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

APPLICATION OF MEWBOURNE OIL COMPANY FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	**Case No. 21361**
APPLICATION OF MEWBOURNE OIL COMPANY FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	**Case No. 21362**
APPLICATION OF MEWBOURNE OIL COMPANY FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	**Case No. 21363**
APPLICATION OF MEWBOURNE OIL COMPANY FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	**Case No. 21364**

MEWBOURNE OIL COMPANY'S
REPLY IN SUPPORT OF MOTION FOR REFERRAL OF APPLICATIONS TO NEW MEXICO OIL CONSERVATION COMMISSION FOR HEARING IN CONJUNCTION WITH *DE NOVO* HEARING IN CASE NOS. 21277- 21280

In accordance with the Oil Conservation Division's ("Division") Scheduling Order on Motion for Referral of Applications, Mewbourne Oil Company ("Mewbourne") submits its Reply to Apache Corporation's Response to Motion for Referral of Applications to New Mexico Oil Conservation Commission for Hearing in Conjunction with *De Novo* Hearing in Case Nos. 21277-21280 ("Apache Response") and Ascent Energy, LLC's Response to Motion for Referral of Applications to New Mexico Oil Conservation Commission for Hearing in Conjunction with *De Novo* Hearing in Case Nos. 21277-21280 ("Ascent Response").

I. Introduction

1. The Oil and Gas Act ("the Act") confers upon the Commission and Division concurrent jurisdiction to prevent waste, promote conservation, and protect correlative rights and

authorizes the Director of the Division to refer any matters to the Commission for hearing. *See* NMSA 1978, §§ 70-2-11 and 70-2-6. As explained in Mewbourne's Motion and below, a joint hearing would protect correlative rights, prevent waste, and promote conservation in accordance with the Act. A joint hearing would also promote efficiency and conserve resources of the Division, the Commission, and the parties. Accordingly, good cause exists for the Director to refer Mewbourne's applications to the Commission.

2. Neither Apache nor Ascent provides a legitimate reason to deny Mewbourne's Motion. Apache ignores that a joint hearing would protect correlative rights, prevent waste, promote conservation, and result in efficiency and disregards the nature and scope of the *de novo* hearing. Ascent's position that only Mewbourne's applications involving the W/2 W/2 of Sections 28 and 33 should be considered at a joint hearing fails to provide a basis to treat the applications differently, is predicated on unsworn allegations, and mistakenly relies on Mewbourne's actions at the Division hearing on Apache's and Ascent's applications. Accordingly, Apache's and Ascent's objections to Mewbourne's Motion are unfounded and should be rejected.

II. Apache ignores that a joint hearing would promote efficiency and comport with the requirements of the Oil and Gas Act and disregards the nature and scope of the *de novo* hearing.

3. Mewbourne's applications in Division Case Nos. 21361-21364 involve acreage that overlaps with Ascent's applications in Commission Case Nos. 21277 and 21278 and that conflicts with Apache's proposed development plans in Commission Case Nos. 21279 and 21280. If the cases are heard separately, the parties will be required to participate in a hearing before the Division on Mewbourne's applications, participate in a *de novo* hearing before the Commission on Apache's and Ascent's applications that involve similar evidence and overlapping acreage, and then potentially participate in another *de novo* hearing on Mewbourne's applications. A joint

hearing would promote efficiency and conserve resources, eliminate the risk of inconsistent decisions, and protect correlative rights by allowing the Commission to address the competing applications collectively.

4. Contrary to Apache's claims, Mewbourne's applications do not seek a Division or Commission determination regarding its contractual dispute with Ascent. Rather, the applications seek compulsory pooling for horizontal spacing units in the W/2 of Sections 33 and 28, Township 20 South, Range 30 East in Eddy County, in which Mewbourne holds a 50% interest. Mewbourne's Motion provided background on its agreement with Ascent to explain why Mewbourne filed these applications and seeks a joint hearing. As explained in the Motion, Mewbourne has acted reasonably and in good faith and should be permitted to present its applications, and respond to Apache's and Ascent's applications, in a manner that protects correlative rights, prevents waste, and promotes conservation in accordance with the requirements of the Oil and Gas Act. A joint hearing would best facilitate this result.

5. Apache's argument that Mewbourne should be required to present its applications to the Division to develop the record and avoid surprise at the *de novo* hearing ignores that the *de novo* hearing will be an entirely new hearing. *See* Response at ¶¶ 4-5. The Oil and Gas Act and its implementing regulations provide for a *de novo* hearing before the Commission – not a *de novo* appeal. *See* NMSA 1978 § 70-2-13; 19.15.4.23.A NMAC. At the *de novo* hearing, all parties will be permitted to present new evidence and arguments and are not bound by the record before the Division. *See id*.; *see also Alarcon v. Albuquerque Public Schools Education Board*, 2018-NMCA-021, ¶ 28, 413 P.3d 507 ("A *de novo* hearing is an entirely new hearing that is conducted as if there had been no prior hearing."). This is true whether Mewbourne's applications are heard along with Apache's and Ascent's applications or whether only Apache's and Ascent's applications are heard.

