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

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APPLICATION OF HILCORP ENERGY COMPANY TO AMEND THE WELL DENSITY AND LOCATION REQUIREMENTS AND ADMINISTRATIVE EXCEPTIONS OF THE SPECIAL RULES FOR THE BLANCO-MESAVERDE GAS POOL, RIO ARRIBA AND SAN JUAN COUNTIES, NEW MEXICO

Case No: 16403

MOTION FOR RE-HEARING

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INTRODUCTION

San Juan Citizens Alliance ("SJCA") moves the New Mexico Oil Conservation Commission ("OCC") for a re-hearing of Case No. 16403, Hilcorp Energy Company's Application to Amend the Well Density and Location Requirements and Administrative Exceptions of the Special Rules for the Blanco-Mesaverde Gas Pool in Rio Arriba and San Juan Counties, New Mexico. These Special Rules were amended by the OCC's December 4th Order granting Hilcorp's application in this case ("December 4th Order"), making the deadline to file a motion for a re-hearing 5pm on December 24th in accordance with the Oil and Gas Act, N.M. Stat. § 70-2-25.

SCJA requests a rehearing of Case No. 16403 for the following reasons:

1. The OCC's decision to amend the Special Rules was arbitrary and capricious, not supported by substantial evidence, and contrary to the law. As a primary matter, the Special Rules are not well-tailored. Hilcorp failed to present a sufficient basis for a pool-wide change to the existing Special Rules that allows for both recompletions of existing wells and the drilling of new oil and gas wells across the entire 1.3-million-acre Blanco-Mesaverde Gas Pool by all operators. Hilcorp also admitted they have thus far been unable to complete more than a small number of the exceptions they have been granted on a well-by-well basis to date, demonstrating the exception process Hilcorp had relied upon prior to the amendment of the Special Rules was sufficient and a pool-wide amendment unnecessary. The OCC also wrongly compartmentalized its decision-making process, ignoring important factors relevant to the Special Rules and making a distinction between surface and subsurface issues that is contrary to OCC's statutory and regulatory

duties and was called into question by the substance of the Commissioners' own discussions with Hilcorp's expert witnesses.

2. SJCA was improperly denied intervention in the September 13th and November 19th hearings. The OCC was obligated to grant SJCA standing under state law, and, even if that standing was denied, to allow SJCA to intervene given SJCA's participation would have contributed substantially to the prevention of waste and the protection of public health and the environment. SJCA intended to present the affirmative testimony of two landowners impacted by the pattern of oil and gas well spacing and density in the Blanco-Mesaverde Gas Pool regarding Hilcorp's surface waste of natural gas and public health and environmental impacts caused by oil and gas development. SJCA also intended to contend, through cross-examination, that Hilcorp failed to meet its burden to justify the pool-wide change to the Special Rules, risking surface waste as well as public health and environmental impacts. The burden to intervene before the OCC is necessarily low, to ensure full consideration of information and factors relevant to OCC's decision, and SJCA met its burden. The OCC, by denying SJCA intervention, put blinders on its own decision-making, depriving itself of a full and fair process essential to a reasoned and informed decision.
3. OCC improperly considered Hilcorp's application through a purely adjudicatory process without providing the public and others participatory protections afforded by rulemaking, despite the vast, 1.3-million-acre scale of the decision and unjust result of excluding the public from meaningful participation when there was broad public concern about the application. Furthermore, OCC in relying on the holding in *Uhden v. New Mexico Oil Conservation Comm'n*, 817 P.2d 721 (1991), overstated the breadth and reach of *Uhden*'s

holding and ignored factual distinctions that, considered here, demonstrate the need for compliance with rulemaking provisions.

4. OCC improperly denied SJCA's motion for a continuance, which was denied on the basis that SJCA was not a party to the proceeding. SJCA should have been granted intervention and the substantive issues in its motion for a continuance should have been fully considered, including to ensure that additional information requested by various elected New Mexico political leaders was provided to the OCC to inform its consideration of Hilcorp's application.
5. At the start of the November 19th hearing, OCC Chairwoman Heather Riley made statements demonstrating that OCC had made predetermined decisions regarding SJCA's status as an intervenor and SJCA's various motions. OCC appears to have therefore made decisions outside of the bounds of the proceedings, in conflict with their duties as impartial decisionmakers.

