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 CLOSING BRIEF

Cimarex Energy Co., and its affiliate Magnum Hunter Production Inc. (collectively "Cimarex"), submit their Closing Brief to the Oil Conservation Commission ("Commission") providing the legal and regulatory basis establishing that Cimarex has standing to seek a *de novo* hearing in this proceeding. In support of its position, Cimarex states the following:

A. Introduction

Cimarex recognizes that its request to be defined as a "party of record adversely affected" pursuant to NMSA 1978 §70-2-13 is a question of first impression under the particular facts and circumstances of this case. Cimarex also acknowledges that the Commission must craft a decision that provides the proper relief to Cimarex without establishing a precedent that other parties could abuse, that would cause inefficiencies in the Commission's regulatory process, or that would adversely affect the need for applicants to obtain finality of decisions issued by the Oil Conservation Division ("Division"). As explained herein, Cimarex respectfully submits that the Commission can craft a narrowly-tailored decision that will both protect the Commission's interests while setting a precedent that will be a desirable and necessary option for the Commission to implement under proper circumstances.

B. Procedural Background

The present case arises from a unique set of facts and circumstances; it is distinguishable from situations of general oversight or neglect that do not satisfy the criteria to qualify as a "party of record adversely affected" by a decision of the Division.

The touchstone for obtaining a compulsory pooling order pursuant to the New Mexico Oil and Gas Act ("Act") is the statutory obligation to seek a voluntary agreement with working interests owners as required by NMSA 1978 §70-2-17(C) and related regulations.[1] At a minimum, an applicant is required to provide "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) (Emphasis added). The obligation to engage in good-faith "negotiations" during the time prior to filing an application for a compulsory pooling order, and leading up to the hearing is illustrated by recent decisions of both the Division and the Commission in Order Nos. R-20223 and R-21416-A, respectively.

Colgate Operating, LLC ("Colgate") did not have standing to apply for, let alone receive, a pooling order because it ignored its statutory and regulatory obligations – it never made an attempt to enter a voluntary agreement, let alone engage in good-faith negotiations to reach such an agreement. To make matters worse, Colgate made material misrepresentations to the Division falsely claiming that it had met these obligations. Colgate does not dispute that it failed to satisfy its obligation, nor does it provide evidence to the contrary, but states only that its failure "should have been litigated in a contested hearing before the Division." *See* Colgate's Reply to Cimarex's Response to Colgate's Motion to Dismiss Cimarex's Application for a *De Novo* Hearing ("Colgate's Reply"), p. 1. Thus, Colgate wrongfully obtained its pooling order

[1] NMSA 1978 Sec. 70-2-17(C) states that a force pooling is allowed when "owners have not agreed to pool their interests." Online Meriam Webster dictionary defines agree as "to concur" or "to consent." Therefore, the proper interpretation of the statute is that parties must have attempted but failed to reach an agreement prior to a forced pooling, a requirement of the statute codified in NMAC 19.15.12A(b)(vi).

through false claims and misrepresentations and thereby undermined both the legitimacy of the proceedings and the validity of the order itself.

Moreover, Colgate failed to submit a complete application to the Division. The C-102 form for Colgate's Meridian well was not submitted to the Division for review, as required by the rules and the Division's pooling checklist. Colgate did not satisfy this requirement until January 27, 2021, after Cimarex made an appearance.

The Division held a hearing in this case on January 7, 2021. Cimarex, the second largest owner in the unit, made its entry of appearance in the case on January 19, 2021, before Colgate completed its application on January 27, 2021, with the filing of its C-102. The Division issued its Order on Colgate's application on January 19, 2021, before Colgate had completed its application.

The issue before the Commission is whether it has the authority under existing law and rules, given the circumstances and facts specific to this case, to grant Cimarex a *de novo* hearing pursuant to §70-2-13. Cimarex respectfully submits that the Commission does have such authority and that there is good cause and justification to exercise it in a judicious and measured manner in order to not only uphold the integrity of the pooling proceeding, but also to rectify the adverse effects of Colgate's misfeasance on Cimarex. The Commission can craft an order that addresses these important issues when they arise under the specific, narrow circumstances as presented in this case. Such a narrowly-tailored approach would not open a floodgate of *de novo* appeals and therefore would not burden either the Commission or future applicants who adhere to the proper procedures for seeking a pooling order.

