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 CONSOLIDATED REPLY TO MEWBOURNE OIL COMPANY'S AND APACHE CORPORATION'S RESPONSES TO ASCENT ENERGY LLC'S MOTION TO DISMISS

Ascent Energy, LLC ("Ascent") submits its Consolidated Reply to Mewbourne Oil Company's ("Mewbourne") Response in Opposition to Ascent Energy, LLC's Motion to Dismiss, and to Apache Corporation's ("Apache") Response to Ascent Energy, LLC's Motion to Dismiss ("Reply"). Ascent submits its Reply to the New Mexico Conservation Division ("Division") in a good faith effort to clarify the proper construction of NMSA 1978 §70-2-13, the application of *res judicata,* and other procedural matters in dispute in the above-referenced cases. In support of its Reply, Ascent states the following:

Introduction and Procedural Background:

1. In the briefing of these cases, Ascent raised a number of issues regarding the proper procedure and application of the New Mexico Oil and Gas Act ("Oil and Gas Act"), that should be addressed in order to avoid prejudice, maintain due process, and uphold fundamental fairness in these proceedings. The issues raised are valid and have merit, and Ascent has requested that the Division and the New Mexico Oil Conservation Commission ("Commission") make a determination of the issues based on the requisite reasoning and rationale for such determination. *See e.g. Viking Petroleum, Inc. v. Oil Conservation Comm'n,* 1983-NMSC-091, ¶ 8, 100 N.M. 451 (findings by expert the Commission must disclose the reasoning on which its order is based); *Atlixco Coalition v. Maggiore,* 1998-NMCA-134, ¶ 14, 125 N.M. 786 (an agency's action is arbitrary and capricious if it entirely omits consideration of relevant factors or important aspects of the problem at hand); *Fasken v. Oil Conservation* Commission, 1975-NMSC-009, ¶ 8, 87 N.M. 292 (citing *Continental Oil Co. v. Oil Conservation Com'n,* 1962-NMSC-062, ¶ 20, 70 N.M. 310: "***[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)

2. The Division and Commission are two distinct administrative bodies, each having its own obligation to interpret and apply the statutes of the Oil and Gas Act in their proper manner. *See* NMSA 1978 §70-2-6; *see also Marbob Energy v. Oil Conservation Com'n*, 2009-NMSC-013, ¶ 2, 146 N.M. 24 (§70-2-11(A) empowers the Division "to make and enforce rules, regulations and orders" based on its interpretation of the Oil and Gas Act). The Commission has concurrent jurisdiction with the Division only *"to the extent necessary for the [C]omission to perform its duties as required by law,"* which includes the proper application of NMSA 1978 §70-2-13. *See id.* (emphasis added). [1] The Commission issued its Order No. R-21454-A on the premise that "Order No. 21454 does not order the [Division] to rehear Ascent Energy's pooling applications under Case Nos. 16841 and 16842," but as ruled by the Commission, the Order "stayed the hearings in the matters in Case Nos. 21277, 21278, 21279 and 21280 until all competing applications are heard by the Division or are otherwise resolved." *See* Order No. R-21454-A.

3. Because Ascent is raising issues that bear directly on the determination of which applications should properly be considered "competing applications" under the Oil and Gas Act,

[1] Mewbourne argues that §70-2-13 does not prohibit Commission from consolidating the newly-filed applications in a single *de novo* hearing because the Division and Commission can "do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." *See* Mewbourne's Response, at p. 8. However, what is indicated in the Oil and Gas Act are the limitations on consolidation imposed by the specific language of §70-2-13. The Division and Commission have tried to use the broad language of §70-2-11 before the New Mexico Supreme Court in an effort to override the specific limitations of §70-2-28. *See Marbob v. Oil Conservation Com'n,* 2009-NMSC-013, ¶ 13, 146 N.M. 24. However, the *Marbob* court disagreed, stating that the Commission ignores the plain language of the specific statute, and the Commission cannot use the broad language of §7-2-11 to override the requirements of a more specific statute in the Oil and Gas Act. *See id.* at ¶ 14. Doing so creates a contradiction in the Oil and Gas Act. *See id.* "As a general rule of statutory construction,…general language in a statute is limited by specific language." *Id.* at ¶ 15 (citing *Lubbock Steel & Supply, Inc. v. Gomez,* 1987-NMSC-025, ¶ 6, 105 N.M. 516.

and because the Commission did not address the issues raised for making such determination, Ascent, respectfully requests the Division to determine what constitutes a valid competing application in the context of these proceedings. The two main issues are (1) whether *res judicata* applies to the newly-filed applications in these proceedings; and (2) whether the language of §70-2-13 should exclude the hearing of the newly-filed applications from an appeal to the Commission for a *de novo* hearing. Ascent maintains its position that *res judicata* bars the Division from hearing Apache's applications in Case Nos. 21489, 21490, and 21491, and from hearing Mewbourne's applications in Case Nos. 21362 and 21364. Furthermore, Ascent maintains that §70-2-13 restricts the cases that can be heard by the Commission in the *de novo* hearing of Division Order No. 21258 to the cases that were the subject of the original order, thus, excluding the newly-filed applications.

Legal Overview and Arguments:

A. *Res Judicata* Applies to Apache's and Mewbourne's Newly-filed Applications and Therefore the Division is Barred from Hearing these Applications in Case Nos. 21489, 21490, 21491, 21362 and 21364.

