forced to rely on Kinder Morgan's lawsuit to raise the Committee's constitutional claims. Order at 5, 10 n.3. Even supposing that the Committee had known of Kinder Morgan's challenge, Kinder Morgan's cooperation was not assured; it might have had the power but did not have an obligation to preserve the Committee's rights. Kinder Morgan would likely refuse to bring suit against the County to recover taxes imposed by the County on the Committee, as it had not consented to being an agent for litigation concerning the Committee. To protect its remedy, the Committee would therefore be forced to sue Kinder Morgan to ensure that Kinder Morgan protected the Committee's constitutional rights, provided that it would only have been able to do this if it had notice of the controversy. Far from being efficient, the District Court effectively imposed on the Committee the requirement that it bring suit against a third party so that the third party would vindicate its rights. Because this requires a multiplicity of suits and expending unnecessary time and energy, it cannot be an efficient remedy within the meaning of the TIA.

ii. Courts consider whether remedies are plain, speedy and efficient concerning the one who pays taxes, not third parties.

When courts consider whether one who pays taxes has a plain, speedy and efficient remedy under the TIA, they consider whether the one paying the taxes has that remedy, not someone else. *See Rosewell,* 450 U.S. at 514 ("There is no doubt that the Illinois state-court refund procedure *provides the taxpayer with* a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax.") (emphasis added; citation omitted); *California v. Grace Brethren Church,* 457 U.S. 393, 416 (1982) ("Thus, before any entanglement from the benefit eligibility hearings occurs, the appellees should be able to challenge the constitutionality of the state unemployment insurance taxes."); *Hill v. Kemp,* 478 F.3d 1236, 1253 (10th Cir. 2007) ("[I]f the state provides adequate procedural due process *to allow a taxpayer to raise any constitutional objections,* then the state has done all that is required under the Tax Injunction Act") (emphasis added; quoted source omitted). Thus, the minimal procedural requirements of the TIA concern the taxpayer, but the Colorado Supreme Court' interpretation of Colorado's oil and gas statutes fail to meet this requirement by defining "taxpayer" in such a way that it does not include the one who is liable for the taxes. *CO2 Comm., Inc.,* 2023 CO 8, ¶¶ 30, 46; C.R.S. § 39-10-106(4)(a). It is no answer to say that a remedy is available to a "taxpayer" if the term is divorced from ultimate tax liability. The District Court erred when it relied on Kinder Morgan as providing a "plain, speedy and efficient remedy."

The procedural requirements are met when the remedy is available to the person whose rights are at stake, not when they are available to someone else. In each case, it is the taxpayer before the court asking for relief about taxes for which that taxpayer is liable. Here, however, the District Court concluded that the one liable for taxes cannot proceed because someone who was not liable for the Committee's taxes must litigate on its behalf. It was error.

C. When considering the County's Motion to Dismiss for lack of subject matter jurisdiction, the District Court erred by failing to construe the Committee's jurisdictional allegations as true.

The District Court erred, and its Order should be reversed for violating the rules relating to a "facial attack" under Rule 12(b)(1). Both the County and the District Court treated the county's motion to dismiss, ECF No. 17, as a facial attack under Rule 12(b)(1). Under these circumstances, the law required by *Holt v. United States* is that "[i]n reviewing a facial attack on the complaint, a district court *must* accept the allegations in the complaint as true." 46 F.3d 1000, 1002 (10th Cir. 1995) (emphasis added; abrogated on other grounds). Similarly, in *Carmichael v. Kellogg, Brown & Root Servs., Inc.,* the Eleventh Circuit said that "Facial challenges to subject matter jurisdiction are based *solely* on the allegations in the complaint[, and] [w]hen considering such challenges, the court must . . . take the complaint's allegations as true." 572 F.3d 1271, 1279 (11th Cir. 2009) (emphasis added). This Court should reverse the District Court's Order and order from its review of the Complaint that the District

Court has subject matter jurisdiction and the TIA is no bar.

Motions to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12 (b)(1) "generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *Ruiz v. McDonnell,* 299 F.3d 1173, 1180 (10th Cir. 2002). While a court may not assume that allegations are true in the context of a *factual* attack, "[a] facial attack assumes the allegations in the complaint are true and argues they fail to establish jurisdiction." *Grace Bible Fellowship v. Polis,* No. 23-1148, 2024 WL 1340201, at *2 (10th Cir. Mar. 29, 2024), *cert. denied,* No. 24-226, 2024 WL 4486392 (U.S. Oct. 15, 2024); *Ruiz,* 299 F.3d at 1180; *Holt v. United States,* 46 F.3d 1000, 1002 (10th Cir. 1995). As with the district courts, this Court also accepts the jurisdictional allegations as true for purposes of a facial attack. *Safe Streets All. v. Hickenlooper,* 859 F.3d 865, 878 (10th Cir. 2017).

In this case, the District Court supported its Order with eight references to the County's motion to dismiss. *See* Order at 1-4, 4 n.4 (referencing ECF No. 17). The truthfulness of allegations in the motion to dismiss are disputed, and the Committee responded by correcting the truthfulness of the County's version of events. Aplt. App. at 53-57. The County may have lured the District Court in relying on allegations in its motion to dismiss by arguing that the District Court "may" rather than "must" accept factual allegations in the complaint as true. Aplt. App. at 8 ¶ 33. If the District Court should be allowed to use a few references to the County's motion to dismiss, the standard

evaporates, and the reviewing court would be faced with a tremendous effort, especially where, as here, there were factual disputes. The burden would be overwhelming. If the County wanted to deal with additional, disputed facts, it could have filed a motion for summary judgment.

In its Complaint, the Committee described the proceedings in Colorado state court in which it sought a hearing and judicial determination concerning its tax liability. Aplt. App. at 11-13, 21-24. Those proceedings culminated in the Colorado Supreme Court determining that the Committee lacked standing to bring claims concerning that tax liability. *Id.* at 23-24. Because it was denied standing, and therefore a remedy in Colorado's courts, the Committee alleged that the TIA did not bar its claims in federal court. *Id.* at 13 ¶ 8.

The County nevertheless moved to dismiss the Complaint because the TIA barred the Committee's claims. *Id.* at 38 ¶ 5. When considering the motion to dismiss, the District Court suggested that it was a facial attack on subject matter jurisdiction. Order at 7 (citing *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell,* 363 F.3d 1072, 1075 (10th Cir. 2004)). Because the motion to dismiss brought a facial attack, the District Court acknowledged that it must "presume [] all the allegations contain in the complaint to be true." *Id.* (quoting *Bernard v. Vermont,* No. 23-CV-00241-DDD-KAS, 2024 WL 760005, at *1 (D. Colo. Feb. 2, 2024)). Included among the allegations it was required to accept as true were allegations that (1) Colorado's courts had denied standing to the Committee to challenge state law taxes, and as a result, (2) that the TIA could not bar its claims because, as documented by case law, there

was no plain, speedy and efficient remedy for the Committee in Colorado's courts. Aplt. App. at 11.

Nevertheless, in its Order dismissing the Committee's Complaint, the District Court found to the contrary, concluding that "Plaintiff failed to allege insufficient remedies in state court, so the exception to the [TIA's] jurisdictional bar does not apply here." Order at 10. This was error, as it deviated from this Court's requirement that the District Court "must" construe the Committee's jurisdictional allegations as true for purposes of a motion to dismiss styled as a facial attack. *Holt,* 46 F.3d at 1002. Had the District Court construed as true the factual, jurisdictional allegation that "the Colorado Supreme Court" had denied the Committee's members, "standing, and therefore 'a plan, speedy and efficient remedy' that comprises 'procedural criteria' including a 'full hearing and judicial determination' is not available" to the Committee's members, it could only have found that the TIA's exception was met. Aplt. App. at 11; *Rosewell,* 450 U.S. at 512-13. In relying extensively on the County's Motion to Dismiss (cited within the Order as ECF No. 17), rather than the Committee's Complaint, the District Court failed to construe the Complaint's allegations as true and deviated from the facial attack standard. Order at 1-4; *Ruiz,* 299 F.3d at 1180.

VII. Conclusion

The District Court erred by dismissing the Committee's complaint under 28 U.S.C. § 1341. The TIA only bars federal court jurisdiction when there exists a "plain, speedy and efficient remedy" in Colorado's courts, and the Colorado Supreme Court has decisively withheld any remedy from the Committee. Even if a remedy were available for the Committee through Kinder Morgan, such a remedy would not be plain, speedy and effective: Colorado's procedures do not entitle the Committee to notice of taxes assessed against it, withholding from the Committee notice and the opportunity to be heard, the most fundamental procedural safeguard. Such a remedy would also lack plainness and efficiency, as the Committee's ability to defend its constitutional rights would be speculative and inefficient if it were required to rely on a third party to defend them without receiving notice that they needed defending. Finally, the District Court erred by failing to apply the standard applicable to a facial attack on subject matter jurisdiction, and instead supported its Order by citation to the County's motion to dismiss. This Court should review the Complaint anew and the arguments below, find that the District Court had subject matter jurisdiction, and reverse the District Court's Order dismissing the Committee's Complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and 28 U.S.C. § 1341.

Respectfully submitted,

Allen Vellone Wolf Helfrich & Factor P.C.

/s/ Brenton Gragg
1600 Stout Street, Suite 1900
Denver, CO 80202
Telephone: (303) 534-4499
Facsimile: (303) 893-8332
bgragg@allen-vellone.com

&

John M. Cogswell, Esq.
Cogswell Law Offices
PO Box 705
Saratoga, WY 82331
Telephone: (303) 887-3923

Attorneys for Appellant CO2 Committee, Inc.

Dated December 13, 2024.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument under 10th Cir. R. 28.2(C)(2). Oral argument would assist the Court to understand the procedural background and complex factual circumstances presented in this matter.

APPELLEES' BRIEF
(JANUARY 29, 2025)

No. 24-1337

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff/Appellant,

v.

MONTEZUMA COUNTY, ET AL.,

Defendants/Appellees.

Appeal from the United States District Court
for the District of Colorado
The Honorable Charlotte N. Sweeney, Judge
District Court Case No.: 1:23-cv-02457-CNS-NRN

APPELLEES' BRIEF

No Oral Argument Requested

Nathan A. Keever, Atty. Reg. No. 24630
Madeleine P. Mayfield, Atty. Reg. No. 61008
DUFFORD WALDECK
744 Horizon Court, Suite 300
Grand Junction, CO 81506
T: 970-241-550
F: 970.243.7738

E: keever@dwmk.com; mayfield@dwmk.com

Attorneys for Defendants/Appellees

Table of Prior and Related Appeals

There have been no prior or related appeals in this matter to the United States Court of Appeals for the Tenth Circuit.

Corporate Disclosure Statement

No corporate disclosure statement is required under rule 26.1.

Statement of the Case

1. This case began as a dispute over 2008 taxes owed for a carbon dioxide extraction operation in southwest Colorado.

2. Many different parties might own a fractional stake in oil and gas mineral rights in one area, but it would be inefficient for each to operate its own production equipment to harvest only those minerals in which they have a stake. It is typical for these parties to designate a mineral field as a "unit," then select one party from among the stakeholders as the unit operator. The unit operator supplies equipment and labor to extract all minerals from the unit, then splits the profits proportionally among the stakeholders. *Colo. Prop. Tax Adm'r v. CO2 Comm., Inc.*, 527 P.3d 371, 373 (Colo. 2023).

