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, 21362, 21363 and 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

ASCENT ENERGY LLC'S MOTION TO DISMISS
APACHE CORPORATION'S CASE NOS. 21489-91

Ascent Energy, LLC ("Ascent") respectfully requests that the Division dismiss Apache's pooling applications in Case Nos. 21489, 21490, and 21491, and on the same grounds described herein, dismiss Mewbourne's pooling applications in Case Nos. 21362 and 21364. In support of its Motion to Dismiss, Ascent states the following:

Procedural Background:

1. Pursuant to NMSA 1978 § 70-2-13 and NMAC 19.15.4.23(A), Apache Corporation ("Apache") and Mewbourne Oil Company ("Mewbourne") requested the Oil Conservation Commission ("Commission") to conduct *de novo* hearings of the following cases decided by the Oil Conservation Division ("Division"): Case Nos.16481 and 16482, which decided spacing and pooling applications filed by Ascent, and Case Nos. 20171 and 20202, which decided spacing applications filed by Apache. The plain language of § 70-2-13 and Rule 19.15.4.23(A) provide for these cases to be heard *de novo* and the Commission properly scheduled the *de novo* hearing, docketing these as Case Nos. 21277, 21278, 21279, and 21280. Subsequently, Mewbourne, in its "Motion for Referral of Applications to New Mexico Oil Conservation Commission for Hearing in Conjunction with *De Novo* Hearing in Case Nos. 21277-21280," requested that its newly-filed cases be added to the *de novo* hearing, to wit: Case Nos. 21361, 21362, 21363 and 21364. After Mewbourne filed with the Division its Motion to Refer these cases, Apache, which had initially opposed Mewbourne's referral on valid legal grounds, filed its "(Amended) Motion to Stay the *De Novo* Hearing in Case Nos. 21277-21280," requesting that the *de novo* hearing be stayed so that Apache could file more cases to be included in the *de novo* hearing, to wit: Apache's new pooling applications in Case Nos. 21489, 21490, and 21491.

2. On August 25, 2020, the Commission issued Order No. R-21454 in which it stayed the *de novo* hearings until the Division decided Apache's yet to be filed pooling applications and Mewbourne's pooling applications. Ascent filed a Motion to Rehear Order No. R-21454 which opposed the inclusion of Apache's newly-filed cases, arguing that their inclusion exceeds the statutory authority governing *de novo* hearings. The parties fully briefed this issue. On September 17, 2020, the Commission issued Order No. R-21454-A, stating that Order No. 21454 does not order the Division to rehear Ascent's pooling applications under Case Nos. 16481 and 16482; rather, the order stayed the hearings in the matters in Case Nos. 21277, 21278, 21279, and 21280, until all competing applications could be heard in conjunction with one another or be entirely consolidated for the purpose of hearing. Thus, Order No. R-21454-A only stayed the *de novo* hearing as scheduled and left it to the discretion of the Division to hear Apache's newly-filed cases and the manner in which they should be heard at the Division level. In doing so, the Commission did not make findings or rulings on the legal arguments presented by Ascent nor did it provide reasoning or rationale, pursuant to § 70-2-13 and case law, that show the statutory basis for the Division's hearing the newly-filed cases as a precondition for their inclusion in the *de novo* hearing or whether such inclusion is proper under § 70-2-13 and related case law.

Legal Overview and Arguments:

3. Based on the foregoing, Ascent respectfully requests that the Division exercise its authority, pursuant to NMSA 1978 § 70-2-6, to address the questions that remain unresolved: whether the Division's hearing of Apache's newly-filed cases for purposes of including them in the *de novo* hearing is prohibited by statute and case law.

4. The matter in Case Nos. 21489, 21490, and 21491, has been previously adjudicated by the Division in Case Nos. 20171 and 20202, in which the Division, by its final Order No. R-21258, denied Apache's development plan for the N/2 of Sections 28 and 29 and the NE/4 of Section 30, Township 20 South, Range 30 East, Eddy County, New Mexico ("Apache's Laydown Plan"). Therefore, the Division is barred, under *res judicata*, from hearing the new cases, as such hearing constitutes a re-litigation of the matter in Apache's original Lay Down Plan. Apache's efforts to repackage the previously-adjudicated matter as new cases (particularly Apache's redundant descriptions of the N/2 as the S/2 N/2 and the N/2 N/2 and changes in well locations) does not obviate the fact that these new cases involve the same parties, the same formations, the same lands, and the same issues, and therefore *res judicata* applies.

5. Likewise, the Division is also barred, under *res judicata*, from hearing Mewbourne's applications in Case Nos. 21362 and 21364 covering the W/2 W/2 of Sections 28 and 33, Township 20 South, Range 30 East, Eddy County, New Mexico ("W/2 W/2 Lands"). The Division issued a final order for W/2 W/2 Lands that granted operatorship to Ascent. Although the Division is barred from hearing these two cases, Ascent recognizes that, since they address facts of the W/2 W/2 Lands, these cases could be deemed part of the original cases and included in the *de novo* hearing. *See* Footnote No. 1, herein, for further discussion regarding the inclusion of Mewbourne's Case Nos. 21362 and 21364.

