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

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:	
APPLICATION OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF A HORIZONTAL SPACING UNIT FOR A POTASH DEVELOPMENT AREA AND PILOT PROJECT, EDDY COUNTY, NEW MEXICO	**Case Nos. 21489, 21490, and 21491**
IN ITS RELATION TO THE FOLLOWING:	
APPLICATION OF ASCENT ENERGY, LLC FOR COMPULSORY POOLING, EDDY COUNTY NEW MEXICO	**OCD Case Nos. 16481 and 16482** **OCC Case Nos. 21277 and 21278**
AMENDED APPLICATIONS OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF HORIZONTAL SPACING UNIT AND POTASH DEVELOPMENT AREA, EDDY COUNTY, NEW MEXICO	**OCD Case Nos. 20171 and 20202** **OCC Case Nos. 21279 and 21280**
APPLICATION OF MEWBOURNE OIL COMPANY FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	**OCD Case Nos. 21361-21364**
APPLICATION OF ASCENT ENERGY, LLC, FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	**OCD Case Nos. 21393 and 21394**
ORDERS OF THE COMMISSION	**Order Nos. R-21454 and R-21454-A**

MEWBOURNE OIL COMPANY'S RESPONSE IN OPPOSITION TO ASCENT ENERGY, LLC'S MOTION TO DISMISS

Mewbourne Oil Company ("Mewbourne") submits the following response in opposition to Ascent Energy, LLC's ("Ascent") Motion to Dismiss Apache Corporation Case Nos. 21489-91

("the Motion") to the extent the Motion also seeks dismissal of Mewbourne's applications in Case Nos. 21362 and 21364 and argues that Mewbourne's applications in Case Nos. 21361 and 21363 should not be included in the *de novo* hearing before the Oil Conservation Commission ("Commission") in Case Nos. 21277 – 21280.[1] For the reasons discussed below, the Motion should be denied.

INTRODUCTION

The Motion advances meritless arguments that have now been rejected by the Commission on two separate occasions. Indeed, rather than make any new argument in the Motion, Ascent simply attaches its Motion for Rehearing on the Commission's Order Granting Apache's Motion for Stay, which was rejected by the Commission after extensive briefing. Ascent's third attempt to deny Mewbourne any opportunity to present the merits of its pooling applications asks the Division to overrule the Commission and is improper.

The Commission rejected Ascent's arguments for good reason. Ascent argues first that the doctrine of *res judicata* bars the Division from hearing Mewbourne's applications in Case Nos. 21362 and 21364 because they conflict with a previous division order designating Ascent as the operator of the W/2 W/2 of Sections 28 and 33. This argument has no merit – Mewbourne is seeking a pooling order pursuant to its own pooling application, *not asserting a claim against Ascent* that was adjudicated on the merits in a prior proceeding.

Ascent also makes the unsubstantiated argument that the Commission is barred from consolidating the pending applications in a single *de novo* proceeding with other applications that concern the same lands and operators. This argument is improperly made before the Division and has been expressly rejected, twice, by the Commission in Order Nos. R-21454 and R-21454-A, in

[1] The Motion appears to be incorrectly titled in that it seeks dismissal of Mewbourne's applications in Case Nos. 21362 and 21364 as well as Apache Corporation's ("Apache") applications in Case Nos. 21489-21491.

which the Commission decided to conduct a single *de novo* hearing on the pending applications for the sake of efficiency, to protect correlative rights, and to avoid inconsistent rulings. In addition to the fact that the Commission has authority to control its own docket, Ascent's anti-consolidation argument is based on an absurd reading of the Oil and Gas Act – Ascent argues that the statute's use of the singular "matter" rather than the plural "matters" in the context of de novo proceedings precludes the Commission from consolidating cases for purposes of hearing. Ascent's argument ignores the purpose and language of the Act and New Mexico's canons of statutory construction and must be rejected.

