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

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

APPLICATION OF COLGATE OPERATING, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

Commission Case No. 21744
Division Case No. 21629
Order No. R-21575

CIMAREX ENERGY CO.'S AND MAGNUM HUNTER PRODUCTION INC.'S RESPONSE TO COLGATE OPERATING , LLC'S MOTION TO DISMISS THEIR APPLICATION FOR *DE NOVO* HEARING

In response to the Motion to Dismiss Cimarex's Application for *De Novo* Hearing ("Motion to Dismiss") submitted by Colgate Operating, LLC ("Colgate") to the New Mexico Oil Conservation Commission ("Commission"), Cimarex Energy Co., and its affiliate Magnum Hunter Production Inc. (collectively "Cimarex"), respectfully submit that the facts and proceedings, as well as the case law, underlying Cimarex's request for a *de novo* hearing before the Commission fully warrant and justify such hearing, and therefore, Cimarex requests that Colgate's Motion to Dismiss Cimarex's Application for *De Novo* Hearing be denied. In support of its Response to Colgate's Motion to Dismiss ("Motion"), Cimarex states the following:

I. Background and Procedural History:

1. In Case No. 21629, Colgate sought a compulsory pooling order for the N/2 N/2 of Sections 2 and 3, Township 20 South, Range 29 East, NMPM, Eddy County New Mexico ("Subject Lands").

2. Neither Colgate nor Cimarex own a majority working interest in the Subject Lands. While Colgate owns a 27.25% net working interest, Hunter Magnum Production, Inc. ("Magnum Hunter"), Cimarex's affiliate, owns a 25% net working interest.

3. Colgate failed to initiate any meaningful discussions, let alone negotiations, to obtain a voluntary pooling agreement with Cimarex. Instead, after sending out its well proposal dated July 10, 2020, for the Meridian 3 Fed State Com 131H Well, the sole communication that Colgate sent to Cimarex about its proposal was an August 31, 2020 email responding to a question that Cimarex emailed to Colgate on August 18, 2020:

> August 18, 2020 email from John Coffman, Cimarex Landman to Mark Hajkik, Colgate Senior Landman:
>
> Mark
>
> I just took over this proposal over here in our camp. Just a quick question, are y'all planning on drilling just the N2N2 mile or are there any development plans for the S2N2 that might make this a N2 JOA? I know Mewbourne operates the S2N2 in Section 3. Just trying to get a feel of what your plans are in the area.
>
> Thank you,
>
> John Coffman
>
> August 31, 2020 response:
>
> John,
>
> As you probably noted, our operated strip is the N2N2, which abuts to several additional operated units in the section due north. Due to our consolidated operational efficiencies we would be happy to talk some options for the offsetting acreage in order to fully maximize the development of the area.
>
> Thanks,
>
> Mark

See Cimarex's Application to Reopen Case submitted on February 16, 2021, ¶ 2, attached hereto as Exhibit A.

4. Contrary to the representations it made to the Division during the hearing on January 7, 2021, Colgate made no other attempts to negotiate with Cimarex and did not provide any follow-up information prior to the hearing. Colgate followed its response with four months of silence. Thus, the entirety of the discussions between Colgate and Cimarex concerning Colgate's proposal can be repeated verbatim on a little more than a half page.

5. Months later, Colgate decided to pool the Subject Lands for the proposed Meridian well, and on Christmas Eve, December 24, 2020, Cimarex received Colgate's Notice Letter of the pooling hearing docketed for January 7, 2021, which the law firm Modrall, Sperling, Roehl, Harris, & Sisk, P.A. (the "Modrall Firm") sent to Cimarex on behalf of Colgate.

6. On November 22, 2020, Cimarex instituted a company-wide protocol for office workers for the holiday season for the period from November 22, 2020 through January 15, 2021. Under that protocol, all office employees in Denver, Midland, and Tulsa were "strongly encouraged" to work from home. Employees at the Midland office were instructed not to work from the office during this time period unless it was an emergency and then only after having obtained permission from a supervisor. *See* Declaration Under Penalty of Perjury of Riley Morris, at Para. 4. Mr. Morris' Declaration is attached hereto as Exhibit B.

7. The United States Postal Service proof of delivery indicates that the Notice Letter was delivered on December 24, 2020, at 5:26 a.m. *See* USPS Proof of Delivery, a copy of which is attached hereto as Exhibit C. Cimarex established a protocol for checking mail during the period from November 22, 2020 through January 15 2021, and the Land Technician in charge of the internal distribution of mail at the Midland office scanned the Notice Letter and attached it to an

email dated December 29. However, that email contained the following subject line: "RE: SWD Application_Muskegon 20 State Com 1_Sec 20-T175S-R29E, Eddy County_Longfellow Energy.pdf." . *See* Morris Declaration at ¶ 5. Mr. Morris, the landman at Cimarex who is responsible for reviewing pooling applications in the area in which the Subject Lands are located, received the email on Tuesday, December 29. However, he did not open the attachment (the Notice Letter) since the subject line of the email referenced an application for a salt water disposal well which did not involve the development of minerals in which Cimarex has a working interest. Mr. Morris became aware of the mistake on January 12, 2021. *Id*. at ¶ 6.

8. This unusual set of circumstances deprived Cimarex of the opportunity to file an entry of appearance for purposes of attending the hearing and to submit a competing application prior to the hearing.

9. During the time leading up to, and during, the hearing on January 7, 2021, Colgate made a number of material misrepresentations to the Division in its application, in its exhibits, and to its counsel, the Modrall Firm, which also represented Cimarex during this time period, that prejudiced Cimarex. Colgate's most egregious and impactful misrepresentation was that it sought to obtain a voluntary agreement from interest owners when, in fact, it failed to discuss any such agreement with Cimarex. If Colgate had engaged in negotiations with Cimarex, as it represented to the Division, the parties may have been able to negotiate a voluntary pooling agreement or land swap avoiding the current dispute. Even if no such agreement could have been reached, Cimarex would have been aware of Colgate's intention to pursue its well proposal and pooling application and the Modrall Firm would not have been able to represent Colgate based on the conflict with Cimarex, which was a client of the firm. *See* Cimarex's Application to Reopen Case at ¶¶ 12-13 (Exhibit A attached hereto).

10. After later realizing that the hearing had already been held on January 7, 2021, Cimarex was forced to find and retain new counsel since the Modrall Firm had been compromised because of Colgate's misrepresentations to the Modrall Firm that Cimarex was not going to object to Colgate's Application. After being retained, the undersigned counsel filed an Entry of Appearance on behalf of Cimarex on January 19, 2021. On January 29, 2021, Cimarex filed an Application to Reopen the Case, which presented new evidence along with Cimarex's plans to file a competing application.

11. By Order No. R-21575-A, Mr. Brancard, the hearing examiner, denied Cimarex's Application to Reopen Case; however, Mr. Brancard specifically preserved the option "for the Applicant to pursue a timely appeal [with the Commission] of Order R-21575." *See* Order No. R-21575-A. Cimarex exercised that option and timely filed an Application for *De Novo* Hearing, which included a copy of the Application to Reopen the Case with its new evidence and which the Commission docketed as Case No. 21744.

