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

APPLICATION OF VENDERA RESOURCES III, LP, VENDERA MANAGEMENT III, LLC AND HIGHMARK ENERGY OPERATING, LLC TO APPROVE A FORM C-145 NAMING HIGHMARK ENERGY OPERATING, LLC AS THE SUCCESSOR OPERATOR OF THE CENTRAL VACUUM UNIT, LEA COUNTY, NEW MEXICO

Case No. 21704

APPLICANTS' MOTION FOR LEAVE TO SUPPLEMENT RECORD REGARDING MOTION TO DISMISS

Applicants Vendera Resources III, LP, Vendera Management III, LLC and Highmark Energy Operating, LLC (collectively "Vendera") hereby move to supplement the record with Respect to Chevron USA, Inc.'s ("Chevron") Motion to Dismiss:

1. In these proceedings, Chevron is taking the position that the Division lacks jurisdiction to determine most if not all of the issues brought forth in the Amended Application regarding the operatorship of the Central Vacuum Unit.

2. Given the attack on subject matter jurisdiction, Vendera has filed an action in State District Court in Lea County, New Mexico which seeks various forms of relief, including, Counts I – IV, substantially the relief sought in these proceedings. A true and accurate copy of Vendera's First Amended Complaint is attached hereto as Exhibit 1.

3. Chevron has filed a Motion to Dismiss Counts I – IV in the State Court proceedings. A true and accurate copy of that Motion to Dismiss (with Exhibits deleted as they are already part of these proceedings) is attached hereto as Exhibit 2.

4. In that Motion to Dismiss, Chevron raises certain legal arguments and, concludes in Subparagraph E seeking dismissal under "the primary jurisdiction

doctrine," in which urges the District Court to dismiss based on the primary jurisdiction of the Division.

5. Given inconsistencies in Chevron's position, Vendera thinks the Division should be aware of these recent developments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion* was e-mailed to the following counsel on this 12th day of August, 2021:

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FILED
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Lea County
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CLERK OF THE COURT
Cory Hagedoorn

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

VENDERA RESOURCES III, LP; VENDERA MANAGEMENT III, LLC; and **HIGHMARK ENERGY OPERATING LLC**,

Plaintiffs,

v.

No. **D-506-CV-2021-00438**
Honorable Lee A. Kirksey

CHEVRON USA, INC., and, CHEVRON MIDCONTINENT, L.P.

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, ACCOUNTING AND INJUNCTIVE RELIEF

COME NOW Plaintiffs by and through their undersigned attorneys, HINKLE SHANOR LLP (Andrew J. Cloutier), and for their First Amended Complaint state:

1. Plaintiff Vendera Resources III, LP ("VR3") is a limited partnership organized under the laws of the State of Delaware, with its principal office in Dallas, Texas, and which owns an interest in real property in Lea County, New Mexico that is the subject of this action.

2. Plaintiff Vendera Management III, LLC ("VM3") is a limited liability company organized under the laws of the State of Delaware, with its principal office in Dallas, Texas, and which owns an interest in real property in Lea County, New Mexico that is the subject of this action.

3. Plaintiff Highmark Energy Operating, LLC ("Highmark") is a limited liability company organized under the laws of the State of Delaware, with its principal office in Tyler, Texas, which is authorized to conduct business and operate oil and gas wells in

EXHIBIT 1

the State of New Mexico, and which owns an interest in real property in Lea County, New Mexico that is the subject of this action.

4. VR3 and VM3 are sometimes collectively herein referred to as "Vendera." VR3, VM3, and Highmark are sometimes collectively referred to herein as "Plaintiffs."

5. Defendant Chevron USA, Inc. ("Chevron") is a Pennsylvania corporation whose principal place of business is in San Ramon, California. Chevron is authorized to do business in the State of New Mexico and owns an interest in real property that is the subject of this action in Lea County, New Mexico. Chevron may be served with process by serving its registered agent, CSC of Lea County, Inc., MC-CSC1, 726 E. Michigan Dr., Suite 101, Hobbs, New Mexico 88240-3465.

6. Defendant Chevron Midcontinent, L.P. ("Chevron Midcontinent") is a foreign limited partnership whose general partner, Chevron Midcontinent Operations LLC has the same business address in San Ramon, California as Chevron; is registered to do business in New Mexico; and, may be served with process by serving its registered agent Corporation Service Company at 123 East March Street, Suite 101, Santa Fe, New Mexico 87501.

7. The Court has jurisdiction over the parties and the subject matter. Venue is proper as Highmark and Chevron are both residents of Lea County, New Mexico for venue purposes and the real property which is the subject matter of this action is situated solely in Lea County, New Mexico.

GENERAL ALLEGATIONS

Ownership in the Central Vacuum Unit

8. Vendera, Highmark, and Chevron own working interests in the Central Vacuum Unit (the "CVU").

9. The CVU consists of approximately 3,046.2 acres of unitized oil and gas leases located southwest of Lovington, New Mexico in Lea County.

10. The CVU was formed pursuant to a Unit Agreement dated December 1, 1976 and recorded in the Lea County Records, at Miscellaneous Book 344, Page 371, a true and correct copy of which is attached to this First Amended Complaint as Exhibit 1 (the "Unit Agreement").

11. The Unit Agreement unitizes thirty-one separate tracts of oil and gas leaseholds and associated rights (Tracts 1-29 plus Tracts 8a and 14a) insofar as those cover the Grayburg-San Andres Formation (the "Unitized Formation") as that formation is defined in the CVU Agreement.

12. The operation of the CVU is governed by a Unit Operating Agreement dated December 1, 1976, a true and correct copy of which is attached to this First Amended Complaint as Exhibit 2 ("CVU Operating Agreement").