3. One such arrangement served the stakeholders with rights in the McElmo Dome, a geological formation in the Montezuma and Dolores counties of Colorado. *Id.* at 372. The McElmo Dome contains a large deposit

of carbon dioxide ("CO2"), a gas with industrial applications in oil and gas extraction. *Id.*

4. Many stakeholders owned interests in the mineral rights in the McElmo Dome, and they designated Kinder Morgan CO2 Co., L.P. ("Kinder Morgan") as the unit operator. *Id.* In 2008, Kinder Morgan owned 44% of the interest in the McElmo Dome unit. *Id.* at 374. CO2 Committee, Inc. ("CO2 Committee"), appellant in this case, represented many smaller stakeholders, its members, who collectively owned an 11.224% interest in the McElmo Dome. *Id.*

5. Colorado has a special tax structure for operations like the McElmo Dome unit. Because the operator is a single party selected to represent the interests of potentially thousands of parties, in the interest of efficient tax collection Colorado requires the operator to pay all taxes associated with a unit for all parties interested in that unit. *Id.* at 373-74. The operator then collects reimbursement from each non-operating stakeholder, each paying proportionally to its own interest. *Id.* at 374.

6. Colorado tax law determines the value of an oil and gas interest by calculating the sale value of minerals extracted, then subtracting the cost for bringing those minerals to market, including transportation costs. *Id.* at 373-74 (citing COLO. REV. STAT. § 39-7-101(1)(d)). If an operator subcontracts transportation costs to an unrelated third party, the operator may deduct whatever the third party charges for the service from the sale value of its minerals, including the third party's profit margin. *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Comm'rs*, 396 P.3d 657, 661 (Colo. 2017). But, to prevent gaming the system, if an operator uses a related party (for example, an affiliate

or partner) to transport the minerals, it may only deduct the actual costs of transportation, including a reasonable return on investment, but not a profit margin. *Id.* Otherwise, the related party could be incentivized to charge an unreasonably high rate to reduce the operator's tax liability.

7. Kinder Morgan shipped the CO2 it harvested from the McElmo Dome via the Cortez Pipeline to western Texas, where oil field operators purchased it for industrial application. *Id.* at 662. The Cortez Pipeline Company, a partnership, owned that pipeline and charged its users a flat rate of 22 cents per MCF[1] of CO2 transported. *Id.* In 2008, Kinder Morgan reported that its CO2 sold for 52 cents per MCF. In reporting its tax liability, it claimed the full 22 cent deduction for transportation costs, among other deductions. *Id.*

8. But a Montezuma County auditor discovered that Kinder Morgan was one of the partners who owned the Cortez Pipeline Company. *Id.* This made the Cortez Pipeline Company a related party under the Colorado tax code, which meant Kinder Morgan was not entitled to deduct the full 22 cent transportation charge. After adjusting the deduction down to the actual costs of transportation, Kinder Morgan owed an additional $2 million in taxes. *Id.* at 663. Montezuma County attempted to collect this tax for 2008 retroactively. *Id.*

9. Kinder Morgan fought the retroactive assessment. It appealed to the Montezuma County Board of Commissioners, then to the Colorado Board of Assessment Appeals, then to the Colorado Court of Appeals,

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[1] "MCF" is a standard unit for gas sales and represents one thousand cubic feet of gas.

then finally to the Colorado Supreme Court, which ultimately upheld the retroactive assessment. *Id.* at 668. The litigation lasted nearly ten years.

10. But that was not the end of the matter. Shortly after Kinder Morgan ran out of appeals, it told CO2 Committee it should try litigating the same issue. Appellant's Opening Br. at 6 ("Kinder Morgan encouraged the SSWIOs to challenge the application of the assessments to them."). CO2 Committee then sued Montezuma County in the United States District Court for the District of Colorado to challenge the same retroactive assessment. *CO2 Comm., Inc. v. Montezuma Cnty.*, 18-cv-02502 (D. Colo. 2018) (unpublished). Montezuma County moved to dismiss, citing the federal Tax Injunction Act, which provides that plaintiffs may not complain about state tax laws in federal court when there is a "plain, speedy and efficient remedy" available at the state level. 28 U.S.C. § 1341. CO2 Committee stipulated the dismissal of its suit. Order, App. at 83.[2]

11. CO2 Committee sued again, this time in Colorado state court. *Colo. Prop. Tax Adm'r v. CO2 Comm., Inc.*, 527 P.3d 371, 372 (Colo. 2023). Montezuma County moved to dismiss, alleging lack of standing. *Id.* at 374-75. It argued that because only Kinder Morgan paid taxes on the McElmo Dome unit, CO2 Committee had no direct tax liability and therefore

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[2] In accordance with 10th Cir. R. 28.1(A), this footnote accompanies the first citation to the record in this brief and explains our convention for such citations. In this case, the record consists only of the Appellant's Appendix. We first state the name of the cited document within the Appendix, use the abbreviation "App." to refer to the Appendix, then pin cite the page(s) of the Appendix on which the cited proposition appears.

could not appeal the tax valuation. *Id.* After more protracted litigation, the Colorado Supreme Court agreed and ordered the dismissal of the suit. *Id.* at 380.

12. CO2 Committee refiled in federal court. Complaint and Jury Demand, App. at 9-35. Just as it had in 2018, Montezuma County moved to dismiss the claim under Rule 12(b)(1), citing the Tax Injunction Act. Defendants' Motion to Dismiss, App. at 44-48. Montezuma County also cited the doctrines of preclusion and comity as alternative bases in support of its motion. *Id.* at 48-50. CO2 Committee claimed that the Tax Injunction Act does not bar its suit since it has no standing—and therefore, it says, no remedy—under state law. Plaintiff's Response to Defendants' Motion to Dismiss, App. at 57. The federal district court disagreed and again dismissed its claim. Order, App. at 89 ("Plaintiff has failed to establish that a plain, speedy, and efficient remedy is impossible in state court."). The district court ruled only based on the Tax Injunction Act without reaching the other two alternative grounds. *Id.* ("[T]his Court does not have subject matter jurisdiction and an analysis under the comity doctrine and res judicata is not necessary."). CO2 Committee appealed the dismissal; that appeal is now before the Court.

SUMMARY OF ARGUMENT

The federal courts are without subject matter jurisdiction to hear this case. CO_2 Committee challenges the validity of Colorado's oil and gas tax administration. It believes that the retroactive assessment against it was invalid because CO2 Committee received no notice of the assessment and did not owe the tax as a matter of Colorado tax law. Complaint and Jury

Demand, App. at 24. It asks the Court to declare the assessment illegal and enjoin its enforcement. *Id.* at 25. But challenges to state tax laws belong in state court. Congress made this clear when it passed the Tax Injunction Act, codified at 28 U.S.C. § 1341, which removes cases challenging state tax laws from federal jurisdiction, provided that the state procedures for hearing that challenge are sufficient to ensure fairness. All that the Act requires is a "full hearing and judicial determination." *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 513 (1981). Colorado's process is procedurally sufficient by that metric. Colorado allowed CO2 Committee to bring its claim, advance any arguments it felt justified it, and to have a judge make the final decision. The Tax Injunction Act requires nothing more.

Even without the Tax Injunction Act, the common law doctrine of comity demands judicial restraint to avoid federal interference in the collection of state taxes. While comity is in some ways comparable to the Tax Injunction Act, it is "more embracive than the Tax Injunction Act." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 424 (2010). It requires only "that an adequate state-court forum is available to hear and decide" the plaintiff's case. *Id.* at 421. The Colorado courts are both adequate and available.

The Colorado Supreme Court has heard and ruled on both the merits of CO2 Committee's claim, when Kinder Morgan advanced the same claim, and on the issue of CO2 Committee's standing to bring the case by itself. Claim preclusion therefore bars the substance of CO2 Committee's complaint, since CO2 Committee and Kinder Morgan are in privity and Kinder Morgan's litigation precludes CO2 Committee's.

And issue preclusion bars CO2 Committee from relitigating the issue of standing, since the Colorado Supreme Court already decided that it lacked standing.

Both because this Court lacks jurisdiction and because the Colorado Supreme Court has already ruled on this case, the Court should AFFIRM the dismissal of CO_2 Committee's complaint.

ARGUMENT

A. Tax Injunction Act

The Tax Injunction Act provides, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The statute removes issues of state tax law from federal subject matter jurisdiction unless there is no "plain, speedy and efficient remedy" available in the courts of that state. *Id.*; *California v. Grace Brethren Church*, 457 U.S. 393, 396 (1982) (holding that the Tax Injunction Act "deprived the District Court of jurisdiction" to hear a challenge to a state tax law). The statute is not limited to the types of cases it enumerates by name and applies to, among others, civil rights actions like the one before the Court. *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986). Federal courts construe the lack-of-remedy exception narrowly. *Id.* at 1240. The Tax Injunction Act does not require that a remedy be substantively available in the sense that the plaintiff will actually win its case and recover, but rather that the state-court remedy "meets certain minimal *procedural* criteria." *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 512 (1981) (emphasis in

original). The Supreme Court found important a statement the Tax Injunction Act's sponsor made on the floor of the Senate: "Thus [by the 'plain, speedy and efficient remedy' language] a full hearing and judicial determination of the controversy is assured." *Id.* at 513 (quoting 81 Cong. Rec. 1416 (1937)) (emphasis added). In other words, that the plaintiff's claim would fail in state court is of no importance, so long as the state court's process is sufficient. A sufficient process requires only that the plaintiff has an opportunity to state its case and to have a judge adjudicate the claim. The Tenth Circuit agrees with the First Circuit that the key is the plaintiff's "opportunity to *raise* the desired legal objections with the eventual possibility of Supreme Court review of that claim." *Brooks*, 801 F.2d at 1240 (quoting *Carrier Corp. v. Perez*, 677 F.2d 162, 165-66 (1st Cir. 1982)) (emphasis in original). The Tax Injunction Act does not promise a substantive result, nor require the state court to reach the merits of the plaintiff's claim. It requires only that the state process is fair, the plaintiff may raise its claims, and a judge issues or reviews the final ruling. The Colorado judicial process satisfies these requirements, since it allows a judicial hearing and grants plaintiffs the right to appeal, including to the U.S. Supreme Court. *Cf. Rosewell*, 450 U.S. at 514 ("There is no doubt that the Illinois state-court refund procedure provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax. Appeal to the higher Illinois courts is authorized and review is ultimately available in this Court." (cleaned up)).

CO2 Committee cannot show that it was denied "a full hearing and judicial determination." CO2 Com-

mittee had its day in court. It raised its constitutional objections and appealed its case to the Colorado Supreme Court. No less than eleven Colorado judges heard and determined its case.[3] Further, Kinder Morgan brought its case on the same substantive issue to the Colorado Supreme Court—another eleven judges. Collectively, the two entities have had over a decade's worth of hearings and determinations from twenty-two judges. The Tax Injunction Act does not require that the plaintiff could prevail under state law, only that the plaintiff can be heard under state law. CO2 Committee has had ample opportunity to speak.

CO2 Committee's primary argument that the Tax Injunction Act does not apply to this case is that it had no remedy in state court since the Colorado courts determined it lacked standing to challenge the retroactive assessment. *E.g.*, Appellant's Opening Br. at 13 ("[B]ecause the Committee lacked standing in state court . . . no remedy was available to it at all."). This is a plain misunderstanding of the Tax Injunction Act. CO2 Committee rejects the procedural requirement of the Tax Injunction Act and substitutes in its place a new, substantive requirement with no basis in the statute's text or in case law. In its reading, the Tax Injunction Act requires the state court at least to reach the merits of the claim to bar federal jurisdiction. There is no case that has held this proposition to be true, all cases CO2 Committee cites are inconsistent with it, and it defies the purpose of the Tax Injunction Act.

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[3] One at the trial court, three at the Court of Appeals, and seven at the Supreme Court.

i) CO2 Committee's position is inconsistent with the case law it cites

CO2 Committee consistently claims that lack of standing necessarily precludes a remedy within the meaning of the Tax Injunction Act. It cites several cases which use somewhat broad language in characterizing the standard under the Tax Injunction Act, and implies those cases stand for the proposition that standing is necessary to the availability of a state court remedy. But none of these cases stretch the standard so far as would allow CO2 Committee to bring its claim in federal court. In fact, every one of these cases is inconsistent with CO2 Committee's positions in the present litigation.