I. STANDARD OF REVIEW

Under New Mexico law, NM Stat. § 39-3-1.1, the District Court may "set aside, reverse or remand" OCC's decision if they find:

> (1) the agency acted fraudulently, arbitrarily or capriciously;
> (2) the final decision was not supported by substantial evidence; or
> (3) the agency did not act in accordance with law.

The New Mexico Supreme Court has clarified that in order to determine whether an agency's action is arbitrary and capricious, "[t]he reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *Nat'l Council on Comp. Ins. v. New*

Mexico State Corp. Comm'n, 756 P.2d 558, 562 (N.M. 1988). "The term 'not in accordance with law' involves action taken by an agency or court which is based on an error of law, is arbitrary and unreasonable, or is based on conjecture, and is inconsistent with established facts." *Perkins v. Dep't of Human Servs.*, 748 P.2d 24, 29 (N.M. 1987). "However, the [C]ourt may always substitute its interpretation of the law for that of the [Commission] 'because it is the function of courts to interpret the law.'" *Johnson v. New Mexico Oil Conservation Comm'n*, 978 P.2d 327, 330 (1999) (quoting *Fitzhugh v. New Mexico Dep't of Labor,* 922 P.2d 555 (1996)).

II. THE OCC'S DECISION WAS ARBITRARY AND CAPRICIOUS, UNSUPPORTED BY SUBTANTIAL EVIDENCE, AND NOT IN ACCORDANCE WITH LAW

The OCC's decision to amend the Special Rules in this case was arbitrary and capricious, unsupported by substantial evidence, and contrary to the law. As a primary matter, the Special Rules, as amended, are not well-tailored. They change well spacing and density rules across the entire 1.3-million-acre Blanco-Mesaverde Gas Pool, allowing not just Hilcorp, but all operators, to undertake recompletions of existing Dakota wells as well as drill new infill wells. Hilcorp, however, admitted they have been unable to keep up with recompleting the well-by-well exceptions for which they have already received spacing exceptions in the Pool. Moreover, while other operators such as LOGOS Resources II, LLC were represented in the proceedings, no other operators in the Blanco-Mesaverde Gas Pool provided evidence in support of Hilcorp's application. The amendment to the Special Rules is therefore, at best, premature and, at worst, unsupported by substantial evidence justifying the Special Rule's new scope and reach. OCC also acted contrary to its statutory obligations by falsely compartmentalizing its duty to prevent sub-surface waste from its duty to prevent surface waste, both as a matter of substance but also as a basis to deny SJCA's intervention. OCC did this despite testimony by Hilcorp's witnesses

and questions by the Commission that addressed various surface impacts that are likely to result from the approval of this application.

A. The OCC's decision in its December 4th Order is arbitrary and capricious because it did not fully consider all facts before it when making its decision, and chose to exclude factual inquiries the OCC itself brought into issue by failing to allow SJCA to intervene to present them

At several points during both the September 13th and November 19th hearings, Hilcorp's expert witnesses demonstrated there was no urgency to amend the Special Rules and in fact ample reason to delay or narrow the scope of Hilcorp's application. This was a point that SJCA planned to provide broader evidence about, had it been granted intervention, through the direct testimony of its witnesses and cross-examination of Hilcorp's witnesses, thereby demonstrating that a well-tailored rule would have helped ameliorate surface waste as well as public health and environmental impacts. Hilcorp admitted that they have been granted spacing exceptions at a much faster pace than they can drill wells and highlighted their preference for recompleting wells in part because of decreased surface impacts. Furthermore, while Commissioners denied SJCA's right to intervene on the basis surface issues were not in contention, they themselves repeatedly asked questions about surface impacts and the reduced surface impacts of recompletions, negating the OCC's conclusion that surface impacts were not at issue. These statements demonstrate OCC failed to fully investigate, obtain, and consider relevant facts, and inappropriately excluded full testimony from SJCA on surface impacts, rendering OCC's decision in the December 4th Order arbitrary and capricious, unsupported by substantial evidence, and contrary to the law.