13. Currently the CVU is an enhanced oil recovery unit in which carbon dioxide is injected through injection wells into the Unitized Formation to recover oil in that formation that ordinarily could not be recovered through conventional or secondary recovery means.

14. Chevron is the successor by merger to the original Unit Operator of the CVU, Texaco, Inc.

15. Vendera first acquired its interest in the CVU when VM3 purchased all the non-operating working interest of Marathon Oil Company (being 25.55532%) in the CVU effective May 1, 2018 and received an Assignment, Conveyance and Bill of Sale which is recorded at Book 2138, Page 341 of the Lea County Records, a true and accurate copy of which is attached to this First Amended Complaint as Exhibit 3 (the "Marathon Assignment").

16. VM3 conveyed 25.7075% of the interests it acquired in the Marathon to VR3 and VM3 continues to own 74.2025% of the interest it acquired under the Marathon Assignment.

17. VM3 and VR3, in the same percentage proportions described in Paragraph 16 above, purchased all of Penroc Oil Corporation's ("Penroc") non-operating working interest in the CVU (being 7.60453 percent) and some other properties effective October 1, 2019 pursuant to an Assignment, Conveyance and Bill of Sale which is recorded at Book 2156, Page 811 of the Lea County Records, a true and accurate copy of which is attached to this First Amended Complaint as Exhibit 4 (the "Penroc Assignment").

18. In an Assignment, Conveyance and Bill of Sale effective November 1, 2020 and recorded at Book 2173, Page 662 of the Lea County Records, a true and accurate copy of which is attached hereto as Exhibit 5 (the "Graham Assignment"), Vendera acquired all right, title and interest of H.M. Bettis, Inc., S.B. Street & Co., W.T. Boyle & Co., and Stovall Energy, Ltd. (the "Graham Assignors") in and to the CVU.

19. In an Assignment effective November 30, 2020 and recorded at Book 2173, Page 421 of the Lea County Records, Chevron assigned 99% of its working interest in certain undescribed properties to its affiliated entity, Chevron Midcontinent. On January

22, 2021, Chevron and Chevron Midcontinent recorded an Amendment to Assignment which attached the originally recorded Assignment between them and an Exhibit A which essentially describes the 99% interest conveyed as Chevron's interest in the CVU. A true and accurate copy of the Amendment to Assignment is attached as Exhibit 6.

20. Prior to the Amendment to Assignment attached as Exhibit 6, Chevron owned 59.99148% of the working interest in the CVU.

21. After being provided with the Graham Assignment, Chevron took the position that the Graham Assignment is a withdrawal by the Graham Assignors from the CVU. VM3 disputes that position.

22. In an Assignment, Conveyance and Bill of Sale effective April 1, 2021 and recorded at Book 2179, Page 612 of the Lea County Records, a true and accurate copy of which is attached hereto as Exhibit 7, Highmark acquired all right, title and interest of Triple T Resources LP, being a .13216% of the working interest in the CVU.

23. Even though Chevron was notified that it was removed as operator of the CVU on November 19, 2020, nonetheless on May 3, 2021, Chevron and Chevron Midcontinent announced that they are publicly marketing for sale operatorship and their interests in the CVU and other assets for sale through RBC Capital Markets Richardson Barr. The marketing executive summary is attached as Exhibit 8.

Operations of the CVU

24. In provisions of the CVU Operating Agreement governing and pertaining to the non-operating working interest owners' manner of exercise of supervision over operations of the CVU, there is a provision pertaining to meetings of the working interest owner representatives:

> 4.2 Meetings. All meetings of Working Interest Owners shall be called by Unit Operator upon its own motion or at the request of one or more Working Interest Owners having a total Unit Participation of not less than five percent (5%). No meeting shall be called on less than fourteen (14) days' advance written notice with agenda for the meeting attached. Working Interest Owners who attend the meeting may amend items included in the agenda and may act upon an amended item or other items presented at the meeting. The representative of the Unit Operator shall be chairman of each meeting.

25. Based on the information Vendera received from Marathon because of the Marathon Assignment, Vendera is informed and believes and upon that information and belief alleges that the last meeting of the CVU working interest owners was held in 2012.

26. Beginning in April 2019, Vendera began requesting that Chevron schedule a meeting of the CVU working interest owners or their representatives.

27. To date, Chevron has not scheduled a meeting of the CVU working interest owners.

28. In provisions of the CVU Operating Agreement governing and pertaining to the authorities and duties of the Unit Operator, there is a provision pertaining to reports to Working Interest Owners that requires the Unit Operator to furnish periodic reports to the Working Interest Owners;

> 7.6 Reports to Working Interest Owners. Unit Operator shall furnish to Working Interest Owners periodic reports of Unit Operations as prescribed by Working Interest Owners.

29. To date, despite having first acquired an interest in the CVU three years ago, Vendera has never received a periodic report of Unit Operations from Chevron as required in said Paragraph 7.6.

30. In provisions of the CVU Operating Agreement governing and pertaining to Unit Expenses, there is a provision pertaining to budgets that requires the Unit Operator

to prepare and furnish a budget annually to the Working Interest Owners on or before the first day of August each year:

> 12.2 Budgets. Before or as soon as practical after the effective date hereof, Unit Operator shall prepare a budget of estimated Unit Expense for the remainder of the calendar year, and on or before the first day of each August thereafter shall prepare such a budget for the ensuing calendar year. A budget shall set forth the estimated Unit Expense by quarterly periods. Budgets shall be estimates only and shall be adjusted or corrected by Working Interest Owners and Unit Operator whenever an adjustment or correction is proper. A copy of each budget and adjusted budget shall promptly be furnished to each Working Interest Owner.

31. To date, despite acquiring its first interest in the CVU in May 2018, Vendera has never received an annual budget from Chevron as required by said Paragraph 12.2.

