SUMMARY
July 23, 2026

2026 COA 61

No. 25CA0686, *Myrick v. Colorado Energy & Carbon Management Commission* — Energy and Environment — Oil and Gas — Energy and Carbon Management Act — Pooling Interests — Overriding Royalty Interests

As a matter of first impression, a division of the court of appeals interprets section 34-60-116(7), C.R.S. 2025, to decide a timing issue: when an overriding royalty interest (ORRI) derived from a nonconsenting owner's interest should be paid. The division concludes, based on the statute's plain language, that the legislature intended for ORRIs derived from the working interests of nonconsenting owners (owners who bear no risks or costs of developing an oil well) to be paid only after the consenting owners (owners who assume the risks and costs of well development) have recovered the nonconsenting owners' share of production costs. Therefore, the division affirms the district court's order affirming

the Colorado Energy and Carbon Management Commission's order. The division also affirms the Commission's decision not to consider an untimely public comment filed in violation of its rules.

COLORADO COURT OF APPEALS **2026 COA 61**

Court of Appeals No. 25CA0686
City and County of Denver District Court No. 24CV30594
Honorable Ericka F. H. Englert, Judge

Tate Myrick, David Myrick, Jr., and Tina M. Woodby,

Plaintiffs-Appellants,

v.

Colorado Energy and Carbon Management Commission, a Colorado state agency, and Verdad Resources LLC, a Delaware limited liability company,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE FREYRE
Brown and Schutz, JJ., concur

Announced July 23, 2026

Steptoe & Johnson PLLC, Scott M. Campbell, Robert A. Willis, Denver, Colorado, for Plaintiff-Appellants

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¶ 1 This case arises from interests created by an oil and gas lease. Plaintiffs, Tate Myrick, David Myrick, Jr., and Tina M. Woodby (collectively, the Myricks), owners of an overriding royalty interest (ORRI), appeal the district court's order in favor of defendants, the Colorado Energy and Carbon Management Commission (Commission) and Verdad Resources LLC (Verdad), an oil and gas company that is both a mineral owner and an operator of the oil and gas wells at issue.

¶ 2 As a matter of first impression, we are asked to interpret section 34-60-116(7), C.R.S. 2025 (the Pooling Statute), to decide a timing issue based on different types of oil and gas well ownership. Nonconsenting owners choose not to incur the costs and risks of developing oil and gas wells on the front end, while consenting owners bear those upfront costs and risks. Applying the Pooling Statute, should an ORRI derived from a nonconsenting owner's interest be paid immediately upon a well's production or only after the consenting owners have recovered the nonconsenting owner's share of the production costs?[1] The Myricks argue that because an

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[1] The parties do not dispute that an ORRI derived from a consenting owner's interest is payable upon production from a well.

ORRI is a non-cost-bearing interest like a royalty, it should be paid when production begins. Verdad and the Commission argue that because the ORRI derives from a nonconsenting owner's interest, its payment must be delayed until the consenting owners have been reimbursed for the costs and risks of production pursuant to the Pooling Statute. We conclude that the legislature clearly expressed its policy decision to require nonconsenting owners to reimburse consenting owners before receiving production revenue that can be used to pay ORRIs. Accordingly, we affirm the district court's order.

I. Background

¶ 3 The Myricks are the owners of an ORRI in oil and gas leases for property located in Weld County. Verdad operates eight wells within a 1,920-acre drilling and spacing unit (DSU) known as the Sonic Star Drilling and Spacing Unit. The Commission established the DSU after the federal government executed an oil and gas lease to Sonic Star, a Myrick entity, in 2010. The lease provided that the lessor (the federal government) was to be paid a royalty of 12.5%. The Myricks then conveyed the mineral interest in the lease to other parties. As part of the conveyance, the Myricks reserved a 1.25% ORRI.

¶ 4 The eight wells at issue have four working interest owners, including Verdad. For seven of the wells, Verdad is a consenting working interest owner, while the other three working interest owners are nonconsenting working interest owners. On the other well, two working interest owners joined Verdad as consenting owners.

¶ 5 As mentioned above, a consenting owner is a lessee who assumes the development risks and pays the upfront costs of production. A nonconsenting owner is a lessee who refuses to assume any risk or pay its share of production costs up front. Pursuant to the Pooling Statute, a nonconsenting owner's interest is subject to a cost recovery scheme. § 34-60-116(7)(a)(I), (II). A nonconsenting owner is not entitled to receive its share of production until the consenting owners have recovered their costs, plus a statutory penalty. § 34-60-116(7)(b).