12. On March 3, 2021, Colgate filed its Motion to Dismiss Cimarex's Application for Hearing *De Novo*, to which Cimarex responds herein.

II. Cimarex is a Party of Record under the Oil and Gas Act and Statewide Rules.

13. Colgate correctly points out that "parties enter appearances routinely either to challenge an application or to preserve appellate rights (*de novo* proceedings before the Commission)." *See* Motion to Dismiss, Section A, p. 2. Such entries of appearance prior to the actual hearing secures, in absolute terms, a party's right to a *de novo* hearing under the Oil and Gas Act ("Act"). However, an entry of appearance prior to the hearing is not the only way to qualify for a *de novo* hearing.

14. NMAC 19.15.4.10, on which Colgate relies, does not state that a party must make an appearance at the actual "hearing" to qualify as a party to the proceedings, but states only that one option for such qualification is provided as follows: "a person to whom statute, rule or order requires notice…who has entered an appearance in the case; . . . " NMAC 19.15.4.10A(2). (emphasis added). Cimarex submits that "case" as a defining term is broader in scope than "hearing." Cimarex successfully "entered an appearance in the case" on January 19, 2021.

15. Furthermore, Cimarex made its entry of appearance while the case was still open and active and not yet closed because at the time of Cimarex's entry of appearance, Colgate had not yet submitted all the documents and exhibits required by the Division for completion and closure of the case. The C-102 form for Colgate's Meridian well had not been submitted to the Division for review, as required by the rules and the Division's pooling checklist. In fact, Colgate did not satisfy this requirement until January 27, 2021, well after Cimarex made its entry of appearance.

16. Cimarex also made its entry of appearance prior to the filing of the Division's Pooling Order, which was filed of record on January 20, 2021. In addition, Cimarex respectfully contends that Order No. 21575 was prematurely issued, and should not have been issued prior to the Division's review and confirmation of Colgate's C-102 documentation, a defect that should warrant review by the Commission.

17. Therefore, Cimarex satisfied NMAC 19.15.4.10A(2) to qualify as a party to the adjudicatory proceedings. Furthermore, Cimarex's entry of appearance, under the facts and circumstances of this case, also satisfied NMAC 19.15.4.10B to qualify as a party to the adjudicatory proceedings, which provides that a "person entitled to notice may enter an appearance at any time by filing a written notice of appearance with the division." (emphasis added).

Accordingly, and because there is no express time limitation in this rule, Cimarex did successfully file a written notice of appearance to become a party to the proceedings under this rule.

18. Commission Order No. 14097-A specifically describes how a party becomes a party of record and acquires standing for a *de novo* hearing. *See* Order No. R-14097-A, attached hereto as Exhibit D. Unlike *Pubco Petroleum Corp. v. Oil Conservation Commn.,* 1965-NMSC-023, 75 N.M. 36, cited by Colgate, which only addresses the issue of exhaustion of administrative remedies, Commission Order No. R-14097-A tackles directly the threshold question of what constitutes a party of record. Order No. R-14097-A establishes three categories for meeting, or failing to meet, this threshold question.

19. The first category is when a party files an entry of appearance prior to the hearing and makes an appearance at the hearing, which guarantees and secures, without qualification, a party's status as a party of record and its right to a *de novo* hearing. The second category is when a party does not make an appearance at the hearing, but files an entry of appearance well after the final order was issued and the record had been closed and taken under advisement, without providing any reasons for its late filing, failing to request that the record be reopened, and failing to submit new evidence. Under such circumstances, a party falls short of qualifying as a party of record, and under Order No. R-14097-A, the Commission is justified in rejecting the application for *de novo* hearing.

20. The third category is the one presented herein: a party who does not make an appearance at the hearing, but promptly makes an appearance in the case prior to the filing of the order and final submission of all exhibits, who establishes a reasonable basis for its late filing and absence at the hearing, and who promptly requests that the record be reopened, while submitting new evidence and arguments. Cimarex respectfully submits that such party does in fact meet the

threshold for being a party of record and qualifying for a *de novo* hearing, and that the Commission should consider such party's application for a *de novo* hearing on a case-by-case basis.

21. In the case underlying Order No. R-14097-A, the applicant sought a pooling order and had an evidentiary hearing on September 3, 2015. Twenty two days after the hearing was held, Amtex Energy, Inc. ("Amtex") filed an entry of appearance stating it opposed the application, but as the Commission noted, Amtex's entry of appearance did not assert the basis for opposing the application, nor did it request that the record be reopened for further evidence. *See* Order No. R-14097-A, at ¶¶ 2-5.

22. Relying heavily on *New Energy Economy, Inc. v. Vanzi,* 2012-NMSC-5, 274 P.3d 53, the Commission found that Amtex did not take the necessary actions to become a "party of record" in the case because (1) it failed to submit any evidence or arguments in writing; (2) it filed an entry of appearance well after the record was closed while at the same time "offered no excuses for its late filing;" and (3) it "did not request the record be reopened or offer to submit any new evidence." *See* Case No. R-14097-A, at ¶¶ 13-15. Therefore, the Commission concluded that under the holdings of *New Energy*, Amtex did not participate in the case in a legally sufficient manner to warrant intervention. *See id.*

23. Cimarex's entry of appearance is distinguishable from Amtex's in a number of significant ways. In its entry of appearance, Cimarex not only objected to the proceedings, but stated that it would be submitting a request to reopen the hearing, that it would be providing a competing pooling application, and that it would be filing a motion to stay the issuance of the pooling order. Immediately after filing an entry of appearance, Cimarex filed its Application to Reopen the Case that: (1) provided the basis for its opposition to the Colgate's application and new evidence substantiating its opposition; (2) explained the reasons for its late filing and absence at

the hearing; and (3) presented new evidence coupled with a legal argument for a finding that Colgate failed to meet the proper criteria for obtaining a valid pooling order. In addition, Cimarex filed competing applications in Case Nos. 21764 and 21765, which the Commission should review in order to ensure the protection of correlative rights and prevention of waste in this controversy. *See* Application to Reopen Case (Exhibit A attached hereto).

24. Thus, Cimarex should not be assigned to the same category as Amtex, as a party that does not meet the threshold to be a party of record and does not qualify for a *de novo* hearing, but Cimarex respectfully submits that, based on the underlying facts and circumstances, the Commission should consider Cimarex to be a party of record that has met the threshold, and has satisfied the criteria, for rights to a *de novo* hearing.

III. The Commission's Granting a *De Novo* Hearing to Cimarex is Consistent With, and Fully Supported by, New Mexico Case Law and the Act.