6. For applicable arguments and analysis demonstrating why the Division is barred under *res judicata* from hearing Apache's newly-filed pooling applications and Mewbourne's newly-filed applications for the W/2W/2 Lands, *see* Ascent's Motion to Rehear Order No. R-21454, at ¶¶ 9-11, attached hereto as Exhibit 1; and more specifically, *see also* Ascent's Reply to

Mewbourne's Response in Opposition to Ascent's Motion to Rehear Order No. 21454, at ¶¶ 1-5, attached hereto as Exhibit 2.

7. If the Division heard and decided Apache's pooling applications, Apache would receive an improper advantage at the expense of both Ascent and Mewbourne. Hearing Apache's cases gives Apache an unprecedented three bites at the apple in these proceedings. Apache had its first bite at the original hearing (Case Nos. 20171 and 20202) where its development plan was denied. Now, if the Division proceeds with these cases, Apache would get a second bite to promote its same general development plan; and finally, if the Division consolidates and refers the cases to the Commission for the *de novo* hearing, Apache would receive its third bite. Allowing such an outcome runs counter to the established practices of the Division and abrogates all notions of fundamental fairness. In short, this represents a grave miscarriage of due process.

8. Furthermore, hearing Apache's applications in Case Nos. 21489, 21490, and 21491, for the purpose of consolidating them with the Division's hearing of Mewbourne's applications in Case Nos. 21361, 21362, 21363, and 21364, and then referring all such cases to the Commission for a single *de novo* hearing exceeds the plain language, and statutory mandate, of § 70-2-13, which requires that the "matter," and only the "matter," of the original hearing at the Division level be heard by the Commission. The inclusion of additional "matters" is barred by the statute because it is prejudicial to the parties involved, allows opposing parties to exert undue, unpredictable advantage in the proceedings, and undermines a fair playing field for all parties, including all future applicants, who rely on the predictability of clear statutory interpretation by the Division. Including such new matters represents the emergence of a new policy that goes against decades of Division precedent. For applicable arguments and analysis

demonstrating why the Division is barred from referring Apache's and Mewbourne's applications to the Commission as additional matters in the *de novo* hearing, *see* Ascent's Motion to Rehear Order No. R-21454 at ¶¶ 12-16, attached hereto as Exhibit 1; more specifically, *see also* Ascent's Reply to Mewbourne's Response in Opposition to Ascent's Motion to Rehear Order No. 21454 at ¶¶ 6-8, attached hereto as Exhibit 2.[1]

9. The extent to which new matters could be introduced in a *de novo* hearing was an issue of substantial and unresolved concern in the original 1955 drafting of the *de novo* statute, in which former Governor Simms explained that the difference between "*de novo*" and "*de novo* on the record" resides in the observation that "*de novo* on the record" considers only the evidence in the record while "*de novo*" considers the record as well as the introduction of additional evidence relating to the record. *See* Case No. 903 at p. 24. The Governor provided an example of a trial examiner who heard a case, while a study relevant to the presented evidence of the case was being conducted but was not completed until six months later. If the study provided facts that were at the time unknown to the Examiner's ruling, Governor Simms reasoned that the "*de novo*" hearing should allow such additional evidence provided by the study as it may impact an understanding of the record. *See id.* at pp. 24-25. In the present cases, such analogy provides the basis for Mewbourne's introduction of new facts such as its acquisition of new working interest or the status of prior negotiations in the W/2 W/2 Lands, all appropriate under the proper application of § 70-2-13, which is the reason Ascent did not object to the introduction of these new facts. However, Governor Simms and officials to the original discussion of the statute in

[1] The Division should note that Ascent does not object to the Commission including Mewbourne's applications in Case Nos. 21362 and 21364, covering the W/2 W/2 Lands, in its *de novo* hearing. Mewbourne was present at Division's original hearing for the W/2 W/2 Lands during which working interest was discussed, and Mewbourne has subsequently acquired working interest in these Lands. Therefore, there is an argument that these applications could be considered part of the matter of the original cases, which Ascent has decided not to contest so that Mewbourne would be allowed to address issues of new working interest and prior negotiations the *de novo* hearing.

no way contemplated, or considered, that new applications, and extraneous evidence newly created or derived from new applications, be included in a *de novo* hearing. On the contrary, the officials expressed concern that such inclusion would undermine due process and the constitutionality of the *de novo* statute. *See* Case No. 903 at p. 20. (Reviewing the *de novo* statutes of other states, the officials noted that the main considerations were "due process requirements" and "what was required as a constitutional matter.") Due process and the proper constitutional interpretation of § 70-2-13 should take priority over administrative efficiency and economy.

10. Finally, the Division may hear Mewbourne's applications in Case Nos. 21361 and 21363, which cover the E/2 W/2 of Section 33 and 28, Township 20 South, Range 30 East, Eddy County, New Mexico ("E/2 W/2 Lands"). However, after deciding these cases, the Division is barred from referring the cases to the Commission for inclusion in its *de novo* review because, in addition to the reasons stated above, the Commission lacks the necessary jurisdiction to hear cases that arise from a contract dispute.[2] For applicable arguments and analysis that determine why the Division should not refer cases that arise from a contract dispute to the Commission for

