

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

**APPLICATION OF AVANT OPERATING,
LLC FOR COMPULSORY POOLING AND
APPROVAL OF NON-STANDARD HORIZONTAL
SPACING UNIT, LEA COUNTY, NEW MEXICO**

Case Nos. 24544

**PRIMA'S CLOSING ARGUMENT WITH
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Prima Exploration, Inc. ("Prima"), through its undersigned attorneys, hereby files its Closing Argument with Findings of Fact and Conclusions of Law ("Closing Argument") for the above-referenced case that the Oil Conservation Division ("Division" or "OCD") heard on August 20-21, 2024.

Introduction

As described in its opening statement, Prima, a non-operating interest owner, comes before the Division to seek relief from the development plan and pooling application proposed by Avant Operating, LLC, ("Avant") in Case No. 24544. Prima has determined that Avant's plan would overdevelop Section 25 and 36, Township 18 South, Range 33 East, NMPM, Lea County, New Mexico ("Subject Lands") by proposing to drill four wells per each of the three benches, for a total of 12 wells in the Bone Spring. As demonstrated at the hearing and as set forth herein, drilling three wells per bench, for a total of nine wells in the Bone Spring, will efficiently develop the proposed unit; the drilling of three additional wells is unnecessary and would result in substantial economic waste.

Prior to the hearing, Avant tried to pursue the development of the Subject Lands through a

private Joint Operating Agreement (“JOA”), as an applicant is required to do prior to asking the state to exercise its police powers to force pool the mineral interests owned by other parties. *See* 19.15.4.12(A)(1)(b)(vi) (applicant “shall” provide “written evidence of attempts the applicant made to gain voluntary agreement...”); *see also* Tr (DD 8-20-24) 51: 6-10; NMSA 1978 (Avant describing efforts to have owners enter a JOA). However, a JOA is not primarily designed to protect against waste and the drilling of unnecessary wells, as parties can join a JOA to pursue a development plan that is inherently wasteful, and under such a JOA, the operator and parties can agree to drill 4, 10, 15, or more wells, regardless of waste or the number of wells actually needed. There are no regulatory brakes to prevent an operator and consenting parties from committing waste under a JOA if that is what they agree to do.

Typically, a wasteful development plan pursued solely under a JOA would never come to the attention of the Division unless a second working interest owner proposes a competing application that brings the two plans before the Division thereby providing the Division with the opportunity to determine which competing development plan prevents waste and protects correlative rights and which does not. But in many situations, the Division does not have the opportunity to thoroughly evaluate the details of a development plan with the rigor afforded in a comparative hearing situation and some forms of waste may not be readily apparent without having the applications subjected to the crucible of a comparative hearing. Fortunately, most plans presented to the OCD are garden variety pooling applications that do not create waste or violate correlative rights or, if they did, it would be readily apparent by the exhibits, and therefore they remain uncontested throughout the pooling process. However, there are those select few applications where waste is more difficult to identify and where a competing application has not been submitted to highlight waste but where an objection by a non-operating owner would provide

the Division opportunity to more clearly identify and highlight waste and violation of correlative rights. This proceeding presents such a situation.

Thus, the negotiations between an applicant and owner, regardless of the amount owned, are essential for conservation because by refusing to join a JOA based on a valid objection that the proposed development plan creates waste and presenting a case-in-chief in support of its objection can directly serve the Division's conservation efforts and allow it to perform its statutory mandates. In the present case, Prima determined that Avant's plan should not be approved because it would result in the waste that naturally flows from the drilling of unnecessary wells, and therefore Prima refused to join the JOA, *see* Tr. (DD 8-20-24) 158: 20-23, which allows the Division to scrutinize more thoroughly Avant's evidence to determine whether the expense and costs of the proposed additional wells are necessary and prudent.

Under current OCD policy, a non-operating owner has very little protection and practically no leverage in negotiations prior to a pooling. Although an applicant is required to make attempts with an owner to enter into a voluntary agreement, the criteria for such attempts is satisfied by sending the well proposal with an AFE and responding however indirectly to one email with no further affirmative attempts required. *See, e.g.* Order No. R-21679-C, ¶¶ 71-94, 102-103 (showing the bare minimum requirements that satisfy good-faith negotiations). Thus, once an applicant has satisfied the minimum requirements for negotiations (which consist of sending out a well proposal and perhaps addressing one email question) there is no incentive for an applicant to engage in further "meaningful" negotiations prior to invoking the police powers of the state to force an owner to submit its mineral interests to a development plan that it views to be inefficient and wasteful. Without meaningful incentive, an applicant can bide its time, going through the motions of communicating, until the date of the hearing.

Prima's objection and case-in-chief represents an important safeguard for preventing waste and protecting correlative rights, in which a non-operating owner, who cannot find recourse through JOA negotiations to address its concerns regarding waste and correlative rights, has the ability to submit testimony and evidence that provides the Division opportunity to determine whether waste would be committed and correlative rights violated under the proposed plan. This safeguard provides a layer of protection against waste by providing review of potentially wasteful development plans and will incentivize applicants to engage in meaningful negotiations that contribute to the overall goals of preventing waste, protecting correlative rights and avoiding the drilling of unnecessary wells.

In support of its case-in-chief, Prima states the following:

I. Procedural history and background:

1. On or about March 11, 2024, Avant sent to Prima Royal Oak 25 Fed Com well proposals for the Subject Lands.

2. On or about June 5, 2024, Prima and Avant began speaking on the phone about the pooling process. During conversations, Prima explained to Avant that even though Prima's interest was being marketed, Prima as the owner of the interest would be the party subjected to the pooling process and therefore had to take steps to protect its interest. Prima asked for additional time to discuss its concerns prior to Avant filing its pooling application, but Avant did not agree to additional time and proceeded with its plans to pool Prima and other uncommitted interests.