The Unit Agreement & Operator Removal Vote

32. In Paragraph 6.2 of the CVU Operating Agreement provides: "The resignation or remove of Unit Operator, and the selection of a successor shall be governed by the provisions of the Unit Agreement."

33. Regarding removal of the Unit Operator, the Unit Agreement provides: "The Unit Operator may be removed at any time by the affirmative vote of Working Interest Owners having ninety percent (90%) or more of the Voting Interest remaining after excluding the voting interest of the Unit Operator. Such removal shall be effective upon notice thereof to the Commissioner" of Public Lands for the State of New Mexico.

34. The Unit Agreement does not contain any provisions relating to meetings of working interest owners in order to conduct a vote to remove that operator.

35. The Unit Agreement does not require any particular way a vote to remove the operator is conducted.

36. The Unit Agreement does not require that the operator receive notice of a vote by the non-operating interest owners to remove the operator.

37. On September 16, 2020 Vendera sent the non-operating working interest owners in the CVU a letter proposing to (a) vote to remove Chevron as operator of the CVU; and, (b) vote to appoint Highmark or some other agreeable party as operator of the CVU.

38. Between September 16, 2020 and November 19, 2020, the following non-operating working interest owners returned their ballots and voted for the removal of Chevron as operator of the CVU and to elect Highmark as replacement operator: Ann McBee Buell; Breitburn Operating, LP; Frisco Energy LLC; H M Bettis, Inc.; Madelon L. Bradshaw; Martha Leonard Revocable Trust by JP Morgan – Chase Bank, its trustee; Martha Leonard Childrens Trust by JP Morgan – Chase Bank, its trustee; McBee Operating Company, LLC; Miranda Leonard Trust by JP Morgan – Chase Bank, its trustee; S.B. Street & Co.; Stovall Energy, LTD.; Triple T Resources LP (vote dated November 6, 2020); Vendera (voted dated November 19, 2020); WD McBee Enterprises, LTD.; W.T. Boyle & Co. (collectively the "Voting WIOs").

39. The Voting WIOs own 36.03133% of working interest in the CVU which is 90.06% of the working interest in the CVU not owned by Chevron.

40. Pursuant to the Unit Agreement, Chevron was voted out as operator as of November 19, 2020.

41. As the Graham Assignment was effective November 1, 2020, it does not matter if the Graham Assignors are counted among the Voting WIOs or if VR3 and VM3 voted the interests of the Graham Assignors.

42. On November 23, 2020, Vendera notified the Commissioner of Public Lands of the vote to remove Chevron and the election of Highmark as successor operator.

CAUSES OF ACTION

COUNT I: Declaratory Judgment (Chevron Has Been Removed as CVU Operator)

43. Plaintiffs incorporate the allegations in Paragraphs 1-42 above as if fully repeated and set forth herein.

44. There is an actual controversy between Plaintiffs and Defendants as to whether Chevron has been removed from the position of operator of the CVU.

45. The New Mexico Declaratory Judgment Act allows this Court to resolve the disputes between over the construction of the Unit Agreement and the Operating Agreement and declare the rights of the parties thereunder. §44-6-4 NMSA (1975).

46. In a December 2, 2020 letter to the General Counsel of the Commissioner of Public Lands, Chevron took the position that it had not been removed as operator of the CVU because the Operating Agreement requires:

a. All votes of the working interest owners of the CVU to be conducted at a meeting of the working interest owners; and,

b. That Chevron receive notice of the vote to remove it as operator of the CVU.

47. Vendera contends that the vote to remove Chevron as operator was validly conducted because the Operating Agreement requires that the vote to remove be conducted pursuant to the terms of the Unit Agreement and the Unit Agreement does not provide for meetings of the working interest owners or require notice in the event of a vote to remove the unit operator.

48. Alternatively, Vendera contends that Chevron waived any notice or meeting requirement by its conduct in refusing to hold meetings of the CVU working interest owners.

COUNT II: Declaratory Judgment
(Highmark is the
Lawful Operator of the CVU)

49. Plaintiffs incorporate the allegations in Paragraphs 1 – 48 above as if fully repeated and set forth herein.

50. There is an actual controversy between Plaintiffs and Defendants as to whether Chevron has been removed from the position of operator of the CVU.

51. The New Mexico Declaratory Judgment Act allows this Court to resolve the disputes between over the construction of the Unit Agreement and the Operating Agreement and declare the rights of the parties thereunder. §44-6-4 NMSA (1975).

52. The working interest owners, other than Chevron, lawfully voted for Highmark as successor operator of the CVU.

53. Chevron was not entitled to vote for itself as replacement operator of the CVU under the terms of the Unit Agreement.

54. Chevron contents that Highmark is not the lawfully selected successor operator of the CVU.

55. Plaintiffs contend that Highmark is the lawfully elected successor operator of the CVU as of the vote to remove Chevron completed on or before November 19, 2020.

COUNT III: Declaratory Judgment
(Alternatively, Chevron Midcontinent
Cannot Vote for the Successor Operator)

56. Plaintiffs incorporate the allegations in Paragraphs 1 – 55 above as if fully repeated and set forth herein.

57. There is an actual controversy between Plaintiffs and Defendants as to how the election of the successor operator of the CVU should be conducted.

58. The New Mexico Declaratory Judgment Act allows this Court to resolve the disputes between over the construction of the Unit Agreement and the Operating Agreement and declare the rights of the parties thereunder. §44-6-4 NMSA (1975).

59. Chevron's removal as operator of the CVU occurred no later than November 23, 2020 when Vendera gave notice of the vote to remove Chevron and the election of Highmark to the Commissioner of Public Lands.

