

<p>DISTRICT COURT, LAS ANIMAS COUNTY, COLORADO 200 East 1st Street, Room 304 Trinidad, Colorado 81082 Telephone: 719.846.3316</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff: XTO Energy, Inc., a Delaware corporation</p> <p>v.</p> <p>Defendant: PATRICK J. PFALTZGRAFF, in his official capacity as the Division Director of the Colorado Water Quality Control Division of the Colorado Department of Public Health and Environment</p>	
<p>Attorneys for Plaintiffs: Ronda L. Sandquist, Colo. Atty. Reg. No. 9944 Christopher O. Murray, Colo. Atty. Reg. No. 39340 Patrick B. Hall, Colo. Atty. Reg. No. 45317 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Telephone: 303.223.1100 E-mails: rsandquist@bhfs.com, cmurray@bhfs.com, phall@bhfs.com</p>	<p>Case Number: 2015CV30041 Division: D</p>
<p>REPLY IN SUPPORT OF PLAINTIFF’S MOTION TO STRIKE DEFENDANT’S MOTION TO DISMISS</p>	

XTO Energy, Inc. (“XTO”), by and through its attorneys, Brownstein Hyatt Farber Schreck, LLP, submits this Reply in Support of Plaintiff’s Motion to Strike the Motion to Dismiss filed by the Colorado Water Quality Control Division of the Colorado Department of Public Health and Environment (the “Division”), and states as follows:

1. The Division’s Motion to Dismiss, filed while this case was stayed until October 9, 2015 by order of the Court, should be stricken. The purpose of a stay, in general, is to suspend all litigation activities, including the filing of motions. The purpose of the Court’s stay in this case was to halt litigation while XTO and the Division engaged in a series of facilitated discussion sessions

pursuant to the Facilitation Agreement, thus allowing the parties to focus their time and resources on resolving this controversy without the Court's involvement. The Court issued an order granting a sixty day stay, until July 17, 2015, which it then renewed until October 9, 2015. The Division's August 20, 2015 filing of the Motion to Dismiss violated the terms of this Court's stay order, and should not be permitted.

2. Moreover, XTO and the Division are currently engaged in the series of discussions established by the Facilitation Agreement. They have completed three sessions, and have two remaining. The Division did purport, at one time, to withdraw from the Facilitation Agreement as to XTO (XTO disputes the validity of the Division's withdrawal),¹ but re-joined the agreement as to XTO before the facilitated discussions began. Accordingly, even if the Division's arguments were legally sound, which they are not, they have no basis in fact: given the parties are currently engaged in settlement efforts outside of Court, the need and justification for a stay remain.

3. Because the Motion to Dismiss was filed while this case was stayed, the Motion to Dismiss should be stricken.

A. The Filing of the Motion to Dismiss Was Improper, and the Court Need Not Decide It First.

4. XTO does not dispute that lack of subject matter jurisdiction can be raised "at any time," but the two conclusions the Division draws from that basic proposition are wrong.

5. First, this proposition means that the defense cannot be waived, not that a party can file a motion to dismiss for lack of subject matter jurisdiction during a stay. Unless the Court raises the issue on an order to show cause, dismissal for lack of subject matter jurisdiction must be sought by a party through a motion. *See* C.R.C.P. 12(b) (defense of lack of subject matter under C.R.C.P(b)(1) may be raised by motion); *People in Interest of E.E.A. v. J.M.*, 854 P.2d 1346, 1350 (Colo. App. 1992) ("A court can *sua sponte* raise the issue and determine whether it has proper subject matter jurisdiction."). A stay, however, halts litigation activities, including the filing of motions (aside from a motion to lift the stay). In other words, the basic rule that subject matter jurisdiction can be challenged "at any time" does not trump the even more basic principle that a stay suspends litigation. The Division could have moved to lift the stay, obtained an order lifting

¹ The facilitated discussions also involve a third party (another coalbed methane producer in the Raton Basin), but the Division did not attempt to withdraw from the Facilitation Agreement as to that nonparty.

