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**

APACHE CORPORATION'S RESPONSE
TO ASCENT ENERGY LLC'S MOTION TO DISMISS

Apache Corporation ("Apache") hereby responds to Ascent Energy, LLC's ("Ascent") Motion to Dismiss Apache Corporation's Case Nos. 21489-91 ("Motion"), which is merely an unsubstantiated attempt to raise arguments previously rejected by the Commission and create

additional work for the parties. This Motion is now Ascent's third attempt to thwart competing cases being heard by the Division that the Commission ruled should be allowed to proceed while a *de novo* appeal involving other competing case was stayed by the Commission. Ascent's Motion fails for the following reasons: (1) Order No. R-21258 has no *res judicata* effect against Apache's Case Nos. 21489, 21490, and 21491 ("Apache's New Cases") and (2) Ascent's interpretation of NMSA 1978, Section 70-2-13 (1981) creates an absurd result that is contrary to the Division's and Commission's long-standing administrative construction.

ARGUMENT

Ascent argues that Apache's New Cases are precluded by the doctrine of *res judicata* because Apache previously filed applications related to the same acreage and that Section 70-2-13 prevents new matters before the Division being heard with cases already before the Commission. As explained below, these arguments are unavailing and the Division may proceed with hearing Apache's Case Nos. 21489, 21490, and 21491.

I. Ascent Cannot Establish *Res judicata*.

In New Mexico, the party asserting *res judicata* must satisfy the following four requirements: "(1) there was a ***final judgment*** in an earlier action, (2) the earlier judgment was ***on the merits***, (3) the parties in the two suits are the same, and (4) the ***cause of action is the same*** in both suits." *Potter v. Pierce*, 2015-NMSC-002, ¶ 10 (citing *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106) (emphasis added).

Moreover, "[*r*]*es judicata* precludes a claim when there has been a ***full and fair opportunit***y to litigate issues arising out of that claim." *Kirby*, 2010-NMSC-014, ¶ 61 (emphasis added). In fact, "a party's full and fair opportunity to litigate is the essence of res judicata." *Brooks Trucking Co. v. Bull Rogers, Inc.*, 2006-NMCA-025, ¶ 11, 139 N.M. 99. The party seeking to bar

claims has the burden of establishing *res judicata*. *Bank of Santa Fe v. Marcy Plaza Associates,* 2002–NMCA–014, ¶ 14, 131 N.M. 537.

a. Ascent cannot establish there is a final judgment.

Here, there is no final judgment. While courts generally have held judgments are final while on appeal, it is well establish that such effect only applies when it is a record appeal and a *de novo* appeal has no such effect of being a final judgment for preclusion doctrines such as *res judicata*. *See Ruyle v. Continental Oil Co.*, 44 F.3d 837, 846 (10th Cir.1994)("Under the federal view, the pendency of an appeal does not prevent application of the collateral estoppel doctrine unless the appeal involves a full trial *de novo*. The majority of state courts follow the federal rule. The federal rule is likewise embodied in the Restatement (Second) of Judgments." (citations omitted)). Accordingly, because the appeal in question is for a *de novo* hearing akin to a trial, Ascent cannot demonstrate that Order No. R-21258 is a final judgment for *res judicata* purposes.

b. Ascent cannot establish the same causes of action were previously brought by Apache and decided on the merits.

The causes of action must be exactly the same in both proceedings and the prior decision must be on the merits of the causes of action. *See Potter*, 2015-NMSC-002, ¶ 10. In Order No. R-21258, with regarding to Apache, the Division dismissed the single issue requested by Apache—the approval of a proposed Potash Area Development plan provided for in the 2012 Secretary of Interior's Order concerning development in the Designated Potash Area in Eddy County, comprised of the N/2 of Sections 28 and 29. Although Apache had originally sought compulsory pooling in the prior cases, the claim was dropped as noted by the Division in its Statement of Factual Findings that:

> Apache has withdrawn the portion of its applications asking for compulsory pooling. Apache has re-iterated its request for the OCD to decide the optimum well direction in this area and to deny Ascent's applications.

> ***
> The applications of Apache Corporation in Case Nos. 20171 and 20202, to the extent not already withdrawn, are hereby dismissed.