4. The Division is barred from hearing Apache's and Mewbourne's newly-filed applications because all criteria for *res judicata* have been met. In order to establish *res judicata,* Ascent has the burden to establish 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. Ascent establishes the four elements for proper application of *res judicata*, as follows:

a. There was a final judgment by the Division in the earlier action.

5. Division Order No. R-21258 provided a final judgement, which did not approve Apache's development plan, but made a final ruling to grant Ascent's development plan. In New Mexico, the standard for determining whether a judgement, or order, is final is low and

does not require a final determination of the rights of the parties. To constitute a final judgment, "it is not essential that there be a final determination of the rights of the parties with reference to the subject-matter of the litigation, but merely with reference to the particular suit." *Bralley v. City of Albuquerque,* 1985-NMCA-43, ¶ 15, 102 N.M. 715. A decision which "puts the case out of court without an adjudication on the merits, is nevertheless, a final order." *See id.*

6. Division Order No. R-21258 more than satisfies the criteria of *Bralley* for a final order. The Order made a final ruling that removed the case from further consideration by the Division since it concluded the proceeding, granted Ascent the rights of development, and left the losing parties with the right to appeal to the Commission. The Order did not provide for any contingency, or time limitation, that would invalidate the finality of the Order. More importantly, it is the final nature of the Order that allowed the opposing parties to invoke §70-2-13 for review by the Commission. Absent finality, seeking de novo review would not have been an option.

7. Nonetheless, Apache and Mewbourne attempt to argue that a ruling is not final if "the appeal involves a full trial *de novo*" *See* Apache's Response, p. 3; *see also* Mewbourne's Response, at p. 7. Both Apache and Mewbourne base this argument on a passing reference in *Ruyle v. Continental Oil Company,* 44 F.3d 837 (10th Cir. 1994), a case in which the court ultimately ruled that the order of the agency does in fact provide preclusive effect pursuant to collateral estoppel and *res judicata. See Ruyle* 44 F.3d at 846. Furthermore, the *Ruyle* court held that the pendency of appeal does not undermine the finality of the order or its preclusive effect. *See id.*

8. The cursory reference in *Ruyle,* on which Apache and Mewbourne, base their misplaced argument that a pending *de novo* hearing would negate the finality of a Division order, is the court's citation to Wright & Cooper, Federal Practice & Procedure, §4433, at 308 (1981) followed by the court's citation to Restatement (Second) of Judgements §83 cmt. at (1980). *See id*. The statement in Wright's Federal Practice & Procedure provides: "The Supreme Court long ago seemed to establish the rule that a final judgment retains all of its *res judicata* consequences pending decision of the appeal, apart from the virtually nonexistent situation in which the "appeal" actually involves a full trial *de novo*." Federal Practice & Procedure (Wright & Miller) §4433 (3rd ed.).

9. Both Apache and Mewbourne incorrectly contend that since this proposition applies to a number of states, it would also apply to New Mexico. However, this is untrue. First, the *de novo* hearing in §70-2-13 is not equivalent, or akin, to a virtually nonexistent situation in which the appeal involves a full federal trial *de novo*. Secondly, and more significantly, there is no case law in New Mexico supporting such a proposition, and Apache and Mewbourne provide none. In fact, in New Mexico, the opposite is the case. In *Alarcon v. Albuquerque Pub. Sch. Bd. of Educ.*, 2018-NMCA-021, ¶ 32, 413 P.3d 507, Albuquerque Public Schools attempted to argue that a teacher could not apply for a write of mandamus, which requires a final order by an administrative body, because under the statute, the teacher "could appeal an adverse decision from a discharge hearing conducted by the superintendent to an independent arbitrator who hears the case *de novo*…." *Id.* The *Alarcon* court rejected this argument, illustrating that the *de novo* hearing does not supplant the initial hearing for purposes of finality, nor does the opportunity to have a subsequent or pending hearing *de novo* preclude the establishment of finality of the initial order. *See id.* at ¶¶ 32-33.

10. Finally, to determine whether an order is final, New Mexico courts will give the term "finality, *a practical,* rather than a technical construction." *See Clancy v. Gooding,* 1982-NMCA-096, ¶ 9, 98 N.M. 252 (emphasis added). Relying on *Gillespie v. Unites States Corp.,* 379 U.S. 148 (1964), the New Mexico Supreme court has established that all its cases "have long recognized that whether a ruling is 'final'… is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments," and because of "this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than technical construction,'" a rule adopted by the New Mexico Supreme Court. *See Central-Southwest Dairy. Coop v. American Bank of Commerce,* 1967-NMSC-231, ¶ 17, 78 N.M. 464 (omission in the original); *see also Clancy,* 1982-NMCA-096, ¶ 9. Apache and Mewbourne continue to split-hairs as they offer the Division overly-technical rationales, based on irrelevant dismissals and technical jurisdictional questions, that fail to show Order No. R-21258 is not final; whereas, Ascent provides the proper practical basis of review that demonstrates the finality of the order has been established. In short, and for all practical purposes, Division Order No. R-21258 made a final decision granting operatorship to Ascent that concluded the hearing, passing the matter off for development or appeal.

b. The earlier judgment by the Division was on the merits.