[2] Counsel for Apache made this same argument, stating in Apache's "Response to Mewbourne Oil Company's Motion for Referral of Applications to New Mexico Oil Conservation Commission for Hearing in Conjunction with *De Novo* Hearing in Case Nos. 21277-21280," that "the reasons proffered by Mewbourne for consolidation are a contractual dispute between Ascent and Mewbourne that caused it to file new applications before the Division. The Commission clearly lacks jurisdiction to resolve contract disputes…." (emphasis added). This argument represents standing policy of the Division and Commission. *See* Order Nos. 12747 and 14187-E. Apache changed its position regarding consolidation, not because Apache determined that the Commission has jurisdiction to address contract disputes, but by wrongly asserting "that Ascent will now likely seek to consolidate its newly-filed cases with the *de novo* hearing cases." *See* Apache's "(Amended) Motion to Stay the *De Novo* Hearing in Case Nos. 21277-21280," at ¶ 14. Apache's assertion is a mischaracterization of Ascent's intent; Ascent has consistently maintained throughout its pleadings that the only cases that are permitted to be heard in the *de novo* hearing are the original cases involving the W/2 W/2 Lands. Only if the Division decided, contrary to the mandate of § 70-2-13, to refer to the Commission Mewbourne's cases for the E/2 W/2 Lands, did Ascent request, as a protective measure, that its cases be referred to the Commission. *See* Ascent's "Response to Mewbourne Oil Company's Motion for Referral of Applications to New Mexico Oil Conservation Commission for Hearing in Conjunction with *De Novo* Hearing in Case Nos. 21277 – 21280" at p. 12. Counsel for Ascent agrees with Apache that the Commission lacks jurisdiction to hear as part of its *de novo* hearing new cases that clearly arise from a contract dispute and has consistently maintained in its pleadings that the Division and Commission adhere to the statutory mandate of § 70-2-13.

inclusion in the *de novo* hearing, *see* Ascent's Motion to Rehear Order No. R-21454 at ¶¶ 17-18, attached hereto as Exhibit 1. Counsel for Apache and Mewbourne have been notified about this Motion to Dismiss.

For the forgoing reasons, Ascent respectfully requests that the Division, after review and consideration of the legal arguments of record, dismiss Apache's applications in Case Nos. 21489, 21490, and 21491, and decline to hear or consolidate said cases for purposes of referring them to the Commission for the *de novo* hearing. If the Division finds that Apache's applications should be dismissed based on *res judicata*, then Mewbourne's applications in Case Nos. 21362 and 21364, which cover the W/2 W/2 lands, should also be dismissed on the same grounds, and accordingly, Ascent respectfully requests their dismissal.

Furthermore, Ascent respectfully requests that the Division decline to consolidate and refer to the Commission for the *de novo* hearing Mewbourne's Case Nos. 21361 and 21363. Order No. R-21454-A specifically states that "[t]he hearings in these matters shall be stayed until all competing applications are heard by the Division or are otherwise resolved." (emphasis added). Ascent submits that the proper interpretation and application of § 70-2-13, and related case law, would fully resolve the applications with respect to the requirement that they be heard at the *de novo* hearing. If after review of the legal issues presented herein, the Division finds that the applications do not qualify for consolidation and referral, the Commission should deem the cases resolved, for purposes of the *de novo* hearing, and proceed with its review of the "matter" of the original cases (Case Nos. 16481, 16482, 20171 and 20202) as required by statute. By eliminating Apache's and Mewbourne's impermissible cases, the Division would ensure that the proceedings in this matter promote administrative efficiency and economy within the proper, constitutionally-authorized application of §70-2-13.

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 October 29, 2020:

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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 HORIZONTAL SPACING UNIT AND POTASH DEVELOPMENT AREA, EDDY COUNTY, NEW MEXICO

Case Nos. 21279 & 21280
Order No. R-21454

ASCENT ENERGY, LLC'S MOTION TO REHEAR ORDER NO. R-21454

The Oil Conservation Commission ("Commission") issued Order No. R-21454 staying the *de novo* hearing of the above captioned cases and directing the Oil Conservation Division ("Division"), to: rehear the pooling applications (Case Nos. 16481 and 16482) of Ascent Energy, LLC, ("Ascent"); hear the yet to be filed pooling applications of Apache Corporation ("Apache"); and hear the pooling applications (Case Nos. 21361, 21362, 21363, and 21364) of Mewbourne Oil Company ("Mewbourne").[1] Afterwards, the Commission plans to hear all cases and matters involved in a consolidated *de novo* hearing. *See* Order No. R-21454, at pp. 1-2, ¶ 2.

In accordance with NMSA 1978 § 70-2-25 and NMAC 19.15.4.25, Ascent respectfully requests a rehearing of Order No. R-21454. In support of its Motion to Rehear, Ascent states the following:

[1] The Division's hearing of the yet to be filed pooling applications of Apache constitutes a rehearing of Case Nos. 21279 and 21280; hearing Case Nos. 21362 and 21364 constitutes a rehearing of the same matter in Case Nos. 16481-16482.

EXHIBIT
1

I. Procedural and Factual Background

1. On April 4, 2020, the Division issued final Order No. R-21258, in which it pooled the working interests in the W/2 W/2 of Sections 28 and 33, Township 20 South, Range 30 East, NMPM, Eddy County, New Mexico ("W/2 W/2 Lands"), granted Ascent operating rights for the W/2 W/2 Lands, and denied the competing spacing application for the N/2 of Sections 28 and 29 and the NE/4 of Section 30, Township 20 South, Range 30 East, NMPM, Eddy County, New Mexico, proposed by Apache, referred to herein as Apache's "Lay Down Unit."