the stay, and then filed a motion to dismiss, but it elected to skip the first two steps. This procedural flaw is not technical, but fundamental and fatal: a substantive motion should not be filed or entertained during a stay. *See Magluta v. U.S. Fed. Bureau of Prisons*, No. 11-cv-02381-RM-KLM, 2013 U.S. Dist. LEXIS 101294, at *3-4 (D. Colo. July 19, 2013) (striking motions filed during stay); *Fid. Nat'l Title Ins. Co. v. Pitkin Cnty. Title, Inc.*, No. 12-cv-03077-RM-KLM, 2015 U.S. Dist. LEXIS 4931, at *3 (D. Colo. Jan. 15, 2015) (denying without prejudice motion for leave to file summary judgment and motion for summary judgment because they were filed while the action was stayed); *Commander Props. Corp. v. Beech Aircraft Corp.*, No: 88-2202-EEO, 1994 U.S. Dist. LEXIS 17147, at *3 (D. Kan. Nov. 30, 1994) (“A stay of the proceedings at least implies that the parties will not litigate while the case is stayed. Litigation includes discovery and motions. While the stay was in effect, the parties had no right to impose upon each other duties to respond to discovery or to motions.”).

6. Second, the proposition that lack of subject matter can be raised “at any time” does not mean that the Court must decide the question of subject matter jurisdiction “at any time” the defendant wishes. Subject matter jurisdiction is not a talisman allowing a litigant to direct the Court’s priorities. As the Division correctly states, it is the inherent power of the Court “to control the disposition of causes on its docket.” *Town of Minturn v. Sensible Hous. Co.*, 273 P.3d 1154, 1159 (Colo. 2012). The Division does not possess this inherent power, however, and thus its unsupported assertion that the Court must first decide its Motion to Dismiss should be rejected. *See* Resp. ¶ 11.

7. The Division’s Motion to Dismiss should not have been filed during the stay, and it need not be decided before XTO’s Motion to Strike.

B. The Court’s Order Is Not “Self-Executing.”

8. Contrary to the Division’s assertions, the Court’s orders entering and continuing stay are not “self-executing.”

9. The Court’s May 18, 2015 order granted a stay of sixty days.

10. The Court’s July 17, 2015 order extended the stay until October 9, 2015.

11. Thus, the stay, as entered, expires after a fixed period of time (subject to status reports requesting continuation of the stay), not automatically upon the occurrence of some event.

12. The Division complains that briefing XTO's Motion to Strike is a waste of resources. XTO agrees. And it could have been avoided if the Division would have meaningfully conferred with XTO regarding its interpretation of the Court's stay orders prior to drafting a fourteen-page Motion to Dismiss.

13. The Court's orders make clear that the stay was in effect when the Division filed the Motion to Dismiss. As a result, that motion should be stricken.

C. The Division Is Currently Participating in the Facilitation with XTO.

14. The merit of its legal arguments aside, the Response omits a key fact: both the Division and XTO are currently participating in the facilitated discussion process. In fact, XTO and the Division have completed three facilitated discussion sessions to date, and are on track to complete the final two on September 21, 2015. *See* Aff. of Ronda L. Sandquist, Sept. 17, 2015 ("Sandquist Aff."), at ¶¶ 4, 8-10.

15. As the Response notes, the Division did purport to withdraw from the Facilitation Agreement as to XTO on July 23, 2015, but the Response fails to mention that, on August 24, 2015, the Division agreed to resume the facilitation with XTO. *See* Sandquist Aff. at ¶¶ 5-7.

16. This omission implies that the litigation should restart because the parties' settlement talks fell apart, but any such argument is as moot as it is misleading.

17. Because the facilitated discussion is ongoing, the need and justification for a stay remain.

CONCLUSION

18. For the foregoing reasons, XTO reiterates its request that the Court strike the Division's Motion to Dismiss without prejudice to refile should the Court later lift the stay.

19. XTO also requests its costs incurred in connection with its Motion to Strike.

Respectfully submitted this 17th day of September, 2015.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2015, I electronically filed a true and correct copy of the foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S MOTION TO DISMISS** with the clerk via the Integrated Colorado Courts E-filing System (ICCES) which will provide notice of such filing and service upon the following:

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