Finally, Ascent argues that Mewbourne's applications should not be considered because they impermissibly seek a determination of contract rights from the Division. Ascent has not identified any impermissible request in Mewbourne's applications for compulsory pooling and its argument has no merit.

For these reasons, which are set forth more fully below, the Motion should be denied.

ARGUMENT

A. The Commission previously rejected the arguments Ascent asserts here.

In Case Nos. 21278 – 21280, the Commission will address Ascent's applications to pool the W/2 W/2 of Sections 28 and 33, Township 20 South, Range 30 East in Eddy County and Apache's applications for the approval of potash development areas in the N/2 of Sections 28 and 29 and the NE/4 of Section 30, Township 20 South, Range 30 East in Eddy County. The following applications are pending before the Division and involve this same acreage: Mewbourne's applications in Case Nos. 21361 – 21364 seek to pool the W/2 of Sections 28 and 33;[2] Apache's

[2] Two of Mewbourne's applications involve the W/2 W/2 of Sections 28 and 33 (Division Case Nos. 21362 and 21364), and two of Mewbourne's applications involve the E/2 W/2 of Sections 28 and 33 (Division Case Nos. 21361 and 21363).

applications in Case Nos. 21489 – 21491 seek to pool the N/2 of Sections 28 and 29 and the NE/4 of Section 30; and Ascent's applications in Case Nos. 21393 – 21394 seek to pool the E/2 W/2 of Sections 28 and 33.

The *de novo* hearing in Case Nos. 21278 – 21280 was stayed by Commission Order No. R-21454 until Mewbourne's, Apache's, and Ascent's pooling applications that are pending before the Division are resolved and all of the related matters can be consolidated for a *de novo* hearing before the Commission. *See* Exhibit A, Order No. R-21454. The Commission issued Order No. R-21454 after extensive briefing by Apache, Ascent, and Mewbourne and expressly determined that one *de novo* hearing on all of the applications will promote efficiency and best comport with the Oil and Gas Act's requirement that the Commission prevent waste and protect correlative rights.

After the Commission issued Order No. R-21454, Ascent filed a Motion for Rehearing, largely re-arguing the same issues the Commission had rejected. Following a second round of briefing by Apache, Ascent, and Mewbourne, the Commission issued Order No. R-21454-A, reaffirming its decision to stay the *de novo* cases while Mewbourne's, Apache's, and Ascent's pooling applications are resolved by the Division. The parties' briefs addressed the issues raised by Ascent here – including Ascent's arguments regarding the doctrine of *res judicata*.[3] In denying Ascent's motion, the Commission found that Ascent had largely mischaracterized Order No. R-21454 and rejected – for the second time – the same arguments Ascent presents here. *See* Exhibit B, Order No. R-21454-A.

[3] *See, e.g.,* Commission Case Nos. 21277-21281, Mewbourne Oil Company's Response in Opposition to Ascent Energy LLC's Motion to Rehear Order No. R-21454.

Ascent now inexplicably asks the Division to overrule the Commission with respect to the scope of the *de novo* hearing and raises the same arguments that have now been rejected multiple times. Ascent's Motion must be denied.

B. The doctrine of *res judicata* does not bar consideration of Mewbourne's applications in Case Nos. 21362 and 21364.

Although Ascent concedes that Mewbourne's applications involving the W/2 W/2 lands should be included in the *de novo* hearing,"[4] Ascent also confoundingly claims that the doctrine of *res judicata* precludes consideration of Mewbourne's applications in Case Nos. 21362 and 21364 because the Division issued Order No. R-21258 in Division Case Nos. 16481-16482, 20171, and 20202 (now Commission Case Nos. 21277 – 21280). This assertion has no merit.