CO2 Committee asserts that "Colorado's Supreme Court analyzed whether Colorado's statutory scheme provided the Committee with a remedy." Appellant's Opening Br. at 15. But the Colorado Supreme Court used the word "remedy" or "remedies" exactly once, and then only to say that the statutory scheme allows the county treasurer to seek "remedies" for nonpayment of tax from nonoperating unit owners. *Colo. Prop. Tax Adm'r v. CO2 Comm., Inc.*, 527 P.3d 371, 377 (Colo. 2023). It had nothing to say on whether Colorado law provided CO2 Committee with a remedy as that term is used in the Tax Injunction Act and never cited or discussed the Tax Injunction Act at all. *See generally id.* CO2 Committee later asserts that "Colorado's highest court has spoken and concluded that [Colorado courts] do not [provide it with a remedy.]" Appellant's Opening Br. at 17 (citing *CO2 Comm., Inc.*, 527 P.3d at 380). But the Court simply did not say anything like that, and the cited paragraph says only that CO2 Committee lacked standing. *CO2*

Comm., Inc., 527 P.3d at 380 ("Because CO2 [Committee] lacks a legally protected interest, it lacks standing to challenge Montezuma County's retroactive assessment and increased property taxes."). Contrary to CO2 Committee's assertion, the Colorado Supreme Court has not analyzed the effect of the Tax Injunction Act in this case.

CO2 Committee claims that *Sacks Bros. Loan Co. v. Cunningham*, 578 F.2d 172 (7th Cir. 1978), suggests that the proper standard in applying the Tax Injunction Act is whether the state court would "entertain [the plaintiff's] challenge." Appellant's Opening Br. at 18 (quoting *Sacks Bros.*, 578 F.2d at 175). To begin, that case is two years older than *Rosewell*, a Supreme Court case, so to whatever extent it is inconsistent with the procedural standard expressed in *Rosewell* it has been overruled. But even if it is good law, *Sacks Bros*. does not support CO2 Committee's position in the present litigation. In that case, the plaintiff first brought a suit in state court alleging that Indiana's tax law violated equal protection, and the trial court dismissed its case. *Sacks Bros.*, 578 F.2d at 175. The plaintiff sued again in federal court, arguing that "the dismissal prove[d] the unavailability of a state remedy," *id.*, just as CO2 Committee now argues that its lack of standing in Colorado court proves the unavailability of a state remedy. The Court expressly rejected that argument and dismissed for lack of subject matter jurisdiction, holding "the taxpayer's failure to win in state court . . . does not negate the existence of the remedy." *Id.* So even if a state court must "entertain [the plaintiff's] challenge" for the Tax Injunction Act to apply, the *Sacks Bros*. Court determined that a state court's dismissal without reaching the merits

was sufficient entertainment.[4] CO2 Committee cannot demand more here.

Similarly, CO2 Committee cites *Burris v. Little Rock*, 941 F.2d 717 (8th Cir. 1991) for the proposition that "[i]t is only when a 'taxpayer's federal rights receive full consideration, [that] the remedy is adequate.'" Appellant Opening Br. at 19 (quoting *Burris*, 941 F.2d at 720) (second alteration in original). The quoted language does appear in *Burris*. But the Eighth Circuit did not explain what it meant by "full consideration," and it cited only *Rosewell*. *Burris*, 941 F.2d at 720. *Rosewell* in turn, merely held that a state court remedy must satisfy "minimal *procedural* criteria" to be adequate. *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 512 (1981) (emphasis in original). The Eighth Circuit held in that case that the Tax Injunction Act barred the plaintiffs from seeking federal resolution of its claims even when they, like the CO2 Committee, claimed to receive notice of the tax only when it was too late for them to fight it. *Burris*, 941 F.2d at 721 ("The appellants, of course, argue that these remedies were not really available because they did not learn of the assessment in time to use them."). The Eighth Circuit responded that the plaintiffs had received adequate notice in that case, but even if they hadn't, that "[p]roperty owners are charged with

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[4] It is unclear from the text of the *Sacks Bros.* decision on what grounds the state trial court dismissed the plaintiff's complaint. The Court says only that "this case comes to us after a dismissal without appeal of plaintiff's claim." *Sacks Bros.*, 578 F.2d at 175. The state decision appears to have not been reported as we cannot find it in the database to which we have access. But because it was a dismissal, we may assume that the state court did not reach the merits of the complaint.

knowledge of laws that affect them, particularly laws governing taxation." *Id.* at 721 n. 3. Even though the plaintiffs before it could no longer receive a state court remedy, having missed the deadline, the Eighth Circuit still dismissed for lack of subject matter jurisdiction under the Tax Injunction Act. *Id.* at 721. Those plaintiffs must have had whatever "full consideration" the Eighth Circuit thought necessary, even though they had never brought a case in state court. The Eighth Circuit's holding does not, therefore, support CO2 Committee's position, but rather undercuts it.

ii) CO2 Committee's position defies the purpose of the Tax Injunction Act to keep federal courts from interfering with state tax collection, and granting its relief would disrupt Colorado's orderly oil and gas tax administration

While CO2 Committee did lose the right to challenge taxes like this one itself by designating a unit operator, it did so voluntarily, opting in to the application of the representative system. And it got something out of it: the increased efficiency associated not only with having only one operator, but also with having only one tax representative for the unit. Further, it and the other interest owners in the McElmo Dome were able to designate the tax representative who could litigate this issue on its behalf, Kinder Morgan. Colorado's structure is not arbitrary but voluntary and reasonable. The representative system streamlines the process and lightens the administrative burden while still allowing each interest holder a vicarious right to access the courts.

Colorado's oil and gas taxation system requires the representational model in which operators handle taxation on behalf of all interest holders in a unit, and it requires the power to retroactively assess erroneously unpaid taxes. *See Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Comm'rs*, 396 P.3d 657, 666 (Colo. 2017) (discussing harms that would befall Colorado tax administration without retroactive assessments). The representative system gives the tax administrators a single point of contact who manages all mineral interests in the unit as one, so the administration does not need to handle separate tax claims from hundreds or even thousands of individual interest holders per unit. CO2 Committee benefits from this system by enjoying a lower tax rate than would be necessary to support a larger tax apparatus capable of handling each interest owner separately while still raising revenue for the state. This efficiency is in the best interest of all Colorado taxpayers.

The purpose of the Tax Injunction Act was to leave state tax administration to the states. "[T]his legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 522 (1981). Otherwise, "state tax administration might be thrown into disarray . . . with consequent damage to the State's budget . . . Moreover, federal constitutional issues are likely to turn on questions of state tax law, which . . . are more properly heard in the state courts." *Id.* at 527 (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n. 17 (1971) (Brennan, J., concurring in part and dissenting in part)). "[T]he [Tax Injunction Act] has its roots in equity practice, in principles of

federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). CO2 Committee would have the Court construe the Tax Injunction Act as allowing federal lawsuits enjoining state taxes whenever a state court dismisses a complaint without reaching the merits. Such a broad reading of the Tax Injunction Act's exception would have the opposite effect from what the Tax Injunction Act's drafters intended, throwing open the doors to federal courts to disrupt the collection of state taxes.

Under Montezuma County and the Colorado Supreme Court's position, all working interest owners in the McElmo Dome are represented in a single suit, brought by the operator, in this case the owner of the largest interest who has the most at stake. But under CO2 Committee's logic, there must be a second suit. And it will not stop there. CO2 Committee does not represent all interest owners other than Kinder Morgan in the McElmo Dome. If it can sue, so can the others. There could be a dozen unique lawsuits on the same underlying facts this time next year if this case proceeds, imposing significant litigation expenses on Montezuma County. There is no need to allow this to occur. Allowing this case to proceed would interfere with Colorado's orderly system of tax collection against the spirit of the Tax Injunction Act. Federal intrusion into this system, especially of the nature that CO2 Committee now demands, could sabotage the efficient and fair representative system, throwing Colorado's "tax administration . . . into disarray." *Tully*, 429 U.S. at 73.

iii) Contrary to CO2 Committee's claim, the trial court was not required to accept its claim that it had no remedy in state court as true, even under the facial attack standard

CO2 Committee says, correctly, that under a facial attack on the sufficiency of a complaint, the trial court must accept the allegations as to material facts in that complaint as true. Appellant's Opening Br. at 31; *e.g.*, *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) ("In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true."). But then CO2 Committee claims, incorrectly, that the trial court was therefore required to accept the allegation that "the [Tax Injunction Act] could not bar [CO2 Committee's] claims because . . . there was no plain, speedy and efficient remedy for the [CO2] Committee in Colorado's courts." *Id.* at 33. The latter claim does not follow from the former because the alleged lack of remedy is not a factual assertion, but instead a legal conclusion. A trial court "need not take as true the complaint's legal conclusions." *Dronsejko v. Thornton*, 632 F.3d 658, 666 (10th Cir. 2011).

In *Dronsejko*, the plaintiff claimed that the defendant acted "recklessly," a legal conclusion, and provided several facts to support that assertion. *Id.* The court accepted the factual allegations as true and then determined whether those factual allegations "g[a]ve rise to a cogent and compelling inference that" the defendant acted recklessly. *Id.* That Court did not presume that the defendant acted recklessly but only presumed the truth of the alleged facts underpinning the conclusion. Analogously, here, CO2 Committee

claimed that it lacks a remedy in Colorado state courts and offered several facts in support of that claim. The Court should determine whether the offered facts "give rise to a cogent and compelling inference that" CO2 Committee lacked a remedy, *id.*, and should presume the offered facts are true, but should not presume that CO2 Committee lacked a remedy. As argued above, the lack of standing in state court does not lead to the inference of a lack of remedy.

Even if the alleged lack of remedy were a factual assertion rather than a legal conclusion, the trial court would still have had no obligation to accept it as true, because in that case the Motion was not a facial attack on the complaint but rather a factual attack. "[A] party may . . . challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations." *Holt*, 46 F.3d at 1003 (cleaned up). The Motion spent several pages challenging the assertion that CO? Committee lacked a remedy under Colorado law. Defendants' Motion to Dismiss, App. at 44-48. If the lack of remedy is a factual assertion, those pages challenging it make the Motion a factual attack. And if the Motion was a factual attack, the trial court could not presume the truth of the alleged lack of remedy. In either case, therefore, CO2 Committee is incorrect that the trial court was required to accept as true the allegation that it lacked a remedy under Colorado law.

B. Comity and Preclusion

Although Montezuma County has not filed a cross-appeal on the issues of comity and preclusion,

which the court below failed to reach, it may nevertheless assert those doctrines as alternative bases for affirming the district court's ruling. *Ute Distrib. Corp. v. Sec'y of the Interior of the U.S.*, 584 F.3d 1275, 1282 (10th Cir. 2009) ("An appellee may, without filing a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court." (cleaned up)). Comity and preclusion both appear in the record. Defendants' Motion to Dismiss, App. at 48-49 (comity); 49-50 (preclusion).

i) Contrary to CO2 Committee's argument, the doctrine of comity is more expansive than is the Tax Injunction Act and bars its claim

Citing dicta from a Supreme Court decision from the 1980s and the opinion of a federal district court, CO2 Committee argues that the scope of the doctrine of comity is "not functionally different" from that of the Tax Injunction Act. Appellant's Opening Br. at 19-20 (citing *Fair Assessment in Real Est. Ass'n v. McNary*, 454 U.S. 100, 116 n. 8 (1981); *Guertin v. City of Eastport*, 143 F. Supp.2d 67, 70 (D. Me. 2001)). But the *Fair Assessment* Court expressly limited its analysis to "the principles recognized in *this case*." *Fair Assessment*, 454 U.S. at 116 n. 8 (emphasis added). Further, it declined to reach the Tax Injunction Act at all. *Id.* at 107 ("Because we decide today that the principle of comity bars federal courts from granting damages relief in such cases, we do not decide whether [the Tax Injunction Act], standing alone, would require such a result."). And, of course, the decision of the federal district court of Maine is of no precedential weight in this Court.