3. On or about June 15, 2024, Avant submitted to the OCD its application to pool the Subject Lands.

4. On or about June 20, 2024, Prima made its entry of appearance in the case, and on or about June 25, 2024, Prima exercised its right under Division policy to file an objection to the case going forward by affidavit.

5. On or about June 27, 2024, Avant filed a response in opposition to Prima's objection arguing that Prima had no legal grounds for a continuance or objection to presentation of the case by affidavit.

6. A status conference was held on June 27, 2024, and a Pre-hearing Order was issued in Case No. 24544 that set a contested hearing date for August 20, 2024.

7. On or about July 19, 2024, Prima submitted a motion to dismiss Avant's pooling application, in which it asserted two objections: (1) Prima expressed its concern that Avant had listed an excessive number of initial wells in its application that could threaten termination of the pooling order if they were not drilled by the commencement date; and (2) Prima objected to Avant drilling 12 wells in the unit as being too many that would overdevelop the unit resulting in excessive costs and burdens. *See* Exhibit 1, ¶¶ 7-10 attached to Prima's Motion to Dismiss Pooling Application on the Basis that more Initial Wells have been Proposed than can be Drilled by the Pooling Order Deadline ("Prima's Motion to Dismiss").

8. After Avant filed its response to the motion to dismiss, and Prima filed its reply, the Division issued an order denying the motion on the basis of that the number of initial wells can be managed by proposing a development plan pursuant to the OCD's new procedures.

9. The parties proceeded to the contested hearing, which was held on August 20-21, 2024, during which Prima presented its case-in-chief in support of its objection to Avant's application on the basis that 12 wells, spaced at 4 wells per bench, overdevelops the unit thus creating waste and violating correlative rights.

II. The term “waste” under 1978 NMSA § 70-2-3 and 19.15.2.7(W)(1) NMAC is used and understood in the Oil and Gas Act (“Act”) in its “ordinary meaning” and in addition to its ordinary meaning “shall include” specifically prescribed uses and definitions that further broaden the meaning and usage of waste.

10. The plain language of the statutory definition of waste under the Act is clear and unambiguous. Waste is specifically defined in the Act as follows: “As used in this act the term ‘waste,’ *in addition to its ordinary meaning*, shall include:” A. “underground waste;” B. “surface waste;” C. “the production of crude petroleum oil in excess of the reasonable market demand;” D. “the nonratable purchase or taking;” E. “the production” of natural gas in excess of reasonable market demand;” and F. “drilling or producing operations” that unduly reduce the total quantity of potash. *See* § 70-2-3. Waste; definitions (Emphasis added).

11. When construing the meaning of a statute, the New Mexico Supreme Court determines and gives effect to the Legislature’s intent. *See Marbob Energy Corp. v. OCC*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.2d 135 (citing *N.M. Indus. Energy Consumers* 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105). When discerning such intent, the court looks first “to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended.” *Id.* “When statutory language is clear and unambiguous, [this Court] *must give effect to that language and refrain from further statutory interpretation.*” *Id.* (citing *Anadarko Petroleum Corp. v. Baca*, 117 N.M. 167, 169, 870 P.2d 129, 131 (1994)) (Brackets in the original) (Emphasis added).

12. It is clear from the plain language of the statute (§ 70-2-3) that the scope of the meaning and usage of “waste,” as used in the Act, focuses first on the ordinary meaning of waste, while also expanding that definition to “include” a certain selection of more technical meanings including the definition of “underground waste,” among five other technical definitions. Thus, “in addition” to the ordinary meaning of waste, which defines the broad parameters of the term under

the Act, additional, more specific meanings are also included. The statute does not state that the definition and meaning of waste shall be limited or restricted just to “underground waste,” such as leaving oil in the ground, or just to the other technical definitions, but “shall include” the subset of the more technical definitions, listed as A through F, IN ADDITION to the ordinary meaning of waste. Furthermore, the full scope of the definition of waste is recognized when cited in New Mexico case law. *See, e.g., Continental Oil Co. v. OCC*, 1962-NMSC-062, ¶ 7, 70 N.M. 310, 373 P.2d 809 (defining waste by first recognizing and citing its ordinary meaning: “Waste – Definitions – As used in this act, *the term waste, in addition to its ordinary meaning*, shall include (e) The production in this state of natural gas from any gas well or wells, or from any gas pool, in excess of the reasonable market demand....”) (Emphasis added).

13. Examples of the ordinary meaning of waste from online dictionaries include: (1) “an unnecessary or wrong use of money, substances, time, energy, abilities, etc.” as defined by the online Cambridge English Dictionary (<https://dictionary.cambridge.org/us/dictionary/english/waste#>); (2) “loss of something valuable that occurs because too much of it is being used or because it is being used in a way that is not necessary or effective,” as defined by the online Britannica Dictionary (<https://www.britannica.com/dictionary/waste>); and (3) “Action or process of wasting: II.5 Useless expenditure or consumption, squandering (of money, goods, effort, etc.),” as defined by the online Oxford English Dictionary (https://www.oed.com/dictionary/waste_n#14999243). Thus, the definition of waste under the Act includes such ordinary meanings as “economic waste,” that is, waste from the unnecessary expenditure of money and funds when drilling, operating and producing wells, in addition to the waste of resources, time and energy from drilling, operating, and producing unnecessary wells.

III. Economic waste has established itself in New Mexico case law as an integral part of waste to be prevented under the Act and has come to be recognized as waste in multiple areas over which the Division has jurisdiction.