60. After becoming aware of the vote to remove it as operator and the election of Highmark, Chevron contested its removal and the underlying vote calling for a re-vote whereby Chevron could oversee the vote, while at the same time Chevron apparently attempted to convey 99% of its working interest in the CVU to Chevron Midcontinent in an Assignment dated November 30, 2020. Such assignment to its affiliate caused or would cause Chevron Midcontinent to have adequate voting power to block any removal vote by the other working interest owners, stripping them of this fundamental right and neutering that provision of the Unit Agreement, essentially making Chevron unremovable.

61. The November 30, 2020 Assignment from Chevron to Chevron Midcontinent was ineffective because it did not describe any property interest conveyed and, other than with the benefit of hindsight in the Amendment to Assignment attached hereto as Exhibit 6, it is impossible to tell that Chevron was intending to convey an interest in the CVU to Chevron Midcontinent.

62. At the time of its removal, Chevron owned 59.99148% of the working interest in the CVU and was not entitled to vote for itself as successor operator.

63. Especially as Chevron is marketing its interests in and, apparently, operation of the CVU to third parties for sale, including the interests of Chevron

Midcontinent, there is no valid business reason for the transfer of working interest from Chevron to Chevron Midcontinent. Instead, the transfer appears to be a means of attempting to make Chevron unremovable as operator, and to gerrymander the successor operator vote by allowing Chevron to vote 99% of its working interest for itself. In the event Chevron and Chevron Midcontinent sell their interest in CVU and attempt to deliver operations to a third party, from the current voting percentages held by the working interest owners, in order to appoint a successor operator, the successor operator would require the votes of the parties who have already voted to remove Chevron as Operator and appoint Highmark as the successor operator.

COUNT IV:
Injunction & Accounting

64. Plaintiffs incorporate the allegations in Paragraphs 1 – 63 above as if fully repeated and set forth herein.

65. Chevron refuses to recognize its removal as the operator of the CVU and refuses to cooperate in transferring operatorship of the CVU to Highmark.

66. As Unit Operator of the CVU, Chevron possesses substantial records related to the operatorship of the CVU that are important for all CVU working interest owners to have in the possession of the operator.

67. Chevron is required to execute various documents with the New Mexico Oil Conservation Division and/or New Mexico State Land Office to transfer operatorship of the CVU to Highmark.

68. Chevron is not cooperating in transferring the operatorship of the CVU to Highmark.

69. Highmark has executed and certified the New Mexico Oil Conservation Division Form C-145 to transfer the operatorship of the CVU from Chevron to HighMark, but Chevron has refused to counter execute and certify the C-145. A true and accurate copy of that Form C-145 is attached hereto as Exhibit 9.

70. In a December 1, 2020 letter to the New Mexico State Land Office, a true and accurate copy of which is attached hereto as Exhibit 10, Highmark accepted the duties and responsibilities of the unit operator of the CVU.

71. Public health, safety and welfare is enhanced if Highmark is the recognized lawful operator of the CVU and has all historic records related to the CVU to assist it in conducting the future operations thereof.

72. Plaintiffs will suffer irreparable harm if Chevron is not enjoined to turn over all records of the CVU operator and cooperate in transitioning the operatorship of the CVU to Highmark.

73. Damages are not adequate to compensate Plaintiffs for Chevron's refusal to cooperate in transitioning operatorship of the CVU to Highmark.

74. Chevron should account to Highmark for all CVU production, proceeds from that production, and expenses from December 1, 2020 to the date of the Complaint.

COUNT V:
Breach of Contract

75. Plaintiffs incorporate the allegations in Paragraphs 1 – 74 above as if fully repeated and set forth herein.

76. Prior to the Graham Assignment, the Graham Assignors collectively owned a 0.07044 percent non-operating working interest in the CVU, and Chevron was billing

the Graham Assignors their respective percentage shares of unit operating expenses monthly.

77. The Graham Assignment is substantially like the assignment under which the Graham Assignors acquired their interests in the CVU.

78. After Chevron was presented with the Graham Assignment, Chevron's counsel advised Vendera that "it is clear that the attempted assignment effectuates a withdrawal from the Agreements in violation of Paragraph 19.1 of the Unit Operating Agreement" and Chevron refused and continues to refuse to treat the Graham Assignment as an assignment of the Graham Assignors' CVU interests to Vendera.

79. At the time of formation of the CVU, the Graham Assignors and/or their predecessors in interest contributed the majority of Tract 5 which is a 40-acre tract in the NE/4NE/4 of Section 30 of Township 17 South, Range 35 East which was subject to State of New Mexico oil and gas lease number B-2423 (the "Tract 5 Lease").

80. At the time of formation of the CVU, other than the Tract 5 lease, the Graham Assignors and/or their predecessors in interest did not own any leasehold interest in the other 30 tracts that form the CVU.

81. Paragraph 5.1 of the CVU Operating Agreement reserves the rights of the working interest owners of CVU not modified by that agreement.

82. Paragraph 24.1 of the CVU Operating Agreement provides that the agreement "shall be binding upon and inure to the benefit of the respective heirs, devisees, legal representatives, successors, and assigns of the parties hereto."

83. The Graham Assignment provides that it "does hereby assign, sell and transfer unto Assignee...subject to the limitations, conditions, reservations, agreement

and exceptions set forth in this Assignment" all lease wells, units and contracts listed in the exhibits to that Assignment which include the Tract 5 Lease, the wells in the CVU, the CVU Unit Agreement and the CVU Agreement.

84. Nothing in the Graham Assignment signifies an intent by any of the Graham Assignors or Vendera to withdraw Tract 5 or the interest in the CVU formerly owned by the Graham Assignors from the CVU or the CVU Operating Agreement.

85. Each of the Graham Assignors executed affidavits that were presented to Chevron in December 2020 that they intended to assign their interests to Vendera and VR3, not withdraw those interests from the CVU.

