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OIL CONSERVATION DIVISION

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APPLICATION OF HILCORP ENERGY COMPANY TO AMEND THE WELL DENSITY AND LOCATION REQUIREMENTS AND ADMINISTRATIVE EXCEPTIONS OF THE SPECIAL RULES FOR THE BLANCO-MESAVERDE GAS POOL, RIO ARRIBA AND SAN JUAN COUNTIES, NEW MEXICO

Case No: 16403

REPLY TO HILCORP'S RESPONSE IN OPPOSITION TO SJCA'S MOTION FOR RE-HEARING

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INTRODUCTION

San Juan Citizens Alliance ("SJCA") hereby responds to Hilcorp Energy Company's Response in Opposition to SJCA's Motion for Re-Hearing in Case No. 16403 before the New Mexico Oil Conservation Commission ("OCC"), Hilcorp Energy Company's Application to Amend the Well Density and Location Requirements and Administrative Exceptions of the Special Rules for the Blanco-Mesaverde Gas Pool in Rio Arriba and San Juan Counties, New Mexico. Hilcorp's arguments in its Response are flawed for the following reasons:

1. OCC may not deny SJCA the ability to file a Motion for Re-Hearing solely on the basis that SJCA does not meet the definition of "party" under OCC's rules. Rather, under New Mexico law on standing and appeals, like a court to whom SJCA may later appeal, OCC must address the merits of SJCA's Motion for Re-Hearing, and cannot avoid doing so simply because it denied SJCA intervention in the first instance.
2. Hilcorp's interpretation of OCC's rules pertaining to intervention renders those requirements meaningless. Hilcorp describes underground reservoir management as the sole issue before the OCC in this matter, ignoring OCC's adjudicatory rules that provide for intervention on a broad range of both underground and surface management issues, specifically "the prevention of waste, protection of correlative rights or protection of public health or the environment." NMAC § 19.15.4.11. Hilcorp's interpretation – that surface waste issues are irrelevant to reservoir management decisions – would render this provision in the OCC's intervention rules meaningless.
3. Hilcorp's argument that SJCA was properly denied standing because it did not intend to present an affirmative case on underground reservoir management issues misinterprets the burden that an intervenor would have if intervention was granted under NMAC §

19.15.4.11. The burden to put on an affirmative case in favor of its application is Hilcorp's, and SJCA has no such burden. SJCA may "contribute substantially" in the proceeding in a variety of ways, including by demonstrating, e.g., through cross examination, that Hilcorp failed to meet its burden.

4. Hilcorp argues that later stages of decision-making are sufficient to address SJCA's surface concerns. Hilcorp is wrong. The OCC itself raised surface issues in these proceedings, such as pipeline capacity and surface impacts, through cross examination of Hilcorp's witnesses, and SJCA is entitled to do so as well. Well density and spacing rules set the pool-wide pattern of development across the landscape, and surface issues are necessarily a relevant factor to ensure a reasoned and informed decision-making process.
5. SJCA rests its arguments that Hilcorp's application should have been considered through a rulemaking proceeding rather than as an adjudication on those arguments presented in its Motion to Deny Hilcorp's Application and Motion for Re-Hearing. Hilcorp does not offer any substantive arguments to counter SJCA's Motions in its Response, ignoring the legal precedent SJCA cites that describes the standard of fairness at issue.

I. OCC MAY NOT DENY SJCA'S MOTION FOR A RE-HEARING SOLELY ON THE BASIS THAT OCC DID NOT ALLOW SJCA TO INTERVENE

Under the Oil and Gas Act and OCC's adjudicatory hearing rules, motions for re-hearing must be brought by a "party of record." N.M. Stat. § 70-2-25, NMAC § 19.15.4.1. While SJCA may not meet the definition of "party" in OCC's rules after its intervention was denied,[1] it is a

[1] NMAC § 19.15.4.1 reads:

A. The parties to an adjudicatory proceeding shall include:

(1) the applicant;

(2) a person to whom statute, rule or order requires notice (not including those persons to whom 19.15.4.9 NMAC requires distribution of hearing notices, who are not otherwise entitled to notice of the particular application), who has entered an appearance in the case; and

(3) a person who properly intervenes in the case.

"party of record" by virtue of its participation in the proceedings through its attempts to intervene, and must be afforded the opportunity to file a motion for re-hearing and have the substance of that motion considered. OCC's rules define "party" for the purpose of limiting those to whom notice and other formal engagements in a hearing must be supplied, but the term "party of record" in the Oil and Gas Act simply limits those who can request a re-hearing and then appeal an OCC decision to the District Court to those who formally participated in the preliminary administrative proceedings. By virtue of its attempt to intervene, SJCA is a "party of record."