To ensure fairness, the Commission's rules require the parties to submit exhibits one week prior to the *de novo* hearing and provide an opportunity for the introduction of rebuttal exhibits. *See* 19.15.4.13.B.2 NMAC. Given these provisions, there is no basis for Apache's position that a Division hearing on Mewbourne's applications should be required to develop the record or avoid surprise. *See* Response at ¶ 6.

6. With respect to Apache's argument that the Director does not have authority to consolidate cases before the Commission, *see* Response at ¶ 3, the Act expressly authorizes the Director to refer "any hearing on any matter" to the Commission and does not impose restrictions on the reason for the referral. NMSA 1978 § 70-2-6(B). Thus, Mewbourne's applications can be referred to the Commission for the purpose of a joint hearing. If the cases are referred to the Commission and the Commission determines that a separate motion for consolidation is necessary, Mewbourne will file one.

7. Regarding Apache's request for a continuance of the *de novo* hearing until December 10, 2020 to allow for discovery from Mewbourne, Mewbourne does not believe any such discovery should be necessary given the Commission's rules discussed above but would not object to a continuance of the *de novo* hearing if its Motion is granted.

8. A joint hearing would comport with the Act's requirement that the Commission and the Division exercise concurrent jurisdiction to prevent waste, protect correlative rights, and promote conservation and would also promote efficiency and conserve resources of the Division, the Commission, and the parties. Apache's objections to Mewbourne's Motion are unfounded and should be rejected.

III. Ascent fails to provide a legitimate basis to treat Mewbourne's applications that involve the W/2 W/2 of Sections 28 and 33 differently from the applications that involve the E/2 W/2 of Sections 28 and 33 and improperly relies on Mewbourne's actions at the Division hearing.

9. Ascent concurs that Mewbourne's applications regarding acreage in the W/2 W/2 of Sections 28 and 33 (Case Nos. 21362 and 21364) should be considered at the *de novo* hearing for purposes of efficiency but requests that Mewbourne's applications regarding acreage in the E/2 W/2 (Case Nos. 21361 and 21363) be heard by the Division after the *de novo* hearing. But as explained in Mewbourne's Motion, Apache's applications affect all of Mewbourne's applications, and a joint hearing would consequently promote efficiency, conserve resources, protect correlative rights, and avoid the risk of inconsistent decisions.

10. The unsworn factual allegations contained in Ascent's Response do not support Ascent's request for a separate hearing on Mewbourne's applications involving the E/2 W/2 of Sections 28 and 33, and they are insufficient to overcome Mewbourne's sworn factual statements. *See, e.g., V.P. Clarence Co. v. Colgate,* 1992-NMSC-022, ¶ 2, 115 N.M. 471 (unsworn factual assertions are not evidence). Many of the unverified allegations are also inaccurate, including Ascent's claim that Mewbourne had not satisfied contingencies for the proposed trade by March of 2020.[1]

11. Ascent's argument that it would distract the Commission to hear cases regarding the W/2 W/2 and the E/2 W/2 of Sections 28 and 33 at the same time is unfounded. Ascent Response at 25. Ascent has not provided any geological basis for this position or any information

[1] Mewbourne completed its quiet title action prior to March 2020 and before the Division issued Order R-21258. Motion at Exhibit A, ¶¶ 6 and 9. Further, Ascent argues both that it was willing and able to close the transaction in March of 2020 and that the letter agreement expired in February 2019. *See* Ascent Response at ¶¶ 11 and 22. If the letter agreement had expired in February 2019, there would have been no basis for Ascent's testimony at the August 2019 hearing that it had "a pending deal" to acquire the acreage subject to the resolution of title issues. *See* Ascent Response at Exhibit B.

to establish that the ownership interests differ. And again, Apache's applications affect all of the acreage. Ascent concedes as much in its Response. *See* Ascent Response at 27 (stating that a Commission determination on Apache's applications will control determinations regarding the W/2 W/2 and the E/2 W/2). It seems that Ascent's position results from the fact that it intends to file pooling applications regarding the E/2 W/2 in the future. *See* Ascent Response at ¶ 26. Ascent's stated intent to file applications in the future should not be used to determine the Division's treatment of the applications that are currently pending.

12. Ascent's request that the Division postpone a hearing on Mewbourne's applications involving the E/2 W/2 of Sections 28 and 33 until after the *de novo* hearing should be denied. Mewbourne's Motion only involves a request for referral of its applications to the Commission, and no continuance motion is pending. And again, Ascent's potential future pooling applications should not impact the Division's treatment of Mewbourne's pending applications.