The doctrine of *res judicata* only precludes the litigation of a subsequent claim when: (1) the parties are the same; (2) the cause of action is the same; (3) there was a final decision in the first suit; and (4) the first decision was on the merits. *See, e.g., City of Sunland Park v. Macias,* 2003-NMCA-098, ¶ 18, 134 N.M. 216. The doctrine of *res judicata* only applies when a party has had a full and fair opportunity to litigate issues arising out of a claim. *See, e.g., Kirby v. Guardian Life Ins. Co.,* 2010-NMSC-014, ¶ 61, 148 N.M. 106; *see also Potter v. Pierce,* 2015-NMSC-002, ¶ 10, 342 P.3d 54. The party seeking to bar claims bears the burden of establishing the requirements of the doctrine have been met. *Kirby,* 2010-NMSC-014, ¶ 61. Ascent has not done so here.

First, Ascent cannot establish that Mewbourne previously brought the same causes of action or that the causes of action were decided on the merits. None of Mewbourne's applications pending before the Division have previously been heard, and the Division has not considered evidence or issued any ruling on Mewbourne's requests to pool the W/2 of Sections 28 and 33 and

[4] Motion at ¶ 4 and footnote 1.

be designated as the operator of that acreage. In evaluating competing pooling applications, the Division considers:

a. A comparison of geologic evidence presented by each party as it relates to the proposed well location and the potential of each proposed prospect to efficiently recover the oil and gas reserves underlying the property.
b. A comparison of the risk associated with the parties' respective proposal for the exploration and development of the property.
c. A review of the negotiations between the competing parties prior to the applications to force pool to determine if there was a "good faith" effort.
d. A comparison of the ability of each party to prudently operate the property and, thereby, prevent waste.
e. A comparison of the differences in well cost estimates (AFEs) and other operational costs presented by each party for their respective proposals.
f. An evaluation of the mineral interest ownership held by each party at the time the application was heard.
g. A comparison of the ability of the applicants to timely locate well sites and to operate on the surface (the "surface factor").[5]

Because Mewbourne's applications have not yet been heard, none of these factors have been addressed. Thus, the requests for relief and "causes of action" are not the same, the merits of Mewbourne's applications have not been determined, and the doctrine of *res judicata* does not apply.

Second, the Division's pooling order regarding the applications that are now pending before the Commission is not final. Under Section 70-2-13 of the Oil and Gas Act, the applications addressed by the order are subject to a *de novo* hearing rather than a *de novo* appeal. "A *de novo* hearing is an entirely new hearing that is conducted as if there had been no prior hearing." *Alarcon v. Albuquerque Public Schools Education Board*, 2018-NMCA-021, ¶ 28, 413 P.3d 507. Because

[5] *See, e.g.*, Order No. R-20223.

the order is subject to an entirely new hearing, it is not final and cannot support a finding of *res judicata. See, e.g., Ruyle v. Continental Oil Co.,* 44 F.3d 837, 846 (10th Cir. 1994) (judgment is not final if it is subject to a *de novo* trial) (citing Restatement 2nd of Judgments § 13). The Division also retains jurisdiction to modify its orders when it is necessary to do so. *See* 1978 NMSA § 70–2–11(B); Order No. R-21258.

Third, because Mewbourne's applications have not been heard, Mewbourne has not had a full and fair opportunity to litigate the matters raised by its applications on the merits. In the absence of a full and fair opportunity to litigate, *res judicata* cannot apply. *See, e.g., Brooks Trucking Co., Inc. v. Bull Rogers, Inc.,* 2006-NMCA-025, ¶ 11, 139 N.M. 99. ("[A] party's full and fair opportunity to litigate is the essence of res judicata.").

To the extent Ascent's briefing before the Commission relied on *Amoco Production Co. v. Heiman*, 904 F.2d 1405 (10th Cir. 1990), that reliance is misplaced. In *Amoco,* the Tenth Circuit addressed whether a Commission order approving a unit, including the allocation formula, collaterally estopped the parties from re-litigating the allocation formula in a civil lawsuit after the Commission's order was upheld by the New Mexico Supreme Court. Not surprisingly, the court found that the decisions of the Commission and the New Mexico Supreme Court had preclusive effect. *Amoco* has no bearing here, where Ascent seeks to preclude the Division from hearing Mewbourne's applications that have not been previously addressed.