Under New Mexico law, appeals are limited to those who have appeared as "litigants in the court below…The same is true of the usual appeal from a decision or order of an administrative agency." *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo Cty. Air Quality Control Bd.*, 459 P.2d 159, 166 (N.M. Ct. App. 1969). Standing is also question of law and is considered de novo on appeal. *See San Juan Agricultural Water Users Assoc. v. KNME-TV*, 257 P.3d 884, 887 (N.M. 2011). Thus, OCC cannot simply dismiss SJCA's Motion for Re-Hearing on the basis that intervention was denied and therefore SJCA is not a "party" under OCC's rules. Rather, like a court to whom SJCA may later appeal, OCC must address the merits of SJCA's Motion for Re-Hearing, and cannot avoid doing so because it denied SJCA intervention in the first instance. OCC must allow SJCA to secure administrative remedies by considering its Motion for Re-Hearing in a substantive manner.

II. HILCORP'S INTERPRETATION OF THE OCC'S INTERVENTION REQUIREMENTS WOULD RENDER THOSE REQUIREMENTS MEANINGLESS

Hilcorp argues that SJCA would only have been properly permitted to intervene if it intended to contribute "expert testimony" related solely to underground reservoir management.

Hilcorp is incorrect. As SJCA established in its pleadings for the November 19th hearing and its Motion for Re-Hearing, OCC's limitation of issues under consideration to solely underground reservoir management misapprehends OCC's statutory duties as well as OCC's responsibility to address all factors relevant to the decision in question, here the pool-wide pattern of well spacing and density that necessarily involves intertwined subsurface and surface issues. The OCC, as detailed in the record for this proceeding and below, itself demonstrated that well spacing and density rules implicate intertwined surface and subsurface issues. Furthermore, under Hilcorp's logic, OCC's intervention rules in NMAC § 19.15.4.11—providing that a party may be permitted to intervene if it "will contribute substantially to the prevention of waste, protection of correlative rights or protection of public health or the environment"—are rendered entirely meaningless. These issues, in particular waste (including surface waste), as well as public health and the environment, are necessarily surface issues. If the OCC adopts Hilcorp's interpretation, no one could ever intervene under this provision.

III. THE BURDEN TO PUT ON AN AFFIRMATIVE CASE IS HILCORP'S, NOT SJCA'S

Hilcorp argues that SJCA was properly denied standing because it did not intend to present expert testimony on underground reservoir management. Setting aside the issue of whether surface management was also at issue in the case, Hilcorp misapprehends the intervenor's burden in this matter. SJCA was only required under NMAC § 19.15.4.11 to show that it would "contribute substantially to the prevention of waste or protection of public health or the environment." Nothing in NMAC § 19.15.4.11 limits intervention only to those parties who intend to present an affirmative case through the presentation of its own witnesses, though SCJCA did intend to do so here. A party – including SJCA – may "contribute substantially" in a variety of ways, including by cross-examining Hilcorp's witnesses to probe whether Hilcorp's

proposed rule change was well-tailored and complied with the law. It is, of course, Hilcorp's burden to justify the change to well spacing and density rules in the Blanco-Mesaverde formation, not SJCA's.

As SJCA emphasized in its Motion to Intervene as well as its Motion for Re-Hearing, the OCC adopted this provision to allow citizens and organizations to engage in proceedings in order to further the OCC's mandates to prevent waste, protect correlative rights, and, most importantly, to protect public health and the environment. The OCC, in adopting this provision, did not intend to limit involvement only to those parties who could "contribute substantially" to underground reservoir issues.

IV. HILCORP'S ARGUMENT THAT LATER STAGES OF DECISIONMAKING ARE SUFFICIENT TO ADDRESS SURFACE ISSUES ARBITARILY COMPARTMENTALIZES DECISIONMAKING

As explained above, OCC rules provide for intervention for parties that would "contribute substantially" with regard to surface management issues, in particular surface waste as well as public health and environmental concerns. Hilcorp's argument that SJCA's surface management concerns can be raised through engagement in subsequent well-by-well permitting and approval processes is therefore irrelevant. Surface management concerns are a relevant factor the OCC must consider when it entertains a change to the pool-wide pattern of well density and spacing, here across the 1.3 million-acre Blanco-Mesaverde Gas Pool. This is acknowledged by the OCC's provisions for intervention as well as by the New Mexico's Oil and Gas Act, which provides that "surface waste" may be caused by "the manner of spacing." N. M. S. A. 1978, § 70-2-3.