13. The alleged "federal rights" raised by Ascent that relate to BLM's approval of a development area have no bearing on Mewbourne's request for a joint hearing. *See* Ascent Response at 24. Although the BLM's actions regarding the development area will be considered at the *de novo* hearing, they do not provide a reason that Mewbourne's applications should not be heard with Apache's and Ascent's applications. Further, Ascent fails to identify any authority holding that BLM approval of a development area may constitute a property right.[2] Commission Order R-12108-C does not support Ascent's position, as that case did not involve a development area, and the Commission stated it was doubtful that an APD constituted a property right and that

[2] In fact, the Secretary of the Interior's 2012 Order on the Potash Area gives BLM discretion to approve an operator or successor operator of a development area and drilling islands. *See* Secretarial Order No. 3324 at ¶ 6(e)(2)(c).

any right conferred by an APD does not control the Commission's inquiry regarding compulsory pooling. *See* Order R-12108-C, ¶¶ (f) and (o).

14. Ascent's attempt to construe Mewbourne's actions at the hearing in Division Case Nos. 16481 and 16482 as an admission regarding Ascent's applications or qualifications lacks merit. *See* Ascent Response at ¶¶ 17-19. As Mewbourne explained above, all parties will be permitted to present new evidence and arguments at the *de novo* hearing. That is precisely why parties often enter an appearance in cases heard by the Division even if they do not present evidence. Further, as Mewbourne explained in its Motion, it did not oppose Apache's and Ascent's applications because it had entered into a letter agreement with Ascent that involved a trade of Mewbourne's acreage in Section 33. Because Mewbourne and Ascent had entered into a trade agreement and Mewbourne was completing a quiet title action to complete the transaction, Mewbourne had no reason to oppose Ascent's applications. Mewbourne's actions at the Division hearing cannot be construed as an admission of any sort.

15. Ascent's request for leave to seek consolidation regarding the compulsory pooling applications it intends to file in the future is premature, as those applications are not pending before the Division.

IV. Conclusion

16. The Oil and Gas Act establishes that it is the Division's and Commission's joint obligation to protect correlative rights, prevent waste, and promote conservation. As explained in Mewbourne's Motion, Mewbourne holds a 50% interest in its proposed horizontal spacing units and in the spacing units proposed by Ascent, and Mewbourne has drilled and completed over 400 wells in Eddy County while Ascent has completed none. These facts, as well as the history of the negotiations between Mewbourne and Ascent, provide a strong basis for Mewbourne's pooling

applications and for Mewbourne's opposition to Ascent's and Apache's applications and demonstrate that a joint hearing is appropriate to protect correlative rights, promote conservation, and prevent waste.

17. Considering Mewbourne's applications in conjunction with Ascent's and Apache's applications would also allow the Commission to resolve the conflicting applications in a manner that promotes efficiency and conserves resources of the Division, the Commission, and the parties. Otherwise, Mewbourne's applications will be heard by the Division and Ascent's and Apache's applications will be heard *de novo* by the Commission, potentially resulting in conflicting decisions and delay if a *de novo* hearing is subsequently required on Mewbourne's applications.

For the foregoing reasons, Mewbourne respectfully requests that the Director of the Division issue an order referring Division Case Nos. 21361 through 21364 to the Commission for hearing in conjunction with Commission Case Nos. 21277 through 21280.

Respectfully submitted,

HINKLE SHANOR LLP

/s/ Dana S. Hardy

Dana S. Hardy
Dioscoro "Andy" Blanco
P.O. Box 2068
Santa Fe, NM 87504-2068
Phone: (505) 982-4554
Facsimile: (505) 982-8623
dhardy@hinklelawfirm.com
dblanco@hinklelawfirm.com
Counsel for Mewbourne Oil Company

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2020, I served a true and correct copy of the foregoing pleading on the following counsel of record by electronic mail:

Earl E. DeBrine, Jr.
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Phone: (505) 848-1800
edebrine@modrall.com
Counsel for Apache Corporation

Darin C. Savage
Andrew D. Schill
William E. Zimsky
Abadie & Schill, P.C.
214 McKenzie St.
Santa Fe, NM 87501
Phone: (970) 385-4401
darin@abadieschill.com
andrew@abadieschill.com
bill@abadieschill.com
Counsel for Ascent Energy LLC

Ernest L. Padilla
Padilla Law Firm, P.A.
Post Office Box 2523
Santa Fe, NM 87504
Phone: (505) 988-7577
padillalaw@qwestoffice.net
Counsel for EOG Resources, Inc.

Dalva L. Moellenberg
Gallagher & Kennedy, PA
1239 Paseo de Peralta
Santa Fe, NM 87501-2758
dlm@gknet.com
Counsel for Oxy USA, Inc.

/s/ Dana S. Hardy
Dana S. Hardy