C. Legal Arguments:

I. The language of the Act and related regulations provides the Commission with the authority to grant Cimarex a *de novo* hearing.

In *Nmma v. N.M. Water Quality Control Comm.,* 2007 NMCA 10, 141 N.M. 41, the court enunciated the baseline rules of statutory construction: "When construing a statute, we begin with the plain language, and we assume that the ordinary meaning of the words expresses the legislative

purpose." *Nmma*, at ¶ 12 (citations omitted). "Our main goal is to give effect of the legislature's intent." *Id.* (citation omitted). "We also consider the history and background of the statute, as we harmonize the language in a manner that facilitates the operation of the statute and the achievement of its goals." *Id.* (citation omitted). "Agency rules are construed in the same manner as statutes," that is, by the plain language of the rules themselves. *See Nmma,* at ¶ 12 (citation omitted).

Section 70-2-13 is the sole statute that governs the requirements for a *de novo* hearing. This statute broadly provides, in pertinent part, that "*any party* of record adversely affected shall have the right to have the matter heard *de novo* before the commission" upon the filing of a timely application. (Emphasis added). However, the term "party of record" is neither defined nor addressed in §70-2-13, or elsewhere in the Act or regulations.

Because neither the Act nor the regulations provide a definition of the term "party of record," its meaning for purposes of seeking a *de novo* hearing before the Commission under §70-2-13 can be discerned by examining both the text of the statute and the Commission's regulations. First, §70-2-13 does not require a "party of record" to have been present at the hearing when testimony is taken; the statute specifically separates "transcript of testimony" and "record." Second, NMAC 19.15.4.10A(2) provides that "[a] person to whom statute, rule, or order requires notice…*who has entered an appearance in the case;*…." qualifies as a party to "an adjudicative proceeding." (Emphasis added). Finally, NMAC 19.15.4.10B allows a person who is entitled to notice to "enter an appearance at *any time*." (Emphasis added). Thus, in order to be a "party of record" that is authorized to file an application for a *de novo* hearing under §70-2-13, that party only has to qualify as a party who has the right to file an entry of appearance and did, in fact, enter an appearance in the case. There is no requirement that the party had to have presented evidence at the hearing or to have made any type of argument at the hearing in favor or opposed to the application or to even have attended the hearing.

In the present case, Cimarex had the unquestionable right to file an entry of appearance. While it filed that appearance after the hearing was held, the entry of appearance was submitted prior to the record in the proceeding being complete. The plain language of §70-2-13 requires that before the Division can render a decision in the matter, the Division "shall cause a complete record of the proceeding to be made" which must include the "*receiving* of…exhibits offered in evidence." (Emphasis added). Cimarex made its entry of appearance prior to the completion of the record because at the time of Cimarex's entry of appearance, January 19, 2021, Colgate had not yet submitted all the documents and exhibits required by the Division for completion and closure of the case. Colgate did not satisfy this requirement until January 27, 2021, well after Cimarex made its entry of appearance. This fact alone qualifies Cimarex as a party of record under §70-2-13.

In *New Energy Economy, Inc. v. Vanzi,* 2012-NMSC-5, 274 P.3d 53, on which the Commission relied in Order No. R-14097-A, the court determined that what constitutes a "party," or in this case "party of record," in an administrative hearing is not set by statute when the statute does not specify a meaning and that the agency may determine the scope of what constitutes a party without input from the New Mexico Supreme Court or the Legislature. *See New Energy,* at ¶ 35. Thus, the Commission is authorized to "broaden or constrain the term 'party.' " *Id*. Accordingly, since "party of record" is not defined in §70-2-13, 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 when the request falls within the purview of the statutory and regulatory language.