In her expert testimony, Hilcorp's witness Michelle Sivadon, a senior reservoir engineer for Hilcorp, stated that of the 62 applications for spacing exceptions that the Oil Conservation Division (OCD) had approved as of July 2018, only 22 had been completed. Ms. Sivadon

explained Hilcorp had "not executed all 62 because of frac crew limited availability" as well as "our internal capital budget constraints that we have." Case No. 16403, Reporter's Transcript of Proceedings, Commissioner Hearing, (September 13, 2018) at 89-91. Ms. Sivadon thus admitted to the slow pace at which Hilcorp is able to complete wells and the effectiveness of the well-by-well process for seeking exceptions to the Special Rules. This admission highlights the lack of need or factual support for a pool-wide change to the Special Rules.

Mr. Andrew Sparks, a geologist for Hilcorp, described Hilcorp's strategy as planning to focus on recompleting wells first, eventually drilling new wells in a targeted way. *Id.* at 75. Commissioner Balch asked Mr. Sparks a series of questions aimed at addressing surface impact concerns during cross-examination, including whether Hilcorp would engage in blanket or targeted infill drilling, how many wells would be recompletions, whether there is horizontal potential in the pool, and asking the witness to affirm that recompleted wells are preferable, adding as part of his question that it "minimizes surface" impacts. *Id.* at 74-79. The OCC, by denying SJCA's intervention on the basis surface impacts were not at issue, effectively precluded any further inquiry into this issue, including whether the magnitude of impacts, even if minimized, would have unacceptably causes surface waste or public health and environmental harm.

Ms. Sivadon also highlighted that recompletions minimize surface impacts and are less expensive for the operator than drilling new wells. *Id.* at 96. Chairwoman Riley asked Ms. Sivadon questions about the state of the existing wells and whether or not they are adequate for recompletions in terms of the state of the wellbores, the implicit concern being whether they could cause groundwater contamination or otherwise fail, causing surface impacts. *Id.* at 102. Commissioner Balch asked Ms. Sivadon to describe the type of frac fluid Hilcorp intends to use

and their source of water for that fluid, and again asked the witness to affirm that Hilcorp would prioritize recompletions, stating: "One thing we're always really conscious of is the surface footprint and the amount of operations that occur at the surface because that does cause disruption, noise pollution…" *Id.* at 106. Again, no further inquiry into this line of questioning by SJCA, whose interests include surface waste and public health and environmental protection, was allowed.

By, on the one hand, asking questions regarding the surface impacts of Hilcorp's application but, on the other hand, denying SJCA the ability to intervene as a mechanism to raise its own citizen-based concerns regarding surface waste, public health, and the environment, the OCC acted arbitrarily and capriciously and contrary to law. The OCC's decisions rest on assumptions and limited factual contentions by the OCC and Hilcorp that it did not allow the public, here SJCA, to test through participation as a party. This extends both to the need and basis for the amendment to the changes to the Pool Rules and to the impacts of that amendment to surface waste and public health and the environment. Even absent SJCA's participation, Hilcorp's own witnesses provided evidence demonstrating the rule was not well-tailored and unsupported by substantial evidence and that the existing system of seeking well-by-well exceptions to the Special Rules was working and aligned with the pace of its own operations.

B. The OCC failed to fulfill its statutory duties in the December 4th Order by failing to consider effects to public health and the environment or the potential for surface waste and thus did not act in accordance with law

In the December 4th Order, OCC described the increase in drainage of the reservoir that would result from the increase in well density as the factors in its decision to approve Hilcorp's application, *see* December 4th Order at 6-7. OCC justified the narrow scope of its consideration of factors by stating that:

> Hilcorp's Application raises issues of geology and reservoir engineering that relate solely to the proper management of an underground gas pool to avoid the prevention of underground waste and the protection of correlative rights. The drilling, operation, and production of oil and gas wells and the disposition of oil field wastes are not at issue under this Application.

December 4th Order at 5.