14. As its oil and gas case law developed over the decades, New Mexico courts often looked to other oil and gas producing states such as Oklahoma. Oklahoma's oil and gas law, in particular, has played a prominent role for guidance and setting precedence. For example, the New Mexico Supreme Court in *Continental Oil Co. v. Oil Conservation Commission*, 1962-NMSC-062, ¶ 26, relied on *Choctaw Gas Co. v. Corporation Commission*, 295 P.2d 800 (Okla. 1956) to establish that the two fundamental purposes of the exercise of the Commission's powers -- "the prevention of waste and the protection of correlative rights" -- are interrelated to the extent that if the State, through an agency such as New Mexico Oil Conservation Commission ("OCC"), could not protect such rights, then there would be a return "to the wasteful drilling practices and races" as experienced in the past. See *Continental Oil*, 1962 NMSC at ¶ 26 (citing *Choctaw Gas Co. v. Corporation Commission*, 295 P.2d at 805). See also the New Mexico Supreme Court in *Rutter & Wilbanks Corp. v. Oil Conservation Commission*, 1975-NMSC-006, ¶ 25, 87 N.M. 286, 532 P.2d 582, citing *Landowners, Oil, Gas and Royalty Owners v. Corporation Com'n*, 415 P.2d 942, 950 (1966) and *Panhandle Eastern Pipe Line Co. v. Corporation Com'n*, 285 P.2d 847 (Okla. 1955) to justify the allocation of production and revenue on the basis of equity to prevent excessive drilling.

15. *Panhandle Eastern Pipe Line Co. v. Corporation Com'n*, 285 P.2d 847 (Okla. 1955) on which the *Rutter* court relied, involved orders by the Commission directing that the subject lands be divided into well-spacing units of 640 acres each and that the interests of the lessors in each of the 640 acres be pooled. See *Panhandle*, 285 P.2d. at 848. Owners appealed the orders, which restricted the number of wells that could be drilled in each unit to one per 640-

acre unit, *see id.*, arguing that the order was entered without probative evidence showing that, “without such an order *waste of gas, physical or economic*, would result...” *See id.* at 854 (Emphasis added). The *Panhandle* court disagreed citing that the Commission presented witnesses who testified that the drilling of more than one well per unit was “unnecessary” and that “the expense of drilling additional wells would not be economically feasible in view of the slight additional gas they might recover from the common source of supply,” thus showing that in this circumstance economic waste took priority over physical waste of the product. *See Id.* at 855.

16. During the hearing Avant attempted to suggest that waste as understood in the oil and gas industry is limited to the physical waste of the hydrocarbons themselves and does not include economic waste. *See* Tr. (DD 8-20-24) 160: 5-25; 161: 1-25; 162: 1-25; 163: 1; and 189: 20-22. But this narrow view of waste is not supported by case law for the industry nor is it supported by the expansive definitions of waste, used by gas producing states such as Oklahoma and New Mexico, which include the ordinary meaning of waste in addition to specified technical meanings. *See, e.g.*, Oklahoma’s definition waste under Title 52 (oil and gas statutes) stating that “[t]he term waste as used herein, ***in addition to its ordinary meaning*** shall include....” *See* 52 OK Stat § 273 (2023) (Emphasis added); compare New Mexico’s definition of waste: “As used in this act the term ‘waste,’ ***in addition to this ordinary meaning***, shall include....” § 70-2-3 (Emphasis added).¹

¹ It should be noted that the Oklahoma statute is more explicit and thorough in its inclusion of “economic waste” to the extent that economic waste would be included in the ordinary meaning of waste and Oklahoma explicitly lists “economic waste” as a recognized form of waste in the latter parts of its definition. In contrast, New Mexico’s definition of waste under the Act would include “economic waste” within the scope of the “ordinary meaning” of waste to the extent that this expansive language is included in the meaning of waste under the Act.

17. In Oklahoma, for example, the courts have relied on its definition of waste to require a wider spacing for wells, *see Ward v. Corporation Commission*, 470 P.2d 993, 995 (Okla. 1970), arguing that even if “underground physical waste does occur, it is not as likely to be so irretrievable...as the *economic waste inevitably resulting from future drilling of unnecessary holes....*”² *Id.* at 997. *See also Winter v. Corporation Com’n*, 660 P.2d 145, 150 (Okla. Civ. App. 1983) (the court upholding an order issued by the Commission for a 640-acre drilling and spacing unit because it is “determined to be supported by substantial evidence and *acts to prevent economic waste* and protect the parties’ correlative rights and is therefore affirmed.”)(Emphasis added); *Southern Oklahoma Royalty Owners Ass’n v. Stanolind Oil & Gas Co.* 266 P.2d 633 (Okla. 1954) (the court upholding the decision of the Commission “that in order *to prevent economic waste and to prevent the drilling of unnecessary wells*, the exceptions prayed for in the applications should be granted....”) (Emphasis added).

18. Relying in part on Oklahoma’s understanding of economic waste, the New Mexico Supreme Court has also come to recognize the importance of recognizing economic waste as waste to be prevented under the Act. In *Rutter Wilbanks v. Oil Conservation Commission*, 1975-NMSC-006, ¶ 007, 87 N.M. 286, 532 P.2d 582, the court upheld the Commission’s decision to prohibit the drilling of an additional well in the unit because the Commission found that drilling the additional well “would result in supererogatory risk and *economic waste caused by the drilling of an unnecessary well.*” (Emphasis added). The *Rutter* court further noted that “this court’s opinion in *Continental Oil Co. v. Oil Conservation Com’n*, [1962-NMSC-062], 70 N.M. 310, 373 P.2d

² In *Ward*, 470 P.2d at 996, the court noted that even though Ward’s economic analyst had testified that “four wells in Section 34 will produce more gas condensate (as well as greater gas income in terms of the near future) than only one well on that same 640 acre area, the Commission’s Trial Examiner found that to establish drilling units of the size that would necessitate the drilling of four wells on all geographical sections of lands in the area, was not only unnecessary, *but would result in (economic) waste.*” (Emphasis added)(parentheses in the original).

