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:

CASE NOS: 21393, 21394

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

CASE NOS: 21361 - 21364

APPLICATION OF MEWBOURNE OIL COMPANY
FOR COMPULSORY POOLING,
EDDY COUNTY, NEW MEXICO.

CASE NOS: 21489 - 21491

APPLICATION OF APACHE CORPORATION
FOR COMPULSORY POOLING,
EDDY COUNTY, NEW MEXICO

REPORTER'S TRANSCRIPT OF VIRTUAL PROCEEDINGS

EXAMINER HEARING

DECEMBER 3, 2020

SANTA FE, NEW MEXICO

This matter came on for virtual hearing before the New Mexico Oil Conservation Division, HEARING OFFICER FELICIA ORTH and TECHNICAL EXAMINER BAYLEN LAMKIN on Thursday, December 3, 2020, through the Webex Platform.

Reported by: Irene Delgado, NMCCR 253
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I N D E X

CASE CALLED

STATUS CONFERENCE 03

REPORTER CERTIFICATE 25

HEARING EXAMINER ORTH: Let's move then to a number of matters, all of which are on the worksheet this morning in connection with arguments on a motion to dismiss. So these matters are 21393. Ascent Energy is the applicant, compulsory pooling application related to a well named Anvil.

21394, another application by Ascent Energy, compulsory pooling application again related to a well named Anvil.

21361, 21362, 21363 and 21364, all of them the applicant is Mewbourne Oil. All of them compulsory pooling applications related to a well named Sidecar.

And then we have 21489, 21490 and 21491, Apache is the applicant in these matters. And these are compulsory pooling applications related to a well named Taco.

If I might have appearances, please, Mr. Savage.

MR. SAVAGE: Yes. This is Darin Savage with Abadie & Schill on behalf of Ascent Energy LLC.

HEARING EXAMINER ORTH: Okay, thank you. Ms. Hardy? Ms. Hardy, I'm trying to unmute you. There you go.

MS. HARDY: Thank you. I apologize.

Dana Hardy with the Santa Fe office of Hinkle Shanor on behalf of Mewbourne Oil.

HEARING EXAMINER ORTH: Thank you. Mr. Debrine?

MR. DEBRINE: Earl Debrine with the Modrall

Sperling firm for Apache Corporation.

HEARING EXAMINER ORTH: All right. Thank you. Let's see. Mr. Padilla. Let me unmute you, Mr. Padilla. All done. There you go.

MR. PADILLA: Ernest L. Padilla for EOG Resources. I'm not in this argument, but we are only monitoring these cases as they go forward, so I will not be arguing or participating in the arguments today.

HEARING EXAMINER ORTH: All right. Thank you, Mr. Padilla. Are there any other appearances for the purposes of this argument?

(No audible response.)

HEARING EXAMINER ORTH: No? I hear nothing. Again, this is a motion to dismiss filed by Ascent Energy. We have responses from Mewbourne Oil. We do have the motion, responses and replies. We certainly need not talk at length, insofar as we do have those written pleadings. If you wish to highlight your essential points, please go ahead.

MR. DEBRINE: Madam Examiner, there is a little bit of noise going on, so I didn't hear part of that. But I think you said go ahead, so I will since I filed the motion on behalf of Ascent Energy, I will proceed.

Madam Examiner, good morning. Darin Savage for Ascent Energy LLC. I want to thank you and the Examiners

for the opportunity to address the Division in these cases. As you can see the pleadings present matters and issues that are complex, unresolved and offer the Division the unique opportunity to provide clarity at a higher level of certainty and a fair, just playing field in these proceedings, not just for the present parties, but for all -- each of your applicants as well.

The pleadings that I describe an area of the proceedings before the Division and Commission that has become riddled with ambiguity that present parties with uncertainty and that can also allow parties undue latitude.

The issues presented by Ascent are ones that have not been fully addressed. Ascent is respectfully requesting that they be addressed in a manner that provides Ascent with the confidence that its rights and the rights of any party that finds itself under similar circumstances have been fully accounted for.