The OCC's choice to narrow its consideration to underground reservoir issues and the protection of correlative rights completely ignores the other half of its statutory duties: to prevent "surface waste" in addition to "underground waste" and to consider the effects of its decisions on public health and the environment. The OCC's duties, laid out in the Oil and Gas Act, are "to prevent waste prohibited by this act and to protect correlative rights, as in this act provided." N.M. Stat § 70-2-11. The Oil and Gas Act defines waste to include both "underground waste" and "surface waste" N.M. Stat. § 70-2-3. "Surface waste" is defined broadly:

> [A]s those words are generally understood in the oil and gas business, and in any event to embrace the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of natural gas of any type or in any form or crude petroleum oil, or any product thereof, but including the loss or destruction, without beneficial use, resulting from evaporation, seepage, leakage or fire, especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells, or incident to or resulting from the use of inefficient storage or from the production of crude petroleum oil or natural gas in excess of the reasonable market demand.

Id. As this provision provides, surface waste expressly encompasses "*the manner of spacing*," and determining the appropriate manner of spacing was squarely at issue and indeed the express purpose of Hilcorp's application. *Id*. (emphasis added).

OCC is also broadly "charged with the duty and obligation of enforcing the state's rules and statutes relating to the conservation of oil and gas including the protection of public health and the environment" N.M.A.C. 19.15.5.8. In the 2005 hearing that the Commission held to adopt the public health and environment exception to intervention and other procedural rules, the Commission recognized that its responsibilities were "the prevention of waste, protection of

correlative rights, and the protection of public health and the environment." SJCA's Ex. E to its November 9th Notice of Intervention, 207 (emphasis added). The subsequent order referenced above characterized these factors as the "mandates" of the Commission. OCD Order No. R-12327-A 13482 at 2.

Fundamentally, surface issues, specifically surface waste but also public health and environmental issues, were relevant factors the OCC was obliged, by law, to consider in determining whether to approve Hilcorp's application. The application involves a change to the pattern of well spacing and density across a 1.3 million-acre landscape. That change confers to Hilcorp and all other operators in the Blanco-Mesaverde gas pool the ability to double—whether for recompletions or new infill wells—the spacing and density of oil and gas wells. The pattern of development authorized by the amendment to the Pool Rules is necessarily a factor in the amount of surface waste caused by production, and the impacts production causes to public health and the environment, including from oil field waste. Accordingly, the OCC must account for surface waste and public health and environmental impacts when it is setting that pattern of development through well spacing and density rules. Ignoring the necessarily intertwined subsurface and surface issues implicated by the pattern of development authorized by well spacing and density rules is arbitrary and capricious and, further, deprives the OCC of evidence necessary to reach a reasoned and informed decision that conforms to the law.

Furthermore, the fact that surface use issues may be addressed in subsequent decision-making processes does not excuse the OCC's decision to ignore surface use issues and impacts across the entire 1.3-million-acre Blanco-Mesaverde Gas Pool, in particular because subsequent permitting processes are carried out on a piecemeal, well-by-well basis, rather than on a pool-wide basis. And the very pool-wide pattern of development set by the OCC through the

amendment to the Pool Rules may itself contribute to surface waste and public health and environmental impacts—impacts that cannot be remedied by subsequent, piecemeal, well-by-well approvals. The amendment to the Special Rules "opens the barn door" to massively expanded surface operations, and those operations and their impact are a relevant factor OCC is obliged to consider to ensure the Special Rules are well-tailored and comport with the OCC's statutory responsibilities. Accordingly, OCC's failure to consider these relevant factors is arbitrary and capricious, demonstrates OCC's decision is unsupported by substantial evidence, and is contrary to law. A rehearing to address these issues in full is therefore required.

III. SJCA was improperly denied intervention in the September 13th and November 19th hearings

In both its September 6th and November 9th notices of intervention, SJCA demonstrated it has standing to intervene in this matter. SJCA also demonstrated that intervention is required because SJCA's participation would "contribute substantially to the prevention of waste [and] ... protection of public health or the environment." NMAC 19.15.4.1 l(C).