11. The question of whether an earlier judgement was on the merits is nuanced and must be considered with precision. "Under the doctrine of *res judicata,* a prior judgment on the merits bars a subsequent suit involving the same parties or privies *based on the same cause of action." Myers v. Olson*, 1984-NMSC-015, ¶ 8, 100 N.M. 745 (emphasis added). Because the "same cause of action" is central to, and encompasses, the consideration of merits, "merits" is often omitted as an element in New Mexico case law, being subsumed by the "same cause of

action" element and therefore not necessarily required as a separate element in order to establish *res judicata*. *See Brooks Trucking Co., Inc., v. Bull Rogers,* 2006-NMCA-025, ¶ 10, 139 N.M. 99 (stating that the elements of *res judicata* are (1) the same parties or parties in privity, (2) the identity of capacity or character of persons for or against the whom the claim is made, (3) the same subject matter, and (4) the same cause of action); *see also Moffat v. Branch*, 2005-NMCA-103, ¶ 11, 138 N.M. 224 (stating same elements without mention or inclusion of merits); *Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 6, 122 N.M. 326 (stating same elements without mention or inclusion of merits). Thus, "on the merits" plays a secondary role in the analysis of *res judicata* and must be determined in relation to the cause of action which takes priority.

12. In its cases before the Division, Case Nos. 20171 and 20202, Apache availed itself the Division's jurisdiction, time and resources, filing applications for pooling and operatorship of the N/2 of Sections 28 and 29, and the NE/4 of Section 30, Township 20 South, Range 30 East ("Apache's Unit"), which it proposed as the optimal development plan for the unit. The Division accepted Apache's applications and made itself available for the requested hearing, granting full and fair opportunity to litigate Apache's case. At the hearing, Apache made the strategic decision, on its own initiative, to rescind the pooling provisions of the application but maintain the provisions for its development plan and operatorship, requesting that the Division issue an order for Apache to operate the proposed unit. *See* Transcript of Case Nos. 16481-82, 20171 and 20202, 84-86. It is not the responsibility of the Division to decide for Apache the best way to apply for development and operatorship that could earn such rights, that is the sole responsibility of Apache. In fact, the Division questioned whether it had jurisdiction to decide such a request, but Apache persisted, pleading with the Division to assume jurisdiction over the subject matter and insisting that the Division had the right to do so. *See* Transcript of

Case Nos. 16481-82, 20171 and 20202, 86-100. In the end, the Division relented and assumed full jurisdiction over the subject matter and cause of action, relying on Apache's arguments, *see id.,* at 99-100, and thereafter issued a final order granting operatorship and development to Ascent and not to Apache. *See* Division Order No. R-21258 ("OCD has jurisdiction to issue this Order pursuant to NMSA 1978, Section 70-2-17").

13. Therefore, Apache was provided the full and fair opportunity to fully litigate its cases on the merits, and Apache in fact did so. "*Res judicata* precludes a claim when there has been a full and fair opportunity to litigate issues arising out of that claim." *Bank of Santa v. Marcy Plaza Assoc.,* 2002-NMCA-014, ¶ 14, 131 N.M. 537. "In regard to the subject matter and cause of action, *res judicata* 'does not depend on whether the claims arising out of the same transaction were actually asserted in the original action, as long as they could have been asserted.'" *Brooks Trucking Co., Inc., v. Bull Rogers,* 2006-NMCA-025, ¶ 10, 139 N.M. 99 (citing *Moffat v. Branch,* 2005-NMCA-103, ¶ 18), It was Apache's responsibility to present to the Division its development plan that provided for optimal development, and under *Brooks, res judicata* applies both to claims Apache actually made and those claims Apache could have made. All such claims were decided on the merits because the Division provided Apache the right to have them heard under conditions in which: (1) Apache had legal representation, (2) witnesses were cross-examined, (3) documentary evidence was presented, and (4) the Division rendered findings; thus, meeting all criteria for preclusive effect in the NMOCC's adjudicatory process. *See Amoco Production Co. v. Heimann,* 904 F.2d 1405, 1415-9 (10th Cir. 1990) (showing that based on these elements, the NMOCC's approval process is entitled to preclusive effect).

14. Yet, Apache now claims that the Division did not enter an order on the merits, based on a on the hyper-technical and misplaced distinction that because the Division dismissed

Apache's pooling applications and dismissed the approval of a proposed Potash Area Development, that this somehow negates the fact that the Division decided the case on the merits. *See* Apache's Response, at p. 3. Apache's claim is wholly unsupported by New Mexico case law. When a tribunal is provided to hear cases on the merits, as the Division made available to Apache, the case is in fact heard on the merits even if the case is dismissed. A dismissal is an adjudication on the merits to the extent that when a claim has been dismissed, "the fourth element of *res judicata* (a final valid judgment *on the merits*) will be presumed so as to bar a subsequent suit against the same defendant by the same plaintiff based on the same transaction." *Kirby v. Guardian Life Ins. Of Am.* 2010-NMSC-014, ¶ 66, 148 N.M. 106 (parentheses and emphasis in the original). Thus, any dismissal of Apache's case made by the Division in Order No. 21258 has no bearing on the application of *res judicata* to Case Nos. 21489, 21490, and 21491.