¶ 6 The working interest owners secured mineral rights in the DSU in exchange for paying the government a 12.5% non-risk and non-cost bearing royalty interest. *See* § 34-60-116(7)(a); *Garman v. Conoco, Inc.*, 886 P.2d 652, 656 (Colo. 1994) ("The lessor relinquishes its right to the mineral estate in exchange for a smaller non-risk and non-cost bearing royalty interest . . . ."). Thus, the royalty paid to the federal government is not reduced by the costs of drilling and operating on the DSU, which are borne by the working interest owners.

¶ 7 In contrast, an ORRI "is carved out of, and constitutes a part of, the working interest created by an oil and gas lease." *Grynberg v. Waltman*, 946 P.2d 473, 476 (Colo. App. 1996). When an ORRI payment becomes due, it is a debt owed by the lessee and treated as a personal property interest. *Id.* at 477. An ORRI is considered a non-cost-bearing interest. *See Garman*, 886 P.2d at 656 ("Though their contractual origins may differ, both [a] royalty and overriding royalty interests are non-risk and non-cost bearing interests."). But an ORRI, as a derivative of the working interest, cannot be greater than the working interest from which it came. *Grynberg*, 946 P.2d at 476.

¶ 8 In 2022, Verdad sent the Myricks profit division orders that outlined the amount they were entitled to receive for their ORRIs. Those division orders reflected no ORRI revenue owing to the Myricks from the nonconsenting owners. The Myricks responded with a "Form 37 Payment of Proceeds Requests" alleging that the calculations in the division orders were incorrect. Verdad replied that, pursuant to the Pooling Statute, the Myricks were only entitled to ORRIs attributable to the consenting working interest owners at that time; they were not yet entitled to ORRIs attributable to the nonconsenting working interest owners because the consenting working interest owners had not recovered their share of costs plus penalties.

¶ 9 In December 2022, the Myricks requested a hearing before the Commission regarding Verdad's failure to pay their ORRIs. In February 2023, Verdad filed a petition in opposition to the Myricks' request for a hearing. As relevant here, Verdad asserted that, because the Myricks' ORRIs were carved out of both consenting and nonconsenting working interests in the DSU, they were only entitled to receive ORRI revenue attributable to the nonconsenting owners after the consenting owners had recovered their share of costs and penalties from the nonconsenting owners' interests.

¶ 10 Verdad and the Myricks filed competing motions for summary judgment. The Myricks asserted that there were no disputed issues of fact relevant to their position. They did not submit any evidence of industry custom or standards in support of their motion. The

Myricks and Verdad argued that section 34-60-116(7) supported the unambiguous terms of their respective legal positions.

¶ 11 The hearing officer entered a recommended order concluding that the Myricks were not entitled to payment of the ORRIs derived from nonconsenting working interests prior to the cost recovery period. The recommended order was based primarily on Commission Order No. 1-202, dated September 11, 2017, entered in another matter (Catamount Order), which addressed the same issue and was summarized by the hearing officer as follows:

> Order No. 1-202 . . . considered whether the statutory pooling provisions of the Act [C.R.S. § 34-60-116(7)] required the payment of proceeds to ORRIs derived from pooled nonconsenting working interest owners during the cost recovery period. Following a hearing, the Commission held that C.R.S. § 34-60-116(7)(a) unambiguously excluded ORRIs as interests to be paid by consenting interest owners during the cost recovery period. The Commission found that although the statutory language excludes royalties . . . or other similar interests from the reimbursement obligation, that language does not include ORRIs because ORRIs are carved from the interests of nonconsenting owners who are in fact obligated to reimburse consenting owners under the Act. The Commission further found that, based upon a holistic reading of the Act, the legislature would have explicitly identified ORRIs in section 116(7)(a) if it had intended to

> include ORRIs among those interests to be paid during the cost recovery period.

The recommended order granted summary judgment to Verdad and denied the Myricks' motion for summary judgment.

¶ 12 In November 2023, the Myricks filed for an exception to the recommended order (the Exception). The Commission held oral argument on the Exception on January 17, 2024. On January 23, 2024, HRM Resources IV, LLC (HRM) filed an untimely public comment with the Commission in support of the Exception. On January 24, the Commission deliberated on the issues presented at oral argument. It declined to consider HRM's comment because it was filed after the Exception had been fully briefed and argued and was therefore untimely. By a unanimous vote of the five commissioners, the Commission adopted the recommended order as Commission Order No. 1-322.