Nonetheless, OCC granted Hilcorp's motion to strike SJCA's September 6th and November 9th notices of intervention, concluding SJCA did not have a legal basis to intervene and could not demonstrate it had the "special expertise to contribute substantially to the particular issues before the Commission." December 4th Order at 4. This conclusion was based on OCC's determination (despite the OCC's own questions for Hilcorp on surface impacts) that Hilcorp's application involved purely underground waste and correlative rights. *Id.* at 5. In confining its decision-making process to this narrow set of issues, the OCC improperly writes out of existence its broader responsibility to allow intervention to any prospective party, not just SJCA, to "substantially contribute to the prevention of waste"—which is expressly *not* limited to

underground waste but, rather, waste broadly; i.e., underground *and* surface waste—or to the "protection of public health or the environment." NMAC 19.15.4.1l (C).

The OCC also ignored evidence and authority explaining the exception in NMAC 19.15.4.1l(C) was designed specifically to allow the participation of citizen organizations such as SJCA in adjudicatory proceedings to provide OCC with a full spectrum of evidence to weigh in its decision-making process. As the Chair of OCC explained at the time this exception was adopted, "the concept of standing is broad enough to provide meaningful public participation [in adjudicatory proceedings] from most of the citizens of New Mexico" but the exception would go further and allow people to "meaningfully participate in the process" who had a "a reason based in the mandates that the Legislature had given to the Oil Conservation Division" (referring to "the prevention of waste, protection of correlative rights, and the protection of public health and the environment"). SJCA's Ex. E to its November 9 Notice of Intervention, at 216. In short, the threshold to intervene is low, reflecting OCC's mandates and position as a public agency.

OCC's decision to deny SJCA intervention was thus arbitrary and capricious, unsupported by substantial evidence, and contrary to law and therefore supports SJCA's motion for a rehearing.

IV. OCC improperly considered Hilcorp's application through an adjudication rather than as a rulemaking

OCC inappropriately excluded the public from meaningful participation in this matter, allowing public comment, but through a means that did not require OCC to give that comment any weight. While OCC allowed public comment at the September 13th and November 19th hearings on this application, Chairwoman Riley described OCC's decision to do so at the start of the November 19th hearing thus:

> Concerning public comment, as I mentioned, the rules for this proceeding do not contemplate public comment. Consequently, public comment here – well, we are going to consider public comment, and it will be part of the record, but we can take into consideration whether or not to use that public comment for our decision-making.

Case No. 16403, Reporter's Transcript of Proceedings, Commissioner Hearing, (November 19 2018) at 10-11. Chairwoman Riley thus admitted that while the public could make statements, they were denied meaningful participation in the process or any guarantee the OCC would in fact consider and address public concerns. As evidenced by the record, the OCC did not consider public concerns, at least not meaningfully. However, there was broad public interest in this matter, and OCC should have considered Hilcorp's application as a rulemaking, rather than an adjudication, to provide the public a meaningful opportunity to be heard.

Under OCC's own rules, NMAC 19.15.3.8(D) specifically exempts "special pool orders" from rulemaking proceedings and provides that OCC "may" adopt special pool orders through adjudicatory proceedings. By using the word "may," the rules give OCC the authority to elect to follow rulemaking procedures instead of adjudicatory procedures when changing special pool rules, including when it must as a matter of law. Yet the OCC did not even consider its discretion, categorically determining Hilcorp's application an adjudication and ending any deeper inquiry into whether or not it should have been considered as a rulemaking. As a matter of an exercise of discretion, this is arbitrary and capricious. It is also, here, contrary to law. New Mexico provides statutory rights to procedural due process for the public in the development of law and policy by state agencies, and OCC improperly relied on the narrow holding in *Uhden v. New Mexico Oil Conservation Comm'n*, 817 P.2d 721 (1991), ignoring broader and applicable precedent as well as core notions of fairness it is mandated to consider, in concluding Hilcorp's application implicated an adjudication, not a rulemaking.

