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

APPLICATION OF TOM M. RAGSDALE TO REVOKE ORDER NOS. R-20924 & R-20924-A OR, IN THE ALTERNATIVE, TO DECLARE UNREASONABLE CERTAIN COSTS IMPOSED BY MEWBOURNE OIL COMPANY

OCC Case No. 21902 (de novo)
OCD Case No. 21324

APPLICANT'S CLOSING STATEMENT

Mewbourne assumed the risk by drilling the 10/15 2H three months before it received a compulsory pooling order. *See In re Application of NMOCD Through the Engineering Bureau Chief for Adoption of a New Rule Relating to Compulsory Pooling and Prescribing Risk Charges*, Case No. 13069, Order No. R-11992 at 3, ¶¶ 15, 41 (July 17, 2003); *In re Application of Chesapeake Op'g, Inc. for Compulsory Pooling and an Unorthodox Well Location*, Case No. 12325, at 6, ¶ 28 (recognizing that the operator had "assumed the risk associated with drilling" the well "without first combining the lands to be dedicated to the well either by voluntary agreement of the interest owners or by obtaining a compulsory pooling order from the Division"); Revised List of Undisputed Facts at 3, ¶ 16 ("RLUF"); *id.* at 5, ¶ 30. Mewbourne admits that they took the risk by drilling before receiving a forcepooling order. Tr. 190:7-13.

Mr. Ragsdale never had the opportunity to elect to participate in the 10/15 2H under a forcepooling order. Consequently, Mewbourne cannot recover the costs of its failed drilling attempts by surreptitiously imposing them on the costs of drilling the 15/10 2H. Its efforts to do so violate New Mexico law on forcepooling and notice. Under these circumstances, the Commission should revoke compulsory pooling Order Nos. 20894 and 20894-A. In the alternative, Mr. Ragsdale requests that the Commission deem it unreasonable to impose such

costs when the 15/10 2H does not constitute a "substitute" well. Mr. Ragsdale further requests that the Commission require Mewbourne to provide Mr. Ragsdale with (1) a revised AFE for the 15/10 2H, which shall exclude the unreasonable costs, and (2) another opportunity to elect to participate in the 15/10 2H under the revised AFE.

I. The Commission Has Jurisdiction and Authority to Award the Relief Requested.

The Commission has concurrent jurisdiction with the Division, NMSA 1978, § 70-2-6(B); NMSA 1978, § 70-2-11(B); which is broad: "The division shall have . . . jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas[.]" Sec. 70-2-6(A). Moreover, the Commission has a duty "to prevent waste . . . and to protect correlative rights." and is empowered "to do whatever may be reasonably necessary to carry out the purpose of this act." Sec. 70-2-11(A). The issues and requests for relief stated by Mr. Ragsdale directly relate to his correlative rights and the prevention of waste.

Compulsory pooling is governed by NMSA 1978, Sec. 70-2-17(C), which requires the Commission to ensure that all compulsory pooling orders "are just and reasonable" and that a party who is forcepooled has "the opportunity to recover or receive without unnecessary expense his just and fair share of the oil or gas." Mewbourne's self-serving interpretation of the order is neither just nor reasonable. Moreover, imposing the actual costs of failed drilling attempts on the estimated costs of a different well imposes unnecessary expense.

II. Section 70-2-17 Limits Costs to Those in Drilling "the" Well, Not Another Well.

Mewbourne argues that it is entitled to recover the costs for failed attempts to drill the 10/15H because under Section 70-2-17, the "well unit" is pooled rather than "the particular wells." *See* Tr. 12:5-7. Mewbourne misreads the statutory language. Section 70-2-17(C)

expressly references the "well," as opposed to the "unit," when addressing costs. Parties advancing costs may recover "the actual expenditures required . . . in the drilling of ***such well***" and a risk charge based on "the cost of drilling and completing ***the well***." (Emphasis added.) Applicable costs are those "for the drilling, or for the operation of ***a well***." (Emphasis added.) *See id.* (further referencing "production from such ***well***," "for whose benefit ***the well*** was drilled or operated," and "until the . . . owners drilling or operating ***the well*** . . . have been paid" (emphasis added)). This reading is consistent with the Division's understanding, and industry practice, that an interest owner must have an opportunity to participate under a forced pooling order on a well-by-well basis. *See, e.g.*, *In re Application of Marathon Oil Permian, LLC for Compulsory Pooling*, Case No. 20468, Tr. 9:2-7, 9:18-10:12 (May 2, 2019); *see also id.* at 7:8-9.

