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

IN THE MATTER OF THE HEARINGS CALLED BY THE OIL CONSERVATION DIVISION APPLICATION OF LIME ROCK RESOURCES II-A, L.P.

APPLICATION OF LIME ROCK RESOURCES II-A, L.P. FOR APPROVAL OF COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	**CASE NO. 14820**
APPLICATION OF LIME ROCK RESOURCES II-A, L.P. FOR APPROVAL OF COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.	**CASE NO. 14821**
APPLICATION OF LIME ROCK RESOURCES II-A, L.P. FOR APPROVAL OF COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.	**CASE NO. 14822**
APPLICATION OF LIME ROCK RESOURCES II-A, L.P. FOR APPROVAL OF COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.	**CASE NO. 14823**

RESPONSE TO MOTION TO DISMISS

Lime Rock Resources II-A, L.P., by and through its undersigned attorney, for its response to the Motion to Dismiss of Mewbourne Oil Company, states:

A. Introduction.

Mewbourne Oil Company's motion to dismiss is premised on the notion that the 1973 operating agreement for the drilling of a gas well to the Morrow Formation burdens all formations from the surface of the earth to the Morrow Formation covering the S/2 of Section 7, Township 17 South, Range 28 East, NMPM, Eddy County, New Mexico, to which the well is dedicated. Nowhere in the operating agreement (Attachment 1 of Exhibit A of the motion) is there any specific language that all formations from the surface to and including the Morrow

Formation were to be included within the sphere of the operating agreement. What is clear is that the operating agreement was formed approximately 39 years ago for the purpose of drilling a deep Morrow Formation test well, and that the operating agreement would endure as long as the Morrow well was producing.

Lime Rock does not agree that the operating agreement would prevent it from proceeding with its compulsory pooling cases to a much shallower formation than the Morrow Formation, nor that the operating agreement covers all formations from the surface to and including the Morrow Formation. In support of its position Lime Rock relies on a supplemental title opinion specifically addressing the effect of the operating agreement prepared by its attorneys. This supplemental title opinion, attached hereto as Exhibit 1, concludes, contrary to the Affidavit of Corey Mitchell, that the lands and formations covered by the Lime Rock compulsory pooling cases are not committed to the operating agreement.

Accordingly, the issue seems to be: whether the Oil Conservation Division may determine the intention of the parties to the 1973 operating agreement? Did the operating agreement cover all formations within the S/2 of Section 7 from the surface to and including the Morrow Formation? Or, did the operating agreement only cover the drilling of the Morrow test well, and thus, only the Morrow formation (spaced on 320 acres), should be included within the purview of the operating agreement.

B. The Division does not have the jurisdiction to determine the rights under the operating agreement, a purely private contract, between the parties to the operating agreement.

As discussed above the parties are advancing two interpretations of the operating agreement. Whether or not the operating agreement is subject to interpretation or is ambiguous is not for the Division to decide. A Texas case, perhaps, illustrates this point best. ExxonMobil

Corporation v. Valence Operating Company, 174 S.W.3d 303, 312-313, (Tex.App.–Houston [1 Dist.],2005) states:

> In interpreting a joint operating agreement, we apply principles of contract law. *See Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 727, 731 (Tex.1981). In construing a contract, it is the primary task of the court to determine the parties' true intentions as expressed in the agreement. *Id.* at 727–28; *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983). The court should read and examine the entire writing to ascertain the agreement of the parties, ensuring that all provisions are harmonized and given effect and none is rendered meaningless. *Coker*, 650 S.W.2d at 393. When an unambiguous writing has been entered into by the parties, the courts will enforce the intention of the parties in the instrument as written. *Sun Oil*, 626 S.W.2d at 731.
>
> Ordinarily, the intent of the parties may be discerned from the instrument itself. However, when a question relating to the construction of a contract is presented, we are required to take the wording of the instrument, consider it in the light of the surrounding circumstances, and apply the rules of contract construction to determine the meaning. *Id.* If, in light of the surrounding circumstances, the language is capable only of a single meaning, we can confine ourselves to the writing. *Id.* Our examination of the circumstances surrounding the execution of a contract is, however, only an aid to construction. *Id.* A contract is unambiguous if it can be given a certain or definite legal meaning. *Id.* at 731–32. If, after applying the rules of construction, the contract is subject to two or more reasonable interpretations, the contract is ambiguous, and a fact issue is created on the parties' intent. *313 *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex.1996). However, an ambiguity does not arise simply because the parties advance conflicting interpretations of the same language; for an ambiguity to exist, both constructions must be reasonable. *Id.* We must decide, therefore, whether the MOI provision is capable of only one reasonable interpretation, considering the wording of the instrument under the rules of contract construction in light of the surrounding circumstances. In this light, we first examine the farmout agreement to determine its effect on the interests governed by the JOA.

The scope of the Division's authority does not run to determine contractual disputes such as the instant one before the Division. Marbob Energy Corp. v. New Mexico Oil Conservation Commission, 146 N.M. 24, 27, 206 P.3d 135, 138 (2009) defined the Division's authority as such:

> The Commission was created by Section 70–2–4 of the Act and has two primary duties regarding the conservation of oil and gas: prevention of waste and protection of correlative rights. Section 70–2–11(A); *Santa Fe Exploration Co. v. Oil Conservation Comm'n of N.M.*, 114 N.M. 103, 112, 835 P.2d 819, 828 (1992). The Commission may

> also make rules and regulations to implement and enforce the Act. *See* § 70–2–11(A) (granting the Division the authority to make and enforce rules, regulations, and orders); § 70–2–11(B) (granting the Commission concurrent jurisdiction with the Division "to the extent necessary for the [C]ommission to perform its duties as required by law").