The doctrine of *res judicata* is intended to protect a party from liability on the same claim brought by the same person – not to preclude an administrative agency from issuing new orders or hearing new evidence. *See, e.g., Property Tax Dept. v. Molycorp., Inc.,* 1976-NMSC-072, 89 N.M. 603 (Agency had inherent authority to revise prior order and doctrine of *res judicata* did not preclude it from doing so); *Petroleum Club Inn Co. v. Franklin,* 1963-NMSC-133, 72 N.M. 347

(same). This is especially true here, where the Oil and Gas Act requires the Commission and Division to prevent waste and protect correlative rights. Ascent's argument lacks merit and should be rejected.

C. Ascent's argument that the cases pending before the Division cannot be consolidated and then heard by the Commission in one *de novo* hearing fundamentally misinterprets the Oil and Gas Act and relies on inapplicable authority.

In essence, Ascent asks the Division to determine that the Commission lacks authority to consolidate cases for hearing because Section 70-2-13 provides for the *de novo* hearing of a "matter" (instead of "matters") heard by the Division. Ascent provides no authority to support its apparent argument that the Division can overrule the Commission. Under the Oil and Gas Act, the Commission has authority to manage its own docket and has already decided that these related cases should ultimately be consolidated in one *de novo* hearing. *See, e.g.,* NMSA 1978, § 70-2-11; Exhibit B.

Ascent also ignores the Oil and Gas Act's principal mandate that the Commission and Division prevent waste and protect correlative rights. Specifically, the Act requires the Commission and Division "to prevent waste prohibited by this act and to protect correlative rights, as in this act provided" and further provides that the Division and Commission are "empowered to make and enforce rules, regulations and orders, *and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.*" NMSA 1978, § 70-2-11 (emphasis added). If the Division and Commission lack authority to control their dockets and decide whether to consolidate cases for hearing – as Ascent claims – they would not be able to effectively prevent waste and protect correlative rights. Several parties hold interests in the spacing units proposed by Ascent, Mewbourne, and Apache, and a consolidated hearing on the competing applications will allow the Commission to evaluate all of the

applications, and determine which ones should be granted and denied, to prevent waste and protect correlative rights in accordance with the Act. The Commission has already rejected Ascent's request for bifurcation and a piecemeal review process and the Division should do so as well.

Ascent's interpretation of the Oil and Gas Act also violates New Mexico's canons of statutory construction. Where the interpretation of a statute leads to absurdities, or conflicts with the purpose of the statute when read as a whole, the interpretation does not reflect legislative intent and cannot be adopted. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15, 309 P.3d 1047. Ascent's constrained interpretation of Section 70-2-13 would lead to absurd results that are inconsistent with the requirements of the Oil and Gas Act because Ascent seeks to preclude the Division and Commission from consolidating for hearing cases that involve overlapping acreage to protect correlative rights and prevent waste. Further, Section 12-2A-5 of the New Mexico Uniform Statute and Rule Construction Act states: "Use of the singular number includes the plural, and use of the plural number includes the singular."[6] Thus, the statute's use of the term "matter" – instead of "matters" – is irrelevant. Ascent's flawed reading of Section 70-2-13 would tie the Commission's hands and preclude it from complying with its duties under the Act.

Further, the Oil and Gas Act and its implementing regulations afford parties the right to a *de novo* hearing before the Commission. Contrary to Ascent's argument, the Division does not choose whether to "refer" cases to the Commission after they are heard by the Division. *See* NMSA 1978 § 70-2-13; 19.15.4.23.A NMAC.