25. The holdings of the *New Energy* court, on which the Commission relies in Order No. R-14097-A, clearly show that what constitutes a "party," or "party of record," in an administrative hearing is not set by statute, and may be changed or determined by the agency itself without input from the New Mexico Supreme Court or the Legislature. *See New Energy,* at ¶ 35. Thus, according to the *New Energy* court, the Commission is authorized to "broaden or constrain the term 'party.' " *Id*. Thus, the Commission has full discretion to decide what is fair and just in this case with respect to whether Cimarex should be designated as a party of record. Accordingly, Cimarex respectfully requests that the Commission find that, under the facts described herein, Cimarex is a "party of record" with the right to a *de novo* hearing.

26. In *New Energy*, the court carved out an exception that allowed three parties to become parties to an appeal, after the appeals court denied their entry because they were not official parties in the underlying administrative proceeding. *See New Energy,* at ¶¶ 24-26. The

New Energy court overturned the appellate court and allowed the three parties to participate based on the parties' stake in the appeal: "As a matter of common sense and fundamental fairness, one would expect our appellate procedures to provide for their participation as parties to their appeals on equal footing with their opponents." *Id.* at ¶ 27.

27. In creating this exception, the *New Energy* court relied on other New Mexico case law that has created allowances for parties to pursue appeals when otherwise they would have been excluded from the appellate process. For example, the *New Energy* court noted the precedent set by *Thriftway Mktg. Corp. v. State*, 1990-NMCA-115, 111 N.M. 763, which created an exception allowing a party to intervene for the first time on appeal, when the party had not been involved in the district court proceeding below. *See New Energy,* at ¶ 42. *See also Wilson v. Massachusetts Mut. Life Ins. Co.,* 2004-NMCA-051, ¶ 11, 135 N.M. 506 (holding that while the timely filing of a notice of appeal may be a mandatory precondition to jurisdiction, it is "not an absolute jurisdictional requirement," and the court will recognize certain exceptions to untimely filing when warranted by the circumstances).

28. Thus, the fact that Cimarex missed its opportunity to make an appearance at the hearing because of extenuating circumstances does not automatically bar Cimarex from a *de novo* hearing on appeal when the facts and circumstances warrant such exception. The formalities of notice within the pooling proceedings should only protect and shield the Applicant when the Applicant acts in good faith to adhere to proper procedural protocol and not engage in intentional misrepresentations that negatively affect a party and the integrity of the hearing. A bad actor during the hearing should not receive the benefit of protections from notice.

29. This principle is demonstrated by analogous case law involving the piercing the corporate veil, which is instructive to the issues herein. An owner of an LLC, for example, benefits

from protections provided by an LLC, but only when the procedural formalities of the LLC are followed and the owner is not a bad actor or does not cause harm. *See Morrissey v. Krystopowicz,* 2016-NMCA-011, ¶ 13, 365 P.3d 20. In the same way, Colgate should not be able invoke the benefits of notice when it made material misrepresentations during the hearing that prejudiced Cimarex and undermined the legitimacy of the proceedings.

30. The Act provides that "[w]hen any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party of record adversely affected shall have the right to have the matter heard *de novo* before the commission…." NMSA 1978 § 70-2-13. Neither the statute, nor the regulations, require that the party has to appear at the actual hearing to qualify as a party of record.

31. Furthermore, the Commission should note that § 70-2-13 specifically states "any party of record," and by the use of "any," the statute opens up for consideration what constitutes a party of record beyond just "a party of record" that attends the hearing; "any" party of record would include any party that became a party of record at any time during the case pursuant to the regulations, and such a party would qualify as a party of record for purposes of a *de novo* hearing as long as it met the criteria established in Order No. R-14097-A and in relevant case law of *New Energy* and *Thriftway*.

32. Cimarex meets such criteria; it was a party adversely affected by the pooling order and became a party of record by filing its entry of appearance which, although filed after the hearing had occurred, was timely under the facts and circumstances of this case, as set forth in Paragraphs 6-10, above. Therefore, Cimarex respectfully submits that it has satisfied all criteria enumerated in Commission Order No. R-14097-A that qualifies it as a "party of record" and that allows it to apply for a *de novo* hearing. *See* Order No. 14097-A, at ¶ 15.

IV. Even if Cimarex Does Not Qualify as a Party of Record, the Commission Should Allow Cimarex to Challenge the Division's Order in a *De Novo* Hearing.

33. If the Commission should hold that Cimarex does not qualify as a party of record, the facts and circumstances of this case provide a sufficient basis on which to allow Cimarex to challenge the Division's Order at a *de novo* hearing.

34. Rule 1-060 of the New Mexico Rules of Civil Procedure and Rule 60 of the Federal Rules of Civil Procedure provide guidance in balancing the interests of finality versus relief from unjust judgments. Under both Rule 1-060(B)(1)(3) and (4) and Fed.R.Civ.P. 60(b))(1)(3) and (4),[1] a court may relieve a party from a final judgment or proceeding based on excusable neglect, misrepresentation, or if the judgment is void. All three reasons are present in this case.

A. Colgate's Application and Case were Based on a Material Misrepresentation That Created the False Premise for Filing a Compulsory Pooling Application.

35. For a pooling application to be valid on its merits, and to qualify for approval, it must be supported by "evidence of attempts the applicant made to gain voluntary agreement including but not limited to copies of relevant correspondence." NMAC 19.15.4.12A(b)(vi) (showing the minimum, barebones criteria that must be satisfied for approval of a pooling application); *see also* Division Order No. R-20223 and Commission Order No. R-21416-A (both Orders showing that good-faith "negotiations" between parties prior the applications to pool are among the essential criteria to be considered for approval of a pooling application). Thus, absent a refusal by a working interest owner to enter a voluntary pooling agreement, an operator cannot

[1] New Mexico state courts use federal court decisions interpreting Fed.R.Civ.P. 60(b), in interpreting and applying Rule 1-060(B). *See Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co*., 2007-NMSC-051, ¶ 9, 142 N.M. 527, 168 P.3d 99.

file a compulsory pooling application and the Division lacks jurisdiction to consider such an application.

36. In order to establish the premise for filing its compulsory pooling Application, Colgate represented to the Division that:

> Colgate sought, but has been unable to obtain, a voluntary agreement from all interest owners in the Bone Spring formation underlying the proposed spacing unit to participate in the drilling of the well or to otherwise commit their interest to the well.

Application at ¶ 6.

37. In addition, Exhibit B of its Hearing Packet, the Affidavit of Mark Hajdik, Colgate made the following representation to the Division:

> Prior to filing its application, Colgate made a good faith effort to obtain voluntary joinder of working interest owners in the proposed well. . .

38. However, as set forth in Paragraphs 3, 4, and 9 above, and at Paragraphs 6-10 of Cimarex's Application to Reopen Case, prior to filing its compulsory pooling application, Colgate never initiated any communication with Cimarex regarding its proposal to compulsorily pool Cimarex's working interests in the Subject Lands, let alone a make "a good faith effort to obtain voluntary joinder" of Cimarex's working interests.

39. Thus, absent these material misrepresentations, the Division would not have been able to even consider Colgate's Application. Or put another way, if Colgate had accurately informed the Division that it did not attempt to negotiate a voluntary pooling agreement with Cimarex, which owns a 25% working interest in the proposed horizontal spacing unit, the Division would not have rejected Colgate's Application.