What is binding precedent, however, is *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), decided after both cases CO2 Committee cites, which, after reviewing the Supreme Court's precedent discussing the matter, clearly stated that "the comity doctrine is more embracive than the Tax Injunction Act." *Id.* at 424. A plain English understanding of that sentence requires the proposition that comity may bar some claims not barred under the Tax Injunction Act. So even if the Court holds that the Tax Injunction Act does not bar CO2 Committee's claim, it could still nonetheless hold that the doctrine of comity does.

Comity serves to bar claims against state tax systems in federal court when "an adequate state-court forum is available to hear and decide [the plaintiff's] constitutional claims." *Levin*, 560 U.S. at 421. "Comity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." *Id.* Here, Colorado is taxing the production of oil and gas for sale at market, which is certainly "commercial activity." The comity doctrine is therefore at its fullest strength here. Further, the Colorado courts were not only available to, but in fact did, "hear and decide" both CO2 Committee's and Kinder Morgan's claims on the issues before the Court. Comity therefore precludes hearing this case in the federal courts.

ii) Even if neither the Tax Injunction Act nor the doctrine of comity bars CO2 Committee's claim, it is still precluded from bringing it since the Colorado courts have already entered final judgments on both the procedure and the merits of the claim

In its analysis on *res judicata*, more precisely known as issue or claim preclusion,[5] CO2 Committee simply argues that because the Colorado courts did not reach the merits of its claim, it cannot be precluded from bringing it in federal court, as preclusion requires a final judgment. Appellant's Opening Br. at 21. This claim misses the point in two ways. First, the merits of CO2 Committee's claim have already been litigated in Colorado court, not by CO2 Committee but by its legal representative, Kinder Morgan. This has the same preclusive effect as if CO2 Committee litigated the case itself. And second, even if the Colorado cases have no preclusive effect on the merits of CO2 Committee's claim, they *do* have preclusive effect as to the

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[5] *Res judicata* is somewhat of an ambiguous term. Some courts use it as an umbrella describing both issue and claim preclusion. *E.g.*, *Park Lake Res. Ltd. Liab. Co. v. USDA*, 378 F.3d 1132, 1135 (10th Cir. 2004) ("*Res judicata* doctrine encompasses two distinct barriers to repeat litigation: claim preclusion and issue preclusion."). Others, even within the same Circuit, use *res judicata* to refer only to claim preclusion and to exclude issue preclusion. *E.g.*, *Matosantos Com. Corp. v. Applebee's Intl, Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001) ("Matosantos confuses res judicata (also known as 'claim preclusion') with collateral estoppel (also known as 'issue preclusion')."). Proceedings below generally used "*res judicata*" without specification. To avoid confusion, this brief uses the English terms.

issue of CO2 Committee's standing. The Court should therefore hold that Kinder Morgan's litigation bars CO2 Committee's substantive claim and that CO2 Committee's own state litigation bars it from relitigating its standing.

a. Kinder Morgan's litigation precludes CO2 Committee's claim because the two entities were in privity

In this Circuit, claim preclusion requires four elements: (1) a final judgment on the merits; (2) identity of both parties; (3) identity of cause of action; and (4) a "full and fair opportunity to litigate" the claim. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (quoting *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 n. 6 (10th Cir. 2005)). All elements but the second are clearly present here, though the second requires more analysis. On the first element, the Colorado Supreme Court did reach, and rule on, the merits of Kinder Morgan's claim. *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Comm'rs*, 396 P.3d 657, 666 (Colo. 2017). On the third, Kinder Morgan challenged the legality of exactly the same tax decision that CO, Committee now challenges. *Id.* at 662. And on the fourth, Kinder Morgan had every opportunity to litigate its claim, including before the Colorado Supreme Court.

That leaves only the second element at issue. The question becomes whether Kinder Morgan and CO2 Committee are identical in the context of claim preclusion. Identity of parties requires only privity between the parties. *Lenox MacLaren*, 847 F.3d at 1240. "[P]rivity requires a showing that the parties in

the two actions are really and substantially in interest the same." *Id.* at 1241 (cleaned up). A parent corporation is in privity with its subsidiary. *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1275 (10th Cir. 1995). A corporation is in privity with its agent. *Lowell Staats Mining Co. v. Phila. Elec. Co.*, 878 F.2d 1271, 1276 (10th Cir. 1989). Two business entities acting in concert to create a monopoly in violation of antitrust statutes are in privity with each other. *Lenox MacLaren*, 847 F.3d at 1243.

The Court should hold that Kinder Morgan and CO2 Committee were in privity in this case. This case has only to do with their tax liability under Colorado oil and gas mining law, and under the relevant statutes Kinder Morgan represented CO2 Committee for the purpose of tax collection. *Colo. Prop. Tax Adm'r v. CO2 Comm., Inc.*, 527 P.3d 371, 373 (Colo. 2023). Kinder Morgan paid the taxes in question, then CO2 Committee reimbursed it. *Id.* at 374. They thus acted in concert to pay taxes each year. CO2 Committee also trusted Kinder Morgan to extract the carbon dioxide efficiently on its behalf. *Id.* This is likely alone sufficient to demonstrate an agency relationship between the two entities, or at least a relationship so like agency as to make it not functionally distinct in the context of privity. Further, Kinder Morgan claimed to represent CO2 Committee and the other interest owners before the Colorado Supreme Court. Then CO2 Committee only filed this action after Kinder Morgan instructed it to do so. Appellant's Opening Br. at 6. From all these facts together, Kinder Morgan and CO2 Committee were, to put it plainly, in cahoots. The Court should hold that this put them in sufficient privity that the Colorado courts' rulings on the merits

of Kinder Morgan's claims are binding on CO2 Committee's claims.

b. CO2 Committee's own litigation in Colorado state court precludes it from relitigating the issue of its standing

In this Circuit, issue preclusion has four elements: (1) identity of issue; (2) identity of the party against whom preclusion is asserted; (3) final judgment on the merits of the issue; and (4) the party had a "full and fair opportunity to litigate the issue in the prior proceeding." *Boulter v. Noble Energy Inc.*, 74 F.4th 1285, 1289 (10th Cir. 2023). The second element does not require that the court in the prior litigation reached the substantive merits of the claim, but only that it ruled on the merits of the issue. For example, a ruling that a federal court lacked subject matter jurisdiction over a claim precluded "future relitigation of that jurisdictional question" even though the prior court "never reached the merits" of the complaint. *Id.*

Here, all elements are met. CO2 Committee is the same party now as it was before the Colorado Supreme Court. The Colorado Supreme Court issued a final ruling on the merits of CO2 Committee's standing after it litigated the issue at length. CO2 Committee is therefore precluded from relitigating its standing.

While there appears to have been no case in this Circuit which addressed preclusion after a final state court judgment on standing, one case provided an exception that proves the rule. In *In re Miller v. Deutsche Bank Nat'l Tr. Co.*, 666 F.3d 1255 (10th Cir. 2012), this Circuit determined whether a party which had

lost a challenge to its opponent's standing in a Rule 120 foreclosure proceeding in Colorado state court could relitigate the issue of standing in federal court. *Id.* at 1261 ("It is undeniable that the Millers have not accepted the state court's judgment on the standing issue. They do raise as a defense a similar standing issue to that on which they lost in state court."). Rule 120 is a Colorado Rule of Civil Procedure which allows the holder of a deed of trust to move a court to allow foreclosure of the secured property using unique, expedited procedures. "[P]roceedings pursuant to C.R.C.P. 120 are not adversarial in nature, are not final, and generally no appeal may be taken to review the resulting orders." *Id.* at 1262 (quoting *United Guar Residential Ins. Co. v. Vanderlaan*, 819 P.2d 1103, 1105 (Colo. App. 1991)). The Rule 120 court had not, therefore, issued a "final" judgment as to the party's standing. Because there was no final judgment, there was no bar to the standing challenge. *Id.* By negative deduction, if a final ruling on standing in state court had not been preclusive, there would have been no need for the court to invoke the lack of finality in the Rule 120 proceeding. *Miller* therefore stands for the proposition that final rulings on standing in state court, like that now before the Court, are preclusive in later federal litigation.

Conclusion

Each doctrine addressed in this brief gets at one of two basic ideas. First, matters of state tax law should be heard in state courts when possible. Congress adopted this policy when it passed the Tax Injunction Act, and the federal courts likewise embraced it through the common law doctrine of comity. Both ask this Court not to rule on the substance of CO2 Com-

mittee's claim, since the Colorado courts are more familiar with the structure of Colorado tax law and feature a procedurally fair process which protects CO2 Committee's rights. Second, once a party has brought and lost a case, it must accept the judgment and move on. It may not bring that same case to a different court to try again. Another court has already ruled on the issues CO2 Committee now wants to bring before this Court. The Colorado Supreme Court ruled that CO2 Committee lacked standing under Colorado's mineral tax structure to challenge the tax as applied to it. The same court also ruled on the substantive issue of the validity of the tax in question, after Kinder Morgan, CO2 Committee's legal representative under that statutory structure, challenged it. CO2 Committee is now before this Court demanding a different result on both issues. Even if this Court had jurisdiction to hear that complaint, it should still hold that CO2 Committee and its representative have already argued these issues and lost. The judgment of the district court should be AFFIRMED.

Dated January 29, 2025.

/s/ Madeleine P. Mayfield
Nathan A. Keever, Atty. Reg. No. 24630
Madeleine P. Mayfield, Atty. Reg. No. 61008
DUFFORD WALDECK
744 Horizon Court, Suite 300
Grand Junction, CO 81506
T: 970-241-550
F: 970.243.7738
E: keever@dwmk.com, mayfield@dwmk.com

Attorneys for Defendants/Appellees

APPELLANT'S REPLY BRIEF
(FEBRUARY 19, 2025)

Appellate Case No. 24-1337

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff-Appellant,

v.

MONTEZUMA COUNTY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado
Case No. 23CV2457-CNS-NRN
The Honorable Charlotte N. Sweeney

John M. Cogswell, Esq.
Cogswell Law Offices
PO Box 705
Saratoga, WY 82331
Telephone: (303) 887-3923

Brenton Gragg, Esq.
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout Street, Suite 1900
Denver, CO 80202
Telephone: (303) 534-4499

Facsimile: (303) 893-8332

Attorneys for Appellant CO2 Committee, Inc.

Oral Argument is Requested

I. Introduction

The essence of the CO2 Committee, Inc.'s (the "Committee") claims are that the County,[1] without notice or due process and in violation of 42 U.S.C. § 1983, the Fifth Amendment, the Fourteenth Amendment, and Colorado law (particularly C.R.S. § 39-10-106(1)), illegally taxed the CO2 Committee, Inc. (the "Committee") for taxes which the Committee did not owe. The Colorado Supreme Court held that the Committee had no standing to pursue its tax-related claims in Colorado's courts. Where a person has no standing in the courts of the state, there is no remedy available in the courts of that state. Because there is no remedy available to the Committee in Colorado's courts, 28 U.S.C. § 1341 (the "Tax Injunction Act" or "TIA") cannot bar the Committee's claims from federal court, and the District Court erred in deciding it lacked subject matter jurisdiction.

In response to the Committee's Opening Brief, the County presents a statement of the case at odds with the Committee's underlying Complaint. Among other things, the County claims that the Committee is challenging the retroactive assessment itself rather than the assessment's application. The County claims also that Colorado's courts have "heard" the Committee's

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[1] Collectively, the Montezuma County, Montezuma County Board of County Commissioners, and the Montezuma County Assessor.

claims. What is more important, however, is what the County does not say: beyond a general claim that the procedures in Colorado's courts are sufficient to trigger the TIA's bar, the County does not argue that Colorado's procedures are "plain, speedy and efficient" within the meaning of the TIA. The County does not defend the remedy the District Court purported to find—third-party Kinder Morgan's lawsuit years before the Committee received notice—as "plain, speedy and efficient," either. The County also declines to defend the District Court's reliance on the County's motion to dismiss rather than exclusively relying on the complaint in violation of the facial attack standard provided in *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995).