2. On May 4, 2020, Mewbourne filed applications for *de novo* hearings before the Commission in Case Nos. 16481, 16482, 20171, and 20202, and on May 7, 2020, Apache filed applications for *de novo* hearings before the Commission for said cases. The *de novo* hearing had been scheduled for September 17, 2020, pursuant to NMSA 1978 § 70-2-13 and NMAC 19.15.4.23(A).

3. On July 6, 2020, Mewbourne filed compulsory pooling and spacing applications for the W/2 W/2 Lands (Case Nos. 21362 and 21364) and for the E/2 W/2 of Sections 28 and 33 ("E/2 W/2 Lands") (Case Nos. 21361 and 21363).

4. On July 15, 2020, Mewbourne filed a Motion for Referral of Applications to the New Mexico Oil Conservation Commission for Hearing in Conjunction with *De Novo* Hearing in Case Nos. 21277-21280 ("Mewbourne's Motion for Referral"), which was fully briefed by the parties.

5. On August 4, 2020, Ascent filed pooling and spacing applications covering the E/2 W/2 Lands (Case Nos. 21393 and 21394).

6. On August 5, 2020, Apache Corporation ("Apache") filed its (Amended) Motion to Stay the *De Novo* Hearing in Case Nos. 21277-21280 ("Apache's Motion to Stay"), in which it

expressed its intention to submit new pooling applications with the Division for its Lay Down Unit.

7. On August 25, 2020, the Commission issued Order R-21454, granting Apache's Motion to Stay the *de novo* hearing on the Division's Order No. R-21258. In addition, the Commission directed the Division to: (1) rehear Ascent's pooling and spacing applications for the W/2 W/2 Lands (Case Nos. 16481 and 16482); (2) hear Apache's yet to be filed pooling application for its Lay Down Unit; (3) hear Mewbourne's newly filed pooling and spacing applications for the W/2 W/2 Lands (Case Nos. 21362 and 21364); and (4) hear the pooling and spacing applications for the E/2 W/2 Lands filed by Ascent (Case Nos. 21393 and 21394) and Mewbourne (Case Nos. 21361, 21363).

8. On August 27, 2020, the Division issued an order denying Mewbourne's Motion for Referral.

II. Legal Argument:

A. There is no justification to direct the Division to rehear Ascent's and Apache's previously adjudicated competing applications.

9. The full extent of the Commission findings in its Order to Stay is as follows: "[T]here is good cause to stay the proceedings" in "order to prevent waste and protect correlative rights," and that "it is in the best interest of the public and parties that all the related applications be heard in conjunction with one another, or be entirely consolidated for the purpose of hearing." However, the Order to Stay fails to explain how directing the Division to rehear Case Nos. 16481, 16482, 20171, and 20202 will prevent waste or protect correlative rights; nor could such an explanation pass muster since the Division has already fully adjudicated issues of waste and correlative rights with respect to these development plans for the W/2 W/2 Lands and Apache's Lay Down Unit by entering its final Order No. R-21258. Thus, this direction is arbitrary and capricious.

Viking Petroleum, Inc. v. Oil Conservation Comm'n, 672 P.2d 280, 282 (N.M.1983) (findings by expert administrative commission must disclose the reasoning on which its order is based); *Atlixco Coalition v. Maggiore*, 965 P.2d 370, 377 (N.M. App. 1998) (holding that "an agency's action is arbitrary and capricious if it provides no rational connections between facts found and choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.")[2]

10. Rehearing these cases runs counter to the well accepted doctrine of *res judicata*, which is applicable to adjudicative administrative decisions. In the seminal case of *City of Socorro v. Cook*, 24 N.M. 202, 173 P. 682, 685 (N.M. 1918), the New Mexico Supreme Court held that the doctrine of *res judicata* was applicable to administrative adjudications, noting that:

> The courts have uniformly held that the decisions rendered by an officer or a board legally constituted and empowered to settle the question submitted to it, when acting judicially, have the force and effect of a judgment.

See also: *Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1419 (10th Cir. 1990) (holding that "where a state agency in a judicial capacity, resolves facts properly before it and the parties have had an adequate opportunity to litigate, we accord the agency's decision the same preclusive effect to which it would be entitled in the state's courts.").

11. Thus, after the Division issues a final order, the Division lacks the authority to rehear the same case between the same parties involving the same issues. Instead, the proper procedural

[2] When the sufficiency of the Commission's findings is at issue the courts look to see if the findings are "material to the issues," characterized as "foundational matters," "basic conclusions of fact," and "basic findings." *See Fasken v. Oil Conservation Comm'n*, 532 P.2d 588, 590 (N.M. 1975) (citing *Continental Oil Co. v. Oil Conservation Comm'n*, 373 P.2d 809 (1962)) holding that "***[a]dministrative findings by an expert administrative commission should be sufficiently extensive to show ***the basis of the commission's order) (omissions in the original) Consequently, an agency order must be drafted in a manner that provides "effective, meaningful judicial review," which cannot be accomplished if an agency's decision "is founded on unexplained conclusions with inadequate support in the record." *Gila Resources Information Project v. N.M. Water Control Com'n*, 124 P.2d 1164, 1172 (N.M. 2005).

course is for the Commission to hear an appeal of the Division on a *de novo* basis as provided by NMSA 1978 § 70-2-13 and Rule 19.15.4.23(A), which directs the Commission to conduct *de novo* hearings only after a final Division order has been issued. If the Division is allowed to rehear such cases, not only would this waste the Division's time and resources, but depending on the outcome, it would include additional, unauthorized facts in the *de novo* hearing that would result in either prejudice or gratuitous advantage for the parties involved. *See Potter v. Pierce*, 342 P.3d 54, 57 (N.M. 2015) (recognizing that *res judicata* is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on adjudication; and *Heimann*, 904 F.2d at 1419 (stating similar rationale for the Oil Conservation Commission to uphold a decision based on collateral estoppel).

