STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

APPLICATIONS OF PERMIAN RESOURCES OPERATING, LLC FOR COMPULSORY POOLING EDDY COUNTY, NEW MEXICO. **CASE NOS. 25283-25284**

MRC'S POST-HEARING BRIEF

At the conclusion of the hearing, the Hearing Officer requested briefing on the JOA issues raised by the parties. Accordingly, MRC Permian Company and MRC Delaware Resources, LLC (collectively "MRC") files this brief regarding two pivotal JOA-related issues in these cases. First, Division precedent is clear that when all the owners in a pool have agreed on a plan of development, the Division may only modify that plan upon a finding that the modification is necessary to prevent waste, which Permian failed to establish. Second, even ignoring that Division precedent, under any proposed method of analyzing the working interest commitment in the SE/4 of Section 8 where the parties' development plans overlap (the "Overlapping Acreage"), MRC has the significant working interest control over Permian.

I. MRC Has 100% Working Interest Control in the Overlapping Acreage and the Rest of its Proposed Becky Project.

Consistent with MRC's testimony, Permian admitted at hearing that (i) its title also showed that 100% of the working interest in MRC's Becky project, including the Overlapping Acreage, was committed to MRC's 1964 JOA; and (ii) Permian's affiliate, Read & Stevens, Inc., was one of the parties subject to MRC's 1964 JOA. Accordingly, it is undisputed that MRC has 100% working interest control in its Becky project and the Overlapping Acreage.

Permian claimed it had secured the agreement of approximately 44% of the working interest owners in the Overlapping Acreage (who are also party to MRC's 1964 JOA) under Permian's new overlapping Fiero JOA. Even if that was the case, Permian and those other working

interest owners also remain bound by MRC's 1964 JOA. The 1964 JOA is a binding contract among the parties to the JOA—Permian (and the other working interest owners) cannot unilaterally terminate their commitment by entering an overlapping JOA, without the agreement of all the parties to the 1964 JOA. *See Summit Props., Inc. v. Pub. Serv. Co.*, 2005-NMCA-090, ¶ 29, 138 N.M. 208, 118 P.3d 716 (Ct. App. 2005) ("Novation requires (1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one.") (emphasis added); *see also Heltman v. Catanach*, 2010-NMCA-016, ¶ 6, 148 N.M. 67, 229 P.3d 1239 ("Under the general rule, all of the parties entitled to enforce the covenant must agree to the amendment.").

Here, MRC and multiple other working interest owners subject to the 1964 JOA did not sign Permian's overlapping Fiero JOA or otherwise agree to amend or cancel the 1964 JOA.[1] As a result, Permian and the other working interest owners under Permian's Fiero JOA remain bound by the 1964 JOA and MRC still has 100% working interest control in its Becky project and the Overlapping Acreage.

II. Division Precedent Mandates Deference to MRC's Plan with 100% JOA Commitment Absent a Finding that Modifying it Would Prevent Waste.

Mineral owners may voluntarily pool their interests into a spacing unit for development. NMSA 1978, § 70-2-17(C). When, however, not all owners within a spacing unit have agreed to pool their interests, the Division has authority to force pool those interest owners who have not agreed to voluntarily pool their interests to develop their lands as a unit. *Id.*; *see also* Harvey E. Yates Co. v. Cimarex Energy Co., 2014 U.S. Dist. LEXIS 183891, at *23-25 (D.N.M. Mar. 5,

[1] Permian argued at hearing that MRC's position in this case contradicts its practices, but that is not the case. MRC maintains that the parties subject to MRC's subsequent JOA for development of the Turner 7 Deep Federal #1 (API: 30-015-31255), which included lands outside the 1964 JOA contract area, are still subject to the 1964 JOA. MRC does not dispute that overlapping JOAs can exist in certain circumstances or that lands covered in part by a JOA can be force pooled in certain circumstances. But not in these circumstances.

2014). Permian was therefore required to force pool its Fiero development because it does not have 100% working interest commitment under its proposed Fiero JOA.

That being said, when all of the working interest owners have agreed upon a plan of development or operation of a pool, such as through a JOA, force pooling is not necessary and the Division is required to accept that plan, unless modifying the plan would prevent waste. In particular, NMSA 1978, § 70-2-17(E) states:

> Whenever it appears that the owners in any pool have agreed upon a plan, . . . then such plan shall be adopted by the division with respect to such pool; however, the division, upon hearing and after notice, may subsequently modify any such plan to the extent necessary to prevent waste as prohibited by this act.