¶ 13 The Myricks then sought judicial review and declaratory relief in the district court, arguing that Commission Order No. 1-322 was unlawful and should be set aside and that the Commission's decision was arbitrary and capricious or an abuse of discretion. In a thorough written order, the district court denied the Myricks' claims and affirmed the Commission's order. On appeal, the Myricks contend that the Commission (1) acted arbitrarily and capriciously when adopting Commission Order No. 1-322 and (2) reversibly erred in refusing to consider HRM's public comment.

II. Timing of Payment of an ORRI Derived From a Nonconsenting Owner's Interest

¶ 14 The Myricks contend that section 34-60-116(7)(a)(I) is unambiguous and plainly provides that an ORRI is a statutory exception to the cost recovery scheme that should be paid upon production, even before the consenting working interest owners recover costs, plus a penalty from the nonconsenting working interest owners. They reason that an ORRI is akin to a traditional royalty because it is a non-cost-bearing interest. Alternatively, they argue that the statute is ambiguous and that industry standards and customs support their argument. We disagree.

A. Standard of Review

¶ 15 The State Administrative Procedure Act (APA), section 24-4-106(7) and (11)(e), C.R.S. 2025, governs our review. When an appellate court reviews the decision of an administrative agency like the Commission, "[it] may reverse [the] administrative agency if it finds that the agency acted arbitrarily or capriciously, made a decision that is unsupported by the record, erroneously interpreted the law, or exceeded its authority." *Colo. Dep't of Hum. Servs. v. Maggard*, 248 P.3d 708, 712-13 (Colo. 2011). We "presume the validity and regularity of administrative proceedings and resolve all reasonable doubts as to the correctness of the administrative rulings in favor of the agency." *Gessler v. Grossman*, 2015 COA 62, ¶ 11, *aff'd*, 2018 CO 48.

¶ 16 When, as here, our review of the agency's decision requires that we interpret a statute, we do so de novo. *See Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 825 (Colo. 2008). But we may consider and even defer to an agency's statutory interpretation when statutes have assigned the agency considerable authority and an expert role. *See Bd. of Cnty. Comm'rs v. Colo. Pub. Utils. Comm'n*, 157 P.3d 1083, 1088 (Colo. 2007).

¶ 17 When interpreting statutes, we "give effect to the General Assembly's purpose or intent . . . begin[ning] with the language of the statute itself." *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001). Moreover, a statute should be interpreted to give consistent, harmonious, and sensible effect to all of its parts. *Colo. Oil & Gas*

Conservation Comm'n v. Martinez, 2019 CO 3, ¶ 19. When statutory language is clear, we apply the statute as written and need not resort to other rules of statutory construction. *Id.* However, when a statute is ambiguous, we may examine the circumstances surrounding the statute's adoption and the possible consequences of different interpretations to discern the legislature's intent. *Id.* A statute is ambiguous when it is reasonably susceptible of multiple interpretations. *Id.*

B. Law Governing Pooling and Cost Recovery

¶ 18 The Commission is directed to, among other things, "[s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer . . . may obtain a just and equitable share of production therefrom." § 34-60-102(1)(a)(III), C.R.S. 2025; *Antero Res. Corp. v. Airport Land Partners, Ltd.*, 2023 CO 13, ¶ 14.[2] "Pooling is the consolidation of

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[2] At the time of *Antero Resources Corp. v. Airport Land Partners, Ltd.*, 2023 CO 13, the Commission was known as the Colorado Oil and Gas Conservation Commission. It is now known as the Colorado Energy and Carbon Management Commission. Colo. Energy & Carbon Mgmt. Comm'n, *About ECMC*, https://perma.cc/WG78-M4WP.

various mineral interests into one [DSU] so that a single well can efficiently drain a large area of oil and gas with each interest holder in the pool bearing costs and receiving proceeds according to their interest type." *Antero Res. Corp.*, ¶ 15. When fewer than every owner in a DSU voluntarily agree to pool, the Commission has the statutory authority to pool all interests. *See* § 34-60-116(2). Statutory pooling applies to all working interest owners, who can either opt to incur upfront costs and risks as consenting owners or opt not to incur upfront costs and risks as nonconsenting owners.[3] *Antero Res. Corp.*, ¶ 15.