40. Colgate cannot deny that "but for" its misrepresentations, the Division would not have granted its application. As stated in the Affidavit of Mark Hajdik at Para. 3 (Hearing Packet Ex. B):

> This case involves a request for an order from the Division for compulsory pooling of interest owners who have refused to voluntarily pool their interest for the proposed Bone Spring horizontal spacing unit described below, and in the well to be drilled in the horizontal spacing unit.

Contrary to Mr. Hajdik's representation, the case did not involve a request for a compulsory pooling of interest owners who refuse to voluntary pool their interests.

41. In sum, Colgate obtained the Order from the Division granting its compulsory pooling application based on material misrepresentations to falsely establish the very premise for filing such an application. Thus, using Rule 1-060(B)(3) and (4) as guidance to balance the interests of finality versus relief from unjust judgments, the Commission should allow Cimarex to present its case at a *de novo* hearing.

B. Cimarex's Failure to File its Entry of Appearance Before the January 7, 2021 Hearing was Due to Excusable Neglect

42. As set forth in Paragraphs 5-8 above, Cimarex received the Notice Letter on Christmas Eve. However, due to the COVID-19 protocols established to protect the health and safety of its employees and their families that disrupted the mail distribution process within the company and the holiday season, the Notice Letter was not distributed internally until December 29. Unfortunately, the subject line of the email distributing the Notice Letter mistakenly referred to the attachment as an application of a salt water disposal well causing the landman in charge of monitoring compulsory pooling applications to not open the attachment. Thus, although Cimarex failed to file its entry of appearance prior to the hearing and did not attend the hearing, within 7 days of becoming aware of the hearing, Cimarex, having to find new counsel because of the

conflict created by Colgate, interviewed and retained counsel and filed its entry of appearance and followed up with the filing of its Application to Reopen Case and Application for Hearing *De Novo* Hearing.

43. The burden is upon the party moving to have the judgment set aside to plead and prove grounds for relief under Fed.R.Civ.R 60(b). *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir 1990). However, Rule 60(b)(1) "should be liberally construed when substantial justice will thus be served, " and courts should "resolve all doubts in favor of the party seeking relief." *Jennings v. Rivers*, 394 F.3d 850, 856 (10th Cir. 2005) (internal quotations and citations omitted).

44. One of the leading cases on what constitutes "excusable neglect" is *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 507 U.S. 390 (1993), in which the Court held that the determination whether a party's neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id*. at 391-095, 113 S.Ct. 1489. Such circumstances include "[1] the danger of prejudice to the [nonmoving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.*

45. In this case, Colgate will suffer no prejudice if Cimarex is allowed to pursue its *de novo* appeal since Colgate has not undertaken any action in reliance on the Division's Order, nor could it in light of the federal moratorium on processing permits to drill wells on federal lands. In addition, there will be little or no delay in the proceedings.

46. "[F]or purposes of [Fed.R.Civ.P.] Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to

negligence." *Pioneer Inv. Servs. Co.*, 507 U.S. at 394. Courts are more forgiving of missed deadlines caused by clerical calendaring errors, mathematical miscalculations of deadlines and mishandling of documents. For example, in *Kinder Morgan CO2 Company, L.P. v. State of New Mexico, Taxation and Revenue Depart*., 2009-NMCA-19, 203 P.3d 110, the New Mexico court of appeals found that the mis-calendaring of a deadline qualified as a sufficient reason to constitute excusable neglect under Rule 1-060(B). *See, also*, *Brown v. Fisher*, 251 Fed. Appx. 527, 533 (10th Cir. 2007) (excusable neglect where complaint delivered to administrative assistant not authorized to accept on defendant's behalf); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1396 (10th Cir. 1988) (excusable neglect where counsel overlooked summary judgment motion delivered in stack of other documents); *Espy v. Mformation Techs*., No. 09-2211-EFM, 2009 WL 2912506, at *11 (D. Kan. Sept. 9, 2009) (excusable neglect when paralegal did not check certificate of service for admission requests delivered by hand and erroneously added three days when calendaring response deadline).

47. In this case, the error by Cimarex's Land Technician in mistakenly identifying the Notice Letter as an application for a salt water disposal well, coupled with the fact that the Notice Letter, although sent on December 18, was not received until Christmas Eve, and not processed by the Land Technician until December 29, as well as the remote working status of Cimarex's office employees led to the failure of Cimarex to file an entry of appearance prior to the January 7, 2021 hearing date. These circumstances are sufficient to establish "excusable neglect" under *Kinder Morgan.*

48. Finally, Cimarex has acted in good faith by addressing the issue in a swift manner. Thus, all four factors enunciated by the Supreme Court in *Pioneer Investment* auger in favor of

finding that Cimarex's failure to file its entry of appearance before the hearing was the result of excusable neglect. Thus, the Commission should allow Cimarex to pursue its hearing *de novo*.

V. Conclusion:

49. Contrary to Colgate's claim, this is not a simple case. Applying the Act, case law, and Commission precedent to the facts and circumstances as described herein, Cimarex is a party of record adversely affected by the Division's Order No. R-21575, with standing to seek a *de novo* hearing. In the alternative, even if the Commission does not find that Cimarex is a party of record, the facts and circumstances of this case provide a basis for granting Cimarex standing to pursue its *de novo* appeal of the Division's pooling order.

For the foregoing reasons, Cimarex respectfully requests that the Commission deny Colgate's Motion to Dismiss Cimarex's Application for *De Novo* Hearing and allow the *de novo* hearing, currently docketed, to proceed.

Respectfully Submitted,

ABADIE & SCHILL, PC

/s/ Darin C. Savage

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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 Commission and was served on counsel of record, or on the party of record, if no counsel was provided, via electronic mail on March 12, 2021:

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

APPLICATION OF MAGNUM HUNTER PRODUCTION, INC., AFFILIATE OF CIMAREX ENERGY CO., TO REOPEN COLGATE OPERATING, LLC'S POOLING CASE NO. 21629, EDDY COUNTY, NEW MEXICO

Reopen Case No. _____
Re: Case No. 21629; Order No. R-21575

APPLICATION TO REOPEN CASE

Magnum Hunter Production, Inc., an affiliate of Cimarex Energy Co. (collectively referred to herein as "Cimarex"), through its undersigned attorneys, hereby files its Application to Reopen Case No. 21629 in which Colgate Operating, LLC ("Colgate") sought a compulsory pooling order and operatorship from the Oil Conservation Division ("Division") for the N/2 N/2 of Sections 2 & 3, Township 20 South, Range 29 East, NMPM, Eddy County, New Mexico for the Bone Spring formation ("Subject Lands"). The basis of this application is that Colgate made certain material misrepresentations in its application and in its hearing exhibits that it introduced into the hearing of this case conducted before the Division on January 7, 2021, the most egregious being the representation that it sought to obtain a voluntary agreement from interest owners when, in fact, it failed to discuss any such agreement with Cimarex. Based on these defects, Cimarex contends that pursuant to NMAC 19.15.4.12 and Order Nos. R-20223 and R-21416-A, Colgate's notice was invalid, Colgate failed its obligation to make attempts to reach a voluntary agreement, and its hearing exhibits were fatally defective. Cimarex seeks relief in the form of reopening this Case to allow Cimarex to file its competing application to pool the Subject Lands that meets the regulatory

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criteria for operations and development, including the prevention of waste and protection of correlative rights.