The pleadings contain substantiated -- substantial debate about whether res judicata and collateral estoppel applies to the Division in these cases, or whether the elements of res judicata have been established and whether the statute for the de novo hearing is being interpreted and applied in a manner that it should be.

As shown by Ascent's reply to Mewbourne and Apache, both opposing parties had a full and fair

opportunity to have their causes of action and claims litigated on the merits in the Division's original hearing, which, under res judicata, includes causes of action and claims asserted in the Division's original hearing and those which could have been asserted in an original hearing but were not.

Without retreading all the details of the reply that provides the basis for res judicata, let me just say that it is -- that in its reply, Ascent establishes without reasonable question that res judicata applies, and Apache and Mewbourne's new applications should be dismissed as described in the motion.

I would like to highlight just a few details. Apache is correct to state that the New Mexico -- that New Mexico has adopted the transactional approach to the cause of action elements of res judicata, but Apache's and Mewbourne's causes of action, that is, their new pooling applications satisfy the transactional criteria for res judicata because, one, they relate in time, space and origin to the causes of action in the original hearing; two, they form a convenient trial unit that was adjudicated in the original hearing; and, three, they conform with the parties' business understanding and usage. Another is criteria from Potter versus Pierce is also addressed in Ascent's motion to dismiss in Exhibit 2.

The parties familiar with and in the oil and gas industry understand that in the context of hearings before the Division, a pooling application provides the cause of action and claims adjudicated.

Apache asserted its cause of action in the original hearing, and Mewbourne, who did not object in the other proceedings in the original hearing could have asserted its cause of action which is all that is required to establish res judicata for the cause of action element.

Therefore, Apache and Mewbourne's applications represent the same claims and causes of action as the original hearing, and that is the development of the same lands previously adjudicated.

Applicants in pooling, in pooling applications make numerous claims. They claim they are best operators. They are claim they are the ones who will best prevent waste. They claim they are the ones who best protect correlative rights, and they seek to cause, they seek to cause the Division to act, that is, to perform action on their case by issuing a final order, an order they can rely on for development.

Pooling applications are causes of action and claims for purposes of the Division orders. Throughout their responses, Apache and Mewbourne confuse and conflate new evidence and new applications. The Commission always

allows new evidence in a de novo hearing, but as far as to be practically determined, it has always been new evidence that supports the original cases on appeal for a de novo hearing.

A de novo hearing under the Oil & Gas Act does not allow new applications, especially those barred by res judicata and those that include brand new lands and subject matter not part of the original matter.

(Unclear) provides thorough reasoning and basis why the de novo statute, 7213, does not allow the new applications proposed by Apache and Mewbourne to be included in the de novo hearing applied for.

Ascent respectfully submits that it is important to resolve these issues prior to the Division's hearing in the new applications and prior to the de novo hearing itself. The Division has the authority to interpret and apply the statutes and regulations of the Oil & Gas Act, and this may be the last opportunity in these proceedings to do so before establishing what appears will be new precedent.

As a result, Ascent respectfully asks the Division to give these issues that consideration. Thank you.

HEARING EXAMINER ORTH: Thank you very much, Mr. Savage. Ms. Hardy?

MS. HARDY: Thank you, Madam Examiner. The

Commission has already rejected Ascent's argument twice. This is the third time that Ascent has made these arguments. It made them in response to Apache's motion for a stay before the Commission and also in its motion for a rehearing in the Commission's order.

The Commission rejected the argument and found that all of these applications should be heard by the Division, and they would then be heard by the Commission as part of one de novo trial. So Ascent's arguments have been rejected.

On the res judicata argument, I want to clarify that that argument only applies, I believe, to Cases 21362 and 21364 for the W/2 W/2 cases. I think that's Ascent's argument, but the doctrine does not apply. It's not met at all. Ascent has the burden of proving every element of that doctrine as the party seeking to bar claims. You can't pick and choose which elements you satisfy; it has to be all of them.