Because the Committee has no plain, speedy and efficient remedy in Colorado's courts, the District Court erred in dismissing the Committee's complaint for lack of subject matter jurisdiction. This Court should reverse the District Court's Order dismissing the complaint for lack of subject matter jurisdiction and hold that the District Court has subject matter jurisdiction.

II. Argument

A. The County misunderstands the TIA and caselaw interpreting it

The County is correct that the TIA does not require that a claimant win for state courts to provide the "plain, speedy and efficient remedy." It is also correct that the TIA concerns only procedural criteria for a remedy, and that the mere failure of a litigant to prevail in state court does not prove the absence of a

remedy. But this all misses the point. The County does not respond at all to the Committee's argument that there is no remedy that is "plain," or "efficient" on a procedural level, and instead just insists that there is. Op. Brief at 14-19, 23-28. It is not so. Without standing to bring a justiciable case, the Committee has no remedy at all. Colorado's Supreme Court construed Colorado's oil and gas statutes to require the unit operator, not the taxpayer Committee, to have standing. Thus, for taxpayers like the Committee, no remedy, procedural or otherwise, is available. For this reason, the TIA could not deprive the District Court of subject matter jurisdiction, a point which both the applicable caselaw and purpose of the TIA support.

i. The Committee has no plain, speedy and efficient remedy under applicable caselaw

Rosewell defined "remedy" as a "legal means to recover a right . . . or obtain redress for . . . a wrong." *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 516 (1981) (quoting Webster's New International Dictionary of the English Language 819, 1878, 2106, 2418 (2d ed. 1934)). In order to have the legal means to recover a right or obtain redress for a wrong, a litigant must have standing, because otherwise it lacks the ability to bring "a justiciable case." *Steel Co. v. Citizens For Better Environment*, 523 U.S. 83, 102 (1998) ("Standing to sue is part of the common understanding of what it takes to make a justiciable case"); *Developmental Pathways v. Rutter*, 178 P.3d 524, 530 (Colo. 2008) ("the doctrine of standing concerns a litigant's right to bring a cause of action"). Without standing, "no relief," that is, no remedy, "can be afforded" to a litigant. *Wimberly v. Ettenberg*, 570 P.2d 535, 539

(Colo. 1977); REMEDY, Black's Law Dictionary (12th ed. 2024) ("remedy n. (13c) 1. The means of enforcing a right or preventing or redressing a wrong; legal or equitable relief. — Also termed civil remedy.").

The County claims that the Colorado Supreme Court never decided whether the Committee had a remedy in Colorado's courts or within the meaning of the TIA. Resp. Brief at 11. It is true that the TIA was not at issue within *Colorado Prop. Tax Adm'r v. CO2 Comm., Inc.*, 2023 CO 8, ¶ 30, 527 P.3d 371, *reh'g denied* (Apr. 24, 2023) (hereinafter, "*CO2 Comm*."). But this misses the point. The Colorado Supreme Court decided that the Committee lacks standing to challenge the County's retroactive assessment of increased property taxes. *Id.* at 380. In effect, this means the Committee has no "legal means to recover a right . . . or obtain redress for . . . a wrong" within Colorado's courts, that it could not bring a justiciable cause of action concerning assessments against it, and that it lacked "[t]he means of enforcing a right or preventing or redressing a wrong." *Rosewell*, 450 U.S. at 516; *Steel Co.*, 523 U.S. at 106; REMEDY, Black's Law Dictionary (12th ed. 2024). Just because the Colorado Supreme Court did not use the word "remedy" expressly does not mean that Colorado's courts in fact provide a remedy to the Committee. Denying the Committee standing to bring claims concerning Colorado's taxes was the same thing as denying it a remedy.

The County's attempt to explain away *Sacks Bros. Loan Co. v. Cunningham*, 578 F.2d 172 (7th Cir. 1978) fails. In *Sacks Bros.*,[2] the claimant had not

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[2] The County implies that *Sacks Bros.* was superseded by *Rosewell* because *Rosewell* came afterward, but it articulates no

proven that state courts would not entertain its claims because it had declined to appeal, and the state's untested procedures appeared to provide a remedy. *Sacks Bros.*, 578 F.2d at 174-75 ("at least one of two statutory avenues of review appears to be available . . . this case comes to us after a dismissal without appeal in state court of plaintiffs claim against collection of the same taxes . . . . "). Mere dismissal did not prove there was no remedy. *Id.* at 174 ("it would be unreasonable to assume that the state would establish these rights and then deny judicial review to vindicate them, and our research indicates that such a denial has not taken place."). Proving the absence of a remedy required demonstrating "based on state statutes or case law, that the state courts would not entertain its challenge." *Id.* at 175. Thus, the claimant had not proven that a remedy was unavailable because it had not appealed to test the issue.

Unlike the claimant in *Sacks Bros.*, the Committee did appeal the dismissal of its claims in Colorado's courts. Unlike the claimant in *Sacks Bros.*, the Committee can demonstrate—with an order from Colorado's highest court—that, "based on state statutes [and] case law" interpreting those statutes, "the state courts would not entertain its challenge." *Id.* at 175; *CO2 Comm.*, 527 P.3d at 380. *Sacks Bros.* explains what a claimant must do to show the absence of a remedy in state courts, and the Committee has made that showing. *CO2 Comm.*, 527 P.3d at 380.

The County's explanation of *Burris v. City of Little Rock*, 941 F.2d 717 (8th Cir. 1991) fares no better.

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inconsistency. There is no reason to believe the cases are inconsistent, and they are consistent.

In that case, the taxing authorities gave, and the appellants received by certified mail, advance notice of the tax to be assessed against them. *Id.* at 721 n.3. The appellants just claimed that it was insufficient. *Id.* The notice was also published in a newspaper. *Id.* Even after the objection deadlines associated with those forms of notice had passed, "there were other remedies available" because "[t]he appellants could have sued in chancery court to enjoin the assessment under [an Arkansas statute], which specifically targets illegal tax assessments." *Id.* at 721. Those claimants did not do so, so they did not prove that the apparent remedy was illusory or less than "plan, speedy and efficient." *See id.*

By contrast, the County did not give the Committee notice of the assessment (it claimed none was owed), and the Committee did not receive notice of the assessments at issue (by certified mail or otherwise) until after Kinder Morgan litigated the issue to the Colorado Supreme Court. Aplt. App. at p. 19 ¶ 34, p. 21 ¶¶ 38, 40. When the Committee brought a challenge that appeared to be available under Colorado's statutes, it was dismissed for lack of standing. *CO2 Comm.*, 527 P.3d at 380. The appellants in *Burris* had a procedural remedy available to them in state courts: they could have objected or sued, and there was no evidence that the state courts would not entertain their challenge. *Burris*, 941 F.2d at 721. By contrast, the Committee has no way to challenge taxes because Colorado's Supreme Court has said the Committee may not utilize the procedures available.

ii. The Committee's position is consistent with the text and purpose of 28 U.S.C. § 1341.

The TIA requires a "plan, speedy and efficient" remedy in state courts to bar subject matter jurisdiction. It does not bar subject matter jurisdiction when there is no such remedy. The County's reading is that so long as courts go through the motions by dismissing a case for lack of standing, nothing more is required for a "plain, speedy and efficient" remedy. The TIA's remedy requirement cannot be so hollow, because a remedy impossible to obtain is no remedy at all.

The County implies that the Committee voluntarily waived its constitutional claims by designating a unit operator as its sole representative, and that this satisfies the TIA. Resp. Brief at 14. In doing so, the County overlooks the underlying chronology and ignores the requirement that there must be a remedy to preserve the Committee's federal rights. *Fair Assessment in Real Est. Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 n.8 (1981). Unit operator Kinder Morgan's case was decided in 2017. *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Commissioners*, 396 P.3d 657 (Colo. 2017) (hereinafter, "KM2"). According to the County, this was the Committee's sole opportunity to bring constitutional claims. The problem is that no one could have known it was such an opportunity at the time. The Colorado Supreme Court did not decide that the unit operator was the sole, statutorily designated representative concerning tax litigation under Colorado's statutory scheme until 2023. *CO2 Comm.* 527 P.3d at 380. In 2021, the Colorado Court of appeals had come to the opposite conclusion. *CO2 Comm., Inc. v. Montezuma Cnty.*, 491 P.3d 516 (Colo. App. 2021), *as*

modified on denial of reh'g (May 13, 2021), *rev'd sub nom. Colorado Prop. Tax Adm'r v. CO2 Comm., Inc.*, 527 P.3d 371.[3] In other words, the County argues that the Committee waived its constitutional claims before the Colorado Supreme Court determined that Kinder Morgan alone could bring them. Waiver requires more. *See Wright v. Sw. Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991). It is not the case that the Committee's members knowingly or voluntarily waived constitutional rights through Kinder Morgan's challenge. Kinder Morgan's litigation cannot be a "plain, speedy and efficient remedy" within the meaning of the TIA so it cannot serve the purpose. Op. Brief at pp. 25-28. Except for the broad claim that the Committee had its day in court through Kinder Morgan, the County does not argue that this purported remedy was "plain, speedy and efficient" at all.

Finally, the County argues that the purpose of the TIA is served by declining to hear the Committee's claims in federal court because otherwise it would "throw[ ] open the doors to federal courts." Resp. Brief at 16. But that's wrong. This case concerns only non-operating small share working interest owners under Colorado's oil and gas taxation scheme. Colorado's oil and gas taxation scheme itself is "unique." *CO2 Comm.*, 527 P.3d at 373 ("We reach this conclusion after examining the statutory scheme . . . related to the taxation of oil and gas leaseholds and determining that article 7 of title 39 creates a unique representative system"). There is no reason to think the floodgates

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[3] The County notes that 11 judges heard the Committee's case. Resp. Brief at 9. Three of those judges, a unanimous division of the Colorado Court of Appeals, agreed that the Committee had standing to bring its claims.

would open just because a narrow slice of oil and gas interest owners in one state is allowed to challenge taxes assessed against them. And the exception to the TIA here could be narrower still: while prospective claimants are now aware that only a unit operator can bring their claims, the Committee's members could not have known because *CO2 Comm*. was issued after the unit operator had already exhausted its litigation. The exception to the TIA here would hardly throw open the doors to federal courts because a small group of claimants in one state with a unique statutory scheme were denied a remedy.

B. Comity and claim preclusion do not undermine the Committee's position

i. Comity does not apply for the same reason the TIA does not apply: there is no remedy available in Colorado's courts

The County quotes *Levin v. Corn. Energy, Inc.* for the proposition that "the comity doctrine is more embracive than the Tax Injunction Act." Resp. Brief at 20 (quoting 560 U.S. 413, 424 (2010)). Those words appear in the case, but the County omits an important qualifier to the *Levin* Court's application: "The comity doctrine, we hold, requires that a claim of the kind here presented proceed originally in state court." *Levin*, 560 U.S. at 417. The "[r]espondents [t]here . . . could have asserted their federal rights by seeking a reduction in their tax bill in an Ohio refund suit," but they did not take that step first. *Id.* at 431 n.12. The situation is different when "[n]o refund suit (or other taxpayer mechanism) [is] open to the plaintiffs . . . [where] they d[o] not, therefore, improperly

bypass any state procedure." *Id.* Thus, the problem with the County's argument under *Levin* is that the Committee did originally proceed in state court. It was told that the state courts would not entertain its claim because the Committee lacked standing under Colorado's statutory framework, so "[n]o refund suit (or other taxpayer mechanism) was open to the" Committee and the Committee "did not, therefore, improperly bypass any state procedure" that would trigger comity's considerations. *Id.*

Both the TIA and the comity doctrine look to see if there are "plain, speedy" and complete or efficient remedies available to a claimant. *Fair Assessment in Real Est. Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 n.8 (1981). This Court has also treated the standards as functionally equivalent and noted that both require at least some remedy in state court. *See Landowners United Advoc. Found., Inc. v. Cordova*, 822 F. App'x 797, 802 (10th Cir. 2020) ("For the same reasons stated in the above TIA analysis . . . the comity doctrine also supports the district court's dismissal for lack of jurisdiction.") (unpublished). Neither the TIA nor comity are a bar when such remedies are lacking, especially when the claimant has sought them already and been told they are not to be had.

