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

APPLICATIONS OF MEWBOURNE OIL COMPANY FOR COMPULSORY POOLING, LEA COUNTY, NEW MEXICO

Case No. 23365
Case No. 23366

APPLICATION OF EARTHSTONE OPERATING, LLC, FOR A HORIZONTAL SPACING UNIT AND COMPULSORY POOLING, LEA COUNTY, NEW MEXICO

Case No. 23475
Case No. 23477

EARTHSTONE OPERATING, LLC'S MOTION TO STRIKE THE AMENDED PRE-HEARING STATEMENT OF MEWBOURNE OIL COMPANY AND EXCLUDE UNDISCLOSED TESTIMONY, EXHIBITS OR EVIDENCE

Earthstone Operating, LLC, OGRID No. 331165 ("Earthstone"), in accordance with Paragraph 5 of the Pre-Hearing Order, moves the Oil Conservation Division (the "Division") to strike the Amended Pre-Hearing Statement of Mewbourne Oil Company ("Mewbourne") and to exclude Nick Stowers or any "rebuttal witness" or "rebuttal exhibits" that Mewbourne "may" present at the hearing on this matter.

Earthstone and Mewbourne both were subject to the same Pre-Hearing Order in this matter, which the Division filed on June 15, 2023, and which required both parties to file seven days before the hearing – by September 14, 2023 – "a full narrative of the direct testimony and exhibits for each witness." Pre-Hearing Order ¶ 4(d). Earthstone complied with this requirement (and all of the requirements in the Pre-Hearing Order) by disclosing the full testimony of three witnesses, including testimony and exhibits that explain several aspects of why its development plan is superior to Mewbourne's. But Mewbourne did not comply with this requirement; it did not disclose any testimony or evidence other than that required for uncontested hearings. Only

after seeing Earthstone's pre-hearing statement and packet, did Mewbourne file its "amended" pre-hearing statement, untimely disclosing a "potential rebuttal" witness, but not disclosing any testimony or exhibits this improperly disclosed "potential" witness "may" provide. Mewbourne Amend. PHS at 2.

This process by Mewbourne in violation of the Pre-Hearing Order has denied the Division and Earthstone the ability to bring out the information that this Division and the Oil Conservation Division requires this Division to assess when deciding which of the parties' competing applications, and development plans, is superior.

Mewbourne's improper disclosure of witnesses, testimony, and exhibits continues its failure to act in good faith in these cases. These cases are contested cases before the Division only because Mewbourne is going back on its agreement, reached less than three years ago with Earthstone's predecessor-in-interest, Chisholm Energy, LLC ("Chisholm"), that Mewbourne would not include the acreage targeted in these applications in the North Wilson Deep Unit.

And Mewbourne then unilaterally and unknown to Earthstone went to the State Land Office and failed to provide it a full explanation of these competing applications, so that it could use the State Land Office's unknowing, reluctant endorsement to file a motion to dismiss Earthstone's application in these matters.

Now, less than a week before the contested hearing, and three months after the Pre-Hearing Order was filed in these cases, Mewbourne again fails to proceed in good faith and again tries to disadvantage Earthstone, leaving Earthstone and the Division in the dark by not disclosing – also in violation of the Pre-Hearing Order – what the "[p]otential rebuttal witness" may testify to and what potential "rebuttal exhibits" Mewbourne may file.

In accordance with the Pre-Hearing Order, the Division should strike the Amended Pre-Hearing Statement and exclude any witnesses, testimony, or evidence not disclosed in the Pre-Hearing Statements and Pre-Hearing Exhibit Packets.

BACKGROUND

1. On August 11, 2020, Mewbourne filed an application in Case No. 21418 with the Division requesting that the North Wilson Deep Unit be expanded from 2,145.95 acres to 13,272.13 acres to include, among other lands, the E/2 of Sections 7 and 18, Township 21 South, Range 35 East, NMPM.

2. Earthstone's predecessor-in-interest, Chisholm, along with other working interest owners, opposed the application, because it then owned a 49.916666% Working Interest ("WI") in the E/2 of Section 18 while Mewbourne had no WI in the E/2.

3. Before the December 3, 2020 Division hearing on Mewbourne's application in Case No. 21418, Chisolm and Mewbourne reached an agreement that Mewbourne would exclude the E/2 of Section 18 to protect Chisholm's, and now Earthstone's, correlative rights in the E/2 of Section 18. *See* Case No. 21418 Hearing Tr. at 5:20-23 (Dec. 3, 2020).