809, established the requirement that the Commission make ‘basic conclusions of fact’ or findings. We hold the [Commission’s] *findings as to correlative rights and economic waste* to be sufficient.” (Emphasis added).

IV. The prevention of economic waste plays a vital role in the Division’s overall obligation to prevent waste and protect correlative rights.

19. The New Mexico Oil Conservation “Commission asserts that economic considerations exist as the very core of its statutory obligations.” *Earthworks’ Oil & Gas Accountability Project v. N.M. Oil Conservation Comm’n*, 2016-NMCA-055, ¶ 26, 374 P.3d 710, 720. In *Earthworks*, the Commission revised a rule for the regulation of water pits and adopted a revision of the rule that assisted in the prevention of economic waste. The *Earthworks* court noted that in carrying out its duties under the Act, “the division shall give due consideration to the economic factors involved,” and in addition, the Division must “consider the economic loss caused by the drilling of unnecessary wells.” *Id.* at ¶ 27. In support of its decision, the *Earthworks* court, relying on *Rutter*, 1975-NMSC-006, ¶ 18, held that “[f]indings as to correlative rights and economic waste are sufficient to satisfy our requirement that administrative agencies state their reasoning for issuing an order.” *Id.* at ¶ 32.

20. The exclusion of economic waste from the definition of waste could lead to wastefully absurd results thereby undermining the Division’s ability to properly regulate oil and gas operations and activities in a reasonable and practicable manner that corresponds with the needs and practicalities of the industry, and it would undermine the practicable application of correlative rights which is mandated by statute. *See* NMSA 1978 § 70-2-33 (the definition of “correlative rights” is qualified and restricted by the limiting terms of “practicable” and “practicably,” as “correlative rights” means “the opportunity afforded” to an owner, but only “so far as it is *practicable* to do so,” for the owner “to produce *without waste* the owner’s *just and*

equitable share of the oil or gas or both in the pool, being an amount so far as can be *practicably* determined and so far as can be *practicably* obtained *without waste*, substantially in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool, and for such purpose, to use the owner's just and equitable share of the reservoir energy.”) (Emphasis added). Thus, the proper protection of correlative rights must account for what is “practicable” and they must be protected in such a manner that owners can receive their fair and equitable share of production “without waste,” which according to the statutory definition of waste, means that owners should receive their share of production without “economic waste.”

21. For example, if economic waste were not included in the definition of waste and “waste” were limited just to “underground waste,” which relates to drilling, operating or producing a well or wells “in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas...,” *see* §. 70-2-3, then, under such a limited definition, an operator would have the right to drill and produce a pool without any restriction or limit on the number of wells used to obtain every last drop of the reservoir, however insignificant the amount, without any regard to unreasonably excessive costs imposed on the working interest owners. Such unrestricted license granted to an operator under such a narrow definition of waste would eradicate any notions of what should be considered “practicable” and any reasonable notions of what should be considered an owner's “just and equitable” share of production, factors that the Division must consider under the statutory definition of correlative rights. Thus, a development plan that results in economic waste from the drilling of unnecessary wells violates a non-operating working interest owner's correlative rights.

- V. **Prima's evidence and testimony shows that three wells per bench for a total of 9 wells in the Bone Spring will sufficiently produce Avant's proposed unit and that drilling an additional fourth well per bench in the spacing unit results in the drilling of 3 unnecessary wells and substantial economic waste.**

22. A month prior to the hearing, Prima had stated its objection to Avant's plan to drill a total of 12 wells in the Bone Spring formation, at 4 wells per bench in the proposed unit, as overdevelopment, asserting that 9 wells in the Bone Spring, at 3 wells per bench in the unit, is the optimal number of wells that would best develop the unit. *See* Exhibit 1 (Self-affirmed Statement of David Rhodes), at ¶ 9, attached to Prima's Motion to Dismiss (David Rhodes stating "that a total of 9 Bone Spring wells is the optimal number of wells for the Subject Lands to avoid the drilling of unnecessary wells, maximize the ultimate recovery of hydrocarbons, and provide the owners with their just and equitable share of production without excessive burdens and costs"). Thus, Avant should not have been surprised that Prima's case-in-chief focused on Avant's overdevelopment of the unit by proposing a development plan with four wells per bench, resulting in the drilling of 3 additional, unnecessary wells and excessive waste.

23. In its case-in-chief, Prima provided the Division exhibits that showed relevant production data from offset wells and development plans, which cover wells drilled in this area from 2013, 2014, 2017, and up through 2019, and provide production data up through the present, so that the Division has a clear view of the recent history of drilling and development from wells that utilized both slightly older technology, such as the Iron House and Condor State wells (*see* Prima's Second Amended Hearing Packet, Exhibit A-1, pp. 11 and 12) and current modern-day technology, such as the Buffalo and Mescelaro wells. *See* Prima's Second Amended Hearing Packet, Exhibit A-1, pp. 16 and 17), and the technologies in-between 2013 and 2019 (*see* Prima's Second Amended Hearing Packet, Exhibit A-1, pp. 13-15).

24. Avant attempts to discredit Prima's survey of nearby wells and units by arguing that Prima includes exhibits that depict older wells that used gel fracks instead of the more modern technology. *See, e.g.* Tr. (DD 8-21-24) 232: 2-18 (Avant attempting to argue that one does not see the same declines in the contemporary wells that one sees in the older gel fracks). Avant further suggests that the decline curve in the graphs for some of the older wells such the Iron House wells and the Condor well is not accurate because, in Avant's "opinion," the curves are not a fair representation of what test wells would have done over time. *See* Tr. (DD 8-21-24) 233: 3-18; 234: 10-12. However, when asked to justify its "opinion" by providing a parameter of what goes onto a decline curve, Avant admitted that it does not have any information to "refute what exactly [Prima] was doing" on each of the curves. In other words, Avant's expert witness provided no basis to support this opinion other than he is a "professional," *see* Tr. (8-21-24) 234: 10, which without evidence or concrete analysis is mere baseless tautological reasoning, as it would apply to any statement made by an expert witness, whether Avant's engineer or Prima's engineer.