¶ 19 Any involuntary pooling order must contain two pertinent provisions regarding nonconsenting owners. First, the order must provide that the consenting owners are to be reimbursed for paying the nonconsenting owners' share of the "costs and risks" of drilling and operating the wells from the nonconsenting owners' share of production before the nonconsenting owners may receive their share of production:

> Except as provided in subsection (7)(c) of this section, as to each nonconsenting owner who

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[3] Unleased mineral owners are also included in statutory pooling but are not at issue here.

> refuses to agree to bear a proportionate share of the costs and risks of drilling and operating the wells, the [pooling] order must provide for reimbursement to the consenting owners who pay the costs of the nonconsenting owner's proportionate share of the costs and risks out of, and only out of, production from the unit representing the owner's interest, *excluding royalty or other interest not obligated to pay any part of the cost thereof*, if and to the extent that the royalty is consistent with the lease terms prevailing in the area and is not designed to avoid the recovery of costs provided for in subsection (7)(b) of this section.

§ 34-60-116(7)(a)(I) (emphasis added).[4] Further, consenting owners are entitled to receive a "proportionate part of the nonconsenting owner's share of the production until costs are recovered," and "each nonconsenting owner is entitled to own and to receive the share of the production applicable to the owner's interest in the unit *after* the consenting owners have recovered the nonconsenting owner's share of the costs out of production." § 34-60-116(7)(a)(II) (emphasis added).

¶ 20 Second, the statute allows the consenting owners to recover double the nonconsenting owners' share of certain costs as a

[4] Subsection (7)(c) pertains to unleased mineral owners not at issue here.

penalty for the nonconsenting owners not assuming the risks and liabilities of production. § 34-60-116(7)(b)(I), (II).

C. Analysis

¶ 21 At issue here is the meaning of "or other interest not obligated to pay any part of the cost" of production in section 34-60-116(7)(a)(I). The Myricks argue that an ORRI constitutes such an "other interest" that must be paid before the consenting owners are reimbursed for the nonconsenting owners' share of the costs of production because, like traditional royalties, ORRIs do not bear any costs of production. Conversely, Verdad argues that an ORRI is not an "other interest not obligated to pay any part of the cost" of production because it is an interest derived from an owner's working interest, and a nonconsenting owner's working interest is subject to the cost reimbursement scheme in the statute. According to Verdad, the ORRI is payable only after the consenting owners have recovered the costs contemplated by the Pooling Statute. For the reasons we describe below, we agree with Verdad.

1. The Pooling Statute is Unambiguous

¶ 22 Both parties argue that the Pooling Statute is unambiguous and that its plain language supports their respective positions. We agree the statute is unambiguous and conclude that it supports Verdad and the Commission's position.

¶ 23 The language of section 34-60-116(7)(a) makes a clear distinction between owners who agree to bear the risks and upfront costs of developing an oil well (consenting owners) and those who do not (nonconsenting owners). Subsection (7)(a)(I) requires that any pooling order "provide for reimbursement to the consenting owners who pay the costs of the nonconsenting owner's proportionate share of the costs and risks out of, and only out of, production from the unit representing the owner's interest." § 34-60-116(7)(a)(I). The only part of the nonconsenting owner's production that is excluded — that is, not available to reimburse consenting owners — is "royalty or other interest not obligated to pay any part of the cost" of production. *Id.* And subsection (7)(a)(II) specifies that nonconsenting owners are not entitled to receive their share of production until "after the consenting owners have recovered the nonconsenting owner's share of the costs out of production." § 34-60-116(7)(a)(II). Thus, nonconsenting owners are not entitled to any payments until the well reaches payout and the statutory penalties have been paid.

¶ 24 Further, subsection (7)(b) sets forth the reimbursement and risk penalties for nonconsenting owners and specifies how costs are recovered from the nonconsenting owners' "share of production." For certain costs of equipment and operation, the consenting owners are entitled to recover 100% of the nonconsenting owners' share. For this category of costs, the legislature made clear its

> intent that the nonconsenting owner's share of these costs of equipment and operation will be that interest that would have been chargeable to the nonconsenting owner had the owner initially agreed to pay the owner's share of the costs of the well or wells from the beginning of the operation.

§ 34-60-116(7)(b)(I). In addition, the consenting owners are entitled to recover 200% of certain other costs as a penalty for the nonconsenting owners' decision not to incur the risks of production. § 34-60-116(7)(b)(II).