And New Mexico always favors trial on the merits, that's well established in New Mexico law. Res judicata does not apply for a variety of reasons, and I will not go through all of them, but one of the main ones is that the Division's pooling order is not a final order. The order is subject to a de novo hearing that was sought and is pending.

It's been well established, it's not a de novo

record, it's a de novo hearing. (Unclear) as well as numerous other cases that are cited in our (unclear) 2003 New Mexico Court of Appeals 99, it is a well-established principle that a de novo hearing is a completely new hearing as if the original hearing never took place.

So in order to (unclear) a de novo hearing, it absolutely has not established the basis for res judicata. In cases involving de novo appeal on the record really don't apply to this situation, and whether an order is final for purposes of an appeal to the court of appeals is different from whether it establishes res judicata.

In one of the cases Ascent relies on is the Browning versus City of Albuquerque case establishes that fact. In that case the court said an order that was final for appeal did not establish finality for res judicata. They are two different issues, and Ascent has not met the elements of res judicata.

Ascent's applications in the de novo hearing that are subject to that hearing before the Commission could be denied notwithstanding the order of application, and as a result it wouldn't make any sense to find Mewbourne's applications are barred.

Ascent is incorrect in its cause of action claim because Mewbourne's pooling application has never been heard, and the Division has not addressed the factors or

considered any pooling cases, and the obligation to protect correlative rights and prevent waste requires evaluation and it hasn't been done here.

Mewbourne has absolutely not had a full and fair opportunity to litigate its application which is the crux of res judicata. That's the overarching inquiry that has to be made in determining whether res judicata applies.

Ascent's reply argues that Mewbourne could have filed and litigated its pooling application in the initial hearing on Ascent's application and instead relied on its agreement with Ascent. But it is undisputed and it's been established in prior briefing on Mewbourne's motion for (unclear) and the exhibits to that, that Ascent (unclear) Mewbourne regarding this acreage relied on the agreement at the initial hearing and determined or decided after the hearing the agreement was invalid. So Mewbourne absolutely did not have a full and fair opportunity to litigate its application for the purpose of res judicata.

Ascent's argument on that issue is in Paragraph 18 of its reply actually states that the agreement had -- the agreement -- they are claiming the agreement expired before the hearing and Mewbourne relied on it, anyway. It says the agreement expired by its terms.

But Ascent's -- if that's Ascent's argument, Ascent made misrepresentations at the hearing because it

presented (unclear) testimony that it had this agreement that was pending, and we provided those exhibits in testimony with our briefing on motion for referral.

So if Ascent is claiming that Mewbourne relied on an expired agreement, then it offered incorrect information to the Division at the time of the hearing. And that's another basis that res judicata can't apply that also would warrant the application of equitable estoppel which would provide that Ascent's argument of res judicata could not be considered or estopped from making that argument. You can't assert a defense against a party whose testimony altered its position and relied on the misrepresentation. So that's another reason Ascent's argument on res judicata has to fail in that Mewbourne did not have a full and fair opportunity.

With respect to the scope of the de novo hearing, I think that issue is fully addressed in our brief. I don't want to get into it in detail. The Commission has already determined that these applications should be heard together in one de novo hearing to protect correlative rights and prevent waste.

(unclear) de novo hearing before the Commission following a hearing before the Division, so this is not a discretionary issue to be asking the Division to find the Commission can hear cases whether we want a de novo hearing, and that's not correct under the Oil & Gas Act, and it's

contrary to what the Commission has already determined.

Ascent argues that Mewbourne's application assert contract claims has no merit. Mewbourne's application seeks to pool the acreage at issue and be designated as operator. That is something that can only be granted by the Division under New Mexico law. Contract issues and (unclear) damages both will be addressed in a district court action and can't be awarded by the Division or Commission.

So those are separate issues and Mewbourne what is seeking from te Division pooling and to be designated as operator. There is nothing about Mewbourne's application that concerns contract. That argument is just incorrect.