B. The statutory scheme requires the Commission to conduct the *de novo* hearing from the Division's Order on the W/2W/2 Lands separately from any *de novo* hearing on the Division's decision on the E/2 W/2 Lands

12. There is no statutory basis for the Commission to consolidate *de novo* hearings on the completing applications W/2 W/2 Lands with the competing applications for the E/2 W2 Lands.

13. In support of Apache's Motion to Stay, Mewbourne and Apache rely upon NMSA 1978 § 70-2-13. However, the plain language and ordinary meaning of that statute and the related rule, NMAC 19.15.4.23(A), supports Ascent's position that cases decided separately by the Division, outside its original hearing, cannot be consolidated into a single *de novo* hearing. *Marbob Energy v. Oil Conservation Com'n*, 2006-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135, 139 (holding that "[i]n discerning the Legislature's intent, we are aided by classic canons of statutory construction, and '[w]e look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended," and "[w]hen statutory language is clear and unambiguous, [this Court] must give effect to that language and refrain from further statutory interpretation.") (citations omitted)

14. NMSA 1978 § 70-2-13 provides that "[w]hen any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party of record adversely affected shall have the right to have the matter heard *de novo* before the commission." (emphasis added). Rule 19.15.4.23(A) further clarifies the proper construction of the statute: "When the division enters an order pursuant to a hearing that a division examiner held…[and] [i]f a party files an application for a *de novo* hearing, the commission chairman shall set the matter or [the] proceeding for hearing before the commission." (emphasis added).

15. The statute further states the party "shall have the right to have the matter" heard before the Commission. This language provides for the singular "matter" and does not state or include "matters" in the plural. Rule 19.15.4.23(A) reinforces and clarifies this understanding, as it states "the matter" or the "proceeding" in the singular, not matters or proceedings; in other words, "the matter" that is the subject of the Commission's *de novo* hearing is the "hearing that a division examiner held." The Rule does not say "to be held" or "will hold," and therefore does not apply to the new applications of Mewbourne and Apache. Thus, the plain language of both the statute and rule are in harmony and the Commission should adhere to their literal language.

16. In support of the Motion to Stay, Apache and Mewbourne suggest that the Division can rehear the cases and include additional "matters" in the *de novo* hearing pursuant to NMSA 1978 § 70-2-6.[3] However, their reliance on the general language found in § 70-2-6 over the more specific language of § 70-2-13 stands a basic rule of statutory construction on its head. *See Marbob Energy*, at ¶ 14 (finding that "[t]he Commission's reading of Sections 70-2-6 and -11 ignores the specific requirement in Section 70-2-28," thereby creating "a contradiction in the statute.") The

[3] In its Response to Mewbourne's Motion for Referral, Apache argued that § 70-2-6(B) "does not permit the Director to consolidate an application for hearing before the Division with an existing *de novo* hearing pending before the Commission." Apache's Response to Mewbourne's Motion for Referral of Applications to New Mexico Conservation Commission for Hearing in Conjunction with *De Novo* Hearing in Case Nos. 21277-21280, at p. 2, ¶ 3.

Marbob court resolved this ambiguity "by giving effect to Section 70-2-28, which is the more specific statutory provision." *Id.*

C. The Commission lacks the necessary jurisdiction to hear cases of the E/2 W/2 Lands that arise from a contract dispute.

17. After the Division issued Order No. 21258, Mewbourne filed its new applications based on a breach of contract claim. *See* Mewbourne's Motion for Referral of Applications, at pp. 3-4, 6, ¶¶ 4, 10, 14; *see* Mewbourne's Response to Apache's Motion to Stay the *De Novo* Hearing in Case Nos. 21277-21280, p. 2, ¶ 3; *see also* Ascent's Reply to Mewbourne Oil Company's Response to Apache Corporation's (Amended) Motion to Stay *De Novo* Hearing in Case Nos. 21277-21280, at pp. 4-5, ¶¶ 7-8.

18. In fact, Apache makes this point clear in its Response to Mewbourne's Oil Company's Motion for Referral of Applications to New Mexico Oil Conservation Commission for Hearing in Conjunction with *De Novo* Hearing in Case Nos. 21277-21280, at p. 2, ¶ 3 ("Moreover, the reasons proffered by Mewbourne for consolidation are a contract dispute between Ascent and Mewbourne that caused it to file new applications before the Division. The Commission clearly lacks jurisdiction to resolve contractual disputes…."). Therefore, Mewbourne's pooling requests do not arise from the Division's duty to protect correlative rights or prevent waste on behalf of public interest but arises solely from a private dispute over the interpretation of a letter agreement. Disputes over private rights, for which the Division and Commission lack jurisdiction to hear, are properly brought in district court. *See* Order No. R-14187, ¶ 44.[4]

[4] *See also* Chesapeake Operating Inc., v. Burlington Resources Oil and Gas Company, 60 P.2d 1052, 1057 (Okla. Civ. App. 2002) (holding that "disputes over private rights are properly brought in the district court … "The [C]omission's jurisdiction is limited to protection of public rights in development and production of oil and gas. *Leck v. Continental Oil Co.,* 1989 OK 173, ¶ 7, 800 P.2d 224, 226 (emphasis in the original). Interpretation of the applicability of the [contract] would be beyond the Commission's conferred jurisdiction because it concerns a dispute in which the public interest in correlative rights is not concerned.")