III. The 15/10 2H Is Not a Substitute Well.

The costs of failed attempts to drill can be recovered when a "substitute well" is drilled:

> Well costs shall also include reasonable costs of drilling, testing, completing and equipping a substitute well *if, in the drilling of a well pursuant to a compulsory pooling order*, the operator loses the hole or encounters mechanical difficulties rendering it impracticable to drill to the objective depth and the substitute well is *located within 330 feet of the original well and the operator commences drilling within 10 days of the original well's abandonment*.

19.15.13.8(B)(4) (emphasis added). Mewbourne admits that the 15/10 Wells do not satisfy the Division's definition of a "substitute well." Tr. 87:16-19. Mewbourne contends, however, that the 15/10 2H is a "substitute or replacement well" because the 15/10 2H well is a "mirror well" of the 10/15 2H, Tr. 80:11-81:6. Mewbourne further contends that satisfying the requirement to drill within 10 days is not reasonable, because it can take months to get a BLM permit. *Id.* 79:18-80:10. Thus, Mewbourne argues that the actual costs of failed attempts to drill the 10/15 2H can be imposed on estimated costs of the 15/10 2H, as a substitute well, ***without informing the Division and without providing notice to the parties Mewbourne seeks to forcepool***.

Mewbourne's position requires the Commission to ignore the plain language of the rule. *See generally* 19.15.13 NMAC (devoid of any reference to a "replacement" or "mirror" well). Notably, Mewbourne did *not* have the pooling order required by 19.15.13.8(B)(4) NMAC within it attempted to drill the 10/15 2H. Moreover, Mewbourne's position is contrary to the purpose of the rule, which is to "prevent economic waste by allowing the operator in that situation to proceed with the drilling of the substitute well with the same rig, which would not be practicable if a supplemental application to the Division were necessary." Order No. R-11992 at 4, ¶ 19; *see* No. 31069, Tr. 19:25-20:8 (costs for drilling the original hole to failure and drilling the substitute hole could be considered costs of drilling and completing the well within the statutory meaning, "if the substitute hole were drilled at a location close to the original one and to the same objective formation"); *id.* at 49:12-19 (substitute well provision would prevent waste and protect correlative rights because a company would not incur the costs of releasing a rig, coming back to Santa Fe for a subsequent order, and then hiring a rig and moving it back onto location).

Clearly, the circumstances here—where Mewbourne had to get a new order to drill the 15/10 2H approximately 2 miles away and 9 months after its failure to drill the 10/15 2H—do not fall within the plain language or the purpose of the substitute well rule. The economics are substantially different and imposing such costs are unreasonable without notice.

In re Application of Chesapeake Op'g, Inc. for Compulsory Pooling and an Unorthodox Well Location, Case No. 12325 counsels that Mewbourne is wrong. There, Chesapeake sought to recover costs for drilling to an unproductive formation by forcepooling the respondents after drilling. *See* Order No. R-11327 at 3-4, ¶¶ 14-18 (Mar. 9, 2000). The Division determined that it was unreasonable to require the respondents to pay a share of the costs incurred in drilling the dry hole to the unproductive formation. *Id.* at 5, ¶ 24. Further, the Division required Chesapeake

to afford the respondents an opportunity to participate by paying their share of the costs of drilling from the unproductive formation to the deeper productive formation. *Id.* at 4-5, ¶ 25.

Like Chesapeake, Mewbourne assumed the risk of drilling the 10/15 2H without obtaining a voluntary agreement or an order forcepooling Mr. Ragsdale. Accordingly, it is unreasonable to require Mr. Ragsdale to pay the costs for drilling the 10/15 2H. Further, Mr. Ragsdale is entitled to an opportunity to participate in the drilling of the 15/10 2H, without paying the costs for the failed attempts to drill the 10/15 2H.