Ascent's reliance on Case No. 903, which was a rulemaking proceeding involving a former iteration of the adjudication rule, is misplaced. In the discussion referenced by Ascent, the Commissioners examined whether the record from a proceeding before a Division hearing

[6] Although the New Mexico Uniform Statute and Rule Construction Act specifically applies to legislation adopted after 1997, it expresses general principles of statutory construction and should be followed.

examiner could be introduced in a *de novo* proceeding before the Commission. *See* Case No. 903 at 20. Some of the Commissioners expressed concern that the statute may not allow introduction of the record from a Division case in a *de novo* hearing. *See id.* at 21. None of the commissioners, however, including Governor Simms, suggested that a party could be barred from introducing new evidence in a *de novo* proceeding. *See id.* at 24.

Based on this vague and inapplicable discussion, Ascent somehow reaches the conclusion that "Due process and the proper constitutional interpretation of § 70-2-13 should take priority over administrative efficiency and economy." Motion at ¶ 9. But Ascent fails to provide any basis to find that its due process rights have been violated. Instead, Ascent seeks to preclude the Division and Commission from considering Mewbourne's competing applications in a fair hearing process to protect correlative rights and prevent waste, which would violate Mewbourne's due process rights.[7] Ascent's argument regarding the scope of the *de novo* hearing lacks merit, ignores the purpose and language of the Oil and Gas Act, misstates the Commission's actions in Case No. 903, and must be rejected.

D. Ascent's claim that the Division lacks jurisdiction over Mewbourne's pooling applications because they raise contract issues completely ignores the substance of the applications.

Mewbourne's applications in Case Nos. 21361-21364 request orders: (a) pooling all uncommitted mineral interests in the spacing units; (b) designating Mewbourne as the operator of the wells; (c) authorizing Mewbourne to recover its costs of drilling, equipping, and completing the wells and allocating the costs among the wells' working interest owners; (d) approving the actual operating charges and costs of supervision during drilling and after completion, together

[7] To prevent erroneous deprivation of a property interest in administrative proceedings, due process requires "'reasonable notice and opportunity to be heard and present any claim or defense'." *Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm.*, 2014-NMSC-006, ¶ 20, 319 P.3d 639 (citation omitted);

with a provision for adjusting the rates pursuant to the COPAS accounting procedure; and (e) imposing a 200% penalty for the risk assumed by Mewbourne in drilling and completing the wells. *These requests are the same as those requested by Ascent's applications in Case Nos. 21393 and 21394.* None of Mewbourne's applications mention a contract or request relief related to a contract. Ascent's argument on this issue ignores the facts and the law, was rejected by the Commission, and should be rejected by the Division.

CONCLUSION

For the reasons discussed above, Ascent's motion should be denied and Mewbourne's applications should be set for hearing in accordance with Order Nos. 21454 and 21454-A.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2020, I served a true and correct copy of the foregoing pleading on the following counsel of record by electronic mail:

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

APPLICATION OF ASCENT ENERGY, LLC FOR COMPULSORY POOLING, EDDY COUNTY NEW MEXICO

CASE NOS. 21277 & 21278

AMENDED APPLICATIONS OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF A HORIZONTAL SPACING UNIT AND POTASH DEVELPOMENT AREA, EDDY COUNTY, NEW MEXICO

CASE NOS. 21279 & 21280
ORDER NO. R-21454

ORDER OF THE COMMISSION

THIS MATTER came before the New Mexico Oil Conservation Commission ("Commission") on a Motion to Stay the *De Novo* Hearings set for September 17, 2020 filed on August 5, 2020 by Apache Corporation ("Apache"). The Motion and subsequent pleadings filed by Ascent Energy, LLC ("Ascent") and Mewbourne Oil Company ("Mewbourne") reference several related applications that are currently pending before the Oil Conservation Division ("Division"), or that are planned to be filed and heard by the Division in the future.