15. As shown by the *Brooks* court, the dispositive criteria that determines whether the Division's order was issued on the merits is whether a participant in the hearing was provided the right and opportunity to have its claims asserted. Mewbourne's cause of action in applications for Case Nos. 21362 and 21364 is the same cause of action in Ascent's Case No. 16481 and 16482, that is, the request for the pooling of and operatorship over 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"). Mewbourne participated in the hearing through legal representation, and therefore was provided the right and opportunity to assert claims, such as its own pooling applications, present witnesses and evidence, and have the Division render findings. Mewbourne failed to exercise its right or take advantage of this opportunity; instead, Mewbourne opted to rely on its claim to a letter agreement for which it had not satisfied the terms prior to its expiration. *See* 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 ("Mewbourne's Motion for Referral"), at pp. 6-7; *see also* Ascent's Response to Mewbourne's Motion for Referral (filed in Case Nos. 21361-64), at ¶ 11 and ¶ 22 (showing that Ascent was ready, willing and able to close on the letter agreement, but Mewbourne failed to satisfy its terms prior to its expiration). More importantly, the Division's review and approval of Ascent's application was based on the merits, to which Mewbourne did not object. Therefore, a final judgement on the merits with respect to Mewbourne and the W/2 W/2 Lands was satisfied by the Division's issuance of its final order pursuant to the hearing.

c. Apache's and Mewbourne's causes of action are the same in both hearings.

16. Apache applications in Case Nos. 20171 and 20202, taken together, presented as its cause of action the development of the N/2 of Section 28 and 29, and the NE/4 of Section 30, Township 20 South, Range 30 East, in Eddy County; and Apache's applications in Case Nos. 21489, 21490, and 21491, taken together, are for the development of the same lands, the N/2 of Sections 28 and 29, and the NE/4 of Section 30. Thus, Apache is presenting the same cause of action.[2] The development of these lands can take numerous configurations. Apache had its allocated opportunity to present its development plan at the Division-level, which provided Apache the full and fair opportunity to present its best case and configuration for the optimal development of these lands. The Division should not intercede on Apache's behalf by providing it with the additional opportunity to reconfigure its plan in an attempt to correct any defects that

[2] In its Response, at p. 3, Apache, citing *Potter v. Pierce,* 2015-NMSC-002, ¶ 10, asserts that "the causes of action must be *exactly the same* in both proceedings." (emphasis added). However, this is misleading. Nowhere in ¶ 10 does the *Potter* court say the causes of action have to be "exactly the same," nor does "exactly" or "exactly the same" appear anywhere in the text of the case. The *Potter* court only says the "cause of action is the same in both suits." Ascent has sufficiently established that, for purposes of *res judicata,* the causes are the same.

it failed to address in the original hearing. Providing Apache a second opportunity to present its case is contrary to case law and undermines established precedent. "The essence of the claim preclusion doctrine is that 'litigants are encouraged and afforded a full and fair opportunity to raise issues that exist between them in a single action, but there are consequences for the failure to take advantage of this opportunity.'" *Moffat v. Branch,* 2005-NMCA-103, ¶ 10, 138 N.M. 224 (citing *Moffat I,* 2002-NMCA-067, ¶ 26). Thus, "a litigant is ordinarily not entitled to more than one fair bite at the apple." *Id*. (citing *Ford v. N.M. Dept. of Pub. Safety*, 1994- NMCA-154, ¶ 1, 119 N.M. 405).

17. Giving Apache a second opportunity to present its case prejudices Ascent, and would open the door for other companies to engage in end-runs around *res judicata* and collateral estoppel. The Division should not allow such gamesmanship.

18. Similarly, Mewbourne's applications for the pooling of the W/2 W/2 Lands represent the same cause of action as in the original hearing, where the Division pooled the W/2 W/2 Lands and granted operatorship to Ascent. Mewbourne claims that it did not submit an application for the W/2 W/2 Lands, although it had the opportunity to do so, because Mewbourne had relied on an agreement with Ascent. As a result, Mewbourne's submission of its new applications for the W/2 W/2 Lands is premised on an alleged breach of contract, which the Division has neither jurisdiction nor authority to adjudicate. The cause of action for pooling the W/2 W/2 Lands, represented by Mewbourne's applications in Case Nos. 21362 and 21364, is the same cause of action represented by Ascent's pooling the W/2 W/2 Lands in Case Nos. 16481 and 16482, and to the extent that the Division had jurisdiction to pool the W/2 W/2 Lands, it issued its final order in favor of Ascent. The final element of *res judicata* to be met is that the

parties in the cases are the same. Apache, Mewbourne, and Ascent represent the same parties in the original hearing and all subsequent proceedings.

19. Thus, *res judicata* and collateral estoppel bar the Division from hearing Apache's and Mewbourne's new applications in Case Nos. 21489, 21490, 21491, 21362 and 21364, because Ascent has established all four elements of the doctrine. However, there are some unique claims in Mewbourne's arguments that need to be further addressed. Citing *Property Tax Dept. v. Molycorp.,* Inc., 1976-NMSC-072, 89 N.M. 603, Mewbourne argues that *res judicata* does not preclude an administrative agency from issuing new orders or hearing new evidence. *See* Mewbourne's Response, at p. 7. Mewbourne's reliance on *Molycorp* is misplaced. In *Molycorp*, the Respondent filed in 1975 an annual tax report using valuations issued by the agency in 1972, in an order limited to the 1972 valuation formula. *See id.* at ¶ 3. Since issuing the order, a new statute had been adopted in 1975 that changed the method of valuation, thus the 1972 order had expired. *See id.* at ¶ 5. Therefore, the agency issued a new order and rejected the Respondent's report based on the 1972 valuation. *See id.* The agency had the authority to issue a new order under these circumstances. The *Molycorp* court held that: "*Res judicata does apply to the rulings of administrative bodies* under the proper circumstances." *Id.* at ¶ 11 (emphasis added). However, under the facts of *Molycorp,* the circumstances were not met, as the court ruled that the expired 1972 order was unauthorized and ultra vires. Mewbourne misapplies *Molycorp,* and therefore, fails to provide an argument supporting its position that *res judicata* does not apply to administrative agencies. Mewbourne has not shown that Division Order No. 21258 is either unauthorized or *ultra vires*, and therefore, under *Molycorp, res judicata* applies to decisions made by the Division. In fact, none of the cases cited by Apache and Mewbourne prevent the application of *res judicata* to administrative agencies.