In support of its Application to Reopen, Cimarex states the following:

I. Procedural History and Background:

1. Cimarex received from Colgate a well proposal dated July 10, 2020, for the proposed development of the Meridian 3 Fed State Com 131H Well on the Subject Lands. This was one of 21 well proposals received from Colgate that year, and of the 21, Colgate has drilled two wells, the Dawson 31 Fed Com 124H and 134H Wells.

2. Upon its receipt, Cimarex reviewed the Meridian Well proposal and contacted Colgate on August 18, 2020, by email with a question:

> Mark,
> I just took over this proposal over here in our camp. Just a quick question, are y'all planning on drilling just the N2N2 mile or are there any development plans for the S2N2 that might make this a N2 JOA? I know Mewbourne operates the S2N2 in Section 3. Just trying to get a feel of what your plans are in the area.
> Thank you,
> John Coffman

Colgate responded August 31, 2020, to this inquiry, but never followed up with the information sought by Cimarex:

> John,
> As you probably noted, our operated strip is the N2N2, which abuts to several additional operated units in the section due north. Due to our consolidated operational efficiencies we would be happy to talk some options for the offsetting acreage in order to fully maximize the development of the area.
> Thanks,
> Mark

A copy of this email exchange is attached as Exhibit 1. Since Cimarex never provided the information requested, Cimarex filed the proposal with the other Colgate proposals that Cimarex had received.

3. Colgate decided to pool the Subject Lands for the proposed Meridian well, and on Christmas Eve, December 24, 2020, Magnum Hunter Production, Inc., an affiliate of Cimarex Energy Co., received Colgate's Notice Letter of the pooling hearing for January 7, 2020, which the law firm Modrall, Sperling, Roehl, Harris, & Sisk, P.A. ("Modrall") sent to Cimarex on behalf of Colgate.

4. However, under conditions of a renewed spike in the occurrence of COVID-19 infections, thus, stricter lockdown policies for the workplace, and in the midst of absences of support staff during the holiday, the Notice Letter was inadvertently misplaced and was not delivered to Cimarex's designated land team. Thus, the land team remained unaware of the hearing until after it was held, missing the opportunity to have filed an entry of appearance and competing application. Cimarex recognizes that the Notice Letter was sent within the prescribed time frame prior to the hearing date, and provides this explanation of how Cimarex missed notice of the hearing for the Division's consideration of why Cimarex failed to make an appearance. Had the circumstances of the Notice Letter's receipt been different, Cimarex's land team would have become aware of the hearing at the proper time and would have made a timely entry of appearance.

5. It was not until January 12, 2021, that Cimarex first realized that the hearing had already been held. Upon review of the testimony and exhibits submitted at the hearing, Cimarex found that Colgate had made a number of misrepresentations in its application and during the hearing and had introduced a number of irregularities. As a result, Cimarex requests that the Division reopen the case in order to determine the extent to which such misrepresentations have undermined and invalidated the merits of the proceedings.

II. Legal Arguments:

A. Colgate failed to make the necessary attempts to reach a voluntary agreement and failed to engage in good faith negotiations prior to the forced pooling.

6. Colgate's Landman falsely testified that its case "involves a request for an order from the Division for compulsory pooling of interest owners who have *refused* to voluntarily pool their interests…." Affidavit of Mark Hajdik, Exhibit B, ¶ 3 (emphasis added).[1] However, Colgate never made the prerequisite "attempts" to enter into a voluntary agreement with Cimarex and never made good-faith efforts to engage in any prior "negotiations" for that purpose. Therefore, Cimarex was never provided the opportunity to refuse or fail to enter a voluntary agreement, as is required under the pooling statutes and regulations before an application for a pooling hearing can be submitted and qualify for approval.

7. Colgate also represented to the Division, in its Communication Timeline, Exhibit B.3, that it had responded to various email questions from Cimarex from "August 2020 - January 2021." However, Colgate had responded only once by email to one question initiated by Cimarex, on August 31, 2020, and Colgate failed to follow up with any additional information that Cimerax requested, and did not make any attempt to reach an agreement from that point forward. *See* Exhibit 1. From the manner in which Colgate represented to the Division its communications with Cimarex, describing them as occurring over a six-month period, one would assume that the communications were ongoing or, at a minimum, there was some form of periodic communication

[1] *See also*, Colgate's Application at ¶ 6:

> 6. Colgate sought, but has been unable to obtain, a voluntary agreement from all interest owners in the Bone Spring formation underlying the proposed spacing unit to participate in the drilling of the well or to otherwise commit their interests to the well.

and correspondence between Colgate and Cimarex during these six months prior to the hearing; however, there was not. In reality, the only communication between the parties was Cimarex's email at the end of August, and Colgate's brief response, followed by five months of silence -- no correspondence, no phone calls, no delivery of a copy of the proposed operating agreement and no offer to discuss its terms.

8. For a pooling application to be valid on its merits, and to qualify for approval, it must be supported by "evidence of *attempts* the applicant made to gain voluntary agreement including but not limited to copies of relevant correspondence." NMAC 19.15.4.12A(b)(vi) (showing the minimum, barebones criteria that must be satisfied for approval of a pooling application) (emphasis added); *see also* Division Order No. R-20223 and Commission Order No. R-21416-A (both Orders showing that good-faith "negotiations" between parties prior to the applications to pool are among the essential criteria to be considered for approval of a pooling application). The Division should note that "attempts" in NMAC 19.15.4.12A(b)(vi) is plural, therefore, to satisfy these criteria, there should be a record that includes more than one attempt. Likewise, "negotiations" in Order Nos. R-20223 and R-21416-A is also plural, denoting the requirement of more than one attempt to negotiate.

9. Next to Colgate, which owned a 27% working interest in the proposed unit, Cimarex was the second largest working interest owner with 25%. Given this set of facts, Colgate's efforts to obtain working interest in the proposed unit by voluntary agreement should have placed a strong emphasis and priority on Cimarex. Yet, Colgate failed to make any attempts or efforts to negotiate a voluntary agreement with Cimarex and provided no evidence that it had done so except for its misrepresentations in Paragraph 6 of its Application, in the Affidavit of Mark Hajdik, Exhibit B, ¶ 3, and in its Communication Timeline.

10. At a minimum, to meet and satisfy the good-faith element of prior negotiations, both under the regulations and Division policy, an applicant must show a reasonable record of "attempts" and "prior negotiations," which Colgate failed to do. Colgate's single email to Cimarex is purely reactive and minimal at best, and not in any way proactive; it addresses only one question about the scope of the well proposal and makes no affirmative attempts to reach or negotiate a voluntary agreement.