III. Conclusion

19. For the foregoing reasons, Ascent respectfully requests that the Commission provide a rehearing of its Order No. R-21454 and give consideration to the legal arguments stated herein and to Ascent's proposed order attached as Exhibit A. In the alternative, should the Commission deny this Motion for Rehearing or decide not to respond within the statutory allotted time, then Ascent respectfully requests that, in order to provide finality pursuant to § 70-2-25, the Commission reserve time at its *de novo* hearing to address the issues raised herein and provide the reasoning that this Motion seeks.

Respectfully Submitted,

ABADIE & SCHILL, PC

/s/ Darin C. Savage

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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 HORIZONTAL SPACING UNIT AND POTASH DEVELOPMENT AREA, EDDY COUNTY, NEW MEXICO

Case Nos. 21279 & 21280
Order No. R-21454

Order No. R-_____

[PROPOSED] ORDER OF THE COMMISSION

THIS MATTER came before the New Mexico Oil Conservation Commission ("Commission") on a Motion for the Rehearing of Order No. R-21454 ("Motion") filed on September 10, 2020 by Ascent Energy, LLC ("Ascent"). The Motion pursuant to NMSA 1978 §70-2-25 describes the current status of several 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, and addresses their legal relationship to the Oil and Gas Act, more specifically to NMSA 1978 §§ 70-2-6 and 70-2-13, along with accompanying rules and regulations.

After review of the Motion, the Commission finds that there is good cause to vacate Order No. R-21454 and proceed with the *de novo* hearing for Case Nos. 16481, 16482, 20171, 20202, 21362, and 21364. Case Nos. 16481, 16482, 20171, and 20202 are the cases previously heard by the Division on August 20, 2019, from which Order No. R-21258 was issued. Case

Exhibit A

Nos. 21362 and 21364 directly concern lands and issues adjudicated in the Division's hearing. Because they are part of the original matter, the Commission finds it proper to review these cases in its *de novo* hearing. Mewbourne's Case Nos. 21361 and 21363, and the future cases Apache plans to file with the Division, were not part of the Division's original hearing, and therefore, the Commission finds they are precluded from the *de novo* hearing pursuant to § 70-2-13 and Rule 19.15.4.23(A).[1]

The Division has authority and jurisdiction over all matters relating to the conservation of and gas in this state, pursuant to §70-2-6(A), which the Division properly exercised in the issuance of its final Order No. 21258. Following the Order, Mewbourne Oil Company ("Mewbourne") and Apache Corporation ("Apache") properly exercised their rights under §70-2-13 and Rule 19.15.4.23(A) and were granted a *de novo* hearing (Case Nos. 21277-21280). Having concurrent jurisdiction with the Division to consider all matters relating to the conservation of oil and gas to the extent necessary for the Commission to perform its duties as required by law, the Commission finds it is empowered to hear under *de novo* conditions the matter involving Division Order No. R-21258, and no other matter, pursuant to § 70-2-13.[2] Mewbourne Case Nos. 21361 and 21363 were not part of the Division's original decision, and therefore, they are precluded from *de novo* hearing by the provisions of § 70-2-13 and Rule 19.15.4, 23(A).

Furthermore, pursuant to the proper application of civil procedure which includes *res judicata*,[3] the Division is barred from rehearing Mewbourne Case Nos. 21362 and 21364, and Apache's cases yet to be filed, which cover the same lands and issues as Division Order No.

[1] *See* Marbob Energy v. Oil Conservation Com'n, 206 P.3d 135 (N.M. 2009)
[2] *See id.*
[3] *See* Potter v. Pierce, 342 P.3d 54 (N.M. 2015); City of Socorro v. Cook, 173 P. 682 (N.M. 1918); Gila Resources Information Project v. N.M. Water Control Com'n, 124 P.3d 1164 (N.M. 2005); Amoco Production Co. v. Heiman, 904 F.2d 1405 (10th Cir. 1990)

21258. *Res judicata* is designed to promote efficiency, avert inconsistent outcomes, and avoid undue costs. A rehearing of these cases by the Division would result in wasted time and resources and risk presenting the Commission with inconsistent Division orders for which statutory and regulatory guidance is lacking.

Mewbourne's applications in Case Nos. 21361-21364 arise from a contract dispute between Mewbourne and Ascent, and a question remains whether it is appropriate for the Commission to intervene in a private dispute. Because Mewbourne's Case Nos. 21361 and 21363 involve a private dispute beyond the jurisdiction of the *de novo* hearing as well as lands and facts not involved with the Division's original hearing, the Commission denies their inclusion in the Commission's *de novo* hearing.[4] However, Mewbourne owns working interest in the proposed units, and therefore, it may pursue its applications with the Division under its normal application process. In contrast, Mewbourne's Case Nos. 21362 and 21364, although initiated in response to a private dispute, do involve lands, working interest and other facts adjudicated in the Division's original hearing, at which Mewbourne was present; and therefore, there is good cause to include these two cases in the *de novo* hearing, and they shall be so included. In this manner, the Commission distinguishes Case Nos. 21361 and 21363 from Case Nos. 21362 and 21364 pursuant to § 70-2-13 and Rule 19.15.4.23(A).