20. Mewbourne also attempts to show that Order No. 21258 is not final by arguing that the Division retained jurisdiction over the subject matter of the order. *See* Mewbourne's Response, at p. 7. However, the fact that the Division issues a final order granting operatorship, but retains jurisdiction over other matters that may arise during operations, does not undermine the order's finality. The court in *Central-Southwest Dairy Co-op. v. American Bank of Commerce,* 1967-NMSC-231, 78 N.M. 464, makes this clear. In *Central-Southwest*, the trial court entered a judgment for purposes of appeal but retained jurisdiction over the case to dispose of the remaining issues. *See id.* at ¶ 4. On appeal, the issue was raised whether the judgment was final since the trial court retained jurisdiction. *See id.* at ¶ 6. The *Central-Southwest* court, relying on *Gillespie v. United Steel Corp.,* 379 U.S. 148, 152 (1964), held that the judgment was final, that a final decision "does not necessarily mean the last order possible to be made in a case." *See id.* at ¶ 17 (citing *Gillespie*, 379 U.S. at 152; also citing *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 545 (1949)). Therefore, the Division's Order No. 21258, as issued, is final, and the fact that the Division retained jurisdiction for the possibility of issuing other orders during operations has no bearing on the order's finality. Order No. 21258 adjudicated all issues of prevention of waste and protection of correlative rights in the presence of Mewbourne, who participated in the adjudication of such issues without objection; thus, the Division completed the assurances in the original hearing that correlative rights have been protected and waste has been prevented.

B. Ascent's Interpretation of §70-2-13 Provides the Necessary Procedural Clarity for Maintaining Due Process, Avoiding Prejudice, and Ensuring Fundamental Fairness.

21. The long-standing precedent and application of §70-2-13 has provided for the Commission's hearing of cases decided by the Division prior to an opposing party's applying

for a *de novo* hearing. It does not allow the hearing of new applications outside those heard in the Division's original hearing, especially duplicate applications subject to *res judicata.* Apache exceeds the provisions of §70-2-13 by submitting new applications containing new proposals that, as part of its first "bite" at the Division-level, it had the full and fair opportunity to present, but failed to do so. Mewbourne far exceeds the provisions of the statute by attempting to introduce into the *de novo* review applications for lands that were not even proposed for development in the original hearing, namely, its applications for the E/2 W/2 of Sections 28 and 33 ("E/2 W/2 Lands"). Mewbourne attempts to justify these inclusions by arguing that a *de novo* hearing is a new hearing. *See* Mewbourne's Response, at p. 6. However, the plain language of the statute shows that it is a new hearing of the original hearing, involving the original cases and new facts that are relevant to the issues of the original hearing, not an unqualified free-for-all that allows any and all new applications a party may decide to propose. *See* NMSA 1978 §70-2-13.

22. Without addressing the concerns and arguments of Ascent, Commission Orders No. R-21454 and R-21454-A assume, on the basis of efficiency, that all the new applications submitted by Apache and Mewbourne are proper competing applications that should be consolidated in a single *de novo* hearing. This position is unprecedented and creates new policy that should be given serious consideration since it will affect all future applicants and parties. Neither Apache nor Mewbourne have provided any examples where the Commission has included new applications and new matters under §70-2-13, because there are none.[3] Apache

[3] Ascent's review of case law and spot-checking Commission cases continue to bear out this conclusion. However, Ascent acknowledges that it has neither the time nor resources to conduct a thorough systematic review of all cases heard by the Commission since the adoption of §70-2-13 or its predecessor. Because of the importance of the proper application §70-2-13, and the consequences of deviating from precedent, Ascent respectfully encourages the Division and Commission to review past cases, and/or consult with neutral parties who have the requisite history with the Commission, to confirm to their satisfaction whether this conclusion is valid.

provides a single example of consolidation, in *Bass Enters. Prod. Co. v. Mosaic Potash Carslbad Inc.,* 2010-NMCA-65, 148 N.M. 516, to support its argument that the Commission, under §70-2-13, is not restricted to a "matter" previously decided by the Division, but can hear all "matters" whatever their chronology, nature, or origin in a *de novo* hearing. *See* Apache's Response, at p. 7. However, under proper review of this case, the facts support Ascent's position, and not Apache's position.