Order No. R-21258 at ¶ 14(H). Ascent contends the prior proceeding resulting in a *denial* of Apache's development plan. *See* Motion at ¶ 4. The Division did *not* enter an order that was based upon the merits of an application by Apache for compulsory pooling and approval of any horizontal spacing unit; the Division only *dismissed*[1] Apache's requests for the Division to decide the optimum well direction in the N/2 of Sections 28 and 29 and to deny Ascent's application.

Apache Case Nos. 21489, 21490, and 21491 involve new claims that resulted from the new pooling applications filed by Mewbourne and Ascent involving Apache's acreage that were never decided by the Division on the merits. Specifically, Apache's new applications which are based upon different well proposals for which it was unable to secure voluntary pooling seek an order for compulsory pooling, approval of a horizontal spacing unit, and alternatively, approval of a pilot project in the N/2 of Sections 28 and 29, and the N/2 NE/4 of Section 30 in the Bone Spring and Wolfcamp formations to determine the optimum length and orientation of wells in this area of the DPA, which is critical since development in the DPA is carefully regulated by the Division and the BLM in managing the co-development of oil and gas and potash resources. *See* Applications in Case Nos. 21489, 21490, and 21491. Apache's Case Nos. 21489, 21490, and 21491 cannot be precluded under *res judicata* because Apache's Case Nos. 20171 and 20202 did not include the

[1] The Division did not "deny" this requested relief, which would indicate a decision on the merits, because it "dismissed" Apache's remaining portions of its cases. During the hearing on the prior cases, the Division heard argument regarding a motion to dismiss filed by EOG on the basis that the Division did not have jurisdiction to hear an application for approval of a development plan without at least a request for compulsory pooling. *See* Highlighted Excerpts from August 20, 2019 Hearing Transcript, attached as **Exhibit A**. While the reasoning is not explicitly addressed in Order R-21258, such order does provided Apache's cases are "dismissed." *See generally* Order R-21258. Cases are "dismissed" when procedurally disposed; cases are "denied" when meritoriously disposed. *See, e.g., Jernigan v. New Amsterdam Cas. Co.,* 1961-NMSC-170, ¶ 7, 69 N.M. 336 (holding dismissal for lack of jurisdiction is not a basis for *res judicata*). Thus, this nomenclature indicates the Division held it did not have jurisdiction based on the motion to dismiss. Thus, the record reflects nothing in Apache's prior cases was decided on the merits.

same causes of actions. Moreover, the Division ***dismissed*** Apache's prior applications and did not ***deny*** them on the ***merits***, which is an undeniable requirement for *res judicata*. *Jernigan*, 1961-NMSC-170, ¶ 7, 69 N.M. 336 (holding *res judicata* did not apply because the prior case was dismissed for lack of jurisdiction, which is not a decision on the merits). In short, Ascent cannot meet its burden of establishing both proceedings include the same causes of action that were previously decided on the merits. *Bank of Santa Fe*, 2002–NMCA–014, ¶ 14. While Ascent contends Apache is attempting a third "bite" that would be a "grave miscarriage" of due process, what would be a grave miscarriage of due process is barring Apache from bringing applications never decided and ***already*** recognized as acceptable by the Commission.

c. Ascent also cannot establish the causes of action are the same because the underlying facts of Apache's new cases differ from its prior cases.

In deciding what constitutes a cause of action for *res judicata* purposes, courts often apply the transactional approach, focusing on the underlying facts rather than the legal theories relied on in the first action. *Pielhau v. State Farm Mut. Auto. Ins. Co.*, 2013-NMCA-112, ¶ 14. Ascent contends a hearing on Apache's new cases would constitute "re-litigation of the matter in Apache's original Lay Down Plan" in the N/2 of Sections 28 and 29 and the NE/4 of Section 30. Motion at ¶ 4. Aside from the fact that Apache's request for approval of a development plan was not actually decided on the merits, Apache's New Cases are specific to a new development plan that differs by, among other things, different costs in the authorizations for expenditures, only one Wolfcamp well that is more efficient, and update Bone Spring well locations. Apache's prior well proposals previously submitted in August of 2019 have no bearing on the factors the Division considers in competing cases. *See, e.g.*, Order No. R-20223 at pp. 9-10 (listing the seven (7) factors the Division considers when evaluating competing development plans). In addition, precluding Apache's New Cases under *res judicata* would also prohibit Apache from receiving a "full and fair opportunity"

to adjudicate its claims under its proposed development. *Kirby*, 2010-NMSC-014, ¶ 61. Thus, while Ascent contends the underlying facts relied upon in the first action are the same, such is not the case and Ascent cannot demonstrate the causes of actions are the same from a factual standpoint.

d. Ascent cannot establish Apache had a full and *fair* opportunity to adjudicate its previous cases because Order R-21258 was issued without deliberations from the hearing examiner who presided over the hearing.