4. Notwithstanding that agreement, and only after Chisholm had been acquired by Earthstone, Mewbourne filed these applications in Case Nos. 23365 and 23366 on January 31, 2023. The applications do not mention the agreement Mewbourne reached previously with Chisholm to exclude this acreage from the North Wilson Deep Unit, nor the discussion of this agreement in the purported negotiations discussed in the applications.

5. In response, Earthstone filed these competing applications in Case Nos. 23475 and 23477.

6. On April 17, 2023, Mewbourne filed its Motion to Dismiss, asserting that it had the State Land Office's approval (attaching an email from the State Land Office that "discourage[d]" the drilling across unit boundaries Mewbourne attempts to do here) and that only it could, and asserting further that the Division granting Earthstone's applications would be "futile." MTD ¶ 7 & Ex. B.

7. On June 15, 2023, the Division entered the Pre-Hearing Order for these cases. The Pre-Hearing Order set the contested hearing for just over three months: September 21, 2023. Given the additional issues present in a contested hearing, and the Division's (and parties') consideration of the seven factors for deciding which of competing development plans are superior, the Pre-Hearing Order sets forth additional requirements for "additional information" with the pre-hearing statement, including "a list of material facts not in dispute," a "list of disputed facts and issues," "identification of the witnesses and their qualifications," and "***a full narrative of the direct testimony and exhibits for each witness***." Pre-Hearing Order ¶ 4(a-d) (emphasis added). Most important, given the Division's and the parties' need to compare the competing applications to determine which is superior, the Division's Pre-Hearing Order required all of this information to be "file[d] . . . by 5 p.m. no later than seven (7) calendar days before the hearing." *Id.* ¶ 4.

8. Seven calendar days before the hearing is September 14, 2023.

9. On September 14, 2023, the final day and deadline to file the pre-hearing statements and exhibits under the Pre-Hearing Order, both Earthstone and Mewbourne timely filed their Pre-Hearing Statements and Pre-Hearing Exhibit Packets.

10. Earthstone's Pre-Hearing Statement identified three witnesses: Landman Amanda Redfearn, Geologist Jason Asmus, and Petroleum Engineer Nicholas Goree. *See* Earthstone PHS

at 6. Earthstone also lists the undisputed and disputed facts and issues. *See id.* at 5-6. And in Earthstone's Pre-Hearing Exhibit Packet, Earthstone included Mr. Goree's affirmed direct testimony, providing the narrative testimony that the Division's Pre-Hearing Order required about why Earthstone's development plan is superior to Mewbourne's and providing to the Division as the Pre-Hearing Order requires four exhibits that compare Mewbourne's development plan and AFEs with those of Earthstone. *See* Earthstone Pre-Hearing Exhibits Packet, Ex. C & C-1 to C-4. Additionally, Mr. Goree's sworn direct testimony comparing Earthstone's applications with Mewbourne's applications, Earthstone's geologist, Jason Asmus, testifies in his sworn direct testimony about the features of Earthstone's development plan that make it superior to Mewbourne's development plan from a reservoir engineering perspective. *See* Ex. C ¶¶ 8-13. Additionally, like Mr. Goree's exhibits comparing the AFEs and development plans, attached to Mr. Asmus's testimony are five exhibits – Exhibits B-5 to B-10 – that compare Mewbourne's development plan to Earthstone's development plan from the reservoir perspective. *See id.*; *see* Earthstone Pre-Hearing Exhibit Packet Exhibits B-5 to B-10.

11. In Mewbourne's Pre-Hearing Statement, Mewbourne identified two witnesses only: Landman Adriana Salgado and Geologist Jordan Carroll. *See* Mewbourne PHS at 2. Mewbourne's Pre-Hearing Statement also fails to list any proposed disputed or undisputed facts and issues. *See Id.* In the Mewbourne Pre-Hearing Exhibit Packet, neither the direct testimony of Ms. Salgado or Mr. Carroll, nor the exhibits provided for them (nor any exhibits properly and timely disclosed by Mewbourne) discuss Earthstone's competing applications' development plan. At bottom, on the deadline for direct testimony and exhibits under the Division's Pre-Hearing Order, Mewbourne failed to provide exhibits or testimony that compare Mewbourne's development plan to Earthstone's superior plan. Mewbourne failed to provide Earthstone or the

Division any proposed evidence on which the Division or Earthstone could prepare to develop questions or cross-examination to test Melbourne's apparent contention that its development plan is superior – or even as proficient – as Earthstone's development plan. [1]

12. On September 15, 2023, after the Division's deadline to disclose witnesses and exhibits and provide "a full narrative of the direct testimony and exhibits for each witness," Pre-Hearing Order ¶ 4(d), Mewbourne filed its "Amended" Pre-Hearing Statement. This untimely Amended Pre-Hearing Statement made two changes to the timely filed Pre-Hearing Statement: addition of a previously undisclosed witness "Nick Stowers, Engineer," and that "Mewbourne Oil Company may present rebuttal exhibits." Mewbourne Am. PHS at 2 (emphasis omitted). In addition to late disclosure of witnesses, Mewbourne did not provide the required "Full narrative of the direct testimony and exhibits" for Mr. Stowers, and still has not done so. Pre-Hearing Order ¶ 4(d).