IV. Mewbourne Failed to Satisfy the Notice Requirements of 19.15.4.8 NMAC.

19.15.4.8 and 19.15.4.9 NMAC specify the information that must be contained in an application, in notice of hearing on an application, and in a hearing in which no interest owner opposes a compulsory pooling application. Here, notice was defective because Mewbourne failed to provide an adequate "description of the hearing's purpose" and "a reasonable identification of the adjudication's subject matter that alerts persons who may be affected if the division grants the application." *See* 19.15.4.9(A)(5)-(6) NMAC; *see also* NMSA 1978, § 70-2-23 (1977). Mewbourne's purpose was to obtain one order pooling the two 10/15 wells *and* the two 15/10 wells, which would purportedly allow it to impute actual costs of failed attempts to drill the 10/15 2H on estimated costs of the 15/10 2H. neither the application nor the notice letter in Mewbourne's Case No. 20809 adequately informed the interest owners of the purpose of the proceeding. RULF at 3-4, ¶ ¶ 23-24, 26.Notice published by the Division did not alert interested parties to this purpose. *See* Notice of Hearing on Oct. 23, 2019, ¶ 29, *available at* http://www.emnrd.state.nm.us/OCD/documents/10-03OCDHEARING.pdf.

Notice that does not substantially comply with notice requirements is defective and renders an order void and invalid. *Martinez v. Maggiore*, 2003-NMCA-043, ¶¶ 12-13, 133 N.M.

472; *see id.* ¶¶ 22, 28; *see also Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 3, 127 N.M. 120; *Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 3, 91 N.M. 455. In Case No. 20809, notice was deficient; the order is therefore void and invalid.

In addition, 19.15.4.12(A)(1)(b)(vi) & (ix) NMAC specifies the information required when no interest owner appears in opposition: "written evidence of attempts the applicant made to gain voluntary agreement including but not limited to copies of relevant correspondence" and "a copy of the AFE the applicant . . . will submit to the well's interest owners." Mewbourne did not, however, propose the 15/10 Wells to Mr. Ragsdale with the AFE now at issue. *See* RLUF at 5, ¶ 32; Tr. 26:3-9, 27:8-21, 28:23-29:6; App. Exh. 5. Moreover, the AFE submitted to the Division for the 15/10 2H was not the AFE that was submitted to Mr. Ragsdale. A change to financial evidence, including expenditures, is a material change or deficiency. Notice: Material Changes or Deficiencies in Applications Submitted to OCD Engineering Bureau (June 11, 2020)

Finally, Mewbourne's application in Case No. 20809 fails to satisfy the minimal standards of notice pleading. "The theory of pleadings is to give the parties notice of the claims and defenses against them, and the grounds upon which they are based." *Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 9, 109 N.M. 386. The 15/10 application failed to provide notice that Mewbourne would impose the costs of failed attempts to drill the 10/15 2H on the costs of drilling the 15/10 2H. Moreover, the rationale for allowing notice pleadings is that the facts relating to a particular theory will be tried before taking that theory to the factfinder. *Schmitz*, 1990-NMSC-002, ¶ 9. *See generally* App. Exh. 4; Case No. 20809, Tr.

Contrary to Mewbourne's representation, Tr. 255:9-15; Mewbourne did *not* bring up at the 15/10 hearing that Mewbourne sought to recover costs for the failed attempts to drill in the anticipated order. *See generally* No. 20809, Tr. Nor did Mewbourne provide notice to the

parties Mewbourne sought to forcepool. Case No. 21902, Tr. 69:9-70:13; RLUF at 3-5, ¶¶ 23-29. Rather, Mewbourne asked the Division to include "all four wells, the two 10/15 wells and the two 15/10 wells, because they may still drill the original two wells." No. 20809, Tr. 4:2-4. Mewbourne counsel added, "that's the first time I've ever asked for that type of Order in 37 years." No. 20809, Tr. 6:15-16 (Oct. 3, 2018); *see* No. 21902/21324, Tr. 280:15-19 (admitting this is the first time Mewbourne used one well in an order as a substitute well for a different well). Subsequently, Order No. R-20924-A pooled the proposed unit for the purpose of drilling all four wells, the 10/15 and 15/10 Wells. RULF at 5, ¶ 33. It does not authorize Mewbourne to impose the costs of failed drilling of the 10/15 2H on the estimated costs to drill the 15/10 2H.