It is well established that a party must have received a *full and fair opportunity* to adjudicate a claim in a prior action before it can be precluded under *res judicata* in a second action. *Kirby*, 2010-NMSC-014, ¶ 61; *Brooks Trucking Co.*, 2006-NMCA-025, ¶ 11; *Potter*, 2015-NMSC-002, ¶ 15. Apache did not receive a full and fair opportunity to adjudicate because the order issued months after the hearing examiner retired from the Division and was not the result of deliberations from the hearing examiner who presided over that hearing. The technical hearing examiner who presided over Ascent and Apache's prior cases was William V. Jones. **Exhibit A** at p. 1. The hearing was held on August 20, 2019; Mr. Jones retired from the Division at the end of September. The Division issued Order R-21258 on April 14, 2020, approximately seven months after the retirement of the hearing examiner. Although Section 70-2-13 provides the Division can appoint a hearing examiner to preside over a hearing, prepare a report, and make a recommendation to the Director, the hearing examiner who presided over the hearing retired before the cases were decided. Since Director lost the benefit of the hearing examiner's assessment of the quality of the technical evidence and evaluation of witness credibility, [2]the procedure provided for Section 70-

[2] There were other procedural irregularities in that the post-hearing briefs requested were apparently misplaced as a result of the retirement of the hearing examiner his departure so that they were resubmitted at the request of the Division approximately six (6) months after first being submitted. *See, e.g.*, Apache Corporation's Post-Hearing Brief, available at http://ocdimage.emnrd.state.nm.us/imaging/CaseFileView.aspx?CaseNo=2017 (served and submitted on September 16, 2019 and uploaded March 3, 2020).

2- 13 was not followed and a full and fair opportunity was lacking. Therefore, Ascent cannot meet its burden to establish all the requirements necessary to apply *res judicata*.

II. Ascent's Interpretation of Section 70-2-13 is Dysfunctional and Would Prohibit the Commission from Performing its Adjudicatory Duties, and has Already Ruled that Apache's New Cases May Proceed and Be Consolidated for Hearing with Ascent's and Mewbourne's New Cases.

When evaluating a question of statutory construction, the following general principles apply: "(1) the plain language of the statute is the primary indicator of legislative intent; (2) we will not read into a statute language which is not there, particularly if it makes sense as written; (3) we will give persuasive weight to long-standing administrative constructions of statutes by the agencies charged with administering them; and (4) when several sections of a statute are involved, they must be read together, so that all parts are given effect." *Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 2010-NMCA-065, ¶ 12, 148 N.M. 516. "If the plain language of a statute creates an unreasonable or absurd result, [courts] will reject the literal language." *Id.* Thus, the Division must interpret statutes to fulfill their intended purpose and can take into consideration the Division's and Commission's long standing application.

It appears Ascent argues Apache's New Cases must be dismissed because Section 70-2-13 only provides jurisdiction to hear a single "matter" and to allow Apache's new cases to be consolidated with the competing cases filed by Ascent and Mewbourne would somehow undermine a fair playing field for all parties. Motion at ¶ 8. First, Ascent's argument concerning "referral" of cases from the Division to the Commission, is moot as this issue has been previously decided by the Division with respect to Mewbourne's competing cases. *See* Motion at ¶ 8; Order on Motion for Referral of Applications, issued August 27, 2020, attached as **Exhibit B** (denying Mewbourne's motion for referral). If Apache's and Mewbourne's competing cases are heard before the Commission, it will be because of an appeal from a party and not a referral from the

Division. Second, hearing all competing cases together during a new hearing under the *de novo* standard is clearly fair—they are all on a level playing field once before the Commission.