B. Colgate's pattern of misrepresentations extended to other parties involved in the pooling hearing, thereby undermining the integrity and merits of the adjudicatory process.

11. Colgate's misrepresentation of its communications with another working interest owner in the case is also quite evident and well-documented. In its Communication Timeline, Colgate represents that it had various email exchanges from "July 2020 - January 2021" with the J.M. Welborn Trust ("Welborn Trust"). However, the Pre-hearing Statement filed by Prosperity Bank, as Trustee of the Welborn Trust, shows that communication efforts between Colgate and the Welborn Trust were initiated by Welborn Trust, not by Colgate, on July 16, 2020, with follow up emails on July 30 and August 19, 2020. *See* Prehearing Statement of Welborn Trust, attached hereto as Exhibit 2. According to its clear recounting of correspondence, the Welborn Trust shows that communication efforts did not extend past August 19, 2020; and yet, Colgate represents to the Division that email exchanges continued past August 19, through September, October, November, December and into January, 2021. The discrepancies between the Prehearing Statement of the Welborn Trust and Colgate's Communication Timeline provides additional evidence of Colgate's material misrepresentations during the hearing that the Division should review by reopening the case.

12. Furthermore, Modrall represented Colgate during the filing of Colgate's pooling application and its hearing on January 7, 2021. Colgate misrepresented to Modrall that Cimarex, who is also a client of Modrall for Division work, was not objecting to Colgate's proposal. When Cimarex found out that the hearing had already been conducted, it informed Modrall that Cimarex did not inform Colgate that it was not objecting to Colgate's Application. To its credit, upon receiving this information, Modrall immediately withdrew its representation of Colgate for any subsequent matters involving Case No. 21629. However, Colgate's misrepresentation to its own counsel regarding Colgate's communications with another working interest owner in the hearing, when it knew Cimarex was also a client of Modrall, is another example of the pattern of misrepresentations that Colgate engaged in connection with its Application and in its hearing exhibits.

13. Although Cimarex acknowledges that it misplaced the Notice Letter due to extenuating circumstances, the Division should note that if Colgate had made good-faith attempts to enter into an agreement or negotiations with Cimarex during the time period leading up to the hearing, Cimarex would have been fully aware of Colgate's pooling application and the hearing. Colgate represented to the Division that it had communicated with Cimarex during this time period, but it had not. Similarly, if Colgate had accurately communicated to Modrall that Cimarex had not yet taken a position on Colgate's Application, then Modrall would have requested a waiver from Cimarex in order to maintain representation, and again, upon such request, Cimarex would have become aware of the pooling application and hearing. Thus, although it sent out its Notice Letters within the prescribed time frame, Colgate nonetheless played an affirmative role through its failures and lack of communication in Cimarex's lack of awareness of the hearing.

WHEREFORE, Cimarex respectfully submits that, based on the foregoing, its Application to Reopen be set for hearing before an Examiner of the Oil Conservation Division on March 4, 2021, in order to determine, after proper notice, whether Colgate undermined the adjudicatory process through its patterns of misrepresentations to the extent that the pooling hearing held January 7, 2021, should be dismissed, and the Division require a re-hearing of the case on the merits which should include Cimarex's competing application, to be filed promptly by Cimarex; or if the Division decides that Colgate's case should not be dismissed, then in the alternative, Cimarex requests that Case No. 21629 be reopened and reviewed in order to find, under the circumstances, whether Cimarex's competing application should be heard and considered at this point in the proceedings.

Respectfully submitted,

ABADIE & SCHILL, PC

/s/ Darin C. Savage

Darin C. Savage

Andrew D. Schill
William E. Zimsky
214 McKenzie Street
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darin@abadieschill.com
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Attorneys for Cimarex Energy Co., and Magnum Hunter Production, Inc., an affiliate of Cimarex Energy

Application of Magnum Hunter Production, Inc., an affiliate of Cimarex Energy Co., ("Cimarex") to Reopen Case No. 21629, Eddy County, New Mexico. Applicant in the above-styled cause seeks to reopen Case No. 21629 in order to determine grounds for the introduction and submission by Applicant of a competing pooling application for the Bone Spring formation underlying N/2 N/2 of Sections 2 and 3, Township 20 South, Range 29 East, NMPM, Eddy County, New Mexico. The lands are located approximately 15.5 miles northeast of Carlsbad, New Mexico.

From: Mark Hajdik <MHajdik@colgateenergy.com>
Subject: [External] RE: Meridian Proposal
Date: August 31, 2020 at 9:28:14 PM MDT
To: John Coffman <jcoffman@cimarex.com>

John,
As you probably noted, our operated strip is the N2 N2, which abuts to several additional operated units in the section due north. Due to our consolidated operational efficiencies we would be happy to talk some options for the offsetting acreage in order to fully maximize the development of the area.

Thanks,
Mark

Mark Hajdik** | **Colgate Energy** | **Senior Landman
300 N. Marienfeld St. | Suite 1000 | Midland, TX 79701
O: (432) 257-3886 | C: (832) 904-6006
Email: mhajdik@colgateenergy.com

From: John Coffman <jcoffman@cimarex.com>
Sent: Tuesday, August 18, 2020 1:38 PM
To: Mark Hajdik <MHajdik@colgateenergy.com>
Subject: [EXTERNAL] Meridian Proposal

Mark,

I just took over this proposal over here in our camp. Just had a quick question, are y'all planning on drilling just the N2N2 2 mile or are there any development plans for the S2N2 that might make this a N2 JOA? I know Mewbourne operates the S2N2 in Section 3. Just trying to get a

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feel of what your plans are in the area.

Thank you,

John Coffman

Landman
600 N. Marienfeld St., Suite 600
Midland, TX 79701
Direct: 432.571.7883
jcoffman@cimarex.com

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

APPLICATION OF COLGATE OPERATING, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO **CASE NO. 21629**

PRE-HEARING STATEMENT
OF
PROSPERTY BANK F/K/A AMERICAN STATE BANK
AS TRUSTEE OF THE J.M. WELBORN TRUST

Prosperity Bank f/k/a American State Bank, Trustee of the J.M. Welborn Trust ("Trustee") received a letter from Colgate dated July 10, 2020 notifying the Trustee of the proposed well and indicating that Colgate would be interested in acquiring the Trustee's interest. The Trustee contacted Colgate by e-mail on July 16, 2020. Follow-up e-mails were sent on July 30, 2020 and August 19, 2020. On the latter date, Colgate responded to the Trustee's inquiry. The Trustee sent another e-mail on August 19, 2020 notifying Colgate that the Trustee would be interested in an assignment of the interest held by the Trustee. Colgate promptly responded on the same date and notified the Trustee that there would be a meeting with management to "see what we can offer here." That was the last communication that the Trustee received from Colgate until a letter from Colgate's attorney regarding this Application and the hearing was received on December 21, 2020.