23. In *Mosaic Potash*, one applicant ("First Applicant") applied to the Division for an APD in the Mills' parcel, and another applicant ("Second Applicant") applied for an APD in the Smith's parcel, two separate parcels within the potash area. *See id.* at ¶ 7. These applications were both opposed by a single party ("Opposing Party"), who did not file an application of its own, but who protested in order to protect its potash leases. *See id.* In accordance with standard procedure at the time, the Division would have ruled on the "matter" of the First Applicant, prior to its appeal to the Commission, and likewise, the Division would have ruled on the "matter" of the Second Applicant, prior to its appeal. In this case, each matter was a singular and separate matter, decided by the Division, and ripe to be heard by the Commission. Because these matters were each discrete in their own right, were decided prior to the application for a *de novo* hearing, and because they could be heard together without prejudicing, or violating the due process rights of, either the First Applicant or the Second Applicant, it was proper, under §70-2-13, to consolidate the cases. The interests of the two Applicants were aligned against a single Opposing Party in the appeal and no new matters -- new applications filed after the original hearing barred by *res judicata* or new applications for other lands – were included that would create prejudice, violate due process, introduce bias, and infringe upon the rights of the parties involved. Furthermore, the APD applications filed by Applicants did not compete against each

other. Under these circumstances, the Commission was right to consolidate the cases for purposes of administrative efficiency, and the decision to do so is consistent with Ascent's interpretation of the statute.

24. Apache suggests that Ascent's interpretation would invalidate innumerable cases where the Division heard applications for compulsory pooling of spacing units for multiple wells and those in which it consolidated separate cases involving compulsory pooling requests. *See* Apache Response, p. 8. But Apache's suggestion is false because all the cases previously ruled on by the Commission, including the cases in Mosaic Potash, adhered to the plain language of §70-2-13, in which the Division ruled on the matter prior to an application for *de novo* hearing, and the cases were subsequently heard, or consolidated with other prior rulings on a matter, to be heard by the Commission. The danger lies in deviating from current precedent that exceeds the scope of the statute and results in the issuance of orders that are unauthorized and *ultra vires.*

25. Mewbourne argues that NMSA 1978 §12-2A-5 requires that "matter" in §70-2-13 must also include "matters." However, the rules in §12-2A-5 are not applicable to every statute and must not be applied indiscriminately. The Legislature enacted the Uniform Statute and Rule Construction Act, which includes §12-2A-5, to assist courts with interpreting statutes, not to impose an ironclad rule. *See Freedom C. v. Brian D. (In re Patrick D.)* 2012-NMSC-017, ¶ 13, 280 P.3d 909. Furthermore, a seminal case included in the annotations to §12-2A-5, deciding whether "process" should also mean "proceedings," states that in order to determine the true intention of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole of every part of the *statute* must be considered *in fixing the meaning* of any of its parts. *See State ex rel. Dresden v. Dist. Court of the Second Judicial Dist.,* 1941-NMSC-013, ¶ 4, 45 N.M. 119 (emphasis added); *see also State v. 5th Judicial*

Nominating Com'n, 2007-NMSC-023, ¶ 17, 141 N.M. 657 (showing that while rules of statutory construction establish the use of plurals is without significance, NMSA 1978 §12-2A-5(A), such rules are not applicable when the provision is unambiguously specific).

26. In §70-2-13, "matter" is used in the singular three times and is never referred to in the plural. Furthermore, "matter" is twice used in conjunction with "proceeding," which is also in the singular and never the plural. The use of the singular "matter" always has as its referent in a previous sentence of the statute a singular "matter." There is no variation or deviation from the singular in the usage of "matter" and "proceeding," and this fixes its meaning both in the parts of the statute and as a whole. When discerning the Legislature's intent, the New Mexico Supreme Court looks "first to the plain language of the statute giving the words their ordinary meaning, unless the Legislature indicates a different one intended." *See Marbob Energy v. Oil Conservation Com'n,* 2009-NMSC-013, ¶ 9, 146 N.M. 24 (citing *N.M. Indus. Energy Consumers v. New Mexico PRC,* 2007-NMSC-053, ¶ 9, 142 N.M. 533). "When the statutory language is clear and unambiguous, [this Court] must give effect to that language and refrain from further statutory interpretation." *Id.* (citing *Anadarko Petroleum Corp. v. Baca*, 1994-NMSC-019, ¶ 9, 117 N.M. 167) In §70-2-13, the Legislative intent of the statute is established and expressed through the consistency in the use of "matter" as a singular noun.

27. Not only does the plain language of §70-2-13 limit the *de novo* hearing to the "matter" previously decided by the examiner in the original hearing, as argued extensively by Ascent, *see* Ascent's Motion to Dismiss, ¶ 8, but the syntax of the language in §70-2-13 shows that when the right arises to have the "matter" heard *de novo*, the "matter" at that point, positioned in the last sentence of the statute, is the "matter," in the prior sentence, that incorporates as its basis the "decision rendered in any matter or proceeding heard by an examiner

upon the transcript of testimony and record made by or under the supervision of the examiner in connection with such proceeding." The nature and extent of that incorporation has not been formally determined and is a question of first impression by the Division and Commission, that is, the relationship of the "matter" heard *de novo* by the Commission to the Division's record in the original hearing; certainly, it has not yet been decided by the New Mexico Supreme Court. It is clear, under current precedent, that a *de novo* hearing by the Commission allows for new facts; this is well established, but should those facts be divorced from the relevance of the underlying record, and if so, to what extent. A complete divorce, as argued for by Apache and Mewbourne, nullifies the extensive work performed by the examiners in their efforts to prevent waste and protect correlative rights.