Third, the Legislature clearly intended Section 70-2-13 to allow competing cases to be heard together before the Commission. The use of "matter" in Section 70-2-13 in the singular form is simply part of a reference to a *right* and not intended to provide any such limitation to hearing only one matter at a time. The relevant portion of Section 70-2-13 containing "matter" states that parties have a *right* to a *de novo* hearing before the Commission. The primary purpose is *to create* a *right* to a *de novo* appeal. The Legislature clearly contemplated *matters* being heard in order for the Commission to adjudicate competing applications and used the singular form to generally describe a *right* with reference to an individual matter. Nothing under Section 70-2-13 explicitly limits jurisdiction to prohibit hearing multiple competing cases during one hearing; such proposition is mere argument of counsel that creates an absurd result. Interpreting "matter" to preclude hearing multiple competing cases as part of the same continuous hearing is an excessively restrictive interpretation not supported by any language or application of this statutory scheme.

Third, Ascent's interpretation would invalidate innumerable cases where the Division heard applications for compulsory pooling of spacing units for multiple wells and those it which it consolidated separate cases involving compulsory pooling requests. The Division's and Commission's long-standing interpretation of Section 70-2-13 is to allow a case file hearing multiple competing cases at the same time. The Division and Commission have historically heard competing matters together because that is necessary to determine the prevailing applicant, and therefore, to preclude hearing Apache's New Cases with Ascent and Mewbourne's 's stayed cases before the Commission runs contrary to a historic and simply pragmatic approach. *See, e.g., Bass Enters. Prod. Co.*, 2010-NMCA-065, ¶ 8 ("Pursuant to Section 70–2–13, Mosaic timely applied

to have the *matters reheard de novo before the OCC*, and the APDs were consolidated and heard together, at which time, all parties were permitted to call witnesses, present exhibits, and cross-examine witnesses.") (emphasis added). To not ensure "that all of the related applications be heard in conjunction with one another . . . would result in potentially piecemeal or inconsistent rulings." Order R-21454-A. Thus, aside from being absurd (because it would prohibit hearing competing cases together), interpreting "matter" to preclude hearing multiple competing cases together on appeal contradicts the Division's and Commission's long-standing administrative construction.

Fourth, an interpretation of the relevant portion of Section 70-2-13 is an issue for decision by the Commission. The sentence including "matter" is triggered "[w]hen any matter or proceeding is referred to an examiner *and a decision is rendered thereon*[.] . . ." Thus, this issue of whether the Commission can hear multiple competing cases arises after the Division has heard a matter and should then be decided by the Commission. Fortunately, the Commission has already decided it can hear these relevant competing cases together. In Order R-21454-A, the Commission ordered Apache's and Mewbourne's new cases be heard by the Division before they are consolidated for a *de novo* hearing along with Ascent's stayed cases. The Commission explained why the cases need to be heard together:

> Order No. 21454 promotes administrative efficiency and economy by ensuring that all of the related applications be heard in conjunction with one another, or be entirely consolidated for the purpose of hearing. To do otherwise would result in potentially piecemeal or inconsistent rulings.

Order R-21454-A. Ascent's Motion to Rehear Order No. R-21454 specifically included this same argument regarding Section 70-2-13 and was the basis for the Commission issuing Order R-21454-A. The Commission already rejected Ascent's interpretation of Section 70-2-13. Accordingly, there is certainly no basis under Section 70-2-13 or any other authority to dismiss Apache's new cases.

III. A *De Novo* Hearing Means "Anew or From the Beginning" and it is Well Established That in such Hearings Parties May Present Completely New Evidence.

It is axiomatic that in a *de novo* hearing before the Commission, parties are afforded parties the opportunity to introduce completely new evidence and raise matters that was never considered by the Division. Ascent's has a unique view of what a *de novo*[3] hearing involves, contending that "'***de novo***' considers the record as well as the introduction of additional evidence related to the record" and "'***de novo on the record***' considers only evidence in the record." Motion at ¶ 9. Section 70-2-13 clearly states the adversely affected party has "the right to have the matter heard ***de novo*** before the commission." (emphasis added). Curiously, Ascent advocates for the adoption of an excessively *restrictive* interpretation of "matter" but an excessively *liberal* interpretation of "*de novo*" in the same exact sentence to prevent introduction of new factual evidence. Motion at ¶ 9. It appears Ascent argues the standard intended in Section 70-2-13 is "*de novo* on the record" because Ascent seeks to bar the introduction of any new evidence. Regardless of this curious juxtaposition, it is clear that the Division cannot create language that does not exist because the use of "*de novo*" without "on the record" makes sense as written to allow presentation of additional evidence not in the prior record. *Bass Enters. Prod. Co.*, 2010-NMCA-065, ¶ 12 ("We will not read into a statute language which is not there, particularly if it makes sense as written[.]"). In sum, the Division should conclude the *de novo* standard for hearings before the Commission allows introduction of new facts not in the record below.[4]

[4] This is also an issue that has no bearing on the cases before the Division, and therefore, the Division need not decide it at this time.