And the same argument on this issue would mean basically that any time an operator filed a pooling application after an agreement has fallen through, that the Division can't rely on the application because it's a valid contract. And that's not local law in New Mexico and it's not permitted by the Oil & Gas Act.

So in conclusion, Ascent's motion has no merit and should be denied. Mewbourne's application should be set for Division hearing and with the Commission.

Thank you.

HEARING EXAMINER ORTH: All right, Ms. Hardy. I'm going to mute you there. Mr. Debrine?

MR. DEBRINE: It's a little ironic that Ascent is

arguing for the preclusive effect of the Division's orders in Cases 16481 and 16482 because it has previously raised the issue of res judicata and lost when it sought the dismissal of Mewbourne's application before the Division, and raised it again before the Commission with regard to Apache's motion to stay, and it raised it a third time when it moved the Commission to reconsider its ruling staying the de novo appeals and specifically allowing for these cases to be -- to proceed and be consolidated in one proceeding.

So we really shouldn't be here. There really is no basis for the Division to second-guess the ruling that's already been made by the Commission which was that these cases should be allowed to go forward before the Division first while the de novo appeal is stayed and that should be allowed to proceed.

Although Ascent filed some 35 pages of briefing, its motion, it really only raises one new argument that wasn't raised before in the arguments before the Division and the Commission, and that is the unique concept as to what a de novo hearing involves.

Ascent is essentially arguing that de novo doesn't mean de novo. And it is very clear that it's always been the case that in a de novo appeal to the Commission from a Division order, that the parties are free to present new evidence, claims and, and refer to evidence in prior

hearings, they can do what they like.

The Commission is not bound by the rules of evidence to determine the appropriate evidence that it should consider that when you have got competing applications, there has always been consolidation of the separate applications before the Division and heard in one proceeding.

The Commission previously ruled that for matters of administrative convenience that should take place here. We've got the de novo appeal that's pending, and it's very clear under New Mexico law and in the law (unclear) res judicata, that where an order is entered and subject to de novo appeal, it is not afforded any res judicata effect because de novo means de novo.

If you look at the definition of what Black's Law Dictionary says, it says de novo means anew. And then it goes on to state, citing to case law, that the word anew means that de novo from start to finish, from beginning to end. For instance a trial de novo means trying the matter anew the same as if it had not heard before, as if no decision had previously been rendered.

And that's the black letter definition of de novo. That's the definition that's always been recognized in the decades of proceedings before the Division and Commission once the separate and Division and Commission

were established by the legislature.

And Ascent doesn't cite to any case law that an order that is subject to de novo appeal should (unclear) res judicata and the reason is clear is that the parties are allowed to present anew and there is no collateral estoppel or res judicata effect with regard to the order that was issued by the Division.

We also argue that even if the Division's orders were subject to (unclear) and effect, they shouldn't be afforded that here because the statutory procedure for referring the matter to hearing before the Division examiner was not followed because unfortunately the cases were heard by the Division's chief engineer, Mr. Jones, and he retired shortly after the hearing was held, and many, many months before the Division issued its order in these cases. So the order that was entered was entered by the -- by the Division, but it did not have the benefit of the hearing officer who presided who can assess the merits of the technical evidence and the witnesses' credibility, and so it was not a full and fair opportunity to present matters before the Division and the statute was not followed.

And also for that reason we don't believe res judicata were to apply even if the unique concept of de novo that Ascent advocates were to be followed.

So essentially, we do not believe that the

Division has the authority to overrule the Commission's prior ruling, that these cases should be allowed to go forward in a consolidated proceeding and that this motion should be denied.

HEARING EXAMINER ORTH: Thank you very much, Mr. Debrine. Thank you all, counsel, for that.

Let me ask Mr. Lamkin if he has any questions based on what he heard during the argument.

TECHNICAL EXAMINER LAMKIN: No questions from me. Thanks.

HEARING EXAMINER ORTH: All right. Thank you. In that case, the motion will be taken under advisement and we will see if we can't get an order out sooner rather than later.