25. In effect, Avant is suggesting that the data from the older wells are irrelevant because new completions with modern techniques will recover more oil than older completions. *See, e.g.*, Tr. (DD 8-21-24) 262: 9-13; 299: 6-11. However, Avant misses the point of Prima's exhibits; Prima has never contended or disputed that modern completion techniques do not improve the recoverability of the reservoir. *See* Prima's Second Amended Hearing Packet, Prima Rebuttal Exhibit 8; *see also* Tr. (DD 8-21-24) 299: 12-15. Prima acknowledges that "modern completion techniques make a big difference" for ultimate recovery of the total amount of oil from a reservoir, but the important point and facts that Prima has shown in its exhibits "over, and over, and over again, is that regardless of the completion technique," that is, "[n]o matter what completion technique it is, consistently four wells per mile drastically interferes and overdevelops

the reservoir.” Tr. (DD 8-21-24) 299: 16-25. This excessive interference between wells spaced too tightly is present whether one collects data from the older wells drilled or the modern wells. *See* Prima’s Second Amended Hearing Packet, Rebuttal Exhibit 8. Prima shows conclusively, “that regardless of the vintage of completion,” the wells, both vintage and modern, are showing “this wide drainage radius,” which is the signature sign of excessive interference. *See* Tr. (DD 8-21-24) 300: 7-25; 301: 1-2; *see also* graphs showing well interference in Prima’s Second Amended Hearing Packet, Rebuttal Exhibits 2, 3, 4, 5, and 6. Thus, when viewing this production data in relation to the spacing of the wells, a clear pattern emerges regardless of the age of the technology, whether the technology is more vintage or modern, showing that tighter spacing, the spacing proposed by Avant in its development plan for the Royal Oak wells, at 4 wells per bench with, 1,320 ft between each well, consistently results in excessive interference between the wells that causes a decrease in and loss of production for each well with this tighter spacing. *See id.* It is Avant’s tighter spacing of 4 WPS that causes the wellbores, packed more closely together, to experience excessive interference from the drainage radius and therefore diminished returns. *See id.*

26. Avant further attempts to raise doubts about Prima’s data and its analysis by taking each exhibit out of its context and speculating, in isolation, about all the possible causes for each point of data. *See, e.g.* Tr. (DD 8-20-24) 144: 1-25; 145: 1-5 (Avant identifying a brief anomaly in the Iron House graph, *see* Prima’s Exhibit A-1, p. 11, where it appears that for about a 22-month period starting in 2019 there was a temporary uplift in production before it returned to the diminished rate below the type-curve). Avant raised the question, speculating, whether there could be various reasons, including a pump or artificial lift, that had caused production from the well to have gone up during this temporary period. *See* Tr. (DD 8-20-24) 145:1-5; 147: 7-10. Then, Avant

suggested that if the increase could have been caused by a mechanical issue, could the decline also be caused by a mechanical issue. *See* Tr. (DD 8-20-24) 147: 7-10. Prima answered that although possible, typically one would see such a mechanical issue “addressed quickly.” *See* Tr. (DD 8-2024) 147: 12-16. Finally, in its effort to raise doubts about Prima’s analysis, Avant speculated whether natural fractures or other stratigraphic conditions such as sand channels could cause the step down change shown in Prima’s graphs; however, Prima explained that although it may be possible, it is “unlikely,” and when “all of the evidence over a large area shows the same thing,” then that pattern of lower production would be something to discuss about Avant’s plans, a matter of concern, in addition to watching out for any hypothetical natural fractures. *See* Tr. (DD 8-20-24) 150: 3-20. Prima pointed out that these patterns of diminished production are “obviously repeatable across this area.” *See id.* It should be noted that units exhibiting such patterns have a spacing of 4 WPS in common, as shown by Prima’s exhibits.

27. What is highly notable and revealing about Avant’s case is the absence of exhibits and data that would show a tighter spacing of 4 modern wells per section develops the Bone Spring reservoir any better than the wider spacing of 3 modern wells per mile. At least a month prior to the hearing, Avant became aware of Prima’s objection to Avant’s plan based on concerns of overdevelopment, that a wider spacing of 3 wells per bench would better produce the reservoir than Avant’s tighter spacing of 4 wells per bench. *See* Prima’s Motion to Dismiss, Exhibit 1 at ¶ 9. Therefore, Avant, knowing the basis of Prima’s objection, had ample time and opportunity to provide exhibits that show 3 wells per bench would not sufficiently or effectively develop the reservoir. Yet, none of the Exhibits Avant submitted (Exhibits G-1 through G-8) in its case-in-chief addressed the issue of whether 4 wells per bench overdeveloped the unit, created waste, and/or resulted in the drilling of unnecessary wells; instead, Avant’s exhibits showed that it has

applied for and received certain permits (G-1); had located drilling sites (G-2); had agreements for gas takeaway in place (G-3); provided for water infrastructure (G-4); has access to oil pipelines (G-5); has a history of development and drilling wells in the general area (G-6 and G-7); and has the ability to drill high density wells, even if they result in overdevelopment (G-8). What Avant failed to address was Prima's direct objection to its plan to drill 12 wells, at high density, in the Bone Spring when Prima maintained, and showed in its exhibits, that only 9 wells with wider spacing are necessary for optimal development.