The County points out that *Fair Assessment* dealt only with the situation before it, but the circumstances the Court considered in *Levin* were also narrow: the Supreme Court had never had the "occasion to consider, under the comity doctrine, a taxpayer's complaint about allegedly discriminatory state taxation framed as a request to increase a competitor's tax burden." *Levin*, 560 U.S. at 425-26. In *Levin*, the court was "squarely presented with the

question," and it held, narrowly, "that comity precludes the exercise of original federal-court jurisdiction in cases of the kind presented here." *Id. Levin* did nothing to upset the standard articulated in *Fair Assessment*, that "taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete . . . . " *Fair Assessment*, 454 U.S. at 116. *Levin* did not upset "the principles recognized in" *Fair Assessment* as though they were single application rules—whether the Court considers "plain, speedy, and complete" or "plain, speedy and adequate," "both phrases refer to the obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost." *Id.* at n.8. "[T]he principles recognized in" *Fair Assessment* were the principles governing comity, and the footnote did not suggest that the court in *Fair Assessment* made those principles inapplicable everywhere else. Here, where the Committee's federal rights will be lost because there are no state court remedies available at all, comity does not bar the Committee's claims any more than the TIA.

ii. Neither KM2 nor CO2 Comm. present claim preclusion because they determined different claims

For claim preclusion to apply, "three elements must exist: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (quoted source and internal punctuation omitted). In addition, there must be a "'full and fair opportunity to litigate'

the claim in the prior action." *Id.* (quoting *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005)). Claim preclusion cannot apply concerning Kinder Morgan's litigation in KM2 because there was neither an identity of the causes of action nor a full and fair opportunity for the Committee to litigate its claims in those proceedings. Claim preclusion cannot apply concerning *CO2 Comm*. because there was not identity of the causes of action or a final judgment on the Committee's claims. The holding in *CO2 Comm*. was that Colorado's courts will only entertain suits by primary taxpayers in the oil and gas context, not that the Committee lacked standing as the ultimate taxpayer for purposes of its constitutional rights. Moreover, the Committee's claims were dismissed for lack of standing, so there is no final judgment on the merits.

a) Kinder Morgan's litigation does not present claim preclusion because those proceedings concerned only Kinder Morgan's tax liability and its relationship to the Cortez Pipeline

Kinder Morgan's challenge to the taxes imposed on it concerned (1) whether the County could impose a retroactive assessment on Kinder Morgan after giving Kinder Morgan notice and the opportunity to be heard (the County could) and (2) whether Kinder Morgan was a "related party" vis-à-vis the Cortez Pipeline Company (it was). *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Commissioners*, 396 P.3d 657, 659-60, 667-8 (Colo. 2017) ("KM2"). The Committee challenges neither of these holdings, which resulted in "*Kinder Morgan's tax liability* increas[ing] by over $2 million." *Id.* at 663 (emphasis supplied). What the

Committee challenges here is whether the County could impose the same retroactive assessments on *the Committee*, rather than Kinder Morgan, absent *the Committee* receiving notice and the opportunity to be heard. Aplt. App. at 24-25. KM2 was the culmination of proceedings about Kinder Morgan alone and its tax liability, and Kinder Morgan had its grievances heard on the merits. But the Committee's issue is distinct: KM2 did not hold that the Committee was a "related party" vis-à-vis the Cortez Pipeline, and therefore unable to take transportation deductions. *See* KM2. KM2 did not hold that the Committee could be liable for taxes imposed on Kinder Morgan. *See id.* Accordingly, claim preclusion is inappropriate because even if Kinder Morgan and the Committee are in privity, the claims are not identical. It is one thing for Kinder Morgan to challenge taxes assessed against it after it received notice and a hearing, but it is another thing entirely for the Committee to challenge taxes assessed against it after the Committee received no notice or opportunity to be heard.

Moreover, as described supra, no one could have known that KM2 would apply to the Committee when KM2 entered, so there was not a full and fair opportunity to litigate the issue. The Colorado Supreme Court had not determined that the unit operator was the sole, designated representative under Colorado's statutory scheme, which it only determined years later in 2023. *See CO2 Comm*. The County asks this Court to hold the Committee forever barred from bringing its claims because Kinder Morgan brought different claims and lost, but no one could have known that Kinder Morgan's litigation was the only chance for the Committee's injuries to be redressed. The full and fair

opportunity prong of claim preclusion requires more. *See Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 480-81 (1982).

b) Claim preclusion cannot bar the Committee's claims because the Colorado Supreme Court's narrow granting of certiorari did not concern the Committee's constitutional claims

The Colorado Supreme Court granted certiorari to the Colorado Property Tax Administrator—not the County—on a narrow issue: "Whether the court of appeals erred in holding that nonoperating fractional interest owners in an oil and gas unit have standing to separately challenge a retroactive assessment of tax on the unit, apart from the designated unit operator." *CO2 Comm.*, 527 P.3d at 375 n.2. It did not grant certiorari concerning whether the Committee had standing under Article III of the United States Constitution to bring claims for constitutional violations. It did not decide whether the Committee had standing for all purposes related to its dispute with the County, only whether Colorado's oil and gas statutes permit someone other than the operator to challenges taxes levied against the unit in Colorado's courts. Because the Colorado Supreme Court interpreted those statutes to define "taxpayer," "[a]ny person," and "operator" to mean the operator and the operator alone, it held that the Committee lacked standing for purposes of those statutes. *See CO2 Comm*. 527 P.3d at 378-80.

Essentially, the Colorado Supreme Court's decision defined the taxpayer under Colorado's oil and gas

statutes such that a "taxpayer" in the ordinary sense of the word is not a "taxpayer" under the statutes. Thus, only "[t]he person liable for the tax, primarily," i.e., the unit operator, is the taxpayer under Colorado's oil and gas statutes, even though the operator "cannot always be said to be the real taxpayer[,] [because] [t]he taxpayer is the person ultimately liable for the tax itself." *Colorado Nat. Bank of Denver v. Bedford*, 310 U.S. 41, 52 (1940); TAXPAYER, Black's Law Dictionary (12th ed. 2024) ("taxpayer (1816) Someone who pays or is subject to a tax."); CO2 Comm., 527 P.3d at 377 ("each fractional interest owner is liable for its proportional share of the unit's taxes. § 39-10-106(1)"). Practically, this means that the person ultimately liable for the tax under Colorado's oil and gas statutes cannot obtain redress concerning taxes levied against it in Colorado's courts, but it does not mean the Committee lacks standing under Article III as the one ultimately liable for the tax. *See Bedford*, 310 U.S. at 52. In that regard, the Colorado Supreme Court's decision holds weight but is not determinative, especially where it does not logically follow from the "the language of the act." *Id.* The proper inquiry for purposes of standing here is into the substance, questioning who is ultimately liable for a tax rather than relying on technicalities, and, therefore, has suffered a justiciable, concrete, and particularized injury within the meaning of Article III. *Cf. United States v. Williams*, 514 U.S. 527, 535 (1995) (discussing *Bedford* and noting the Court's "preference for commonsense inquiries over formalism" when considering who is subjected to a tax). The Colorado Supreme Court never addressed the issue.

Thus, the Colorado Supreme Court's decision in *CO2 Comm.* determined that Colorado's courts will

not hear tax challenges assessed against a nonoperating fractional interest owner in an oil and gas unit because it is not primarily responsible for the taxes, and that alone. It expressly did not determine that such a person is not ultimately liable for the tax or that it does not have standing to challenge constitutional violations. *CO2 Comm.*, 527 P.3d at 377 ("If the operator fails to collect the tax, the county treasurer is not precluded 'from utilizing lawful collection and enforcement remedies and procedures against the owner of any fractional interest to collect the tax owed by such owner.' § 39-10-106(4)(a)"). It follows that the Colorado Supreme Court's decision cannot support claim preclusion against the Committee because standing for purposes of Colorado's oil and gas statutes is distinct from standing for purposes of Article III. *CO2 Comm*. determined the Committee does not have *primary* responsibility for the taxes assessed against it, which is required for standing in Colorado's courts, but here the Committee's standing is grounded in *ultimate* responsibility, which even the Colorado Supreme Court concedes is borne by the Committee. *Id.* Because the Committee is ultimately liable for the taxes assessed by the County, it has standing under Article III of the United States Constitution, and there is no claim preclusion under *CO2* Comm. because the case concerned only primary responsibility.

Finally, if claim preclusion barred the Committee's claims here, the doctrine would make tax challenges effectively impossible because of the TIA. A claimant would not be able to prove, as the Committee has, that state court remedies are unavailable without losing an audience in federal court at the same time. If a claimant had been denied a remedy for lack of stand-

ing, as here, the taxing authorities could argue, as here, that the claimant's attempt to utilize state courts is fatal. But the Committee must prove that state court remedies are unavailable, or at least that they are not plain, speedy and efficient, if it is to proceed in federal court. 28 U.S.C. § 1341. Claim preclusion cannot be used as the County would have it, to override the express exception within the TIA for when state court remedies are unavailable.

C. When considering the County's Motion to Dismiss for lack of subject matter jurisdiction, the District Court erred by failing to construe the Committee's allegations as true

The District Court violated the standards provided by *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995) by relying on allegations in both the Complaint and County's Motion to Dismiss. Op. Brief at 32. The County contributed to this violation by telling the District Court that it "may" accept the Committee's Complaint allegations within its briefing on the motion to dismiss. Aplt. App. at 43. The Committee believes the District Court's violation of Holt's standard justifies the reversal of the District Court's Order holding that it lacked subject matter jurisdiction.

A state tax related complaint in federal court is subject to the TIA and must on motion be dismissed for the lack of subject matter jurisdiction if there is a plain, speedy and efficient remedy in state courts, but no such dismissal is warranted where no remedy exists. 28 U.S.C. § 1341. If the motion is on a facial attack basis as it is here, then the District Court must rely on and "accept the allegations in the complaint as true".

Holt, 46 F.3d at 1003. Such allegations are "solely allegations" of complaint. *Carmichael v. Kellogg, Brown and Root Servs., Inc.*, 572 F.3d 1279 (11th Cir. 2009). Whether there is a remedy depends on the District Court's review of the Complaint, not the motion to dismiss. If there is no such remedy as alleged in the complaint, then the TIA does not preclude subject matter jurisdiction. Neither party can provide additional evidence at the motion to dismiss stage under a facial attack but are confined to the allegations in the complaint. The Committee had no other burden.

The Committee's complaint alleged that the Colorado Supreme Court denied it standing to pursue its claims. Aplt. App. at p. 23 ¶ 50. The law is that where there is no standing, there are no remedies. *Steel Co. v. Citizens For Better Environment*, 523 U.S. 83, 106 (1998) ("Standing to sue is part of the common understanding of what it takes to make a justiciable case"). In Colorado, "the doctrine of standing concerns a litigant's right to bring a cause of action". *Developmental Pathways v. Rutter*, 178 P.3d 524, 530 (Colo. 2008). Since the Colorado Supreme Court denied the Committee standing, the Committee has no remedy in state courts, the TIA cannot bar subject matter jurisdiction, and Committee is entitled to have its claims heard in federal court.