This interpretation of §70-2-13 is fully supported by the Commission's analysis in Order No. R-14097-A in which the Commission recognized that not only is the term "party of record" not defined anywhere in the statute, it is not defined anywhere in the Act. *See* Order No. R-14097-A at ¶ 10. By exercising its discretion to grant Cimarex a *de novo* hearing, the Commission will ensure that applicants do not take the Division or its statutory requirements for granted and will

provide the necessary incentive for applicants to be conscientious and diligent throughout the pooling process, including the fundamental requirement of attempting to seek a voluntary pooling agreement before seeking the Commission's intervention.

II. Granting Cimarex a *de novo* hearing will not open the floodgates to excessive *de novo* hearings and will not burden the Commission.

The scope of what constitutes a party of record adversely affected that could qualify for a *de novo* hearing is clear under the regulations and Act. On the one end of the spectrum, filing an entry of appearance prior to the actual hearing secures a party's right to a *de novo* hearing. This incentive will remain in place if the Commission grants Cimarex the relief it is seeking. On the other end of the spectrum, it is clear under the Commission's decision in Order No. R-14097-A, discussed below, when a party fails to qualify for a *de novo* hearing. The Commission can quickly determine the lack of standing on the face of any such request. Within this spectrum, Cimarex respectfully requests that the Commission provide, in conformity with the Act, an additional, but limited and narrowly tailored, option for a party to qualify as a party of record adversely affected when substantial justice and fairness is at stake and when, absent this option, the legitimacy of the proceedings is undermined.

Order No. R-14097-A provides a blueprint for the Commission to make an efficient determination whether a party is a party of record. Under this Order, a party who seeks a *de novo* hearing when making an entry of appearance after the actual hearing must demonstrate its participation in the case "in a legally significant manner." *See* Order No. R-14097-A at ¶ 13. This requirement is satisfied when a party (1) makes an entry of appearance that satisfies NMAC 19.15.4.10(A) and (B) and that demonstrates the party's diligence; (2) submits evidence and arguments in writing that demonstrate the validity of a party's claims of wrongdoing for which the applicant is not able to provide sufficient evidence to the contrary;[2] (3) provides valid reasons for

[2] This factor (2) would facilitate the efficient determination whether a party is a party of record adversely affected. If after the moving party submitted evidence that wrongs were committed and the applicant countered with sufficient

not making an entry of appearance prior to the hearing; and (4) demonstrates, as part of its application for a *de novo* hearing, that there is a justification for the record to be reopened on the basis of new evidence. *See* Order No. R-14097-A at ¶ 15. As shown in its pleadings, Cimarex has satisfied all the threshold criteria described in Order No. R-14097-A to demonstrate that it participated in the case in a legally significant manner and therefore should be granted a *de novo* hearing.

With respect to factor (4), which Cimarex submits is dispositive in the present case, there was no need to reopen the record in order to accept Cimarex's entry of appearance because it was filed before the record was completed. The completion of the record prior to a pooling order being issued is a requirement of §70-2-13. Colgate did not complete the record until January 27, 2021, and did so in direct response to Cimarex making an entry of appearance prior to its completion. Other factors, such as elements of excusable neglect described in Cimarex's Response to Colgate's Motion to Dismiss, may be considered to the extent they inform the criteria for a *de novo* hearing under the Act.

During oral arguments, a question was raised whether, under NMAC 19.15.4.10(C), a party who has not entered an appearance prior to the pre-hearing statement filing date should be able to present technical evidence at the hearing. Cimarex respectfully submits that the new evidence contemplated in factors (2) and (4) above would be presented not at the original hearing but should be considered by the Commission as one of the threshold criteria for granting a *de novo* hearing. This consideration is consistent with the language of NMAC 19.15.4.10(C) which also provides that the Commissioner Chair can direct the submission of evidence "for good cause."

By implementing the four factors derived from Order No. R-14097-A as strict criteria for the appeal, the Commission will be able to receive the benefits of the option for granting a *de novo*

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evidence to demonstrate otherwise, the Commission could quickly dismiss the moving party's application without the burden of further consideration.

hearing under the circumstances described herein without imposing additional burdens on the Commission or prejudicing parties who have submitted pooling applications that meet all of the statutory and regulatory requirements.