¶ 25 Construing these provisions as a whole, we discern no statutory ambiguities and agree with the Commission's observation that "the [Pooling Statute] pretty clearly sets forth that consenting owners are to be reimbursed first during the cost recovery period until the well pays out."

2. ORRIs Paid by Nonconsenting Owners

¶ 26 Next, we examine the ORRI. As previously noted, an ORRI "is not a freestanding interest. It is carved out of, and constitutes a part of, the working interest created by an oil and gas lease, and is limited in duration to the life of the leasehold interest." *Grynberg*, 946 P.2d at 476; *see Hagood v. Heckers*, 513 P.2d 208, 214 (Colo. 1973) ("[A]n [ORRI] has been defined as a given interest severed out of the working interest or lessee's share of the oil . . . ."). The parties agree that an ORRI is a derivative interest, and the Myricks conceded to the Commission that the ORRI here was carved out of the working interest of a nonconsenting owner. Thus, under well-settled principles of property law, the conveyed interest (ORRI) can be no greater than the interest owned by the conveyor (working interest). *Meadow Homes Dev. Corp. v. Bowens*, 211 P.3d 743, 746 (Colo. App. 2009); *see also Commerce Bank, N.A. v. Chrysler Realty Corp.*, 244 F.3d 777, 783-84 (10th Cir. 2001) (transferee's rights are no better than those held by the transferor).

¶ 27 Neither the statute nor the Commission's rules specifically define an ORRI. True, as the Myricks note, the supreme court has observed that an ORRI is "not to be charged with any of the cost or expense of development or operation." *Hagood*, 513 P.2d at 214; *see Garman*, 886 P.2d at 656-57, 656 n.10 (royalty and ORRI are non-cost bearing interests); 2 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* § 418.1 (2025) ("An overriding royalty is, first and foremost, a royalty interest."). But the supreme court also recognized that an ORRI is merely a "share of the oil" severed from the working interest. *Hagood*, 513 P.2d at 214. And a nonconsenting owner is not entitled to receive its share of the produced oil until the consenting owners have recovered the costs contemplated by section 34-60-116(7)(b). § 34-60-116(7)(a)(II). The fact that an ORRI is not subject to the costs of production does not make it a greater interest than that from which it is derived or transform it into an interest tantamount to a landowner's royalty. *See Meadow Homes Dev. Corp.*, 211 P.3d at 746. So while a nonconsenting working interest owner may not charge the holder of an ORRI with production costs, that nonconsenting owner also cannot access its share of production to pay the ORRI until the consenting owners have recovered the nonconsenting owner's share of production costs and the statutory penalty.

¶ 28 The ORRI here derives from a separate contract between the Myricks and the nonconsenting owner, and the terms of that contract may entitle the Myricks to receive an ORRI on the nonconsenting owner's entire share of production. However, the nonconsenting owner is still subject to the reimbursement provisions of the Pooling Statute, so payment of the Myricks' ORRI cannot come from the nonconsenting owner's share of production until the consenting owners have recouped the costs allowed under subsection (7)(b). To permit otherwise would be contrary to the statutory language and would lead to an absurd result. *See Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004) ("A statutory interpretation leading to an illogical or absurd result will not be followed."); *In re N.B.*, 199 P.3d 16, 18 (Colo. App. 2007) ("If the statutory language is clear, [courts] apply the plain and ordinary meaning, unless the result would be absurd or unreasonable."). Indeed, allowing private contracts to trump the statutory scheme in such a way would subvert the rights of other owners who are not parties to the contract, but who must share the costs of production. *See Winter Park Real Est. & Invs., Inc. v. Anderson*, 160 P.3d 399, 406 (Colo.

App. 2007) ("A person not a party to a contract cannot be compelled to perform its terms . . . .").

¶ 29 The Myricks argue that requiring an ORRI to be paid from production only after the consenting owners recover production costs and a penalty is "an absurd result" that renders the words "or other interest not obligated to pay any part of the cost" a mere surplusage when the "owner" is a working interest owner. We disagree. The phrase "other interest" captures interests created by the landowner that, like a royalty, are non-cost bearing. Indeed, a landowner may create an interest from its fee simple before executing a lease or from its share of the royalty after executing the lease. *See Keller Cattle Co. v. Allison*, 55 P.3d 257, 262 (Colo. App. 2002) (describing the difference between a nonparticipating royalty interest that is expense-free and the mineral interest created by execution of the lease). Therefore, the "other interest[s] not obligated to pay any part of the cost" language is not mere surplusage but instead captures interests granted or reserved from the landowners' interest.