The County argues that the Committee's claim that there was no remedy was not a fact and cannot be presumed true. Resp. Brief at 33. The County's argument is without merit. The penultimate fact in the Complaint is that the Colorado Supreme Court said the Committee had no standing to redress damages from statutory violations. That the Colorado Supreme Court said Committee had no standing was a fact, and

the inference that it had no remedy as used in TIA is hardly necessary. Aplt. App. at p. 23 ¶¶ 50-51. Nonetheless, the County has taken the position that there can be a remedy even though the Committee has no standing ("the lack of standing in state court does not lead to the inference of a lack of remedy"). This cannot be so.

The County relies on *Dronsejko v. Thornton*, 632 F.3d 658 (10th Cir. 2011) where "recklessness" had to be proven in a securities fraud case by the facts after review of the entire complaint, and not just individual allegations in isolation. *Holt* did not sanction isolated allegations but the entire complaint. Even in *Dronsejko*, the court had to accept the complaint allegations facts as true. *Dronsejko*, 632 F.3d at 666. Yet, here the District Court and County relied on allegations from both the County's Motion to Dismiss and Complaint. This was error. At a minimum, the District Court applied the wrong standard—purporting to review the motion to dismiss as a facial attack when it questioned the truth of the allegations—which warrants reversal.

III. Conclusion

The District Court erred by failing to accept the Complaint's allegations as true and relying impermissibly on facts taken from the County's motion to dismiss. In addition, the TIA, comity, and claim preclusion all fail to justify the District Court's dismissal of the Committee's complaint for lack of subject matter jurisdiction. Accordingly, this Court should REVERSE the District Court's Order and Judgment dismissing the Committee's complaint and hold that the District Court has subject matter jurisdiction.

Dated February 19, 2025.

Respectfully submitted,

Allen Vellone Wolf Helfrich & Factor P.C.

/s/ Brenton Gragg
1600 Stout Street, Suite 1900
Denver, CO 80202
Telephone: (303) 534-4499
Facsimile: (303) 893-8332
bgragg@allen-vellone.com

&

John M. Cogswell, Esq.
Cogswell Law Offices
PO Box 705
Saratoga, WY 82331
Telephone: (303) 887-3923

Attorneys for Appellant CO2 Committee, Inc.

APPELLANT'S PETITION FOR REHEARING EN BANC (AUGUST 29, 2025)

Appellate Case No. 24-1337

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CO2 COMMITTEE, INC.,

Plaintiff-Appellant,

v.

MONTEZUMA COUNTY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado
Case No. 23CV2457-CNS-NRN
The Honorable Charlotte N. Sweeney

APPELLANT'S PETITION FOR REHEARING EN BANC

/s/ John M. Cogswell, Esq.
Cogswell Law Offices
206 Arapahoe Drive
Saratoga, WY 82331
Telephone: (303) 887-3923

Attorney for Appellant CO, Committee, Inc.

Rule 40. The panel decision conflicted with a decision of the Court and the U.S. Supreme Court to which the Petition is addressed with citations to conflicting cases which follow; and the full Court's consideration is therefore necessary to secure or maintain uniformity of the Court's decision.

The case involves a facial attack in the defendant County's motion to dismiss. The district court relied on allegations from the County's motion to dismiss. The panel decision ignored this despite cases and arguments of plaintiff CO, Committee, Inc. ("Comm"). Op. Br. at 30-34. Further, the panel's decisions allowed the County to take money from certain Unit working interest owners which was not owed and taken without remedy or due process. The main issue in this case is whether the appellant Comm had a Tax Injunction Act ("TIA") remedy in Colorado courts or not. This Court's panel decision misunderstood Colorado statutes applicable to property taxation and overlooked the district court's incorrect facts. The Court's decision cannot maintain uniformity. See both Introduction and Point 1 below.

Introduction. The Appellant CO, Committee, Inc. is a non-profit corporation authorized by its Articles of Incorporation approved by the U.S. District Court by order dated May 6, 2002 in Civil Action No. 96-CV-02451-ZLW-MJW to look after small share working interest owners and others. In this case, as shown by the Complaint, Comm represents its members who are small share working interest owners ("SSWIOs") in a Unit who are working interest owners ("WIOs") and who have no ownership in the Cortez Pipeline Co. ("CPL") which transports CO, from Colorado to Texas. WIOs alone take in kind in this Unit and pay 100% of

the taxes. Royalty and overriding interest owners ("RIOs") and "ORRIOs") pay taxes pursuant to contracts which the operator manages pursuant to C.R.S. § 39-10-106(2) and provisions in the Unit Agreement ("UA") and Unit Operating Agreement ("U0A") approved by the Colorado Oil and Gas Commission. The Unit operator helps the assessor in determining the annual taxes for the WIOs by submitting to assessor an Annual Statement containing all the WIO's. Each WIO's name, address, fractional interest and net revenue are included. C.R.S. § 39-7-101(1) WIOs have due process with respect to the Annual Statement by C.R.S. § 39-7-101(1.5). When assessor receives the Annual Statement, she determines the taxes due for each WIO by proportioning each WIO's net taxable revenue to the net taxable revenues of all WIO's. C.R.S. § 39- 10-106(1) The percentage for each WIO determines its tax. The operator sends notice to each WIO what its taxes are. The operator collects the taxes from the WIOs and sends them to the County.

In 2009 the assessor, pursuant to the regulations of the Assessor's Reference Library ("ARL"), decided by audit that Kinder Morgan ("KM"), as owner (a WIO) in the Unit and 50% owner of the CPL, could not deduct 100% of its CPL tariff costs because it owned part of CPL. As a result, the assessor sent a retroactive assessment ("RA"), known as "special notice of valuation" dated September 30, 2009 to KM as a "property owner". There is attached Exhibit 1, a copy of the actual "special notice of valuation" sent to KM (subject to motion and order). KM challenged the authority of the assessor to submit a RA. If KM failed, it could no longer deduct from its revenue 100% of the tariff costs.

KM brought suit and lost. The assessor's action was finally approved by *Kinder Morgan CO2 Co. v. Montezuma County Board of Commissioners*, 396 P.3d 657 (Colo. 2017)("KM2"). This case was brought by KM as a WIO, not as an operator of the Unit. The CSCt said "We are therefore asked to decide whether this statutory scheme authorizes retroactive taxation where an operator [referring to KM as a WIO] underreports the selling price at the wellhead of the oil and gas it produces". *Id.* 657, 666-667 (emphasis supplied)

Notwithstanding, the assessor illegally compelled KM, a WIO, to treat itself as the operator and allocate the RA taxes to all WIOs including the SSWIOs had no interest in the CPL ("unrelated")[1]. If the assessor amended the 2008 Annual Statement following its audit of KM, a WIO, it had to apply C.R.S. § 39-10-106(1), as described above. Since the SSWIOs were unrelated to CPL and owed nothing in the RA, then the proportionate process would show nothing for SSWIOs because zero divided by the total net return no matter how large is zero. Yet, rather than doing that, the assessor illegally decided that the SSWIOs share in the $2 million taxes since they were "negligible".

Having summarized the Complaint, the Court will see why a rehearing en bane is required. The

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[1] *KM2* showed that KM and Exxon were the sole owners in the Unit who owned CPL. The RA against KM should have included Exxon but it didn't. Maybe the assessor solved her problem by compelling all WIOs liable in the RA which included Exxon. This helped KM because then it would only have to pay its 44% and Exxon its 44% of the $2 million at the "negligible" expense of the SSWIOs. This was illegal. Comm does not know what really happened without discovery.

Court's errors mostly derived from its reliance on (1) a misunderstanding of facial attack, (2) a misunderstanding of the Annual Statement, (3) a misunderstanding of "all fractional interest owners" or equivalent, (4) a misunderstanding of facts, (5) treating RA against the "Unit" or "operator" rather than against KM, a WIO, and (6) a weakness of the Colorado Supreme Court ("CSCt"). As a result, the Court's Order and Judgment ("Order") is incorrect on different levels and caused errors compromising uniformity.

Point 1. Facial Attack: *District Court's Error.* The County filed its motion to dismiss Comm's complaint for lack of subject jurisdiction on the basis of "facial attack". The district court accepted the facial attack and then relied on and used it in its order eight (actually ten by this counsel) allegations of fact contained in the County's motion to dismiss. This was done in violation of the rule that "the district court must accept the allegations in the Complaint as true", Order at 13. Op. Br. at 30-34. *Holt v. United States*, 46 "F.3d 1000, 1002-1003 (10th Cir. 1995)("A facial attack on subject matter jurisdiction challenges the sufficiency of the complaint's allegations which we accept as true".) Assuming Rule 12(b)(1) is the same as Rule 12 (b)(6), the district court violated *Bell Atlantic Corp. v. Twombly*, 550 U.S. 555 (2007)[2]. The district court's

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[2] While *Twombly* is a Rule 12(b)(6) case, it could be that Rule 12(b)(6) may be used for Rule 12(b)(1), but no case has been found. In other words, assuming a facial attack under Rule 12(b)(1) is the same as under Rule 12(b)(6) (plausible standard), jurisdictional determination allegations under Rule 12(b)(1) must be framed by the complaint, not the defense facts. The Court cited *Ashcroft v. Iqual*, 556 U.S. 662, 678 (2009) which infers that Rule 12(b)(6) is applicable to Rule 12(b)(1) cases. If facial attack in Rule 12(b)(1) is the same as Rule 12(b)(6), then

use of facts from the motion to dismiss is legal error and its order should be reversed. *Tellabs, Inc. v. Makor Issues*, 551 U.S. 308, 322-323 (2007) and *Gee v. Pachero*, 627 F.3d 1178, 1186 (10th Cir. 2010).

GFE Corp. v. Associated Grocers, Inc., 130 F.3d 1381, 1384 (1997) said, "The failure to convert a 12(b)(6) motion to one for summary judgment where a court does not exclude outside materials is reversible error unless the dismissal can be justified without considering the outside materials. *See Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995)" *Brown* at 970 said:

> Nevertheless, a district court's failure to comply with Rule 56 is harmless if the dismissal can be justified under Rule 12(b)(6) without reference to matters outside of the plaintiff's complaint. *Miller*, 948 F.2d at 1566. We therefore review this case only under Fed.R.Civ.P. 12(b)(6) and determine whether Mr. Brown's complaint states a cause of action for which relief can be granted.

Because of the foregoing, the district court's order is clearly wrong because it used "outside materials". The error choices are to be reversed or remanded for Rule 56 (maybe to a magistrate) or, like *Brown* or *Rosewell*, this Court could review the County's motion

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plausibility tells one that the facts can include inferences and assumptions if reasonable. *Tellabs*, *supra*. Plausibility "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement"—the illegal agreement being the issue under discussion in that case and the illegal retroactive assessment against Comm in this case. And, well-pleaded factual allegations and inferences in a complaint are viewed in the light most favorable to the plaintiff.

to dismiss by facial attack on allegations in Comm's complaint according to law and determine whether there is subject matter jurisdiction. The Court did none of this. Rather, the Court overlooked Comm's facial attack argument (Op. Br. 30-34) with a reference to *Ashcroft*, a Rule 12(b)(6) case, stating that "legal conclusions" were inapplicable — and that was it. *District Court's Facts*: Several of County's ten allegations of fact in its motion to dismiss were false but relied on by the district court and sent this Court down the wrong road. The district court not only violated the *Peterson* rule (Order at 13), but the Court only held that legal conclusions were not applicable, citing *Ashcroft*.