The Trustee has invested time and money in determining a market value for an assignment of the interest. The Trustee does not desire to participate in the well and wishes to reach an agreement with Colgate for an assignment of the interest at a market rate. In its Application, Colgate indicated that it "has been unable to obtain" a voluntary agreement from all interested owners. The Trustee has shown its willingness to assign its interest. Colgate indicated they would make an offer, but to date, an offer has not been received.

Respectfully submitted,

Prosperity Bank f/k/a American State Bank, Trustee
of the J.M. Welborn Trust

By: Brent McDonald

Brent McDonald
Senior Vice President
1401 Avenue Q
Lubbock, TX 79401
Telephone: 806.741.2371
brent.mcdonald@prosperitybankusa.com

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BILLIE MCMINN
806-741-2370
PROSPERITY BANK 227
1401 AVENUE Q
LUBBOCK TX 79401

0.2 LBS LTR **1 OF 1**

SHIP TO:
OIL CONSERVATION DIVISION
DEPT. OF ENERGY, MINERALS, NAT. RES
1220 SOUTH ST., FRANCIS DRIVE
SANTA FE NM 87505-4225

NM 875 0-03

UPS NEXT DAY AIR **1**

TRACKING #: 1Z F7F 455 01 9163 7794

BILLING: 3RD PARTY

Reference # 1: 311
Reference # 2: J. M. Welborn

CS 22.0.12. WNTNV50 39.0A 11/2020*

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

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

APPLICATION OF COLGATE OPERATING, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

Commission Case No. 21744
Division Case No. 21629
Order No. R-21575

DECLARATION OF RILEY MORRIS UNDER PENALTY OF PURJURY

STATE OF TEXAS)
) ss.
COUNTY OF MIDLAND)

1. I am over the age of eighteen years and have the capacity to execute this Affidavit, which is based on my personal knowledge.

2. I am employed as a Landman with Cimarex Energy Co. ("Cimarex"), working out of the Midland, Texas office.

3. One of my responsibilities is to review pooling applications sent to Cimarex and to its affiliate Magnum Hunter Production Inc. ("Magnum Hunter") by other oil and gas companies for lands in Eddy County, New Mexico to determine whether such applications encompass lands in which Cimarex or Magnum Hunter own any leasehold interest.

4. On November 22, 2019, Cimarex instituted a company-wide protocol for office workers for the holiday season for the period from November 22, 2020 through January 15, 2021. Under that protocol, all office employees in Denver, Midland, and Tulsa were "strongly

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encouraged" to work from home. Employees at the Midland office were instructed not to work from the office during this time period unless it was an emergency and then only after having obtaining permission from a supervisor.

5. On December 29, I received an internal email from our Land Technician with the subject line "RE: SWD Application_Muskegon 20 State Com 1_Sec 20-T175S-R29E, Eddy County_Longfellow Energy.pdf." Because the subject line referred to an application for a salt water disposal well and not a pooling application, I did not read the email or open the attachment, which, from the subject line, appeared to be a .pdf of salt water disposal well application.

6. I did not become aware of the application filed by Colgate Operating, LLC for the compulsory pooling order for the N/2 N/2 of Sections 2 and 3, Township 20 South, Range 29 East, NMPM, Eddy County New Mexico until January 12, 2021.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12th of March, 2021.

DocuSigned by:

FB2B6FD0BC724E8...

Riley Morris

UNITED STATES POSTAL SERVICE

March 12, 2021

Dear Lesley Forrest:

The following is in response to your request for proof of delivery on your item with the tracking number: **9314 8699 0430 0077 8199 36**.

Item Details	
Status:	Delivered, Left with Individual
Status Date / Time:	December 24, 2020, 5:26 am
Location:	MIDLAND, TX 79701
Postal Product:	First-Class Mail®
Extra Services:	Certified Mail™
	Return Receipt Electronic
Recipient Name:	Magnum Hunter Production Inc

Shipment Details	
Weight:	4.0oz

Destination Delivery Address	
Street Address:	600 N MARIENFELD ST STE 600
City, State ZIP Code:	MIDLAND, TX 79701-4405

Recipient Signature

Signature of Recipient: [signature]

Address of Recipient: 600 - 600

Note: Scanned image may reflect a different destination address due to Intended Recipient's delivery instructions on file.

Thank you for selecting the United States Postal Service® for your mailing needs. If you require additional assistance, please contact your local Post Office™ or a Postal representative at 1-800-222-1811.

Sincerely,
United States Postal Service®
475 L'Enfant Plaza SW
Washington, D.C. 20260-0004

EXHIBIT C

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

APPLICATION OF MATADOR PRODUCTON COMPANY FOR A NON-STANDARD OIL SPACING AND PRORATION UNIT, COMPULSORY POOLING, AND NON-STANDARD LOCATION, LEA COUNTY, NEW MEXICO.

CASE NO. 15366 (De Novo)
ORDER NO. R-14097-A

ORDER OF THE COMMISSION

This matter came before the New Mexico Oil Conservation Commission ("Commission") for hearing on February 11, 2016, at Santa Fe, New Mexico, to consider the motion of Matador Production Company ("Matador") to dismiss the appeal filed by Amtex Energy, Inc. ("Amtex") of Order No. R-14097. The Commission, having considered the Motion, the briefs and arguments of counsel, and being otherwise fully advised, enters the following findings of fact, conclusions of law and orders.

THE COMMISSION FINDS THAT:

(1) This matter concerns the definition of a "party of record" under the New Mexico Oil and Gas Act ("Act"), Sections 70-2-1 et seq., and, therefore, who has the right to apply for a de novo hearing before the Commission after a decision on an adjudicatory matter is rendered by the Oil Conservation Division of the Energy, Minerals and Natural Resources Department ("Division"). Section 70-2-13 NMSA 1978.

(2) On August 3, 2015, Matador filed an application ("Application") with the Division seeking approval of a non-standard 160-acre, more or less, oil spacing and proration unit (project area) in the Bone Spring formation, Quail Ridge, Bone Spring Pool (pool code 50460) comprised of the W/2 E/2 of Section 16, Township 19 South, Range 34 East, NMPM, Lea County, New Mexico (the "Unit"). The Application sought an order pooling all uncommitted interests in the Unit and approval of a non-standard location for the well. Order R-14097 Findings 2, 4.

(3) Matador owns or controls 100% of the interest in north half of the Unit and Amtex owns approximately 92.8% working interest in the south half of the Unit. Notice of the Application was provided to all uncommitted mineral interest owners, including Amtex. Order R-14097 Findings 6, 12.

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(4) An evidentiary hearing was held on the Application by the Division on September 3, 2015, which was presided over by a technical hearing examiner, Phillip Goetze, and a legal hearing examiner, Gabriel Wade. Matador appeared at the Division hearing and presented evidence in support of the Application. Prior to the hearing, no other person filed a written entry of appearance. No other party appeared at the hearing, or otherwise opposed the granting of the application. Order R-14097 Finding 7.

(5) On September 25, 2015, 22 days after the Division hearing was held, an Entry of Appearance was filed by Amtex Energy, Inc. and William Savage stating they opposed the application. The entry of appearance did not assert the basis for opposing the application, nor did it request that the record be reopened for further evidence. Matador filed a Motion to Quash Entry of Appearance. Order R-14097 Findings 8, 9.