28. In an effort make up for the deficiencies of its case-in-chief, Avant submitted numerous rebuttal Exhibits, of which 10 were admitted into the record. However, Avant's rebuttal exhibits also fail to address directly Prima's objection based on the premise that the wider spacing of 3 WPS would better develop the unit instead the proposed tighter spacing of 4 WPS. First, Avant's provides Rebuttal Exhibit G-10 that has a list of operators in a general area surrounding the Subject Lands accompanied by a general statement: "**Nearly** All 2BS development within an 8-Mile radius utilize at least 4 wells per section (WPS) spacing." (Emphasis added). The map clearly shows that not all the units have four wells per section, and lack of labeling of the specific units and number of wells each section contains makes it difficult to determine which units have four wells per section and which do not. The fact that Avant clearly acknowledges that not all the units have four wells per section raises the question of why certain operators in certain units of the subject area would choose not to have 4 wells per section and whether the proposed unit in the Subject Lands of this case should have less than 4 wells per section, as Prima has shown that it should.

29. Furthermore, Avant's Rebuttal Exhibits G-12 through G-16 also fail to show that the tighter spacing of 4 wells per section is necessary to properly develop the proposed unit. These

exhibits continue the claims, debunked in Paragraph 25, *supra*, that vintage gel fracs from 2013-2014 are not comparable to modern frac design. *See also* Prima's Second Amended Hearing Packet, Rebuttal Exhibit 1 ("None of these arguments by Avant recognize the foundational issue of overdevelopment. Instead, they focus on historical norms").

30. Also, in these rebuttal exhibits, Avant misrepresents the operative spacing of the wells by attempting to show the wells are not representative of 1,320'±4 WPS spacing. For example, in its Rebuttal Exhibit G-12, Avant points to a distance of 743' between the Ironhouse 20 State 2H and the Condor State 2H, when the operative spacing creating the interference and drainage radius is in actuality the wider spacing between the Iron House 1H and 2H, which have an average spacing closer to 1,600', far greater than what Avant is proposing. *See* Tr. (DD 8-21-24) 282: 13-24; *see also* Prima's Second Amended Hearing Packet, Rebuttal Exhibits 1 and 2.

31. Upon review, it becomes clear that Avant's misrepresentation of the actual operative spacing distance occurs in every exhibit that Prima submitted to show the negative effects of Avant's proposed spacing. For the Kingfisher wells, Avant misrepresents the distance as a tighter 1,004', when the distance for the operative spacing is the wider 1,307,' that is on par with Avant's 1,320'. *See* Tr. (DD 8-21-24) 289: 5-19; *see also* Prima's Second Amended Hearing Packet, Rebuttal Exhibit 3. For the KSI 22 and Scooter wells, Avant claims that the wells have a tighter spacing of 1,104' when the average spacing for the KSI wells is approximately 1,320', the same spacing proposed by Avant, and the average spacing of the Scooter wells is approximately 1,267', very near the wellbore window for Avant's spacing. *See* Prima's Second Amended Hearing Packet, Rebuttal Exhibit 5.

32. Furthermore, Avant erroneously claims Prima left out of its exhibit the EK 29 BS2 1H & 2H wells, *see* Avant's Rebuttal Exhibit G-15, when it is clear from Prima's exhibit that the

EK-29-2H well, was included, “as it is the key to demonstrating the impact of direct offsets to existing wells.” *See* Prima’s Second Amended Hearing Packet, Rebuttal Exhibit 4. In addition, Prima’s Rebuttal Exhibit 4 (p. 26) shows Avant’s fallacy in claiming that the inner EK wells are performing better than the edge wells. *See* Prima’s Second Amended Hearing Packet, Rebuttal Exhibit 4 Continued (p. 26). Review of the EK wells shows that what is portrayed in Avant’s Rebuttal Exhibit G-15 as the inner wells “were actually the original wells” which were drilled without the interference from offset wells, and therefore a “full year of reduced interference allowed them to drain significant reserves prior to the offsets being drilled.” *See* Prima’s Second Amended Hearing Packet, Rebuttal Exhibit 4. EK 29-3H, described by Avant as a bounded inner well, accumulated 114 MBO in its first year, as an unbounded well, prior to the offset EK 29-2H impacting it. *See id.* That amounts to almost half of the oil the well has made in its 8-year life; the fact that after it was impacted by the offset well, it has taken 7 years to double the production from year 1 does not vindicate Avant’s position, but on the contrary, supports Prima’s objection to Avant’s plan. *See id.*

33. As shown in Paragraph 30-31, *supra*, Avant has based much of its opposition to Prima’s position on the argument, however much debunked herein, that the wells Prima has presented actually have tighter spacing than Avant’s proposed 1,320,’ thus creating more interference than what would be expected with Avant’s spacing. *See* Tr. (DD 8-21-24) 295: 3-6 (Prima pointing out that Avant has spent most of its Rebuttal Exhibits G-10 through G-16 trying to contradict Prima’s exhibits by stating that Prima’s exhibits show wells that are tighter spaced than Avant would actually drill). Then, beginning with its Rebuttal Exhibit G-17, Avant makes a contradictory reversal in its position, suddenly arguing that “Interference among offset wells is indicative of sufficient well density and completion size.” *See* Avant’s First Amended Exhibit

Packet, Rebuttal Exhibit G-17; *see also* Prima's Second Amended Hearing Packet, Rebuttal Exhibit 6; Tr. (DD 8-21-24) 294: 24; 295: 1.