28. The examiners bring substantial educational background and industry experience to the decisions they render. They are charged with creating and transcribing a "complete record," and reviewing testimony and documentary evidence to provide "recommendations" to the Director of the Division, and they provide the main bulwark that prevents waste and protects correlative rights. *See* NMSA 1978 §70-2-13. The removal of all consideration of their work from the appeal process raises concerns of due process, and constitutionality, as discussed by the original drafters of the *de novo* statute. *See* Commission Case No. 903, at p. 20; *see also* Ascent's Motion to Dismiss, at ¶ 9. The extent to which the Division's underlying work can be referenced, or utilized, in a *de novo* hearing continues to reverberate through present cases before the Commission, creating uncertainty. For example, in recent de novo appeals in Commission Case Nos. 21273, 21274 and 21275, counsel for Marathon requested that the Commission consider findings made by the Division, while counsel for BTA argued against the inclusion, stating that a *de novo* hearing was a brand new hearing and prior rulings had no relevance. *See*

Transcript of Case Nos. 21273 and 21274, 7-12. No guidance has been provided on this issue, and applicants continue to roll the dice, uncertain if such references will assist in their case yet investing research time for their inclusion.

29. Citing *Alarcon v. Albuquerque Pub. Sch. Bd. of Educ.,* 2018-NMCA-021, ¶ 28, 413 P.3d 507, Mewbourne argues that all *de novo* hearings are entirely new hearings that are conducted as if there had been no prior hearing. *See* Mewbourne's Response, at p. 6. However, in *Alarcon*, the court was making a ruling on the *de novo* hearing embodied in §22-10A-28, involving a school board. *See Alarcon,* 2018-NMCA-021, ¶ 28. The *Alarcon* court bases the authority of its ruling on an even more disparate form of *de novo* hearing, the form taken by a district court from a magistrate court's decision in a criminal case. *See id.* (citing *State ex rel. Bevacqua-Young v. Steele*, 2017-NMCA-081, ¶ 9, 406 P.3d 547). A *de novo* hearing can take any number of forms, forms prescribed by common law, by administrative law, by state district court, or by federal court, all which differ. Some forms are brand new hearings; others consider the record but provide for additional facts and evidence. In New Mexico, there have been no court rulings on the form of *de novo* hearing that should be conducted under §70-2-13, including no rulings by the state supreme court. It should be commonly acknowledged that the criteria for a *de novo* hearing of drilling and operations in the oil and gas industry would likely require more rigorous, expert consideration and evaluation than the *de novo* hearing addressed in *Alarcon.* Oil and gas operations affect substantial investments of resources, generate substantial revenue for the state, impact large swaths of land, and can potentially impact whole communities and other natural resources. Since the question of the proper application of §70-2-13 remains inconclusive, it is valid, and not meritless, to consider the prominent form of *de novo* hearing favored by the original drafters, that being, "the record will be considered and you can introduce additional

evidence." *See* Commission Case No. 903, at p. 24.[4] This form of *de novo* hearing is consistent in large part with current practice, which allows a party to include the Division's record upon request. However, with formal guidance, parties would better understand the relevance and use of the Division's record to the *de novo* hearing.

30. Ascent's interpretation of §70-2-13 provides the necessary clarity for preserving due process and proper procedure, preventing bias and prejudice, and protecting the rights of all parties involved by providing a fair and just playing field. Under Ascent's interpretation, applicants and parties would be able to rely on the expectation that the cases they build for the Division's initial hearing would be the cases they would be defending in a *de novo* hearing and would not have to waste resources anticipating unforeseen new applications, that include new subject matter -- new lands and reconfigurations of units -- outside the original adjudication, or risk losing their investments from the unpredictability of such new submissions. Parties, such as Apache and Mewbourne, would be required to prepare and present their optimal development plans, or secure any agreements on which they intend to rely, at the time of the Division's initial hearing, and not be allowed the unauthorized license, with the benefit of hindsight, to reconfigure their proposals and correct deficiencies through the submission of additional, new applications in order to jockey for undue advantage in a *de novo* hearing. Hence, Ascent's interpretation should be the proper interpretation of §70-2-13 for balancing efficiency, due process and fundamental notions of fairness.

[4] At the end of the discussion in Commission Case No. 903, at p. 25, there was agreement among the participants that the form of *de novo* hearing which considered the record but allowed new evidence should prevail:
GOVERNOR SIMMS: I think Bill is interpretating it as really *de novo* and not *de novo* on the record [*de novo* on the record meaning limited just to the record].
MR. KITTS: I feel that way. Is that the way you feel about it?
MR. KELLAHIN: Yes. I think you ought to consider the record before the Examiner.
MR. KITTS: Then we are in agreement.

C. The Purpose of Mewbourne's Applications Is to Seek Redress for a Contractual Dispute Over Which the Division and Commission Lack Jurisdiction.

31. Mewbourne has made its motivation for filing its new pooling applications expressly clear, that Mewbourne filed its applications to redress an alleged breach of contract. *See* Mewbourne's Motion for Referral, at pp. 6-7 (stating Mewbourne would have filed its compulsory pooling applications for the Sidecar 33-23 wells after it had initially proposed the wells in January 2019 if it had known that Ascent would [allegedly] not comply with its agreement to trade Mewbourne's acreage in the W/2 of Section 33). But for the alleged breach of contract, Mewbourne would not have filed its new applications. *See, i.e.,* Apache's Response to Mewbourne's Motion for Referral (stating that 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, and correctly noting that the Commission clearly lacks jurisdiction to resolve contractual disputes). Therefore, Mewbourne's new applications do not arise from the Division's duty to protect correlative rights and prevent waste, a duty the Division fully performed and completed in the original hearing, without objection from Mewbourne, but arise from a private dispute over the interpretation of a letter agreement.[5]