The New Mexico Supreme Court has confirmed that modification of an agreement among all the working interest owners must be predicated upon the prevention of waste and held that, absent such a finding, the Division lacks jurisdiction to enter a pooling order modifying such agreement. *See Sims v. Mechem*, 1963-NMSC-103, ¶¶ 12-13, 382 P.2d 183 ("[][The statutory authority of the commission to pool property or to modify existing agreements . . . of these sub-sections must be predicated on the prevention of [] waste.").

Here, MRC has 100% working interest commitment under its 1964 JOA for its proposed Becky project. Permian's applications seek to modify the 1964 JOA, by effectively precluding the SE/4 of Section 8 from the agreed development under the 1964 JOA. Thus, the only way for the Division to effect such a modification, where the operator of the JOA opposes it, is to find that the modification is necessary to prevent waste.

III. Permian Failed to Establish that Modifying MRC's 1964 JOA to Allow for Permian's Fiero Development Would Prevent Waste.

Permian claims that MRC's currently proposed Becky development would strand an unleased federal tract in the SW/4 SE/4 of Section 9 and a leased federal tract in the E/2 SE/4 of

Section 9. However, Permian's applications do not seek to include those tracts and, therefore, Permian's applications will do nothing to alter, change, or prevent the purported waste. In other words, even if Permian's applications were granted, those tracts in Section 9 would still need to be included in someone else's development plans.[2]

Moreover, to the extent Permian claims that denying its applications would cause alleged waste by virtue of Permian's lease expiration deadlines, that is not the case. Regardless of Permian's lease expirations, those resources will remain in place for future development and will not be "wasted." In addition, Permian has multiple options to locate pads in locations that would allow it to drill its acreage using 1.5-mile laterals.

Based on the above, the necessary finding that modifying MRC's 1964 JOA to allow for Permian's Fiero development would prevent waste is functionally not possible given the nature of Permian's applications and the claimed waste. As a result, the Division is without authority to modify the 1964 JOA. *See, e.g.,* NMSA 1978, § 70-2-17(E); *Sims v. Mechem*, 1963-NMSC-103, ¶ 12-13, 382 P.2d 183; Division Order R-8013 (application denied because applicant "failed to provide evidence to refute that the 'Agreements'" were not binding); Division Order R-9841 (application denied because pooling was unnecessary since an agreement existed between the parties owning an interest in the proposed spacing unit).

IV. Even Ignoring the above Division Precedent, MRC Owns or Controls the Majority Working Interest in the Overlapping Acreage Under all Scenarios.

Even ignoring the Division precedent discussed above, MRC has the significant working interest control in the Overlapping Acreage—a key factor for Division analysis of partially

[2] Indeed, contrary to Permian's assertion, it is MRC who has taken steps to hopefully prevent any waste in those tracts by nominating the unleased federal tract in the SW/4 SE/4 of Section 9 for leasing and confirming its willingness to work with the working interest owners in those tracts to attempt to include those tracts in MRC's development if those parties desire.

overlapping developments—and therefore (in addition to other reasons outside the scope of this briefing) Permian's applications should be denied.

Even considering Permian's overlapping Fiero JOA, the working interest control in the SE/4 of Section 8 would be (i) MRC with 100% under the 1964 JOA (as set forth above), and (ii) Permian with 44.31991% under its alleged overlapping Fiero JOA. Furthermore, even under Permian's argument, MRC still would have the working interest control advantage of (i) MRC with 55.68009% (being those parties under the 1964 JOA who did not sign Permian's alleged overlapping Fiero JOA), and (ii) Permian with 44.31991% under its alleged overlapping Fiero JOA. Finally, even ignoring the JOAs altogether and looking only at direct leasehold interest, MRC still has the working interest control advantage of (i) MRC with 26.100619%, and (ii) Permian with 1.171875%.

At hearing, although admitting it only had a 1.171875% leasehold interest in the SE/4 of Section 8, Permian tried to argue that it had a 24.760365% contractual interest in the SE/4 of Section 8 by virtue of its Fiero JOA. Permian arrived at this contractual interest by blending its significant interest in the non-overlapping acreage in the S/2 of Section 7 and the SW/4 of Section 8 across the Fiero contract area. That is not the relevant inquiry—the overlapping acreage is. *See* Division Order R-21416 (partially overlapping development factors). In trying to compare its contractual interest of 24.760365% to MRC's leasehold interest of 26.100619%, Permian is comparing apples to oranges and using the benefit of its JOA to calculate its interest, while ignoring MRC's JOA under which MRC has 100% working interest control.

As set forth above, under every possible way of analyzing the working interest control in the overlapping SE/4 of Section 8, MRC has the higher working interest control.

WHEREFORE, MRC respectfully requests that Permian Resources' applications be denied by the Division.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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