(Break in proceeding.)

MR. DEBRINE: Excuse me, Madam Examiner, this is Earl Debrine. I have a little matter with regard to the Ascent Apache and Mewbourne cases since we are here on a status conference, and I don't want to guess as to what the ruling might be, but if we could -- if the ruling is going to be that the cases are allowed to go forward, that we set the hearing for these cases, because I think at the last status conference we decided that we were going to agree on a hearing date.

HEARING EXAMINER ORTH: Oh, I'm sorry, you mean

in the case we just had arguments on?

MR. DEBRINE: Yes, in the Apache, Mewbourne, Ascent matters we just heard the motion. We previously indicated that the parties were going to agree on a hearing date. We already talked about one for the Ascent Mewbourne cases, but if the motion to dismiss were denied, then Apache's cases, we would all have one hearing and agree on a hearing so we wouldn't have to come back once again before the Division to figure out a hearing date.

HEARING EXAMINER ORTH: Thank you for reminding me of that. That's coming back as a memory now. Thank you for that.

MR. SAVAGE: Madam Examiner, can I respond to that?

HEARING EXAMINER ORTH: Yes, Mr. Savage.

MR. SAVAGE: So in our prior motion hearing, Apache made it clear that, in their testimony, that there was no hurry on these -- in the transcripts, I believe it was Ms. Bennett who said there was really no hurry, and that they did not want the Division or OCC to rush because, you know, under the current economic circumstances they felt like that the, the rate of progress towards development has been retarded and slowed.

Ascent, you know, stated in that transcript that they were ready and able to go forward with development if

the Commission would give an expeditious, expeditious hearing on the de novo hearing on the cases that were applied for de novo hearing.

But since then, since we had to deal with these new applications and the cases have been delayed by months and the issues have become so complex and they have also threatened due process rights, Ascent feels they threatened due process rights of the hearing and the proceedings that we, Ascent feels it would be better to, if the Division would take a step back and take the time, and Ms. Bennett used the word orderly, do an orderly assessment and make a decision on these issues prior to subjecting to the parties to, to the proceedings.

HEARING EXAMINER ORTH: Well, certainly the Division would be issuing an order on the motion before subjecting the parties to any kind of hearing. Having said that, because we are typically running three months out in our ability to first set cases for hearing, and I have to ask you to contemplate the possibility that your motion would be denied.

I guess I don't see the harm in deciding on a hearing date while we are all together, which of course would become moot if the decision is granted. So did you -- I'm sorry, did you, Mr. Debrine, did you say that you have come up with a hearing date to propose?

MR. DEBRINE: We did not, but at the last status conference we were discussing a hearing date in late January, early February, and I think the parties were going to check with their clients as to whether that worked.

Apache had already confirmed with its witnesses that they would be available during that time frame, and it sounds like Mr. Savage is advocating for a later date. And I don't have any objection to pushing this into March if that's what he is looking for, but -- but since we are here and this is the third time we have been talking about a hearing date, and we've got the other cases, although the motion to dismiss was brought up again to seek dismissal of the Mewbourne cases, I think we ought to get a date on the calendar so that the parties can plan and the Division can plan accordingly. And then if that date somehow doesn't work out, then obviously the parties are free to continue and try to move around it, but I think we ought to get a date on the calendar since we are all here. And March is fine, if that's what Mr. Savage is looking for.

MR. SAVAGE: That sounds fair to me. You mentioned that March 18 was open.

HEARING EXAMINER ORTH: March 18 is completely open, as far as I understand it. And March 4 has just one contested matter on it right now, and I certainly wouldn't see the problem backing that up either again because there

is so many hours left that we can spend all day Friday. I mean, it could be put in the (unclear) March 18 is completely open.

MS. HARDY: Madam Examiner, I was thinking early March might be preferable because mid March starts its spring break for people with witnesses. If we can plan (unclear) but maybe we will be able to.