86. Chevron continued to refuse to recognize the Graham Assignment, such that in order to get the Graham Assignment recognized as an assignment and not a withdrawal, VM3 filed a lawsuit in the United States District Court for the District of New Mexico on May 4, 2021 which was assigned case number 1:21-cv-00419 (the "Federal Lawsuit").

87. Shortly, and only after VM3 filed the Federal Lawsuit, Chevron notified Vendera that it recognized that the Graham Assignment as an assignment and not an attempted withdrawal from the CVU.

88. Chevron is a sophisticated party that is well versed in assignments in New Mexico and elsewhere. It knows the difference between a common assignment and an extraordinary attempt to withdraw from a unit.

89. Chevron's position to Vendera that the Graham Assignment was a withdrawal from the CVU was adopted in bad faith.

WHEREFORE, Plaintiffs pray that this Court enter its Judgment:

a. declaring that Chevron has been removed as operator of the Central Vacuum Unit;

b. declaring that Highmark is the lawfully elected successor operator of the Central Vacuum Unit;

c. or, in the alternative to (b) above, declaring either that on any vote for successor operator, that Chevron must vote its entire former and present interest and that Chevron Midcontinent is not entitled to vote, or the vote of Chevron and Chevron Midcontinent shall both be treated as votes of the then Unit Operator;

d. requiring Chevron to account for all production from and expenses related to the Central Vacuum Unit on or after December 1, 2020;

e. requiring Chevron to turn over all Central Vacuum Unit records, physical and electronic, to Highmark;

f. awarding Vendera actual and punitive damages for Chevron's bad faith insistence that the Graham Assignment was an attempt to withdraw from the CVU instead of a lawful assignment of interests in real property and associated contracts; and,

g. granting Plaintiffs such other and further relief as this Court may deem just and proper.

Respectfully submitted,

HINKLE SHANOR LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2021, I caused the foregoing, along with this Certificate of Service, to be filed and served electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

_____
Andrew J. Cloutier

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

VENDERA RESOURCES III, LP; VENDERA MANAGEMENT III, LLC, and HIGHMARK ENERGY OPERATING LLC,

Plaintiffs,

v. **No. D-506-CV-2021-00438**

CHEVRON U.S.A. INC., and CHEVRON MIDCONTINENT, L.P.,

Defendants.

DEFENDANTS' MOTION TO DISMISS COUNTS I-IV

Counts I, II, III, and IV of Vendera Resources III, LP, Vendera Management III, LLC, and Highmark Energy Operating LLC's (collectively, "Plaintiffs") First Amended Complaint for Declaratory Judgment, Account, and Injunctive Relief ("FAC") mirrors relief sought by Plaintiffs in an earlier filed proceeding before OCD and therefore must be dismissed pursuant to Rule 1-012(B)(1) NMRA. Plaintiffs' position on this motion was not requested. *See* Rule 1-007.1(C)(1) NMRA.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The claims in Plaintiffs' FAC all relate to a dispute between Chevron and Plaintiffs over operatorship of the Central Vacuum Unit (the "CVU"), a tertiary CO2 recovery oil and gas unit in Lea County, New Mexico. Plaintiffs seek a judicial decree that Defendant Chevron U.S.A. Inc. has been removed as operator of the CVU, and Plaintiff Highmark Energy Operating LLC has been appointed as operator of the CVU.

EXHIBIT 2

Before filing their complaint in this Court, however, Plaintiffs sought relief from the New Mexico Oil Conservation Division ("OCD") on these same issues. Because they elected to pursue administrative remedies before OCD, this Court lacks jurisdiction to entertain the same issues through Plaintiffs' parallel declaratory judgment action in this Court. Instead, Plaintiffs' fate is tied to the administrative process they elected to pursue. Judicial review of the issues raised in Counts I-IV may only be had by way of the administrative appeals process.

II. BACKGROUND

A. Plaintiffs Initiated OCD Case No. 21704 Before Initiating This Case

Initially, on November 23, 2020, Plaintiffs contacted the New Mexico State Land Office ("SLO") purporting to notify the Commissioner that Chevron had been removed as operator. Chevron promptly responded disputing Plaintiffs' claims, and in December 2020, Chevron submitted a series of letters to the SLO providing support for its position. Then, on February 2, 2021, Plaintiffs filed an application in Case No. 21704 with OCD, captioned *Application of Vendera Resources III, LP, Vendera Management III, LLC and Highmark Operating, LLC to Approve a Form C-145 Naming Highmark Energy Operating, LLC as the Successor Operator of the Central Vacuum Unit, Lea County, New Mexico*. Plaintiffs filed their Amended Application in Case No. 21704 on April 7, 2021 ("OCD Application"). *See* Exhibit 1.

On May 14, 2021—more than three months after filing OCD Case No. 21704—Plaintiffs filed their Complaint for Declaratory Judgment, Accounting and Injunctive Relief in this Court. Plaintiffs filed their FAC on June 23, 2021. The only material difference between Plaintiffs' original complaint and their FAC is the addition of Count V, an unrelated claim asserting that Chevron breached the Central Vacuum Unit Operating Agreement by refusing to recognize an assignment of unit working interest by a third party to Plaintiffs. FAC, ¶¶ 75-89. Because Count

V is not raised in Plaintiffs' OCD Application, Chevron does not herein seek dismissal of Count V.

B. Plaintiffs' FAC Duplicates the Same Issues and Requests the Same Relief Requested In Case No. 21704

The most cursory comparison of Plaintiffs' OCD Application with Counts I-IV of the FAC shows that both raise the same issues and seek the same relief, all related to Plaintiffs' claims that Chevron has been removed as operator of the CVU and replaced by HighMark.