CONCLUSION

As explained above, Order R-21258 has no *res judicata* effect on Apache's New Cases because Ascent cannot meet its burden of establishing that Order R-21258 is a final judgment, Apache previously brought the same causes of action, that such causes of action were decided on the merits, and that Apache received a full and fair opportunity to adjudicate its prior causes of action. In addition, Ascent's interpretation of Section 70-2-13 is certainly no basis to dismiss Apache's New Cases. This Motion is merely a repeat of the same efforts previously raised before the Commission. The Commission has already concluded, based upon an evaluation of these same arguments from Ascent, that the best way to follow the procedure prescribed by the Oil and Gas Act and preserve the due process rights of the parties is to stay the appeal involving just one of the competing proposals, allow the other matters to proceed in an orderly fashion for hearing before the Division, and ultimately consolidate all matters for a *de novo* hearing before the Commission. For these reasons, the Division should deny Ascent's Motion to Dismiss Apache's Case Nos. 21489-91.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: */s/ Earl E. DeBrine, Jr.*
Earl E. DeBrine, Jr.
Deana M. Bennett
Lance D. Hough
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800
edebrine@modrall.com
dmb@modrall.com
ldh@modrall.com
Attorneys for Apache Corporation

CERTIFICATE OF SERVICE

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

Darin C. Savage
Andrew D. Schill
William E. Zimsky
ABADIE & SCHILL, PC
214 McKenzie Street
Santa Fe, New Mexico 87501
Phone: 970.385.4401
darin@abadieschill.com
andrew@abadieschill.com
bill@abadieschill.com
Attorneys for Ascent Energy, LLC

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

Dalva L. Mollenberg
GALLAGHER & KENNEDY, P.A.
1239 Paseo de Peralta
Santa Fe, NM 87501
Phone: (505) 989-7278
dlm@gknet.com
Attorneys for Occidental Permian Limited Partnership

Ernest L. Padilla
PADILLA LAW FIRM, P.A.
P.O. Box 2523
Santa Fe, NM 87504
Phone: (505) 988-7577
padillalaw@qwestoffice.net
Attorney for EOG Resources, Inc.

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: */s/ Earl E. DeBrine, Jr.*
Earl E. DeBrine, Jr.

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

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF ASCENT ENERGY, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO. — CASE NOs. 16481, 16482

AMENDED APPLICATION OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF A HORIZONTAL SPACING UNIT AND POTASH AREA DEVELOPMENT AREA, EDDY COUNTY, NEW MEXICO. — CASE NO. 20171

APPLICATION OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF A HORIZONTAL SPACING UNIT AND POTASH AREA DEVELOPMENT AREA, EDDY COUNTY, NEW MEXICO. — CASE NO. 20202

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

August 20, 2019

Santa Fe, New Mexico

BEFORE: WILLIAM V. JONES, CHIEF EXAMINER
DYLAN ROSE-COSS, TECHNICAL EXAMINER
BILL BRANCARD, LEGAL EXAMINER

This matter came on for hearing before the New Mexico Oil Conservation Division, William V. Jones, Chief Examiner; Dylan Rose-Coss, Technical Examiner; and Bill Brancard, Legal Examiner, on Tuesday, August 20, 2019, at the New Mexico Energy, Minerals and Natural Resources Department, Wendell Chino Building, 1220 South St. Francis Drive, Porter Hall, Room 102, Santa Fe, New Mexico.