32. Consequently, the Division, which is barred from hearing Mewbourne's applications in Case Nos. 21362 and 21364 (covering the W/2 W/2 Lands) on the basis of *res judicata,* is also barred from hearing them because their primary purpose is to redress and remediate an alleged contract dispute, that is, they are Mewbourne's apparent attempt to divest Ascent of its pooling rights and operatorship and have them transferred to Mewbourne as redress

[5] For an overview of the facts involved in Mewbourne's contract dispute with Ascent, showing that Ascent was ready, willing, and able to close on the letter agreement but Mewbourne did not satisfy the terms of the agreement prior to its expiration. Ascent was still in negotiations with Mewbourne in an effort to reach an alternative agreement, but the letter agreement itself had expired. *See* Ascent's Response to Mewbourne's Motion for Referral (filed in Case Nos. 21361-64), at ¶¶ 11 and 22.

for the alleged breach. *See* Division Case No. 13663, ¶ 19(c) (stating the Division does not have jurisdiction to rule on contractual matters). Furthermore, Ascent has never argued that the Division cannot hear Mewbourne's applications in Case Nos. 21361 and 21363, covering the E/2 W/2 Lands. Mewbourne owns working interest in these lands and has the right to have them heard; however, these applications should not be consolidated with the cases from the Division's original hearing and heard in a single *de novo* hearing by the Commission, because Mewbourne's argument for consolidation is an apparent effort to insert undue advantage into the *de novo* hearing in pursuit of redress for the alleged breach, and the Commission, by allowing the introduction of such undue advantage would be facilitating the redress of an alleged contractual dispute over which it lacks jurisdiction. *See* Order No. R-14187, ¶ 44.

33. Since neither the Division nor the Commission should take a position, either directly or implicitly, in an alleged contract dispute, the proper venue for Mewbourne to seek redress and compensation for its alleged breach of contract is district court.[6] Therefore, it is imperative that the Division and Commission maintain clear lines of separation between the Division's original cases that are ripe and proper for inclusion in the *de novo* hearing and the new applications, which threaten to introduce bias, prejudice and undue advantage and are inextricably intertwined with Mewbourne's implied cause of action, the alleged breach of contract. Furthermore, the W/2 W/2 Lands, as subject matter to the Division's original hearing, are factually distinguishable from the E/2 W/2 Lands. The potential distribution of working interest in the W/2 W/2 Lands, which have already been pooled, is subject to different criteria than the E/2 W/2 Lands, as provided by the Commission. *See* Order No. R-10731-B, ¶ 23(d). Mewbourne's new applications for E/2 W2 Lands would have the effect of reframing and

[6] *See 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 district court).

diluting the potential concentration of Ascent's working interest, thus prejudicing Ascent, by expanding the scope of lands involved in the *de novo* hearing, which is not permitted under §70-2-13. Clearly, this is an instance where administrative efficiency should not be the primary concern, and by maintaining the clean lines of demarcation provided by §70-2-13, the Division and Commission would avoid numerous problems that undermine due process and fundamental fairness.

D. Despite Apache's Claim to the Contrary, It Must be Presumed that the Division Preserved the Integrity of the Adjudicatory Process When it Issued Order No. 21259, and the Order Is Legitimate.

34. Apache claims that it did not have a fair opportunity to adjudicate its previous cases because the Division failed to account for the retirement, and transitioning, of the presiding hearing examiner prior to the issuance of its Order No. 21258. *See* Apache's Response, at p. 6. It is an extraordinary claim, which requires extraordinary evidence or foundation to assert, and Apache provides none. There were three examiners who heard Apache's cases, William V. Jones, Chief Examiner; Dylan Rose-Coss, Technical Examiner; and Bill Brancard, Legal Examiner. *See* Transcript in Case Nos. 16481-82, 20171 and 20202, 1. Section 70-2-13 states that "*an examiner*…shall certify [a complete record of the proceeding] to the director for consideration together with the report of *the examiner* and his recommendations in connection therewith." (emphasis added). The statute does not require "an examiner" who issues the report or recommendation to be the presiding or chief examiner, and consequently, any examiner who participated in the hearing can issue the report or recommendation; therefore, the requirements of the statute have been met, and Order No. 21258 is valid. Apache's claim assumes, without evidence or statutory authority, that the Division lacked the foresight and

ability to account for Mr. Jones' transition to retirement and failed to receive a proper report and recommendation. Respectfully, the Division should disregard such baseless speculation.

E. Conclusion

For the foregoing reasons, Ascent respectfully maintains its position that the Division should dismiss Apache's new applications in Case Nos. 21489, 21490, and 21491, as well as dismiss Mewbourne's new applications in Case Nos. 21362 and 21364, and therefore respectfully requests that the Division dismiss the applications. Because the issues in these cases have become so complex, Ascent does not object at this juncture if additional time is needed by the Division for an orderly evaluation of the proceedings. Ascent respectfully submits that the issues described herein, if not resolved prior to the *de novo* hearing, would introduce undue advantage, prejudice, miscarriage of due process, and the undermining of fundamental fairness. As a result, Ascent respectfully requests that the Division address the remaining issues - *res judicata*, application of §70-2-13, and the proper form of *de novo* hearing – in order that the rights of the parties are sufficiently protected in the proceedings.

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 November 30, 2020:

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