Both pleadings address Plaintiffs' threshold claim that Chevron was removed as CVU Operator. The OCD Application alleges that "Vendera organized a vote to remove Chevron as unit operator. Sufficient votes were cast to replace Chevron as United operator[.]" Ex. 1, ¶9. Plaintiffs also request that OCD enter an order "removing Chevron as operator." *Id.*, p. 5. Similarly, Count I of the FAC asks the Court to declare that "Chevron Has Been Removed as CVU Operator." FAC, p. 9; *id.*, ¶44 ("There is an actual controversy between Plaintiffs and Defendants as to whether Chevron has been removed from the position of operator of the CVU.").

Both pleadings address Plaintiffs' claim that HighMark has replaced Chevron as the CVU Operator. The OCD Application alleges that "Highmark [is] the duly elected successor unit operator" (Ex. 1, ¶11) and requests that OCD enter an order "[a]pprov[ing] the Form C-145 naming Highmark as successor unit operator of the CVU." *Id.*, p. 5. Count II of the FAC mirrors this claim and request for relief by asking the Court to declare that "Highmark is the Lawful Operator of the CVU." FAC, p. 10; *id.*, ¶55 ("Plaintiffs contend that Highmark is the lawfully elected successor operator of the CVU as of the vote to remove Chevron completed on or before November 19, 2020.").

Both pleadings challenge an assignment of interest made by Chevron to an affiliate. Plaintiffs' OCD Application alleges "Chevron still took surreptitious steps to dilute all non-

operated working interest owners by purportedly assigning all of its right, title and interest in the CVU . . . attempting to make it virtually impossible for the non-operated working interest owners to remove Chevron as the unit operator[.]" Ex. 1, ¶14. Plaintiffs mount a similar challenge to the assignment in the FAC by alleging that the challenged assignment would result in Chevron being unremovable as unit operator: "[s]uch assignment to its affiliate caused or would cause Chevron Midcontinent to have adequate voting power to block any removal vote by the other working interest owners . . . essentially making Chevron unremovable." FAC, ¶60. This allegation is the basis for Count III, pled in the alternative to Counts I and II FAC, ¶61 ("The November 30, 2020 Assignment from Chevron to Chevron Midcontinent was ineffective[.]").

Finally, Plaintiffs ask both OCD and this Court to ultimately effectuate the relief sought in both forums through requests to force a transfer of operatorship from Chevron to HighMark. Plaintiffs asked OCD to "approve the Form C-145 naming Highmark as successor unit operator of the CVU, and removing Chevron as operator." *Id.*, p. 5. Plaintiffs argue that OCD has the authority under OCD Rule 19.15.9.9 to unilaterally approve the Form C-145, without Chevron's signature. *See* Response of Vendera Resources III, LP, Vendera Management III, LLC, and Highmark Energy Operating LLC In Opposition to Chevron U.S.A. Inc.'s Motion to Dismiss, attached as Exhibit 2. Count IV requests similar relief through an injunction and accounting.[1] FAC, ¶¶ 64-74. Plaintiffs seek an injunction to enforce the judgments requested in Counts I and II. Specifically, Plaintiffs seek an injunction requiring Chevron to execute documents transferring operatorship to Highmark. *Id.*, ¶65 ("Chevron is required to execute various documents . . . to transfer operatorship of the CVU to Highmark."); *id.*, ¶69 ("Chevron has refused to counter execute and certify the C-

[1] The accounting remedy is addressed below. *See* IV.D, *infra*.

145."); *id.*, ("Damages are not adequate to compensate Plaintiffs for Chevron's refusal to cooperate in transitioning operatorship of the CVU to Highmark.").

C. Chevron's Challenge to the OCD Application Has Been Briefed, Argued, and Awaits Decision by OCD

Chevron moved to dismiss Plaintiffs' Case No. 21704 on two different grounds. First, Chevron argued that OCD does not have jurisdiction to decide the operatorship issue to the extent resolution of that dispute turns on the interpretation of a private contract. *See* Chevron U.S.A. Inc.'s Motion to Dismiss, Case No. 21704, attached as Exhibit 3. Second, Chevron challenged Plaintiffs' interpretation of Rule 19.15.9.9 NMAC. *Id.*, ¶¶9-13. Chevron argued that, contrary to Plaintiffs' assertion, the rule does not allow OCD to unilaterally effect a change of operator. *Id.*

Chevron's motion to dismiss Case No. 21704 has been fully briefed. OCD heard argument on Chevron's motion to dismiss on April 8, 2021. The case is pending and awaits OCD decision. That decision is subject to judicial review under the Oil & Gas Act. *See* NMSA 1978, § 70-2-25 (providing for appeal to the district court pursuant to § 39-3-1.1).

III. STANDARD OF REVIEW

Whether a trial court has jurisdiction in any case is a question of law. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶10, 171 P.3d 300. "The question of jurisdiction compels an answer. Therefore, when a jurisdictional claim is raised, the issue must be decided before a court can review the case." *Id.*, (internal citations and quotations omitted).

IV. ARGUMENT

A. Controlling Supreme Court Precedent Dictates a Single Path to Judicial Review for Administrative Decisions

Smith v. City of Santa Fe firmly proscribes a district court's jurisdiction over a declaratory judgment action where the same issues have been raised in an administrative process. There,

plaintiff Smith applied to the City of Santa Fe ("the City") for a permit to drill a water well within the City's water service area. *Smith*, 2007-NMSC-055, ¶¶2, 4. A City ordinance required such a permit, and further prohibited the drilling of any water well if the applicant's property was within 200 feet of a City water distribution line. *Id.*, ¶2. Because the Smiths' property was within 200 feet of the City's water line, the City denied the well permit application. *Id.*, ¶4. The Smiths appealed the denial of the permit application to the City Manager, then to the Public Utilities Committee, and finally to the City Council. All appeals were denied. *Id.* Important to the supreme court's decision (discussed below), the Smiths did not pursue judicial review of the City's denial under Rule 1-075 NMRA. *See generally*, *Smith*.