¶ 30 Additionally, we are not persuaded that legislative amendments advance the Myricks' argument. They cite the

Catamount Order that addressed the precise issue we consider here. In that order, the Catamount Commission applied the plain language of the Pooling Statute and concluded as follows:

> The Commission finds that while the statutory language excludes royalties or other similar interests from the obligation to reimburse consenting owners, it does not include overriding royalties because overriding royalties are carved from the interests of nonconsenting owners who have an obligation to reimburse consenting owners under the Act.
>
> Further, where the legislature intended to include overriding royalties in a list of interests, it specifically named overriding royalties. Section 34-60-118[, C.R.S. 2025,] discusses "interests which are free of costs, such as royalties, overriding royalties, and production payments." §§ 34-60-118(5) and (6), C.R.S. The legislature could have included the term "overriding royalties" in § 34-60-116(7)(a), as it did in other sections of the Act. The absence of "overriding royalties" in § 34-60-116(7)(a) shows the legislature did not intend for overriding royalties to be included in the category of interests that are to be paid during the statutory penalty period.

¶ 31 Following the issuance of the Catamount Order,[5] the legislature made changes to section 34-60-116(7)(a)(I). Ch. 361,

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[5] This order was not appealed to the district court.

sec. 1, § 34-60-116, 2018 Colo. Sess. Laws 2155-56. It revised section 34-60-116(7)(a)(I), in relevant part, as follows:

> Except as provided in ~~paragraph (c) of this~~ subsection ~~(7)~~ (7)(c) OF THIS SECTION, as to each nonconsenting owner who refuses to agree to bear ~~his~~ A proportionate share of the costs and risks of drilling and operating the ~~well~~ WELLS, the order ~~shall~~ MUST provide for reimbursement to the consenting owners who pay ~~for the drilling and operation of the well~~ THE COSTS of the nonconsenting owner's PROPORTIONATE share of the costs and risks ~~of such drilling and operating~~ out of, and only out of, production from the unit representing ~~his~~ THE OWNER'S interest, excluding royalty or other interest not obligated to pay any part of the cost thereof, IF AND TO THE EXTENT THAT THE ROYALTY IS CONSISTENT WITH THE LEASE TERMS PREVAILING IN THE AREA AND IS NOT DESIGNED TO AVOID THE RECOVERY OF COSTS PROVIDED FOR IN SUBSECTION (7)(b) OF THIS SECTION.

2018 Colo. Sess. Laws at 2156.

¶ 32 Importantly, the legislature did not add the word "overriding royalties" to section 34-60-116(7)(a)(I), which would have signaled a disagreement with the Catamount Order. Indeed, the legislature refers to ORRIs by name in other provisions of the Act. *See* § 34-60-118(6) ("owners of royalty, overriding royalty, production payment"); § 34-60-122(2)(a), C.R.S. 2025 ("each and every person owning a working interest, a royalty interest, an overriding royalty interest, a production payment”). Instead, the legislature reaffirmed the Commission’s plain-language interpretation through its decision not to name ORRIs in subsection (7)(a)(I), which signals both its approval of the Commission’s interpretation and its intent to exclude ORRIs from “other interest not obligated to pay any part of the cost thereof.” § 34-60-116(7)(a)(I); *see Colo. Pub. Utils. Comm’n*, 157 P.3d at 1089 (“Under the rules of statutory construction, legislative inaction to change this court’s interpretation of a statute is presumed to be ratification of that interpretation.”).

¶ 33 Moreover, rather than invalidating the Catamount Order, the legislature reinforced its cost recovery intent by adding language that a landowner’s royalty must be “consistent with the lease terms prevailing in the area and . . . not designed to avoid the recovery of costs provided for in subsection (7)(b) of this section.” § 34-60-116(7)(a)(I). The legislative amendment, therefore, aligns with our conclusion.

¶ 34 We are similarly unpersuaded that the legislature’s decision to change the word “his” to “the owner’s” in section 34-60-116(7)(a)(I) reflects an intent to include ORRIs in “other interest.” Relying on the Act's definition of "owner," found in section 34-60-103(32), C.R.S. 2025, the Myricks argue that an ORRI is not part of the nonconsenting owner's share of production because an ORRI is not a person with drilling and production rights as defined by the Act. True, an ORRI is not an owner, but as the Myricks conceded, their ORRIs derive from a nonconsenting owner's interest. Allowing an ORRI to be paid before the consenting owners have recovered the nonconsenting owners' share of costs would violate the fundamental intent of the cost recovery provisions of the Pooling Statute.