V. Mr. Ragsdale Timely Elected to Participate.

Mewbourne suggests that even if the Division determined the costs for the two junked holes were disallowed, Mr. Ragsdale waived his right to participate by failing to timely elect. Self-Affirmed Statement of Mitch Robb at 2, ¶ 12 (Mewbourne's Exh. 2). Similarly, Mewbourne suggests that Mr. Ragsdale cannot challenge Mewbourne's imposition of improper costs because he did not enter an appearance in Case Nos. 20580 or 20809. *Id.* ¶ 8. Both arguments fail. First, Mewbourne agreed that Mr. Ragsdale had additional time to elect to participate and, in fact, Mewbourne deemed Mr. Ragsdale consenting in the 15/10 1H. *See* Tr. at 28-34; App. Exhs. 7-10. Moreover, the only reason that Mr. Ragsdale was deemed non-consenting in the 15/10 2H is because he did not pay his share of the costs at issue in this proceeding—actual costs for failed attempts to drill the 10/15 2H that Mewbourne improperly imputed to the estimated costs for the 15/10 2H. Under these circumstances, Mr. Ragsdale timely paid his share of estimated costs for drilling the 15/10 2H. *See* App. Exhs. 8-10.

Second, as discussed, Mr. Ragsdale did not enter an appearance in Case Nos. 20580 or 20809 because Mewbourne failed to alert Mr. Ragsdale to the disputed issue. Mr. Ragsdale would have entered an appearance if Mewbourne had provided notice it sought approval of the 15/10 Wells as "substitute" wells for the 10/15 Wells so that Mewbourne could impose the costs of failed attempts to drill the 10/15 2H on the costs to drill the 15/10 2H. *See* Tr. 69:9-70:13.

VI. The Rights and Obligations of an Interest Owner Under a Forcepooling Order Are Not Dictated by the Provisions of a JOA to Which He Is Not a Party.

Mewbourne contends that "a Pooling Order is the equivalent of an operating agreement" and that "Mr. Ragsdale has not been treated any different than the interest owners subject to the JOA." Robb Statement at 2, ¶ 15 (Mewbourne's Exh. 2). On this basis, Mewbourne argues that Mr. Ragsdale is subject to the costs for failed attempts to drill the 10/15 2H. Mewbourne has provided no factual or legal support for this argument, and undersigned counsel, in diligent research efforts, has found no support for Mewbourne's position. Mewbourne's position makes no sense. If this were true, there would be no reason for a non-operator to prefer to be subject to a force-pooling order instead of a joint operating agreement.

Forcepooling is governed by Section 70-2-12, by the Division's regulations implementing the same, and by the order forcepooling the uncommitted interest owners. *See* NAVIGATING AN IMPERFECT OILFIELD: DRILLING WITH NO JOA OR WITH MULTIPLE JOAS, 62 RMMLF-INST 25-1 (2016), 25-10 (forcepooling statutes typically provide little detail, but some detail may be in forcepooling order"); *id.* (noting that owners under pooling order may enter into an operating agreement to fill in detail); *see also* Lawrence Bender, "Operations in the Absence of An Operating Agreement: Considerations Under State Force Pooling Laws," *Joint Operations and the New AAPL Form 610-2015 Model Form Operating Agreement*, NO. 6 RMMLF-INST 12, 12-1 to -2 (Rocky Mt. Min. L. Fdn. 2017)

(disputes frequently resolved differently under forcepooling scheme than under a JOA). A contract is not binding on one not a party. *See Richards Energy Compr'n, LLC v. Dick Glover, Inc.*, No. 13CV0640 WJ/SMV, 2013 WL 12147626, at *3 (D.N.M. Sept. 16, 2013).