III. A carefully considered option for granting a *de novo* hearing upholds the integrity of the pooling process and promotes the goals of the Act.

Final considerations in the overall equation for granting a party's request for a *de novo* hearing should include relevant and important questions of (1) substantial justice and fundamental fairness; (2) weighing the potential harm and prejudice to both the moving and non-moving parties; and (3) fulfilling the intent and mission of the Act and related regulations, all three of which have been addressed by New Mexico case law. The *New Energy* court allowed three parties, who otherwise would have been excluded from an appeal, 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; *see also Thriftway Mktg. Corp. v. State*, 1990-NMCA-115, 111 N.M. 763 (creating an exception for a party to intervene for the first time on appeal, when the party had not been involved in the district court proceeding); *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 narrow exceptions to untimely filing when warranted by the circumstances).

With 25% working interest, Cimarex is the second largest owner in the unit, the first being Colgate with a 27% working interest. Thus, Cimarex has a considerable stake, on par with Colgate, in the outcome of the case and had every intention of participating in the hearing but for the extenuating circumstances, as explained by Cimarex, for missing its opportunity. Given the requirements under the Act and related regulations for an applicant to seek in good-faith a voluntary agreement and engage in negotiations, if Colgate had adhered to its statutory and

regulatory obligations, Cimarex would have been fully aware of Colgate's efforts to pool and develop the unit prior to the hearing, notwithstanding the missed notice letter. In fact, given the framework of the Act taken as a whole, if the applicant performs its statutory duties and obligations, there is no reason for an owner of substantial interest not to be aware of a pooling effort prior to the hearing. Cimarex's request provides the necessary incentive for ensuring such duties and obligations are met.

Interested parties have a fundamental right to receive notice of forced pooling proceedings. However, a prerequisite to providing such notice is affording interested parties with their right to good-faith negotiations of a voluntary pooling agreement. Colgate clearly failed to afford Cimarex its right to good-faith negotiations. The purpose of the Act and regulations is to ensure that owners have the opportunity to fully negotiate and work out their concerns prior to the state imposing its police powers to force private parties to yield their ownership to the applicant in a forced pooling order. If the applicant violates the purpose and provisions of the Act, then the applicant's privilege to use state power is not legitimate.

Finally, by not having an option narrowly tailored to address these circumstances as they arise, the Commission risks not being able to fulfill its mission under the Act to prevent waste and protect correlative rights to the full extent available under the law. An owner who has a right to drill but misses, for a valid reason, a hearing may have been able to offer a superior development plan that would have prevented waste and protected correlative rights better than the applicant's plan. If the Commission has the authority under such circumstances to consider the merits of the alternative plan, as it does in this case, it should do so in order to uphold the purpose of the Act.

D. Conclusion:

Cimarex has standing to request a *de novo* hearing because it filed its entry of appearance before Colgate's application was complete and the record was closed. Even absent this dispositive fact, Colgate failed to meet its statutory and regulatory obligation to engage in good-faith

negotiations with Cimarex to enter into a voluntary pooling agreement, thus undercutting the entire rationale for seeking Commission intervention to issue a pooling order.

Cimarex respectfully submits that under the unique facts of this case, to the extent that it needs to rely on its discretion, *see, i.e.,* NMSA 1978 70-2-6(B), the Commission should grant Cimarex's request for a *de novo* hearing. Granting Cimarex's request will maintain the integrity of pooling proceedings, without creating an undue burden on the Commission or prejudicing applicants who follow the rules. Finally, granting Cimarex's application will ensure that the development plan it ultimately approves for the subject lands is the best plan to prevent waste and protect correlative rights, thus satisfying the Commission's obligation to the public. For the foregoing reasons, Cimarex respectfully requests that the Commission grant Cimarex a *de novo* hearing and deny Colgate's Motion to Dismiss the Application in Case No. 21744.

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 April 5, 2021:

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