34. Based on this contradictory turnabout, Avant presents its Rebuttal Exhibits G-18 and G-19, which show Batman wells having a very high density of 8 WPS and Cutbow wells having a high density of 6 WPS. These wells and units are much further to the south than the Subject Lands, around 8 miles south. *See* Tr. (DD 8-21-24) 271: 6. As Prima points out, referencing and including these distant wells with high density as examples of proper development for the Subject Lands causes Avant to become "very inconsistent about how many wells per section [Avant] is proposing and why." *See* Tr. (DD 8-21-24) 297: 17-20. Both the Batman development and the Cutbow development have spacings of six to eight wells per bench, which, as Prima points out, far exceeds what Avant is proposing; thus, Avant presents these wells in a way that leads to confusion about why Avant is only proposing four wells in the Subject Lands. *See* Tr. (8-21-24) 297: 21-25; 298: 1-4.

35. As shown in Paragraphs 27-29, *supra*, Avant, who claims that 4 WPS will create sufficient interference to produce the reservoir, has provided no exhibits or data that show whether 3 wells would sufficiently produce the reservoir. When Avant was asked if it has production data that shows 3 wells per section would not develop the reservoir the same as 4 wells per section, instead of answering the question by referencing relevant data or exhibits, Avant responded, "Do you?" Tr. (DD 8-21-24) 267: 12-19. In fact, for Prima the answer is yes; Prima has presented its case-in-chief supported by exhibits whose production data show that spacing of 1,320' (4 WPS) is too tight and a wider spacing (3 WPS) would optimally produce the reservoir without economic waste and the drilling of unnecessary wells. *See* Prima's Second Amended Hearing Packet, Prima's Exhibits A-1 & Rebuttal Exhibits 1-8. Instead of pointing to wells a distant 8 miles from the

Subject Lands, Prima has identified in its exhibits wells and units adjacent to and within close proximity of the Subject Lands whose production data show the density that the wells are drilled at is too tight and “a wider density is merited in order to prevent economic waste.” *See* Tr. (DD 8-20-24) 122: 19-23; *see also* Prima’s Exhibit A-1, p. 10 (map of offset development case studies).

36. Prima’s conclusion, based on production data, is particularly evident in Prima’s Exhibit A-1, p. 16 (highlighting the Buffalo and Mescalero Group), in which Prima shows that the well that will recover by far the most oil within the group is the Buffalo 12 1H, which also is the well spaced furthest from the offset wells with a 1,671’ spacing that approximates 3 WPS. *See* Prima’s Exhibit A-1, p. 16; *see also* Prima’s Second Amended Hearing Packet, Rebuttal Exhibit 6, p. 28; Tr. (DD 8-21-24) 295: 14-19. The production data from the Buffalo wells are determinative in this matter because these wells are modern 2-mile wells, adjacent to the Subject Lands, that have “very similar completion techniques to what Avant is saying is [making] all the difference in recovering reserves.” *See* Tr. (DD 8-21-24) 295: 20-25.

37. The Buffalo wells also demonstrate that you can achieve the necessary interference for proper development with 3 WPS. Prima has shown that the number of wells needed for avoiding all interference is 2.16 wells. *See* Tr. (DD 8-20-24) 138: 1-8. Thus, 3 WPS is the minimum number of wells to achieve the proper balance of interference and production without creating the excessive interference caused by 4 WPS that would work to diminish production and result in excessive costs of drilling unnecessary wells. *See* Tr. (DD 8-21-24) 296: 9-25; 297: 1-4 (Prima showing that 3 wells, based on the Buffalo well example, has the proper level and type of interference, which is not only the type of beneficial interference that could happen later in the life of the well but also produces “immediate interference;” thus, Prima shows that the interference from 3 wells “really gets to the crux of the argument,” in which Prima states “that three wells is

what is required to drain” the reservoir, and Prima shows that Avant basically agrees on this matter having stated that “if you’ve got interference, then you’ve sufficiently developed the reservoir.” *See* Tr. (DD 8-21-24) 296: 15-20; *see also* Avant’s Rebuttal Exhibit G-17 (Avant stating: “Interference among offset wells is indicative of sufficient well density & completion size”).

38. Thus, Avant proposes to drill 4 WPS in order to obtain interference; however, Prima objects to 4 WPS because its tighter spacing creates excessive interference beyond the amount needed for development of the unit and negatively diminishes production of the wells. Three WPS is the optimal number for the unit that provides the proper level of interference and efficient production. The excessive costs of drilling an additional 3 unnecessary wells to obtain a spacing of 4 WPS results in economic waste to the tune of “\$51 million in excessive and unnecessary costs to the owners of these reserves....” *See* Tr. (DD 8-20-24) 140: 1-4.

VI. Proposed finding of fact based on the discussion of evidence described in Part V *supra*, testimony and exhibits.

39. Prima is a working interest owner in Avant’s proposed unit and is directly affected by the costs and economic burdens of Avant’s proposed development plan. *See* Avant’s First Amended Exhibit Packet, Exhibit C-4; *see also* Paragraph 39, *supra*.

40. Prima’s case-in-chief based on available production data shows that 3 WPS is the optimal spacing that provides for a proper drainage radius and the optimal amount of interference for the proper production and drainage of the reservoir in comparison to the tighter spacing of 4 WPS which creates excessive interference resulting in diminished production of the reservoir, \$51 million in additional costs that burden the owners, and the drilling of 3 additional wells that are unnecessary for sufficiently producing the reservoir. *See* Paragraphs, 23 and 35-38, *supra*.

41. Avant failed to provide exhibits, evidence and data showing that a 3 WPS spacing would not sufficiently produce and drain the reservoir in comparison with the proposed 4 WPS;

therefore, Avant failed to show that spacing based on 4 WPS prevents waste, protects correlative rights, and avoids the drilling of unnecessary wells as it attested in its pooling application. *See* Paragraphs 27 and 29, *supra*.

VII. Proposed conclusions of law based on the foregoing legal arguments in the Introduction and Parts II, III and IV, *supra*.