Neither party disputes the authority of the Division to hear and determine compulsory pooling applications. However, it is quite another thing for the Division to determine whether the applications should be dismissed because of two possible interpretations or ambiguity in the operating agreement. Johnson v. Yates Petroleum Corp., 127 N.M. 355, 359-360, 981 P.2d 288, 292 - 293 (N.M.App.,1999), in upholding Division created proration units of 160 acres in a contract dispute said:

> Neither party disputes that the governmental authority in this case, the Oil Conservation Division (hereinafter "OCD"), created proration or spacing units (hereinafter "proration units") of 160 acres. However, the Johnsons assert that to give effect to Paragraph 12, this Court must consider the intent of the clause and the parties, as well as the surrounding circumstances. However, "[w]hen discerning the purpose, meaning, and intent of the parties to a contract, the court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new **293 *360 agreement for the parties." *CC Housing Corp. v. Ryder Truck Rental, Inc.,* 106 N.M. 577, 579, 746 P.2d 1109, 1111 (1987); *accord Montoya v. Villa Linda Mall, Ltd.,* 110 N.M. 128, 129, 793 P.2d 258, 259 (1990). Paragraph 12 clearly states that the lease shall terminate as to all lands not allocated to a "well unit," and expressly defines a "well unit" as the proration unit created by, in this case, the OCD. It is without dispute that the OCD created proration units of 160 acres. Therefore, the contract is clear and unambiguous, and we will not imply terms and construct an agreement for the parties. *See Richardson v. Farmers Ins. Co. of Arizona,* 112 N.M. 73, 74, 811 P.2d 571, 572 (1991) ("A contract is deemed ambiguous only if it is reasonably and fairly susceptible of different constructions.").

Johnson v. Yates Petroleum Corp. was a case commenced in the District Court of Eddy County, not with the Division. Another New Mexico case, Summit Properties, Inc. v. Public Service Co. of New Mexico, 138 N.M. 208, 213-214, 118 P.3d 716, 721 - 722 (Ct.App.,2005) involving the Public Service Commission, a state regulatory agency such as the Division, the New Mexico Court of Appeals, in deciding that the Public Service Commission did not have authority to decide a purely contractual issue stated:

In addition, relying on New Mexico common law, PNM claims that this case involves a matter in controversy that affects the public and does not involve a purely private dispute. *See Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n,* 67 N.M. 108, 117–18, 353 P.2d 62, 68–69 (1960) (discussing rule that the power of the *214 **722 Commission is limited to matters and controversies involving the rights of a utility and the public and does not extend to acts by the utility that do not affect its public duties). PNM claims, in this case, that the matter in controversy—the 1990 Contract—is of public concern because it has to do with Connection Fees that were to be charged in conjunction with the development of 523 residences.

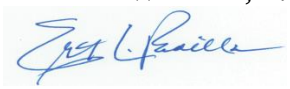
PNM's argument is far too broad. PNM's position would create a situation where no public utility could be sued for any matter related to its activities. The general rule, however, is to the contrary—that jurisdiction over contract or tort claims made against a public utility usually rests with the courts. *See Nev. Power Co. v. Eighth Judicial Dist. Ct.,* 102 P.3d 578, 586 (Nev.2004); *see also Campbell v. Mountain States Tel. & Tel. Co.,* 120 Ariz. 426, 586 P.2d 987, 990–92 (Ct.App.1978) (discussing the doctrine of primary jurisdiction and the rule that construction of contracts and determination of their validity are judicial functions for the courts); *Ethyl Corp. v. Gulf States Utils., Inc.,* 836 So.2d 172, 176 (La.Ct.App.2002) (noting that courts have no jurisdiction over fixing and regulating rates by utility and commission has no jurisdiction over contract disputes with utility); *State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm'n,* 116 S.W.3d 680, 696 (Mo.Ct.App.2003) (determining that controversies over contracts are enforceable by courts, not the commission, because courts can enforce contract and enter judgment); *Bell Tel. Co. v. Uni–Lite, Inc.,* 294 Pa.Super. 89, 439 A.2d 763, 765 (1982) (reasoning that claims related to rates and service are within expertise and jurisdiction of commission, but contract disputes are not). In New Mexico, as in most other states, the Commission has no power to award damages where a contract with a utility has been breached. *See Southwestern Pub. Serv. Co.,* 67 N.M. at 117–18, 353 P.2d at 68 (noting that Commission has power to decide whether utility can enter into a given contract, but once entered into, the construction and interpretation of the contract are to be determined by the courts); *see also* NMSA 1978, § 62–6–4 (2003) (discussing powers and duties of the Commission). The only exclusive power given to the Commission is to "regulate and supervise" every public utility. *See* § 62–6–4(A). This does not preempt lawsuits involving contracts a utility enters into with private parties. *See Southwestern Pub. Serv. Co.,* 67 N.M. at 117–18, 353 P.2d at 68.

C. Conclusion.

The motion to dismiss raises a purely private dispute that should be judicially decided, and not by the Division. The motion should be denied and the compulsory pooling applications should heard by the Division over which it clearly has authority as a regulatory matter.

Respectfully submitted,

PADILLA LAW FIRM, P. A.

By: 

Ernest L. Padilla
P. O. Box 2523
Santa Fe, New Mexico 87504-2523
(505)988-7577

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response to Motion to Dismiss was emailed jamesbruc@aol.com, James G. Bruce, Esq., P.O. Box 1056, Santa Fe, NM 87504, 505-982-2043 on this 8th day of May, 2012.

ERNEST L. PADILLA

EXHIBIT

1