REPORTED BY: Mary C. Hankins, CCR, RPR
New Mexico CCR #20
Paul Baca Professional Court Reporters
Albuquerque, New Mexico 87102

EXHIBIT A

APPEARANCES

FOR APPLICANT ASCENT ENERGY, LLC:

JAMES G. BRUCE, ESQ.
Post Office Box 1056
Santa Fe, New Mexico 87504
(505) 982-2043
jamesbruc@aol.com

FOR APPLICANT/PROTESTER APACHE CORPORATION:

EARL E. DeBRINE, JR., ESQ.
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 4th Street, Northwest, Suite 1000
Albuquerque, New Mexico 87102
(505) 848-1800
edebrine@modrall.com

FOR INTERESTED PARTY EOG RESOURCES:

ERNEST L. PADILLA, ESQ.
PADILLA LAW FIRM, P.A.
1512 South St. Francis Drive
Post Office Box 2523
Santa Fe, New Mexico 87504
(505) 988-7577
padillalaw@qwestoffice.net

FOR INTERESTED PARTY MEWBOURNE OIL COMPANY:

GARY W. LARSON, ESQ.
HINKLE SHANOR, LLP
218 Montezuma Avenue
Santa Fe, New Mexico 87501
(505) 982-4554
glarson@hinklelawfirm.com

FOR INTERESTED PARTY OCCIDENTAL PERMIAN LIMITED PARTNERSHIP:

DALVA L. MOELLENBERG, ESQ.
GALLAGHER & KENNEDY, P.A.
1239 Paseo de Peralta
Santa Fe, New Mexico 87501-2758
(505) 982-9523
dlm@gknet.com

MR. BRUCE: I think -- I agree with Mr. Padilla, that development areas are totally within the purview of the BLM, and this is all federal land. And I don't think -- I know the Division has never approved a development area, and I don't think it's anything the Division has any authority over. And since -- they've said they're not pooling anything. The only company here with a concrete application is Ascent, and I would ask that their objections be -- to Ascent's plan be overruled and that Ascent's applications be granted.

EXAMINER BRANCARD: Mr. Padilla, what was the basis for your motion to dismiss? I'm sorry. I haven't read it.

MR. PADILLA: The basis of the motion was jurisdictional. Ultimately -- well, here you're faced with two development plans, and EOG is faced with two development plans, the east-west proposal advanced by Apache, the north-south advanced by Ascent. And EOG has very limited acreage but still limited acreage. They're looking to see which development plan is going to strand less of their acreage that's not included in either of the north-south proposal or the east-west proposal. EOG believes that some of their acreage is going to get stranded.

But the problem -- the main problem is that you can have all the discussion, you can go back and forth here, and come up with some decision, whether it's approval of the development plan proposed by Apache or the compulsory pooling application that specifies a spacing unit under Ascent. And compulsory pooling obviously is within the jurisdiction of the OCD.

But the main thing is that because of the potash area, the BLM is ultimately going to decide, based on potash and based on the recommendation by the OCD probably -- I don't think they're going to ignore the OCD's decision. But their concern is that they can't jump to either side or support one or the other the way things are given that the BLM ultimately will make a decision and approve the APDs whether they're Apache's or Ascent's.

My experience has been OCD decisions are basically followed by the BLM, but by the same token, they could say, "No, we don't agree." Based on the Secretary's order, they ultimately have jurisdiction over anything, and they could bypass the OCD on this issue. And I haven't seen anything that really says that the BLM wants the OCD to make the decision. There's nothing there that I've seen in these cases that say we're ultimately going to go by what the OCD

determines.

MR. DeBRINE: And if I could just speak to that quickly. The Division clearly has the approval [sic] to establish spacing units for the wells that have been proposed by Apache. They're two-and-a-half-mile wells. We've prepared C-102s. That's going to be part of our presentation and was part of our application and ask the Division to approve the spacing units for the wells. And so the orientation issue is presented and within the Division's jurisdiction just based on that alone.

The issue with regard to pooling -- I mean, ultimately, the BLM isn't bound by a compulsory order of the Division either. They can honor it or not. And there's -- there's recorded decisions out of the District of Wyoming that the BLM isn't bound by a pooling order either. They can disregard it and say, "No. We don't want to permit these federal wells that way. You've got -- you've got to do it a different way." It's ultimately their call with regard to federal lands.

The spacing units that have been proposed by Apache for its wells, it's not all federal acreage. It's also state acreage. And so the -- so the Division clearly has the authority to approve spacing units

encompassing the state acreage as part of Apache's proposals for its Taco 28-30 development area. So I don't think the question of jurisdiction is -- is a -- is a real one.