After review of the Motion and the subsequent pleadings, the Chair, as hearing officer, finds that there is good cause to stay the proceedings currently before the Commission. The Chair also finds that in order to prevent waste and protect correlative rights, it is in the best interest of the public and the parties that all of the related applications be heard in conjunction with one another, or be entirely consolidated for the purpose of hearing. Given that these potentially competing applications are not all ripe for review by the Commission at this time, it is not currently appropriate for the various applications to be immediately transferred to the Commission for hearing. Additionally, a transfer would inevitably result in a significant delay in these proceedings not unlike the issuance of a stay. The potentially competing applications, including those that have yet to be filed, should be heard by the Division prior to the Commission hearing the applications currently before the Commission. However, the Division and the Commission cannot maintain a

stay of these proceedings based on potential applications. Therefore, these applications can and will be heard by the Commission when all filed competing applications have been heard by the Division.

For the foregoing reasons, the Commission finds that Apache's Motion to Stay is well taken and is hereby GRANTED. The hearings in these matters are stayed until all competing applications are heard by the Division or are otherwise resolved. The parties are ordered to notify the Commission when all related filed applications have been heard by the Division or have otherwise been resolved. As part of the notice to the Commission, the parties are encouraged to request the setting of a prehearing conference in order to determine the date and manner in which these competing applications will be heard.

IT IS SO ORDERED.

DONE at Santa Fe, New Mexico, on this 25th day of August 2020.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ADRIENNE SANDOVAL, M.E., CHAIR

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

APPLICATION OF ASCENT ENERGY, LLC FOR COMPULSORY POOLING, EDDY COUNTY NEW MEXICO

CASE NOS. 21277 & 21278

AMENDED APPLICATIONS OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF A HORIZONTAL SPACING UNIT AND POTASH DEVELPOMENT AREA, EDDY COUNTY, NEW MEXICO

CASE NOS. 21279 & 21280

ORDER NO. R-21454-A

ORDER OF THE COMMISSION

THIS MATTER came before the New Mexico Oil Conservation Commission ("Commission") on a Motion to Rehear Order No. R-21454, filed on September 10, 2020 by Ascent Energy LLC ("Ascent"). In addition to Ascent's Motion to Rehear Order No. 21454, the Commission also considered responsive pleadings filed by Apache Corporation and Mewbourne Oil Company, as well as Ascent's Reply.

After review of Ascent's Motion to Rehear Order No. 21454, which order stayed the *de novo* hearings in Case Nos. 21277, 21278, 21279 and 21280 until such time as the Oil Conservation Division holds a hearing regarding the competing cases, and the subsequent pleadings, the Commission finds that good cause remains to stay the proceedings in the above-captioned cases. Contrary to Ascent's assertion, Order No. 21454 does not order the Oil Conservation Division to rehear Ascent Energy's pooling applications under Case Nos. 16841 and 16842. Rather, Order No. 21454 "stayed the hearings in the matters in Case Nos. 21277, 21278, 21279 and 21280 until all competing applications are heard by the Division or are otherwise resolved." Order No. 21454 promotes administrative efficiency and economy by ensuring that all of the related applications be heard in conjunction with one another, or be entirely consolidated for the purpose of hearing. To do otherwise would result in potentially piecemeal or inconsistent rulings.

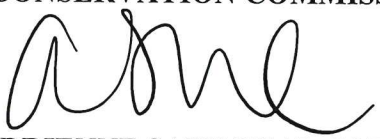
For the foregoing reasons, the Commission finds that Ascent's Motion to Rehear Order No. 21454 is not well taken and is hereby DENIED. The hearings in these matters shall be stayed until all competing applications are heard by the Division or are otherwise resolved. The Commission urges the parties to file all applications with the Division by October 30, 2020, after which the Commission will determine the date and manner in which these competing applications will be heard.

IT IS SO ORDERED.

DONE at Santa Fe, New Mexico, on this 17 day of September 2020.

STATE OF NEW MEXICO

OIL CONSERVATION COMMISSION



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