In *Uhden*, the plaintiff was a mineral rights holder who did not receive personal notice of a rulemaking hearing regarding a spacing change in the pool in which her mineral rights were contained. 817 P.2d 721, 723 (NM 1991). The Court, without considering New Mexico or U.S. Supreme Court precedent on the distinction between rulemakings and adjudications, held that in fairness to the mineral rights holder, she should have been provided personal notice. *Id.* To remedy this failure, the Court referenced an Oklahoma case to conclude that spacing changes in a special pool should be held as an adjudication. *Id.* This decision lies in contrast to U.S. Supreme Court and New Mexico case law distinguishing rulemakings and adjudications, which hold that, "while rulemaking creates generally applied standards to which an agency and individuals are held, adjudication is the resolution of particular disputes involving specific parties and specific problems, by applying such rules." *Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Comm'n*, 374 P.3d 710, 714 (NM Ct. App. 2016) (*cert. denied* Apr. 15, 2016). Here, Hilcorp's application sought to change generally-applied standards governing the entirety of the 1.3-million-acre Blanco-Mesaverde Gas Pool that necessarily implicated broad public interest and the surface estate of San Juan and Rio Arriba Counties that overlay the Pool.

In *Johnson v. New Mexico Oil Conservation Commission*, which followed *Uhden*, the New Mexico Supreme Court clarified the distinction between adjudications and rulemakings in spacing change hearings before the OCC that affect both the public interest and individual mineral rights. 978 P.2d 327 (NM 1999). In that case, the OCC had increased wildcat well spacing requirements through a rulemaking proceeding, and failed to personally notify certain affected mineral rights holders. *Id.* at 328. The Court did not overturn *Uhden*, but pointed to the *Uhden* Court's mistake in relying on constitutional law rather than statutory rights of mineral rights holders, highlighting OCC rules providing that interested parties must be provided

"reasonable notice" of rulemaking proceedings. *Id.* at 331. The Court also pointed to the requirement of "actual notice" to property rights holders in adjudicatory proceedings, explaining, "[i]t is well established that notice requirements are determined on the basis of 'the character of the action, rather than its label.'" *Id.* at 333 (quoting *Miles v. Board of County Comm'rs,* 964 P.2d 169 (1998)). The Court emphasized the need for flexibility and consideration of fairness to determine whether a proceeding is an adjudication or a rulemaking. As the Court explained:

> [N]o test can draw anything like a mathematical line between rulemaking and adjudication.... [A]n adjudication may be based upon a new rule of law that is announced for the first time by the deciding tribunal. Conversely, a rule may have an effect on particular rights comparable to a decision in an adjudicatory proceeding involving the given parties.

Id. (quoting Bernard Schwartz, *Administrative Law* § 4.15, at 190 (2d ed.1984)). The Court upheld the OCC's decision to hold the proceeding as a rulemaking, but required the OCC hold the public hearing again with actual notice provided to the mineral rights holders who had not been provided notice. *Id.*at 334. *Johnson,* echoing U.S. Supreme Court and New Mexico precedent, teaches that agencies must follow the procedure that results in the fairest outcome. *See also Rayellen Res., Inc. v. New Mexico Cultural Properties Review Comm.*, 319 P.3d 639, 649 (2014) ("Procedural due process is ultimately about fairness, ensuring that the public is notified about a proposed government action and afforded the opportunity to make its voice heard before that action takes effect"). Here, as in *Johnson*, the facts of this case may compel a combination of adjudicatory protections for mineral rights holders and rulemaking protections for the broader public in the interest of fairness.

Here, OCC's contention that Hilcorp's application is an adjudication was not in the interest of fairness as it excluded the public from meaningful participation in an issue that was of broad public interest, affected 1.3 million surface acres stretched across two separate New

Mexico counties and multiple federal, state, and local jurisdictions, and was the only meaningful time for the public to express their concerns about the total, cumulative impacts of doubling the well spacing and density across the entire Pool. OCC made the wrong decision in choosing to hold the hearing as an adjudication rather than a rulemaking, serving neither the interests of fairness nor respecting legal precedent describing the factors it should have considered in deciding what procedures it should have followed in this matter.