(6) On December 14, 2015, the Division entered Order No. R-14097 granting the Application and ordering that the "Entry of Appearance filed by Amtex Energy, Inc. on September 25, 2015 for this case is untimely and no further testimony will be accepted." Order R-14097, ¶20.

(7) On January 7, 2016, Amtex filed a De Novo Hearing Application with the Commission regarding Division Order No. R-14097 to request that the case be heard de novo before the Commission pursuant to NMSA 1978 §70-2-13 and Rule 19.15.4.23(A) NMAC.

(8) On January 26, 2016, Matador filed a Motion to Dismiss Amtex's Appeal. On February 2, 2016, Amtex filed its Response to the Motion and on February 10, 2016, Matador filed its Reply. On February 11, 2016 the Commission held a hearing on the Motion to Dismiss and heard oral arguments from counsel for Matador and Amtex.

(9) The Act provides that after a matter is referred to a Division hearing examiner and a decision is then rendered by the Division, "any party of record adversely affected shall have the right to have the matter heard de novo before the commission upon application filed with the division within thirty days from the time any such decision is rendered." Section 70-2-13 NMSA 1978. (emphasis added). There is no claim that Amtex is "adversely affected" by the Division Order. The only issue is whether Amtex is a "party of record".

(10) The Act does not define "party of record". The term does appear several other times in the Act to determine who may request a rehearing of, or appeal, a decision of the Commission.

> Any party of record to the proceeding before the commission or any person adversely affected by a rule adopted under the Oil and Gas Act may appeal to the court of appeals within thirty days after filing of the rule under the State Rules Act.
> Section 70-2-12.2(C).

> Within twenty days after entry of an order or decision of the commission, a party of record adversely affected may file with the commission an application for rehearing in respect of any matter determined by the order or decision...
> Section 70-2-25(A)
>
> A party of record to the rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.
> Section 70-2-25(B).

(11) The Division's rules regarding adjudicatory hearings do not define "party of record" but do define who is, or who may become, a "party" in an adjudicatory proceeding before either the Division or the Commission. Rule 19.15.4.10 NMAC reads in part:

> A. The parties to an adjudicatory proceeding shall include:
> 1. the applicant;
> 2. a person to whom statute, rule or order requires notice (not including those persons to whom 19.15.4.9 NMAC requires distribution of hearing notices, who are not otherwise entitled to notice of the particular application), who has entered an appearance in the case; and
> 3. a person who properly intervenes in the case.
> B. A person entitled to notice may enter an appearance at any time by filing a written notice of appearance with the division or the commission clerk, as applicable, or, subject to the provisions in Subsection C of 19.15.4.10 NMAC, by oral appearance on the record at the hearing.
> C. A party who has not entered an appearance at least one business day prior to the pre-hearing statement filing date provided in Paragraph (1) of Subsection B of 19.15.4.13 NMAC shall not be allowed to present technical evidence at the hearing unless the commission chairman or the division examiner, for good cause, otherwise directs.

(12) Amtex argues that it only needed to qualify as a "party" in the Division proceeding in order to be a "party of record" and therefore have the right to a de novo Commission hearing. As a person who was entitled to notice, Amtex therefore only needed to file an entry of appearance to be a "party" under 19.15.4.10(A), and that entry of appearance could be filed "at any time" under 19.15.4.10(B). At oral argument, Amtex argued that the entry of appearance could be filed at the same time an application for a de novo hearing is filed up to 30 days after the Division order is issued, 19.15.4.23(A) NMAC. Amtex further argued that participation in the Division hearing is unnecessary since the Commission hearing will be de novo. Matador argued that given the limitations in 19.15.4.10(B) and (C), a person must file an entry of appearance prior to the hearing in order to be a party.

(13) In New Energy Economy, Inc. v. Vanzi, the New Mexico Supreme Court considered which participants in several administrative proceedings below had the right to intervene in an appeal to the Court of Appeals. 2012-NMSC-005. The Court found that those who had participated "in a legally significant manner" had the right to intervene. Vanzi, ¶ 47. These included entities that had been petitioners below or who had presented technical evidence at a hearing. However, the Court rejected the right to intervene of an entity that did appear and speak at an adjudicatory proceeding but did not file any entry of appearance or request to intervene prior to the hearing. "This decision not to take formal steps to participate before [the agency] bears significant consequences." Vanzi, ¶ 53

(14) The Supreme Court chose to adopt the "legally significant" participation standard rather than rely on whether someone was classified as a "party" by the agency below. "We recognize, however, that if we were to allow all parties or other participants in an underlying rule-making proceeding automatically to be made parties to an appeal, then serious unintended consequences could arise." Vanzi, ¶ 48. "[W]e recognize that the administrative definition of a "party" to a rule-making proceeding is something of a moving target. As discussed earlier, administrative rules may be changed to define a party more broadly or narrowly, such that "party" may not always mean the same thing." Vanzi, ¶ 49

(15) The Commission finds that Amtex did not take the necessary actions to become a "party of record" in the Division proceeding and therefore have the right to a de novo Commission proceeding. Amtex did not take any actions to become part of the record in the proceeding either by submitting any evidence or arguments in writing or at the hearing, or by filing an entry of appearance prior to, or at, the hearing, or by appearing at the hearing. Amtex filed an entry of appearance well after the record was closed and the case was under advisement by the Division. Even then, Amtex offered no excuses for its late filing and did not request the record be reopened or offer to submit any new evidence.

(16) The Commission does not agree that the term "party of record" should be given an overly broad meaning simply because the Commission proceeding will be de novo. First, "party of record" is used in the Act to determine who has the right to appeal both Division and Commission decisions, and Commission decisions are subject to record review proceedings in the district court and the Court of Appeals. Sections 70-2-12.2 and 70-2-25 NMSA 1978. Second, the Act and the Commission rules intend for a full and fair proceeding before the Division hearing examiners and the Division Director, including notice to all affected parties, in the hopes that the issues will be fully developed and addressed by the Division. Finally, if a person wants the Commission to hear the case initially, they can request that the Division Director assert his authority under the Act to hold the hearing before the Commission. "In addition, any hearing on any matter may be held before the commission if the division director, in his discretion, determines that the commission shall hear the matter." Section 70-2-6(B) NMSA 1978.

THE COMMISSION CONCLUDES THAT:

(1) The Commission has jurisdiction over the parties and the subject matter of this case.

(2) Amtex is not a "party of record" in Case 15366 and therefore does not have the right to a de novo Commission hearing.

IT IS THEREFORE ORDERED THAT:

(1) The Motion to Dismiss Amtex's Appeal filed by Matador is granted. Case 15366 (De Novo) is hereby dismissed.

DONE at Santa Fe, New Mexico this 10th day of March, 2016.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ROBERT BALCH, Member

PATRICK PADILLA, Member

DAVID R. CATANACH, Chair

S E A L