Unhappy with the City's ruling, the Smiths filed a declaratory judgment complaint in district court, seeking a declaration that the City lacked authority over domestic water wells. *Id.*, ¶5. The City moved for summary judgment on grounds that the Smiths failed to exhaust their administrative remedies by not timely pursuing a Rule 1-075 NMRA appeal of the City's decision denying the permit application to the district court. *Id.* The City argued that the Smiths' failure to either exhaust administrative remedies or comply with the time limits of Rule 1-075 precluded the district court from entertaining declaratory relief. *Id.* The district court denied the City's motion for summary judgment, and entered the declaratory judgment requested by the Smiths. *Id.* Following an interim decision by the court of appeals, the New Mexico Supreme Court reversed the district court, finding that the district court lacked jurisdiction over the Smiths' declaratory judgment claims. *Id.*, ¶7.

The supreme court held that the Smiths, having chosen to initiate an administrative process, were limited to the judicial review provided by the administrative process they themselves had initiated. *Id.*, ¶23 ("[H]aving first chosen to pursue administrative relief, we hold that the

Smiths were then required to comply with the applicable time frames that would otherwise govern judicial review of the administrative decision that the Smiths themselves requested."). Declaratory judgments cannot be used to "disregard an exclusive statutory scheme for the review of administrative decisions." *Id.*, ¶15. Because the Smiths did not follow the path to judicial review prescribed by the administrative process, but instead filed a separate declaratory judgment action, the district court lacked jurisdiction over the Smiths' claims. *Id.*, ¶24 ("Once invoking the administrative review process offered by the City, the Smiths were obligated to either pursue a timely appeal under Rule 1-075 or, at a minimum, initiate a declaratory judgment action within the same time frame. Having failed to do so, we conclude that the district court lacked jurisdiction to rule on the Smiths' claim for declaratory relief.").

Central to the court's holding was its recognition that a litigant's right to declaratory relief was not without limit. Rather, "declaratory judgment actions are subject to the same limitations inherent in the underlying cause of action from which the controversy arose." *Id.*, ¶20. One such limit is a district court's power to grant declaratory relief in the face of a litigant's decision to first initiate the administrative process. *Id.*

With foresight apparent to the issue before this Court, the supreme court warned against the "chaos" and uncertainty resulting from a litigant being allowed to pursue a declaratory judgment action on the same issues for which it also initiated an administrative process. In that situation, dismissal of the judicial action is necessary because "[t]o hold otherwise would invite chaos and preclude certainty in the finality of administrative decisions that might otherwise be subject to multiple avenues of judicial review at unpredictable times." *Id.*, ¶23. "Sound judicial policy" prevents a "party aggrieved by an administrative decision to forego an available avenue of judicial review only to allow that same party to initiate judicial review in another form at some

future date that no one can predict or rely upon with any certainty. Indeed, the efficient administration of justice requires just the opposite." *Id.*, ¶24.

Smith has been consistently followed since it was decided in 2007. *See, e.g., State ex rel. Regents of E. N.M. Univ. v. Baca,* 2008-NMSC-047, 144 N.M. 530 (where plaintiff "initiated the administrative review process by filing a bid protest before pursuing a declaratory judgment action" and that process "had a specific statutory right to judicial review of the decision on the bid protest[,]" the plaintiff "could not circumvent the established procedures for judicial review" with a stand-alone declaratory judgment action).

B. Having Initiated an OCD Action, Plaintiffs' Only Path to Judicial Review is Through the Oil & Gas Act

Like the plaintiffs in *Smith*, Plaintiffs in this case initiated an administrative action at OCD *before* filing their declaratory judgment claims in this Court. *See* II.A., *supra*. The administrative process Plaintiffs voluntarily initiated has been through one round of briefing, oral argument has been made, and all issues now raised in Counts I-IV remain pending before OCD. *See* II.B., *supra*. And, just as the administrative process at issue in *Smith* provided the Smiths the right to judicial review of the City's decision (*Smith*, ¶22, (discussing Rule 1-075 NMRA)), the New Mexico Oil & Gas Act affords Plaintiffs the statutory right to judicial review of OCD's decision. *See* NMSA 1978, § 70-2-25 (providing for appeal to the district court pursuant to § 39-3-1.1).

Like the Smiths, Plaintiffs here elected to first pursue an administrative action at OCD. Plaintiffs must now follow the path to judicial review prescribed by the Oil and Gas Act. To rule otherwise would result in the "chaos" and uncertainty the *Smith* court warned against. Having both this Court and OCD simultaneously decide the same issues raises serious concerns regarding the certainty, finality, and applicability of the results in either (and both) forums, contrary to the "sound

judicial policy" adopted by the *Smith* court. It also constitutes waste of judicial resources. For these reasons, this Court is without jurisdiction to decide Counts I-IV.

C. Chevron's Motion to Dismiss the OCD Application Does Not Change the Result Required by *Smith*

As explained above, Chevron filed a motion to dismiss Plaintiffs' OCD Application. *See* II.B., *supra*. Plaintiffs may argue that Chevron's motion justifies an exception to the dismissal required by *Smith*. Such an argument would be misplaced, for two reasons.

First, Chevron's motion to dismiss Plaintiffs' OCD Application presents two arguments, on different issues. The first challenges OCD's jurisdiction to interpret a private contract, the CVU Operating Agreement, to decide the operatorship issues presented by Plaintiffs. *See* Ex. 3. Chevron's second argument is different. That argument is based on the proper construction and application of OCD Rule 19.15.9.9. *Id.* Regardless of its disposition of Chevron's first argument, OCD will likely decide the scope of Rule 19.15.9.9.

