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

APPLICATION OF XTO DELAWARE BASIN, LLC TO AMEND ORDER NO. R-20568 BY EXCLUDING FEDERAL UNIT ACREAGE FROM HORIZONTAL SPACING UNIT EDDY COUNTY, NEW MEXICO **Case No. 20918**

APPLICATION OF XTO DELAWARE BASIN, LLC TO AMEND ORDER NO. R-20249 BY EXCLUDING FEDERAL UNIT ACREAGE FROM HORIZONTAL SPACING UNIT, EDDY COUNTY, NEW MEXICO **Case No. 20919**

RESPONSE IN OPPOSITION TO MOTION TO DISMISS APPLICATIONS

Applicant XTO Delaware Basin, LLC ("XTO") submits its response in opposition to Novo Oil & Gas Northern Delaware, LLC's ("Novo's") Motion to Dismiss Applications ("motion").

FACTUAL BACKGROUND

XTO's applications in Cases 20918 and 20919 request amendments to Order Nos. R-20249 and R-20568 that exclude 80 acres of XTO's federal unit acreage from the horizontal spacing units approved in the orders. With its motion, Novo attempts to (i) deny XTO an opportunity to present evidence regarding the Bureau of Land Management's ("BLM's") position regarding communitization of the unit acreage and XTO's own development plans for the acreage, and (ii) avoid a Division determination regarding the central issue presented in both cases: whether Novo's drilling and completion of laterals that extend into XTO's federal unit acreage without BLM–approved communitization agreements would result in economic waste and, concomitantly, impair XTO's correlative rights. Novo's attempts are misplaced, and its motion should be denied.

FACTUAL BACKGROUND

The operative facts that are relevant to the paramount issue in these cases are set out in XTO's applications. XTO is the BLM-approved successor operator of the Big Eddy Unit ("BEU" or "Unit"), which was established in 1952 by the Oil Conservation Commission in its Order No. R-152. *Applications at 1, ¶3.* The Unit acreage includes the N/2 SE/4 of Section 4, Township 23 South, Range 29 East in Eddy County. *Id.*

The horizontal spacing units that the Division approved in its Order Nos. R-20249 and 20568 both include the N/2 SE/4 of Section 4. *Order No. R-20249 at 5, ¶1; Order No. R-20568 at 4, ¶ 1; id. at 8.* Since the Division issued the orders, XTO has informed the BLM and Novo that it will not approve a communitization agreement for a Novo well with a lateral that extends into that acreage. *Applications at 2, ¶5.* In turn, the BLM has informed XTO that, without XTO's consent, the BLM will not approve a proposed communitization agreement that includes production from XTO's BEU acreage. *Id. at 2, ¶6.*

ARGUMENT

XTO acknowledges that Division adjudications are not controlled by the New Mexico Rules of Civil Procedure. Nevertheless, XTO suggests that two of the procedural rules provide an appropriate framework for the Division to utilize in making its determination regarding Novo's motion. They are Rule 1-012(B)(6), which governs a motion to dismiss, and Rule 1-060(B)(1), which governs a timely collateral attack on a final order based on mistake or inadvertence.

I. Novo Cannot Establish that XTO's Applications Fail to State Claims Upon Which the Division May Grant Relief.

Under Rule 1-012(B)(6), a motion to dismiss may be granted if and only if the claimant has failed to present any potential legal claim for relief. *Rule 1-012(B)(6) NMRA; Trujillo v. Berry, 1987-NMCA-072, 106 N.M. 86.* The courts deem all well- pleaded facts in a complaint to be true,

and review them in a manner most favorable to the claimant. *Runyan v. Jaramillo,* 1977-NMSC-061, 90 N.M. 629. Consequently, a motion to dismiss will be denied unless there is no conceivable legal basis for relief based on the facts alleged. *Trujillo,* 1987-NMCA-072, 106 N.M.86.