HEARING EXAMINER ORTH: All right. Is there objection to setting the date with March 4 with all the caveats that apply the same way as the Division might make it go or might make it moot or further (unclear).

MR. DEBRINE: March 4 works for Apache.

HEARING EXAMINER ORTH: Thank you, Mr. Debrine.

MR. SAVAGE: I have pending applications scheduled for March 4 with Matador. I would prefer not to have all of that -- I mean, the number of applications that would be heard under, under the current proceedings is quite substantial, I believe.

If we go as currently planned, you are going to hear the E/2 W/2, the W/2 W/2 the N/2 of Apache unit, and then, you know, Ascent will have to make some kind of appearance to defend its, its W/2 W/2 unit, even though the Commission order said that they would not be -- it's not a rehearing of that, I believe we can't just let that, you know, the presentations of the other pending applications go

unanswered, so we will have to do some kind of form of defense. So that's quite a busy day, and I already have other pending applications scheduled, so I would prefer not to do that one.

MR. DEBRINE: Could we do it on the 5th, Darin?

MR. SAVAGE: You know, where is the -- where does officially spring break fall? Where does that -- Dana, do you know where that?

MS. HARDY: Well, it's different at different school districts. I went to the Texas Department, so typically any time in March, I think, the last --

MR. SAVAGE: So it's going to be -- any date we choose in March is going to be hit or miss on the spring break schedule. Tentatively we could schedule it for the 18 and then check with the clients, and if everything works out, then the 18th would be great or we can alter it.

MS. HARDY: I think the 18th won't work for me. It might not also work for my witnesses that week.

MR. SAVAGE: The 18th, that Friday.

MR. DEBRINE: The 18th is problematic for me. I have a conflict on the date, but I'm completely tied up the day before, so I won't be able to prep.

MR. SAVAGE: If we jump up to the end of February what kind of dates would be available there?

HEARING EXAMINER ORTH: February 18 has a couple

of contested cases. Marlene, are you able to shed any light there?

MS. SALVIDREZ: For the 18th or the 4th?

HEARING EXAMINER ORTH: For February 18th.

MS. SALVIDREZ: Let me check. Hold on.

So we have a Mewbourne case, Case 21379, 21388 430, 31 and 32 as a special hearing after the regular.

HEARING EXAMINER ORTH: Okay. So if you could just, if we stuck it on the 18th and all of these cases actually go, there is no problem in simply saying we are going to hear this case on the 19th.

How does that sound?

MR. DEBRINE: That's fine for Apache.

MR. SAVAGE: I will have to consult with Ascent, but I believe that will --

MS. HARDY: Mewbourne feels that that would likely work.

HEARING EXAMINER ORTH: In that case, I will issue a prehearing order with February 18 as the hearing date with the understanding that it may in fact not go on the 18th, more likely the 19th, based on the other contested cases.

However, I'm going to notice it up for the 18th so that the notice is the same as for the regular docket. And there's no problem at that point opening the, calling

the matter and then simply continuing it Friday morning if that provides reassurance that your witnesses won't be called upon until they are ready to testify. Are there any questions about that? You will have to unmute yourselves if there are.

MR. DEBRINE: No, Madam Examiner.

HEARING EXAMINER ORTH: Thank you, Mr. Debrine.

MR. SAVAGE: Madam Examiner, sounds like a plan. Thank you.

HEARING EXAMINER ORTH: All right. Thank you.

MS. HARDY: Thank you.

HEARING EXAMINER ORTH: All right. Thank you, Ms. Hardy. Thank you all, and I will get that order out.

MR. SAVAGE: Thank you.

(Concluded.)

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

REPORTER'S CERTIFICATE

I, IRENE DELGADO, New Mexico Certified Court Reporter, CCR 253, do hereby certify that I reported the foregoing virtual proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings to the best of my ability.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.

I FURTHER CERTIFY that the Virtual Proceeding was of poor to good quality.

Dated this 3rd day of December 2020.

/s/ Irene Delgado
_____
Irene Delgado, NMCCR 253
License Expires: 12-31-20