Second, if OCD grants Chevron's motion, the OCD administrative process grants Plaintiffs the right to judicial review of that decision. *See* NMSA 1978, § 70-2-25 (providing for appeal to the district court pursuant to § 39-3-1.1). Under *Smith*, where a party is aggrieved by an administrative decision, and the process provides the right to judicial review, judicial review can be obtained only under that administrative process, and not by the declaratory judgment act. *Smith*, ¶¶23, 24.

D. The Court Lacks Jurisdiction to Decide Plaintiffs' Entitlement to an Accounting

In Count IV, Plaintiffs request the Court to order an accounting for "all CVU production, proceeds from that production, and expenses from December 1, 2020 to the date of the Complaint."

FAC, ¶74. Although Plaintiffs did not request an accounting in the OCD Application (*see generally* Ex. 1), the Court nevertheless lacks jurisdiction to order the requested accounting.

Plaintiffs' request for an accounting puts the proverbial cart before the horse. An accounting "is not to be had for the mere asking." *Priestley v. Law*, 1927-NMSC-062, ¶4, 262 P. 931. Rather, a plaintiff must establish its entitlement to the accounting, and until it does so, a request for an accounting is premature. *Id.*; *see also Stockmen's Ins. Agency v. Guarantee Reserve Life Ins. Co.,* 217 N.W.2d 455, 459 (N.D. 1974) ("[a] party is not entitled to an accounting simply because he demands that remedy; first the party has the burden of proving its right to the accounting."). Accordingly, resolution of an accounting claim involves a two-stage process:

> A suit for an accounting must be tried in two stages. The first stage is to determine whether there is any right to an accounting. Only if the trial court determines that there is a right to an accounting does the trial proceed to the second stage which is the actual accounting.

Cohoon v. Cohoon, 627 S.W.2d 304, 306 (Mo. App. 1981).

To succeed on the first stage of the accounting claim, Plaintiffs must prove its right to an accounting. That is, Plaintiffs must prove that Chevron has been removed, and Plaintiff Highmark has been appointed, as the operator of the CVU. These issues are the subjects of Counts I and II, respectively. Under *Smith*, the Court lacks jurisdiction to decide Counts I and II. The Court cannot therefore decide the second stage of Plaintiffs' accounting claim.

E. Alternatively, the Court Should Dismiss Counts I-IV by Application of the Primary Jurisdiction Doctrine

If the Court declines to follow *Smith*, it should nonetheless dismiss Counts I-IV under the primary jurisdiction doctrine. Primary jurisdiction is a doctrine of comity between courts and administrative agencies. *See Norvell v. Arizona Public Service Co.*, 1973-NMSC-051, 510 P.2d 98. Under the doctrine, this Court has "discretion to abstain from hearing a case that has been brought simultaneously before an administrative tribunal." *See Gandy v. Wal-Mart Stores, Inc.*,

1994-NMSC-040, ¶ 12, 872 P.2d 859 ("Primary jurisdiction is a doctrine used by courts to allocate initial decisionmaking responsibility between agencies and courts where . . . overlaps and potential for conflicts exist. . . . If a court concludes that a dispute brought before the court is within the primary jurisdiction of an agency, it will dismiss the action on the basis that it should be brought before the agency instead.") (*quoting* 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 14.1 (3d ed. 1994)).

The doctrine applies to claims that, although cognizable in court, contain an issue within the competence of an administrative agency. *See Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 857 F.Supp 838, 841 (D.N.M. 1994). In that situation, "the agency's jurisdiction should be given priority in the absence of a valid reason for judicial intervention." *Norvell*, 1973-NMSC-051, ¶35 (quoting authority omitted). In deciding the applicability of the doctrine, courts have generally considered five factors. *Schwartzman*, 857 F.Supp. at 842-43 (identifying and discussing factors). Each factor weighs in favor of following the doctrine here:

- First, does the issue fall within the agency's conventional experience? Yes. Plaintiffs' OCD Application raises the question of the scope and applicability of its own regulation, Rule 19.15.9.9, which OCD is experienced and competent to decide.
- Second, would a party potentially be subject to conflicting orders of the court and agency? Yes. Both Plaintiffs and Chevron are subject to potentially conflicting orders of this Court and OCD, threatening "chaos" and uncertainty.
- Third, have relevant agency proceedings actually been initiated? Yes, Plaintiff initiated their OCD action prior to filing this lawsuit.

- Fourth, has the agency demonstrated diligence in resolving the issue? Yes. Plaintiffs filed their Application on February 2, 2021 and OCD set Chevron's motion to dismiss the Amended OCD Application for hearing on April 8, 2021.
- Finally, what type of relief is sought by the claim? This question asks "is [this] the type of relief courts routinely consider" such as "damages for injury to property or person." *Schwartzman*, 857 F.Supp. at 843. Plaintiffs' claims present a question, in the first instance, of OCD's jurisdiction, as well as on the interpretation and application of OCD Rule 19.15.9.9. These are not questions routinely presented to a court.

Not a single factor weighs in favor of the Court proceeding to simultaneously decide the same claims presently pending before OCD. The Court should abstain from adjudicating, and should dismiss, those claims.

V. CONCLUSION

This Court lacks jurisdiction over Counts I-IV of the First Amended Complaint under the clear holding of *Smith v. City of Santa*. The Court should dismiss those counts. Alternatively, the Court should exercise its discretion to dismiss Counts I-IV under the primary jurisdiction doctrine.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 30, 2021, I filed a copy of the foregoing document via the court's electronic filing system which caused the following to be served via electronic mail:

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