42. A non-operating owners' presentation of its case in opposition to the approval of a pooling application, if based on credible evidence, can provide a valuable contribution (a third option of review) to the efforts to prevent waste, protect correlative rights, and avoid the drilling of unnecessary wells by incentivizing applicants to engage in meaningful negotiations to address such concerns. *See* last Paragraph of the "Introduction," p. 4, *supra*.

43. Economic loss and economic waste, including waste from the unnecessary expenditure of money and resources, is incorporated into and is an integral part of the definition of waste in § 70-2-3, based on the language in the definition stating that the "ordinary meaning" of waste is used to define the term waste within the Act in addition to the technical meanings of waste as enumerated A through F in the statutory definition. *See* Paragraphs 12, 13, and 16, *supra*.

44. New Mexico case law, specifically as developed in *Rutter Wilbanks v. Oil Conservation Commission*, 1975-NMSC-006, ¶ 007, 87 N.M. 286, 532 P.2d 582, and in *Earthworks' Oil & Gas Accountability Project v. N.M. Oil Conservation Comm'n*, 2016-NMCA-055, ¶ 26, 374 P.3d 710, 720, confirms the conclusion of law that economic waste is included in the statutory definition of waste as the term waste is used in its ordinary meaning under the Act. *See* Paragraphs 18-19, *supra*.

45. Because economic waste is considered to be waste as used in the Act and because the definition of correlative rights under the Act is defined pursuant to §70-2-33(H) as an owner's opportunity to produce "without waste" its just and equitable share of oil or gas, a development

plan that causes economic waste as it produces oil or gas violates an owner's correlative rights. See Paragraphs 20-21, *supra*.

46. Because Prima provided exhibits and evidence based on actual production data showing that 3 WPS spacing would optimally produce and drain the reservoir without waste in comparison to 4 WPS spacing which, as Prima showed, results in waste, Prima's objection to Avant's pooling application and development plan should be sustained and Avant's pooling application denied. See Paragraphs, 23 and 35-38, *supra*.

47. Avant failed to provide exhibits and evidence that 3 WPS spacing would not sufficiently develop the reservoir and that 4 WPS spacing would NOT create waste, violate correlative rights, and avoid the drilling of unnecessary wells. See Paragraphs 27 and 29, *supra*.

48. Avant attested in its pooling application that "[t]he pooling of all interests in the Bone Spring Formation within the proposed unit will avoid the drilling of unnecessary wells, prevent waste, and protect correlative rights"; however, at the hearing, Avant failed to substantiate this statement with evidence or data. Therefore, the approval of Avant's pooling application should be denied. See Avant's Pooling Application in Case No. 24544, ¶ 6; see also Paragraphs, 23 and 35-38, *supra*.

VIII. Conclusion:

Avant was fully informed a month prior to the contested hearing that Prima was objecting to its application in Case No. 24544 on the basis that its proposed number of 12 wells for the Bone Spring (4 wells per bench) overdevelops the unit and results in economic waste, the drilling of unnecessary wells, and a violation of correlative rights when the proper number of wells for developing the unit is 9 (3 wells per bench). Notwithstanding the ample time, Avant failed to provide any specific exhibits, data or evidence that 3 wells per bench would not properly develop

the unit. In contrast, Prima provided specific exhibits and evidence based on available production data that 3 wells per bench provided the proper spacing and amount of interference that would optimally produce the reservoir while avoiding economic waste and the drilling of unnecessary wells.

In Avant's pooling application for the Subject Lands, Avant attested that "[t]he pooling of all interests in the Bone Spring Formation within the proposed unit will avoid the drilling of unnecessary wells, prevent waste, and protect correlative rights." See Avant's Pooling Application in Case No. 24544, ¶ 6. However, as set forth above, Avant failed to prove that this assertion was true at the hearing. See Part V, Paragraphs 22 through 39, *supra*. Therefore, because Avant pooling application as submitted cannot meet the criteria for approval, Prima respectfully requests that the Division deny Avant's pooling application and dismiss the case without prejudice, allowing Avant to further evaluate its development plan for waste and violation of correlative rights. If Avant believes it is able to demonstrate to the Division based on actual evidence and not mere opinion that 4 wells per bench can prevent waste, protect correlative rights, and avoid the drilling of unnecessary wells better than 3 wells per bench, then Avant would be able to re-submit its application along with the prerequisite evidence and exhibits showing that waste would be prevented and correlative rights protected. However, if after re-evaluation of its development plan, Avant finds, as shown by Prima herein, that 3 wells per bench is the optimal plan for preventing waste, protecting correlative rights, and avoiding the drilling of unnecessary wells, then Avant would have the opportunity to revise its development plan and pooling application accordingly and re-submit an application that does in fact prevent waste and protect correlative rights.³

³ If the OCD should decide to approve the application, Prima respectfully requests that the OCD include in any pooling order issued the Special Provision attached as Exhibit 1 to Prima's Second Amended Prehearing Statement. The standard pooling order form does not protect an owner against the burden of simultaneous cash calls on multiple wells, and because applicants/operators are continuously increasing the

Respectfully submitted,

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number of initial wells on an application, which directly benefits the applicant/operator, but can substantially burden the mineral owner, Prima requests that there be a counter balance to protect a mineral owner from such potential financial burden when an owner assumes the risk of refusing to join a JOA in order to make efforts to demonstrate to the OCD that a proposed plan creates waste and violates correlative rights. Such efforts should be protected if there are reasonable means readily available to provide protection, and the Special Provision provides a reasonable means, with little to no burden on the applicant/operator, to protect an owner who assumes the risk of challenging a development plan as being wasteful but who then ends up being subjected to the plan it challenged.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the New Mexico Oil Conservation Division and was served on counsel of record via electronic mail on September 16, 2024:

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