ARGUMENT

13. The New Mexico Legislature created the Division and authorized the Division to pool the lands or interest in a spacing unit "to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste." NMSA 1978, § 70-2-17(C).

14. When two operators file applications to pool the lands or interest in the same spacing unit, the Division and the Oil Conservation Commission have developed a number of factors to consider in evaluating competing compulsory pooling applications. Those factors include working interest control, good faith negotiation, differences in proposed risk charge, ability to prudently operate the property, and, most important, "geologic evidence as it relates to

[1] There may be one exception to the complete omission of exhibits comparing the development plans, and that's the "Letter of Support" from Devon Energy Production Company, L.P. *See* Ex. 4. However, this letter does not reference Earthstone's competing applications, let alone provide any basis to compare which development plan is superior, as the Division is required to do to grant a pooling order here.

well location and recovery of oil and gas and associated risk." *Longfellow Energy, LP*, Order No. R-21834 ¶ 13 (Sept. 8, 2021) (quoting *KCS Medallion Resources, Inc.*, Order R-10731-B, ¶ 23(f) (Feb. 28, 1997)).

15. Thus, to evaluate which of two competing development plans is superior, as the Division must do here, the Division may consider the following factors:

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").

Id. ¶ 14.

16. The Division cannot evaluate these factors, however, without evidence. And that's the reason why the Division imposes additional requirements in the filings for contested pooling orders, as it did here in its June 15, 2023 Pre-Hearing Order. Given the importance of selecting the best development plan to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste, it's understandable and proper that the Division require the parties to file a full narrative of the direct testimony and exhibits for each witness." Pre-

Hearing Order ¶ 4(d). The pre-filing of that evidence allows the Division to prepare for questions for the parties. And at least equally as important, it allows the adversarial party to prepare cross-examination, because the opposing party is on notice what evidence will be presented and is in the best position, given the work put into developing the competing applications and development plan, to bring out the nuances in the competing plan to compare and establish why its plan is superior.

17. But Mewbourne failed to comply with the Division's Pre-Hearing Order. It did not file the required full narrative testimony of its engineer Mr. Stowers or Mr. Stowers' exhibits as required. Indeed, Mewbourne failed to disclose any testimony or evidence that Mr. Stowers may present. And this failure was not cured by the untimely-filed amendment.

18. There is no excuse for Mewbourne's failure to comply with the Division's Order. The Pre-Hearing Order was filed three months ago, June 15, 2023. After the Pre-Hearing Order, Mewbourne did not object to having to file the additional testimony and evidence, or to disclose the additional witnesses. Mewbourne didn't object at all. And it's not as if the additional requirements the Division included in the Pre-Hearing Order for this contested hearing are new; the requirements to file the full narrative of the direct testimony and exhibits for each witness in the contested hearing is a consistent requirement that the Division imposes in contested hearing going back years. *See, e.g., Longfellow Energy, L.P.*, OCD Case No. 21651, Pre-Hearing Order ¶ 4 (Mar. 4, 2021).

19. The disclosure of Engineer Nick Stowers by Mewbourne after the deadline imposed three months ago in the Division's Pre-Hearing Order in the "Amended" Pre-Hearing Statement is improper. It violated the Division's three-month old pre-hearing order. And classifying the witness as "a rebuttal witness" who "may" provide exhibits is improper as well.

There is no basis for a "rebuttal" witness; there's no provision in the Division rules, there's no provision in the Pre-Hearing Order, and that the parties are required to disclose a full narrative of all witnesses seven days in advance of the hearing makes clear that there can be no rebuttal witnesses (as it's not possible to provide the full narrative of rebuttal witnesses a week before the hearing).