¶ 35 Finally, we reject the Myricks' argument that their interpretation of the Pooling Statute is "in conformity with industry trade, custom, and usage." They rely on law review articles, treatises, and the HRM public comment to argue that the industry expects the payment of ORRIs from first production (before all costs have been covered).

¶ 36 While we acknowledge that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly," § 2-4-101, C.R.S. 2025, we reject the Myricks' invitation to do so based on the materials they offer because those materials were not presented to or considered by the Commission and are disputed on appeal. *See Club Telluride Owners Ass'n v. Mitchell*, 70 P.3d 502, 503 (Colo. App. 2002) (citing C.A.R. 28 and refusing to consider materials not in the record). Indeed, the Catamount Order is some evidence that contradicts the Myricks' position on industry custom in Colorado. Moreover, we presume the legislature was aware of industry custom when enacting the Pooling Statute, which unambiguously provides the opposite. *Colo. Pub. Utils. Comm'n*, 157 P.3d at 1089.

¶ 37 Applying the plain language of the Pooling Statute, we conclude that an ORRI derived from a nonconsenting owner's share is not subject to payout until the consenting owners have recovered the production costs and penalty detailed in section 34-60-116(7)(b). Accordingly, we discern no error in the district's court's judgment affirming the Commission's order.

III. Public Comment

¶ 38 The Myricks next contend that the district court erred in approving the Commission's decision not to consider HRM's untimely public comment. We discern no abuse of discretion in the

Commission's decision not to consider HRM's comment, for two reasons.

¶ 39 First, HRM did not comply with the procedures for submitting a public comment. The Commission promulgates rules related to practice and procedure. As relevant here, the hearing officer is to consider "written statements, oral statements, the testimony, the evidence, and the arguments presented at hearing" in drafting his recommended order. Dep't of Nat. Res. Rule 520.b, 2 Code Colo. Regs. 404-1. And "[i]f the Commission, Administrative Law Judge, or Hearing Officer receives public comments concerning an adjudicatory proceeding *to be heard*, the public comments will be included in the administrative record for the adjudicatory proceeding." *Id.* at Rule 512.b (emphasis added). But once the hearing concludes, the record is closed. *See id.* at Rule 510.k ("At the conclusion of closing statements, the record will be closed to the presentation of any further evidence, testimony, or statements, except as such may occur in response to questions from the Commission, Administrative Law Judge, or Hearing Officer.").

¶ 40 The hearing officer transmits the recommended order, along with the record, to the Commission. It becomes a final order if no exception is filed. If an exception is filed, "[t]he Commission will conduct a review upon the same record before the . . . Hearing Officer, and a de novo review of the law." *Id.* at Rule 520.c.(1).

¶ 41 No one disputes that the comment was late, as it was not filed until after oral argument on the Exception. Had the comment been timely filed, the parties and the hearing officer could have addressed it. Because the comment was late, it was not part of the hearing officer's record. And the Commission reviewed the hearing officer's recommended order based on the same record that was before the hearing officer. The Commission did not act arbitrarily or otherwise abuse its discretion by following its own rules and rejecting the HRM public comment.

¶ 42 Second, because this was an adjudicatory proceeding and not a rulemaking proceeding, the Myricks' reliance on procedures governing public comment in rulemaking proceedings is misplaced.

¶ 43 Finally, to the extent the Myricks ask us to consider the HRM comment for the first time on appeal, we decline to do so because our review of an agency action under the APA is based upon the record before the agency. *Marks v. Gessler*, 2013 COA 115, ¶ 56.

IV. Attorney Fees

¶ 44 The Myricks request an award of attorney fees incurred in this appeal pursuant to section 34-60-118.5(6), C.R.S. 2025. Verdad makes a similar request. The statute permits the Commission to award reasonable attorney fees and costs to the prevailing party. We deny the Myricks' request because they are not the prevailing party. And we deny Verdad's request because it failed to comply with the procedures set forth in C.A.R. 39.1

V. Disposition

¶ 45 The judgment is affirmed.

JUDGE BROWN and JUDGE SCHUTZ concur.