VII. Without Production from the 10/15 2H, Mewbourne Has No Recourse.

In the absence of a forced pooling order or voluntary agreement, an operator has no recourse for recovery of costs incurred to drill an unsuccessful well. *Bellet v. Grynbert*, 1992-NMSC-063, ¶¶ 16-19, 114 N.M. 690("[T]he operating cotenant may only recover out of the share in actual production for money spent speculatively." (internal quotation marks and citation omitted). A cotenant drills a dry hole at his own risk and without the right to reimbursement for the drilling cost. *Neeley v. Intercity v. Mgmt. Corp.*, 732 S.W.2d 644, 646 (Tex. Ct. App. 1987). This is consistent with Section 70-2-17(C), which provides that the operator may recover costs from non-operators who do not advance costs "solely out of production."

Mewbourne offered no evidence that the costs imposed for the failed drilling attempts were reasonable. As can be seen from the AFEs and testimony relating thereto, Mewbourne failed to differentiate the actual costs for the failed attempts to drill the 10/15 2H from the estimated costs to drill the 15/10 2H. *See, e.g.* App. Exh. 5; Tr. 26:13-27:13; *id.* 98:11-100:9. Moreover, to Mr. Ragsdale's knowledge, Mewbourne never complied with paragraph 28 of Order No. R-20924 or Order No. R-20924-A, requiring Mewbourne to "submit to OCD and each owner of a Pooled Working Interest an itemized schedule of the Actual Well Costs." With no evidence in the record as to reasonableness of the costs, the costs relating to the failed attempts to drill the 10/15 2H should be deemed unreasonable as a matter of law. *See* Tr. 268:6-269:3.

Finally, the Division relied on 19.15.13.8(B)(1) NMAC to conclude that Mewbourne could impose the costs of the failed attempts to drill one well on the estimated costs of another well. *See* Order No. R-21631 at 12, ¶ 8. Subsection B(1) provides as follows:

> If . . . a well . . . was previously abandoned without completion, well costs as to that well shall mean only the reasonable costs of re-entering, reworking, diverting, deepening, plugging back or testing the well; completion in the pooled formation or formations and; if necessary, reequipping the well for production, *unless the division determines that allowance of all or some portion of historical costs of drilling is just and reasonable due to particular circumstances*.

(Emphasis added). The Division's reliance on this rule is misplaced. Nothing in the rule allows recovery of "historical costs" by imposing them on the estimated costs of another well. Further, in light of Mewbourne's failure to inform the Division or the parties to be forcepooled of its intent to do so under Order No. R-20924-A, it is neither just nor reasonable to allow Mewbourne to impose the costs of its failed attempts to drill the 10/15 2H on the estimated costs to drill the 15/10 2H.

Mewbourne's improper conduct at issue here is highlighted by Mr. Robb's astonishing testimony near the close of the hearing. Mr. Robb explains that Mewbourne would have asked Mr. Ragsdale to make an election regarding participation in the wells that had already been unsuccessfully drilled, without informing him that the attempts to drill had failed. Tr. 271:4-273:10. Mewbourne would not have informed Mr. Ragsdale that the wells had failed until after he made an election to participate in a well that Mewbourne "proposed" to drill, but in fact had already unsuccessfully attempted to drill. *Id.* 271:10-11. At best, Mewbourne is playing fast and loosed under the New Mexico law pertaining to compulsory pooling. At worst, Mewbourne admits that it would engage in fraud. *See McNeill v. Rice Eng'g & Op'g, Inc.*, 2006-NMCA-015, ¶ 23, 128 P.3d 476.

Respectfully submitted,

By: */s/Sharon T. Shaheen*

Sharon T. Shaheen
MONTGOMERY & ANDREWS, P.A.
P.O. Box 2307
Santa Fe, New Mexico 87504-2307
Telephone: (505) 986-2678
Email: sshaheen@montand.com

Attorneys for Tom M. Ragsdale

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, a true and correct copy of the foregoing pleading was served upon counsel of record as follows:

James Bruce
P.O. Box 1056
Santa Fe, NM 87504
jamesbruce@aol.com

Attorney for Mewbourne Oil Company

/s/Sharon T. Shaheen