20. Mewbourne's failure to follow, or decision not to follow, the Division's clear requirements in the Pre-Hearing Order places the Division and especially Earthstone at a distinct disadvantage. Neither the Division nor Earthstone can anticipate what, if anything, Mr. Stowers or any other Mewbourne witness may say about why its applications and development plan are superior to Earthstone. Mewbourne now has an additional seven days to review Earthstone's properly and timely filed full narrative and exhibits for all of its witnesses, and develop probing cross-examination, and develop additional direct testimony and exhibit evidence, which Earthstone cannot. This creates a completely unfair process and denies to Earthstone due process. It denies the Division the ability to properly perform its obligation to choose which of Earthstone's and Mewbourne's development plans will best "avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste." NMSA 1978, § 70-2-17(C).

21. The New Mexico Court of Appeals has long held that it is an abuse of discretion and reversible error as violative of fairness and due process rights to allow a previously-undisclosed witness to testify without allowing the opposing party "an adequate opportunity to interview, depose ***and prepare for an adequate cross-examination***" of a late-disclosed witness. *Khalsa v. Khalsa*, 1988-NMCA-013, ¶ 20, 107 N.M. 31, 751 P.2d 715 (emphasis added). *See id.* ¶ 21 (holding trial court abused discretion by allowing the expert to testify). Likewise, the late disclosure of testimony that changed the theory of the plaintiff's case, without providing the

opposing party "the chance to adequately defend" against the untimely evidence is an "abuse of discretion" and reason for reversal. *Camp v. Bernalillo Cnty. Medical Ctr.*, 1981-NMCA-069. ¶ 11, 96 N.M. 611, 633 P.2d 719.

22. Earthstone is prejudiced by the untimely disclosure of a "potential rebuttal witness" and potential "rebuttal exhibits" that continue to remain undisclosed. As the New Mexico Court of Appeals held in *Khalsa* and *Camp*, the untimely disclosure has unduly prejudiced Earthstone because it cannot "prepare for an adequate cross-examination" and does not have "the chance to adequately defend" against whatever Mewbourne and Mr. Stowers may say as purported "rebuttal." *Khalsa*, 1988-NMCA-013, ¶ 20; *Camp*, 1981-NMCA-069. ¶ 11. The Division must, therefore, exclude Mr. Stowers and any undisclosed testimony and exhibits.

23. And Mewbourne has no excuse for its failure to timely disclose this evidence. Every party in a contested hearing going back over at least two years, and likely much longer, has been subject to the same requirements to disclose the narrative direct testimony of their witnesses and their exhibits a week before the hearing. There is no exception to these rules. And Mewbourne didn't object to the Pre-Hearing Order or request an exception. Instead, Mewbourne simply filed an "amended" pre-hearing statement disclosing what it calls a "rebuttal" witness who may testify – to what we don't know – and may present exhibits – about what we don't know. Mewbourne now has a week to review and assess all of Earthstone's evidence that it can present at the hearing, because Earthstone followed the Division's Order. Earthstone, on the other hand, which properly has followed the Division's Order, rules, and has diligently worked to meet all of the requirements and additional requirements imposed on it, is now at a distinct disadvantage going into the Division's important compulsory pooling hearing. After all that the Division and Earthstone put into these cases, that is unfair and a denial of due process.

24. Because of Mewbourne's deliberate and obvious failure and refusal to comply with the Pre-Hearing Order, the Division properly should strike Mewbourne's "Amended" Pre-Hearing Statement that only improperly adds a "potential rebuttal witness" and "may present rebuttal exhibits," and exclude Mr. Stowers, and any exhibits or testimony that were not fully-disclosed before the Division's September 14, 2023 deadline in the Pre-Hearing Exhibit Packets, including, of course, any "rebuttal" evidence (testimony and exhibits).

CONCLUSION

Over three months ago, the Division filed the Pre-Hearing Order for these cases and ordered both parties to disclose a full narrative of every witnesses' direct testimony and all exhibits to be used at the hearing. The Division required that information, among other information, to be filed by 5pm at least seven days before the hearing: September 14, 2023. Earthstone complied with these requirements, which requirements are consistent in every contested hearing. Mewbourne did not. And Mewbourne put the Division and especially Earthstone at a disadvantage in allowing Earthstone to prove, and the Division to see, why Earthstone's development plan is superior to Mewbourne's. Given Mewbourne's failure to comply with the Division's unambiguous requirements, Earthstone moves the Division to strike the Amended Pre-Hearing Statement, exclude any witnesses not disclosed in the Pre-Hearing Statements, exclude any testimony not disclosed in the Pre-Hearing Exhibit Packets, and exclude any exhibits not disclosed in the Pre-Hearing Exhibit Packets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the New Mexico Oil Conservation Division and was served on counsel of record via electronic mail on September 18, 2023:

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