Indeed, the OCC itself acknowledged that well spacing and density rules implicate intertwined subsurface *and* surface issues in these proceedings. For example, as SJCA noted in

its Motion for Re-Hearing, but ignored by Hilcorp in its Response, Commissioner Balch asked Hilcorp questions regarding surface impacts, including whether Hilcorp would engage in blanket or targeted infill drilling, how many wells would be recompletions, whether there is horizontal potential in the pool, and whether recompleted wells are preferable over infill wells, adding as part of his question that such a preference "minimizes surface" impacts. Case No. 16403, Reporter's Transcript of Proceedings, Commissioner Hearing, (September 13, 2018) at 74-79. In addition, Chairwoman Riley asked Hilcorp questions regarding pipeline capacity and pressure. *Id*. at 107-108. Hilcorp responded by explaining it had "several pipe projects going on currently," inclusive of "surface modeling," "several projects identified where [Hilcorp] can fit in additional compressions to help lower those surface gathering system pressures so that we can even extend the life of current wells even further," and the acquisition of "Williams Midstream Assets in the San Juan Basin" so that Hilcorp "will be able to do more of those types of [surface pipeline] projects." *Id*. at 108. Put simply, what's 'good for the goose is good for the gander.' The OCC's decision, on the one hand, to raise surface management issues implicated by Hilcorp's application but, on the other hand, to deny SJCA the ability to do so on the basis that surface management issues were not implicated by Hilcorp's application is plainly arbitrary and capricious action.

SJCA and others repeatedly raised concerns regarding pending information requested of the BLM and U.S. Environmental Protection Agency, as well as information the SLO could have contributed had it been allowed to intervene. In SJCA's Pre-Hearing Statement, SCJA also expressly noted:

> SJCA seeks to understand how approvals under this new well density rule would be implemented with respect to the federal government's management responsibility in the San Juan Basin – in particular given that neither Bureau of Land Management's (BLM) 2003 Resource Management Plan (RMP) nor that RMP's underlying Environmental

> Impact Statement contemplates well density on this scale, suggesting an RMP Amendment and supplemental environmental review would therefore be required before changes made to OCC's Special Rules may go into effect.

SJCA Pre-Hearing Statement at 2. Furthermore, OCC has been allowing Hilcorp to engage in extensive surface waste through its drilling operations by issuing gas capture plans to Hilcorp that capture no gas. Rather, those gas capture plans simply allow Hilcorp to vent or flare gas, as evidenced through the exhibit offered by SJCA during oral argument on November 19th. SJCA is concerned that these plans are in violation of federal air quality rules, which may have been clarified by the information pending from the federal agencies.

All of this information—whether asked by the OCC, provided by Hilcorp, or sought by SJCA – was vital to ensure OCC's decision-making process was reasoned and informed. Hilcorp's attempt to wrongly compartmentalize decision-making about subsurface and surface issues uses subsequent decision-making stages by surface management agencies as a shield of convenience to avoid reasonable questions regarding how the relevant agencies would protect public health and the environment when well-spacing density is doubled. Hilcorp did not offer any substantive arguments in its Response or other pleadings to counter SJCA's arguments that the Special Rule as adopted was not well-tailored, but simply rested its arguments on denying SJCA the opportunity to participate in the process, highlighting the fact that by doing so relevant information related to surface impacts was excluded from the proceedings. The attempt to limit relevant information in this way has no basis in law and should be rejected in favor of an open and inclusive process to ensure reasoned and informed well-spacing and density rules for the Blanco-Mesaverde Gas Pool.

V. HILCORP DOES NOT OFFER SUBSTANTIVE ARGUMENTS TO COUNTER SJCA'S ARGUMENTS THAT HILCORP'S APPLICATION SHOULD HAVE BEEN CONSIDERED THROUGH A RULEMAKING PROCEEDING RATHER THAN AN ADJUDICATION

Hilcorp incorrectly argues in its Reply that SJCA is simply attempting to substitute its judgement for the OCC's by arguing that Hilcorp's application should have been considered through a rulemaking proceeding rather than an adjudication. Hilcorp makes this argument without acknowledging the legal precedent SJCA cites that describes a legal standard of fairness which should have guided OCC's decision-making in this case, and which provides nuance to the New Mexico Supreme Court's holding in *Uhden v. New Mexico Oil Conservation Comm'n*, 817 P.2d 721 (1991), which OCC did not consider in its December 4th Order granting Hilcorp's application in this case. Hilcorp's argument entirely fails to acknowledge the precedent cited by SJCA, and does not engage any of the legal arguments in SJCA's Motion for Re-Hearing. SJCA thus rests its arguments that OCC should have considered Hilcorp's application through a rulemaking proceeding rather than as an adjudication on those it presented in its Motion to Deny Hilcorp's Application and Motion for Re-Hearing.

CONCLUSION

For the reasons above, SJCA respectfully requests that OCC substantively consider the issues presented in SJCA's Motion for Re-Hearing and this motion, and that OCC grant a Re-Hearing in this matter.

Respectfully Submitted,

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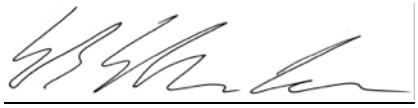

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2018, I served a copy of the foregoing documents to the following counsel of record via Electronic Mail:

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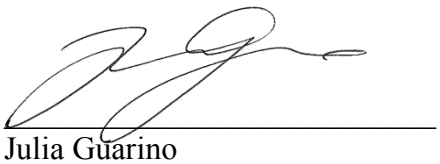

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