The district court's incorrect facts by relying on the motion to dismiss' facts mislead the Court by the term "all fractional interest owners". It was used by the County in its Motion to Dismiss. Then the district court relied on it in its district court order. Then this Court relied on that in its Order mostly because of *Colorado Property Tax Administrator, Petitioner v. CO2 Committee, Inc., Respondent*, 527 P.3d 371 (2023) ("*Comm2*"), dealing with "All fractional interest owners" who are WIOs, RIOs and ORRIOs. The WIOs alone are relevant and are in the Annual Statement and pay all taxes. The operator manages the taxes of RIOs and ORRIOs who are not involved. The district court's use of the County's facts is not only error but used false information which mislead the Court. A few of the incorrect facts relied on by the district court are: "fractional interest owners, like the SSWIOs, own a portion of the Unit's total working interest". (No. The WIOs alone own the working interest.) District court order at 2; "As a result of these assessments, the County retroactively increased the

Unit's valuation by $57 million, increasing the overall tax liability of the Unit by over $2 million". (No. The assessment was solely against KM, a WIO, not the Unit.) District court order at 3; "For 13 years, Kinder Morgan and Plaintiff have challenged the County's retroactive assessments through numerous legal proceedings". (No. Comm had no interest in RA because it had no interest in CPL.) District court order at 4. *This Court's Incorrect Facts*: Comm has set forth the truths of this case in its Introduction from its Complaint. The truths show that the Court's statements which follow are not correct, likely from the district court's order. All of these statements are incorrect and are easily ascertainable by a reasonable person, aware of the Introduction, from the bolded phrases supplied by Comm.

> "This is challenging a retroactive tax assessment imposed on corporate entities in Colorado". Order at 1.
>
> "The Committee's lawsuit is based on a retroactive tax assessment imposed on the Committee's unit operator". Order at 3.
>
> "The County determined that Kinder Morgan's unit owed over $2 million in unpaid taxes based on a related party transaction conducted by Kinder Morgan". Order at 3.
>
> "The Committee alleges that Kinder Morgan then allocated the retroactive tax assessment to all non-operating fractional interest owners . . . ". Order at 3.
>
> "Both the Committee and Kinder Morgan pursued state administrative challenges and then filed the Colorado state court lawsuits

protesting the $2 million retroactive tax assessment". Order at 4.

"The Committee claims that it was only after this ruling, in November 17, that it first became aware of the retroactive tax being imposed on its unit by the County". Order at 4.

"The Committee filed a lawsuit in Colorado state court on October 1, 2018, seeking to challenge the retroactive assessment imposed on Kinder Morgan" Order at 4.

"Colorado law 'creates a representative system for oil and gas leaseholds and lands in which the unit operator serves as the sole taxpayer' . . . [and] "responsible for collecting these taxes from all the non-operating fractional interest owners . . . ". Order at 5.

"Using the Annual Statement, the county tax assessor [upon receipt of the annual statement] then calculates the property taxes owed by the unit, and '[u]nit operators are responsible for collecting these taxes from all of the non-operating fractional interest owners and remitting the total amounts owed to the county treasurer." Order at 5.

"Because the Committee is not a "taxpayer" under the circumstances and is not listed on the Annual Statement filed by the unit operator, the Colorado Supreme Court held that the only entity that receives notice of the valuation or retroactive tax assessment under Colorado law is the unit operator. Order at 5.

> "It [CSCt] further held that the Committee's 'expansive' view — that every fractional interest owner must receive notice of any tax obligation imposed on a unit — is both unworkable and 'illogical' . . . It would require every tax assessor to mail notices of preliminary findings to fractional interest owners — even those "who are not identified in the Annual Statement". Order at 5-6.

Point 2. TIA: *Exceptions and Standing*: The district court must independently assess the facts and procedures to determine whether Comm has a *Rosewell* remedy in state courts. *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2013) and *Rosewell* at 512. The district court and this Court avoided this by seeking exceptions inferring that Comm has no "plain, speedy or efficient remedy" in Colorado courts. Despite the Court's procedural process exceptions, Comm showed why the TIA remedy applied to Colorado courts as defined by *Rosewell*. Op. Br. at 15, 25-28.

This Court relied on the district court holdings that there were exceptions to TIA. Their reasons were (1) the state gave Comm the ability to challenge taxes with a "full hearing and judicial determination", (2) the CSCt said the operator had the power to raise Comm's claims and (3) Comm "failed to establish that [a proper remedy] is impossible in state court". District court order at 11-12. Reason (1) is incorrect and not supported by any evidence. Reason (2) is also incorrect. See Op. Br. at 25-28 and Point 4. Reason (3) is not law and not Comm's burden. Comm's burden is to show there is no remedy and there can be no remedy when there is no standing. See. Op. Br. 14-24.

The Court began with district court (2) above stating the operator's failure to exercise the power to support Comm's claim constituted waiver. KM, as operator, did not know in 2009 what the CSCt held in 2023. *Comm2* The Court then supported the district court (1) that the "full hearing" is a sufficient remedy as a "procedural process afforded" citing *Cities Serv. Gas*, 656 F.2d. at 587. The Court also referred to *Rosewell* that "if minimal procedural remedies are available for the taxpayer to challenge the validity of the tax the federal court must abstain". *Id.* at 587. *Cities* does not apply. In *Cities* the taxpayers were given "the right to a full oral hearing . . . in which all arguments may be presented". Comm has never been afforded such a procedural remedy and there is no evidence to that effect. See Point 3.

The Court then looked for more procedural exceptions by referring to the Annual Statement. This is not correct because the Annual Statement is a due process procedure applicable to the regular annual assessment initiated by the operator and does not apply to a RA initiated by the assessor unless notice is provided. And, if the Annual Statement were a procedural remedy, as noted in the Introduction, Comm would have been relieved of any retroactive taxes because the assessor must comply with C.R.S. § 39-10-106(1).

Lastly, the Court referred to the "principles of federalism". Its reasoning was that "every fractional interest owner" could "file a federal lawsuit" "even though they are not listed on the Annual Statement". As previously noted, all WIOs pay all taxes and all WIOs are listed on the Annual Statement. The Court's findings are not correct. Order at 9-13.

The Court's reasoning with respect to the three exceptions and others do not infer a remedy. The Court should so agree and determine that Comm has no standing in Colorado and thus there can be no remedy. In any case, Comm has shown that a TIA remedy in Colorado does not exist based on the facts in the Complaint.

Point 3. "Full Hearing": Citing the district court's opinion at 2024 WL 3520711 (2024) at 5, the Court said, "The district court held the 'plain, speedy, and efficient remedy' exception did not apply because the Committee and its unit operator (Kinder Morgan) had both been provided a 'full hearing' and judicial determination of their claims for relief'. Order at 6. Differently, the district court said "The challenges brought by Kinder Morgan and Plaintiff to the retroactive assessment meets the requirement that the remedy provide an opportunity for a `full hearing and judicial determination' of Plaintiffs claims". District court order at 11. The fact is that Comm never received "minimal procedural remedies" for a "full hearing" nor were they available to Comm. There is no evidence for such a minimal remedy. There was never a "both". Comm never had a *Rosewell* "full hearing" or an opportunity for one.

Point 4. Power of Operator: KM's effort to help Comm as noted in Order at 9, fn.5, is one WIO trying to help another W10. This is not a procedural remedy. It would take a court to afford a procedural remedy. In *KM2*, KM requested the CSCt to relieve "unrelated" WIOs from the RA. The County would not support this. Comm does not know why that occurred when the assessment was against KM as a WIO. The CSCt did nothing with the request because the case was

against KM, a WIO and the only plaintiff party in *KM2*.

Point 5. Waiver Finding: Both the district court and this Court had language from the County that KM and Comm "both" were acting together. As noted above, that is not correct. KM, a WIO, started its case in 2009 claiming that there was no authority to do a RA. In 2009, KM, a WIO, did not know what the CSCt did 14 years later. Why would KM, a WIO, want to file claims on behalf of Comm between 2009 and 2017 when Comm did not know it had claims. In any case, KM did not know in 2009 what was going to happen in 2023. Waiver cannot be an issue.

Point 6. Annual Statement: The Court relied on the "Annual Statement" (C.R.S. § 39-7-101(1)) to justify its position. As noted in the Introduction, the Annual Statement is not relevant in this case because the RA was delivered to KM, a WIO, not as an operator. By using the Annual Statement, the Court treated the RA as a regular Annual Statement. By using it, the Court reached conclusions that are not correct. The operator did not file the RA as it did with the Annual Statement. The Assessor initiated the RA. Based on the Annual Statement the Court found that (1) Comm was not a taxpayer, (2) "is not listed on the Annual Statement filed by the unit operator" (not true because all WIOs are listed), (3) "the only entity "that receives notice . . . is the unit operator" (not correct because ARL applied to taxpayers, not the operator in *KM2* — Complaint at ¶¶ 17, 19, 21, 23 and Exhibit 1.

Point 7. CSCt's Problem: *Issue and Review*. CSCt did not "review" the Colorado Court of Appeals ("CCApp") as required by CAR 49 and 50(a). The

CCApp's opinion was limited to the WIOs who pay all taxes and who are listed on the Annual Statement. *CO2 Committee, Inc., Plaintiff-Appellant v. Montezuma County, et al*, 491 P3d. 416 ("*Comm1*"). In this case, Comm was the plaintiff acting for SSWIOs who are WIOs. The CSCt's opinion was driven by the "*certiorari* issue"[3] which extended WIOs to "all fractional interest owners in the Unit" by the Colorado Tax Administrator even though Comm objected. The Colorado Property Tax Administrator exercised judicial law by corrupting review, causing no review of *Comm1*, and turning the words "taxpayer", "owner" and "person" under C.R.S. § 39-5-122 to mean "operator" and disregarding what the CSCt said in *Allison v. Industrial Claim, et al.*, 884 P.2d 1113, 1120 (1944) ("There is no question that certiorari is now, and always has been, a recognized form of appellate review.")

New Law and Consequences. In *Comm2*, the CSCt legislated rules that (1) the operator was sole taxpayer, (2) SSWIOs were not taxpayers, (3) the operator is a fiduciary who can represent the Comm (SSWIOs)[4], (4) the words "owner", "taxpayer" and "person" as used in statutes and ARL mean operator

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[3] *Certiorari Issue*: Whether the court of appeals erred in holding that non-operating fractional interest owners in an oil and gas unit have standing to separately challenge a retroactive assessment of tax on the Unit, apart from the designated unit operator.

[4] The operator would win if any WIO thought KM was a fiduciary because of the UA and UOA and what the Court said in *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1162 (10th Cir. 2000): "In view of these precedents, we predict that the Colorado Supreme Court would not categorize as fiduciary all lessee-lessor relationships involving unitization agreements".

and (5) that the representative scheme was extended from statutes applicable to the operator's participation with the assessment of taxes to protecting taxes. Because of these rules, the CSCt found that (1) Comm lacked a legally protected interest and thus had no standing, (2) the County district court was affirmed and (3) *Comm 1* was reversed. This judicial legislation is in violation of *Colorado Constitution, Article II Section 2, Article III, City of Greenwood Village v. Petitioners*, 3 P.3d 427, 444 (Colo. 2000) and *People v. Canister*, 110 P.3d 380, 384 (Colo. 2005). Article III of the Colorado Constitution says CSCt cannot judicially legislate unless "directed or permitted" by the said constitution. Comm has not found any such direction or permission. Judicial legislation is contrary to Colorado law. Moreover, rescuing the Assembly of what a court thinks the Assembly wants is not for the court but for the Assembly. *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004). Compared to *Comm1, Comm2* is mostly *obiter dictum* and its new rules and clearly ex post facto. This Court should not rely on *Comm2* for the reasons shown above primarily because of its *certiorari issue* and its conclusions based on "all fractional interest owners" tells one there is no review. CSCt, relying on all fractional interests, found Comm was not a taxpayer and thus had no standing.

Point 8. Due Process: In a regular annual assessment, the WIOs have due process, by reason of the right to give the operator their net revenue for taxation purposes. No such due process applied to Comm when the County initiated a RA against KM which had notice. The reason is that the County, for reasons unknown, decided it can assess RA taxes against any WIO even though the initial RA was against a

particular WIO. This is a nice way to take money without due process. This is what happened in this case.