For the foregoing reasons, the Commission finds that Ascent's Motion for Rehearing is well taken and is hereby GRANTED. The Commission vacates Order No. R-21454 and will proceed with the *de novo* hearing as originally applied for by Mewbourne and Apache to hear Case Nos. 21277, 21278, 21279 and 21280 (addressing Division Case Nos. 16481, 16482,

[4] *See* Order No. R-14187, ¶ 44; Continental Oil Co. v. Oil Conservation Com'm, 373 P.2d 809 (1962); Chesapeake Operating Inc. v. Burlington Resources Oil and Gas Company, 60 P.2d 1052 (Okla. Civ. App. 2002); see also NMSA 1978 § 70-2-13.

20171, 20202), as well as Case Nos. 21362 and 21364, thus maintaining proper procedure as directed by §§ 70-2-6 and 70-2-13, and Rule 19.15.4.23(A).

IT IS SO ORDERED.

DONE at Santa Fe New Mexico, on this ____ day of _____, 2020.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

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

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

OCC Case Nos. 21277 & 21278
(Division Case Nos. 16481 & 16482)

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

OCC Case Nos. 21279 & 21280
(Division Case Nos. 20171 & 20202)
Order No. R-21454

ASCENT ENERGY, LLC'S REPLY TO MEWBOURNE OIL COMPANY'S RESPONSE IN OPPOSITION TO ASCENT ENERGY LLC'S MOTION TO REHEAR ORDER NO. R-21454

Ascent Energy, LLC ("Ascent") submits its Reply to Mewbourne Oil Company's ("Mewbourne") Response in Opposition to Ascent Energy, LLC's Motion to Rehear Order No. 21454 ("Mewbourne's Response") in order to provide the Oil Conservation Commission ("Commission") a clarification of Ascent's position in relation to the arguments advanced by Mewbourne. In support of its Reply to Mewbourne's Response, Ascent states the following:

1. It is beyond dispute that when the Oil Conservation Division ("Division") issued Order No. R-21258, it had finalized its adjudication of all facts and issues for protecting correlative rights and preventing waste in the subject lands and units. However, Mewbourne and Apache Corporation ("Apache") are seeking to re-litigate these same facts and issues in Mewbourne's new applications for the W/2 W/2 of Sections 28 and 33 ("W/2 W/2 Lands")

EXHIBIT
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T20S, R30E, and Apache's yet to be submitted applications for the N/2 of Sections 28 and 29, and NE/4 of Section 30 ("Apache Unit") T20S, R30E.

2. The Division completed its statutory duties for these lands and units pursuant to the Oil and Gas Act; thus, it is not authorized to hear or rehear these same matters after the Commission has granted Mewbourne's application for a *de novo* hearing. Mewbourne did not apply to the Division to reopen the cases in order to have the order modified based upon a procedural omission or defect. Instead, Mewbourne relied on N.M.S.A. 1978, § 70-2-13 to initiate an appellate review by the Commission. Consequently, Mewbourne misapplies its case authority of *Property Tax Dept. v. Molycorp., Inc.* 555 P.2d 903 (N.M. 1976) and disregards the relevant holdings in Ascent's case authority of *Amoco Production Co. v. Heiman*, 904 F.2d 1405, 1414 (10th Cir. 1990) that gives preclusive effect to an agency's decision. *See* Mewbourne's Response p. 4, ¶ 6.

3. An agency can modify an existing order pursuant to a proper reopening of the case for a valid reason; but neither Mewbourne nor Apache have requested the Division to reopen the cases nor have they provided any valid reasons for doing so. They requested an appellate review by the Commission under *de novo* conditions. In its original hearing, the Division issued a final order that is subject to *de novo* review by the Commission under § 70-2-13, the same way a final order by a district court is subject to a *de novo* hearing by an appellate court. Contrary to Mewbourne's assertion that the Division order is not final because it is subject to appellate review by the Commission, the fact that an order is subject to appellate review does not erase the Order's finality insofar as it applies to the Division's jurisdiction to reconsider the facts and issues it has already decided, as provided under case law, statutory mandate, principles of civil procedure and *res judicata*. The Division's order is ripe for appellate

review by the Commission and the Commission has agreed to hear it precisely because it is a final order pursuant to a final decision. If it were not final, the order would not qualify for the appellate review provided by the Commission's *de novo* hearing.

4. New Mexico has adopted "the transactional approach in analyzing the single-cause-of-action element of *res judicata*," which considers "all issues arising out of a 'common nucleus of operative fact' as a single cause of action," as follows: (1) how they relate in time, space or origin; (2) whether, taken together, they form a convenient trial unit, and (3) whether their treatment as a single unit conforms to the parties' business understanding or usage. *See Potter v. Pierce*, 342 P.3d 54, 57 (N.M. 2015). When the Division adjudicated Apache's and Ascent's applications in the presence of Mewbourne, it satisfied all three criteria, thus creating a final decision with preclusive effect at the Division level for the matter and issues involving the protection of correlative rights and the prevention of waste.