The testimony's going to be that the parties tried to work through the collaborative process provided in the Secretary's order. They were unable to reach agreement, and so the BLM told the parties to come to the Division and present at hearing technical evidence to determine what's the best development area. And they have indicated they're going to go along with that, and I don't think there is any question that they will. Is it within their authority to disregard it? Sure, just like it is a pooling order or other orders that the Division might enter with regard to federal acreage, but clearly this is something within the purview of the jurisdiction, to approve the spacing units that are encompassed within Apache's Taco 28-30 development area. And we're prepared to present evidence that it's the superior plan and the Division ought to adopt it.

And really the point in question is: Is it really ripe for decision? Until the different working interest owners really know which plan to -- what plans to jump into, should they participate in one well or the

other? Until we know what the -- what the plan is going to be, we really can't make an intelligent decision, if you're a working interest owner, as to which plan you want to participate in.

And the testimony is going to show that Apache -- even though Ascent says they have a deal working with the Hudson group, we're going to provide the Division with a letter of support from the Hudson group saying they support Apache's development plan.

EXAMINER JONES: We did have another case that involved east-west versus north-south, but the east-west was not proposed as a unit. In this case it is. They're actually asking for approval of a horizontal spacing unit. But we do have another one. I don't remember the number.

MR. BRUCE: Well, you know, the thing is under the pooling statute, if there are uncommitted interests, which there certainly are, in order to form a well unit, you have to force pool them, and they're not here force pooling anybody.

Obviously, Ascent doesn't agree with Apache's proposal. And if -- and it has -- it has preliminary agreements to acquire the Hudson family interest. Obviously, if Apache wants to move forward, they're going to have to force pool. And, of course,

can testify, evidence can be presented, and you can get a decision from the Division that they will recognize and apply as part of the process under the Secretary's order. And that's why we're here. And that's what we've been told to do, and we think it's -- we think it's appropriate. We think the Division, back in January, told us that we ought to be doing this. That's why we're here.

EXAMINER BRANCARD: And I appreciate that, Mr. DeBrine, because I've looked through some of the transcripts for this case, and I've seen how many different hearing examiners you've had to appear before. I think there were five in one meeting, none of whom are here today.

Was EOG's motion to dismiss denied at that meeting, Mr. Padilla?

MR. BRUCE: Yes.

MR. PADILLA: I don't think it was denied, but the decision was made to have a hearing, to go ahead with the hearing. I -- I never got anything in writing or any verbal declaration that the motion was denied. The decision was made to go forward with hearing.

MR. BRUCE: Mr. Examiner, I would simply say that was at a point where Apache was still pressing forced pooling, and they're not doing that now.

EXAMINER BRANCARD: Well, let's continue.

EXAMINER JONES: Okay. I have one more question.

MR. DeBRINE: If I could just add, the motion was definitely denied. I mean, we can talk to Mike and get confirmation. I don't know if there was an email confirmation sent out, but it was argued. Everybody was here, counsel for OXY and counsel for Mewbourne. Everybody was there. And the motion was deliberated on by the legal examiner and the technical examiner, and the motion was denied. And Ascent also had a motion to dismiss with respect to the notice of Apache's application, and it withdrew that motion in advance of the hearing.

MR. BRUCE: Mr. Examiner, that was based on the fact that I believe at least one of Apache's pooling applications was filed either immediately before or at the same time as they sent out well-proposal letters. And that was a violation of Division Order R-13165, and that's why I moved to dismiss. I later withdrew that because, of course, another five or six months had passed, and I just said, "Well, let bygones be bygones." But now they're not seeking to force pool.

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
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**

ORDER ON MOTION FOR REFERRAL OF APPLICATIONS

Applicant Mewbourne Oil Company filed on July 15, 2020, a Motion for Referral of Applications to the Oil Conservation Commission for Hearing in Conjunction with Cases No. 21277-21280, originally set for *de novo* hearing before the Commission on September 17, 2020, and now stayed.

The Motion for referral was fully briefed, and arguments were held on the motion as part of the Division hearing docket on August 20, 2020.

For the reasons set out in the responses to the motion by Apache Corporation and Ascent Energy, and consistent with the order issued on August 25, 2020 by the Oil Conservation Commission in the related Commission cases 21277-80, Mewbourne's motion for referral directly to the Commission is denied.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

ADRIENNE SANDOVAL, M.E.
DIRECTOR

Date: 8/27/20

EXHIBIT B