Applying those legal standards to Novo's motion, the Division cannot conclude that there is no legal basis whatsoever to grant the relief requested by XTO based on the facts stated in its applications. The BLM has informed XTO that it will not grant a communitization agreement submitted by Novo if XTO has not consented to the agreement. *Applications at 2, ¶6.* And without a BLM-approved communitization agreement, Novo cannot produce from any portion of a lateral that is located in XTO's BEU acreage.

Citing to the general pooling provision in the Oil and Gas Act ("the Act"), Novo's motion asserts that XTO's control of 80 unitized acres "is irrelevant". *Motion at 2.* Contrary to that assertion, the inclusion of the BEU acreage in the Novo horizontal spacing units is most certainly relevant. The Act's general pooling provision does not render meaningless the BLM's regulatory authority over unitized federal acreage.

While the Act grants to the Division authority to pool uncommitted mineral interests, it is silent with regard to the scope of that pooling authority when it intersects with the BLM's regulatory authority. *See §70-2-17(C).* Here, the BLM's regulatory authority over the BEU, including its control over communitization agreements, presents a counter to the Division's pooling authority under the Act. Because Novo's completion of laterals in the N/2 SE/4 of Section 4 would result in economic waste in the absence of BLM-approved communitization agreements, XTO's applications implicate the Division's statutory obligations under the Act to (i) prevent waste and protect correlative rights, and (ii) consider the economic loss caused by the drilling of

unnecessary wells. *§70-2-17(A) and (B).* Clearly, XTO's applications state legal claims for relief within the meaning of Rule 1-012(B)(6).

II. Order Nos. R-20249 and 20568 Should Be Reconsidered and Amended.

As noted above, Rule 1-060(B)(2) permits a timely collateral attack on a final order based on mistake or inadvertence. *See Rule 1-060(B)(2).* Pursuant to the rule, the courts take a liberal approach to determining what constitutes good cause to vacate a final judgment or order so that the ultimate result will address the true merits of the case. *Phelps Dodge Corp. v. Guerra*, 1978-NMSC-053, 92 N.M. 47. In these cases, there is good cause for the Division to reconsider and amend Order Nos. R-20249 and R-20568.

The record in consolidated Cases 16283 and 16286 reveals that Novo did not adequately inform the Division that its proposed horizontal spacing units would include 80 acres of unitized federal acreage and thereby alert the Division that any production from that acreage would be contingent upon BLM communitization approval. During the July 12, 2018 hearing in the consolidated cases, Novo's land witness testified that the acreage in Novo's proposed horizontal spacing units is "in the north half of [Section] 4". *Transcript of July 12, 2018 hearing at 35.* The land witness further testified that the proposed horizontal spacing units "are just below the Big Eddy Unit where XTO operates." *Id. at 23.*

Whether a result of inadvertence or a factual mistake, the testimony regarding the location of XTO's BEU acreage in Section 4 is clearly erroneous. It is beyond dispute that the BEU extends into the south half of Section 4, specifically the N/2 SE/4. *See Order No. R-152.* Novo's failure to adequately advise the Division as to the nature of XTO's interest in the N/2 SE/4, which would have alerted the Division to the issue of concurrent BLM jurisdiction, necessitates the conclusion

that there is good cause for the Division to consider the true merits of XTO's requests that the Division amend Order Nos. R-20249 and 20568.

XTO's absence from Cases 16283 and 16286 should not impact that conclusion. XTO does not dispute Novo's factual recitation regarding XTO's lack of participation in the consolidated cases. *See Motion at 2.* But the important issues of prevention of economic waste and protection of correlative rights outweigh XTO's lack of participation in the cases, and are issues the Division contemplated when it provided in Order Nos. R-20249 and R-20568 that "jurisdiction of this case is retained for the entry of such further orders as the Division may deem necessary." *Order No. R-20249 at 8, ¶21; Order No. R-20568 at 7, ¶23.* Consequently, the Division should proceed to a consolidated hearing on the merits of XTO's applications.

CONCLUSIONS

For the foregoing reasons, XTO submits that Novo's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2019 I served a true and correct copy of the foregoing ***Response in Opposition to Motion to Dismiss Applications*** via email to:

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