5. Furthermore, the *Amoco* court found that the NMOCC's adjudicatory process is entitled to preclusive effect because: (1) the parties who appeared before the agency were represented by counsel; (2) witnesses were cross-examined; (3) documentary evidence was introduced; and (4) the agency rendered findings. *See Amoco,* 904 F.2d at 1419. Again, the Division satisfied these criteria when it rendered in a judicial capacity its final decision on correlative rights and waste for the W/2 W/2 Lands and the Apache Unit; and therefore, the Division is precluded from repeating such hearings on this matter. Mewbourne and Apache must abide by the appellate procedure inscribed into the plain language of § 70-2-13. As Mewbourne asserts, its new pooling applications for the E/2 W/2 of Sections 28 and 33 are "no different from the other pooling applications heard by the Division,"[1] and therefore they should be heard by the

[1] It may true that in form Mewbourne's applications are no different from other pooling applications, but the context and genesis of the application are unique, in that "but for" its breach of contract claim,

Division in the first instance, under normal procedures, and must not be included in the *de novo* hearing designed specifically for review of correlative rights and waste in the W/2 W/2 Lands and the Apache Unit.

6. Contrary to Mewbourne's description of the scope of the Commission's and Division's concurrent jurisdiction, NMSA 1978 §§ 70-2-6 and 70-2-11 do not provide cart blanche license for the Division and Commission to undertake an unqualified, indiscriminate review of correlative rights and waste; both statutes state the "commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law." *See id.* at § 70-2-6(B) and -11(B). This language of limitation restricts the Division and Commission to mutually exclusive roles in the Oil and Gas Act when specific statutes so prescribe.[2] Thus, when the Division enters an order pursuant to a hearing that a division examiner held, the singular role of the Commission, as required by § 70-2-13 and Rule 19.15.4.23(A), is to set the matter for hearing before the Commission, and not include, as required by law, other matters, new applications or rehearings by the Division that risk inconsistent decisions, prejudice or gratuitous advantage.

Mewbourne would not have filed these applications, a fact that not only was acknowledged by Mewbourne in its briefings, but was immediately identified by both Apache and Ascent in their briefings, that Mewbourne's applications arose from a contract dispute and therefore the Commission does not have jurisdiction to hear them as part of its *de novo* hearing unless they were part of the original hearing. Proper venue is in district court. However, Mewbourne's new application for the W/2 W/2 Lands only might be part of a sufficient nexus with the original hearing to warrant review by the Commission.

[2] Not only are separate and distinct roles of the Division and Commission prescribed by § 70-2-13 in relation to § 70-2-6, but separate roles of the Division and Commission appear throughout the Oil and Gas Act. For example, the Division "may make rules and orders" for specific subject matter under the Oil and Gas Act, *see* NMSA 1978 § 70-2-12, but the Commission, not the Division, is the body that "shall" adopt a rule pursuant to the Oil and Gas Act only "after hearing by the Commission." *See* NSMA 1978 § 70-2-12.2. Such distinctions are further reflected in NMSA 1978 § 70-2-31(E), which states "[t]he commission shall make rules, pursuant to Section 70-2-12.2 NMSA," in which it assesses penalties for violations. This authority is not granted to the Division by restrictions in § 70-2-12.

7. The Commission has encountered a similar circumstance in *Marbob Energy v. Oil Conservation Com'n*, 206 P.3d 135 (N.M. 2009) where it argued that the Division's and Commission's broad jurisdiction to protect correlative rights and prevent waste under the general statutes of §§ 70-2-6 and -11 allowed the Division to assess penalties for violations pursuant to specific statutes found at §§ 70-2-28 through -31. Mewbourne correctly points out that where the interpretation of a statute conflicts with the purpose of the statute and therefore does not reflect the legislative intent, such interpretation cannot be adopted, s*ee* Mewbourne Response, p. 3, ¶ 4, and this is precisely what the *Marbob* court found when it ruled against the Commission, holding that the Commission and Division cannot use their broad powers under §§ 70-2-6 and -11 to override the requirements of a more specific statute, as this creates a "contradiction" because the "Legislature cannot have intended both." *See id.* at 141. In the same way, the Commission must not use §§ 70-2-6 and -11 to override the provisions of § 70-2-13.

8. Contrary to Mewbourne's suggestion, Ascent is not seeking to restrict or curtail the important and necessary roles that the Division and Commission perform for the protection of correlative rights and the prevention of waste. Ascent advocates only for the proper maintenance of procedural due process and the integrity of statutory language in order to provide applicants a judicially fair playing field where the Division and Commission can properly exercise their roles to the full extent of the law under the statutory provisions of the Oil and Gas Act. Applicants should be provided a basis that allows them to reasonably rely on orders issued by the Division, and if an opposing party rightfully applies for appellate review pursuant to § 70-2-13, then under such circumstances, all parties involved should be provided a reasonable basis for anticipating how the proceedings of the *de novo* hearing will be conducted and what matter or proceeding the Commission will review. Even if the factors of efficiency of process and the

preservation of administrative resources argued against Ascent's position, which they do not, these factors should not be the main considerations in the Commission's review. Fairness, avoidance of prejudice, procedural due process, reliability, and compliance with proper statutory guidance and legislative intent should be given equal priority, if not more.

For the foregoing reasons, Ascent maintains its position that Order No. R-21454 should be reheard and therefore respectfully requests that the Commission grant Ascent's Motion to Rehear.

Respectfully Submitted,

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