V. OCC improperly denied SJCA's motion for a continuance

As described in Section III above, OCC improperly denied SJCA intervention in this proceeding, and therefore improperly refrained from substantively considering SJCA's motion for a continuance. As SJCA described in its November 16th Motion, important information from the U.S. Environmental Protection Agency and the U.S. Bureau of Land Management had been requested by SJCA and is pending release. This information is relevant to SJCA's substantive concerns about the OCC's decision to increase well density across the entire Blanco-Mesaverde Gas Pool, and implicates OCC's surface protection mandates. Furthermore, New Mexico federal and state political leadership, inclusive of Governor-elect Michelle Lujan Grisham, New Mexico State Land Commissioner-Elect Stephanie Garcia Richard, New Mexico House Majority Leader Peter Wirth, and Chairman of the New Mexico House Energy, Environment, and Natural Resources Committee Matthew McQueen, Senator Tom Udall, Senator Martin Heinrich, Representative Ben Ray Lujan, and the Rio Arriba County Commission all requested that the OCC continue the proceeding pending the production of additional information from EPA and BLM. Additionally, OCC failed to require the attendance of Hilcorp's witnesses, raising serious procedural concerns regarding OCC's November 19th hearing by denying SJCA the opportunity to cross-examine Hilcorp's witnesses if SJCA had been granted intervention. The OCC should

have provided SJCA the opportunity to intervene and should have given these arguments due consideration.

VI. OCC appears to have made a pre-determined decision

Under New Mexico law, in order to comply with due process requirements, an "administrative tribunal" requires "an impartial decision-maker." *State ex rel ENMU Regents v. Baca*, 189 P.3d 663, 667 (2008) (quoting *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell,* 882 P.2d 511, 520 (1994)). The New Mexico Court of Appeals elaborated on this requirement, explaining:

> A fair and impartial administrative hearing requires, at a minimum:
> > that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. In addition, our system of justice requires that the appearance of complete fairness be present.

ERICA, Inc. v. New Mexico Regulation & Licensing Dep't, Alcohol & Gaming Div., 184 P.3d 444, 458–59 (2008) (quoting *Colonias Dev. Council v. Rhino Envtl. Servs., Inc.,* 81 P.3d 580 (2003) (internal quotation marks and citation omitted), *rev'd on other grounds,* 117 P.3d 939 (2005)). This requires the administrative decision-making body to avoid the appearance of bias, including making a predetermined decision prior to an administrative hearing.

Concurring in a decision by the New Mexico Court of Appeals, Judge Hernandez agreed with the majority that a hearing by an administrative agency should be reversed, given that the citizen who had requested a hearing was not provided with all the evidence against him prior to the hearing. Judge Hernandez emphasized:

> I recognize that one of the main purposes of administrative law is to provide a more flexible and informal procedure than is possible before courts. However, informality must not be practiced to the point that a hearing becomes a summary proceeding, a mere formality preceding a predetermined result.

First Nat. Bank v. Bernalillo Cty. Valuation Protest Bd., 560 P.2d 174, 180 (1977).

Unfortunately, in the November 19th hearing OCC held on Hilcorp's application, Chairwoman Heather Riley made a statement at the beginning of the hearing that made it clear the Commissioners had already made decisions about how they would rule on SJCA's pending motions. At the beginning of the November 19th hearing, Chairwoman Riley stated:

> So before we get started, I have a statement I'd like to read, if you-all will bear with me, please.
>
> Before we start with today's proceedings, I want to comment on certain concerns that have been raised and outline a few procedural matters pertaining to today's hearing. First I want to thank all of you for your interest in this matter. It's good to see so much interest in what is taking place in our community and that so many are willing to be involved. Having said that, it's important that everyone interested in this proceeding and here today understand the scope and context of the hearing.
>
> The Oil Conservation Division classifies wells and establishes well location and well acreage requirements for operators within spacing units, approves unorthodox well locations and approves pooling. The Division's primary statutory obligation is to prevent waste and protect correlative rights. The prevention of waste includes taking actions to ensure the underground resource is efficiently and completely recovered, leaving no waste.
>
> Today's hearing considers an application to adjust the prescriptions for the Blanco-Mesaverde Pool in northwest New Mexico. By rule, this matter is an adjudicatory, not a rulemaking proceeding. The distinction is important because different procedural and notice requirements apply depending on the type of proceeding. Adjudicatory hearings before the Division or the Commission are not subject to public comment. Further, a pooling application determines how many wells it takes to effectively recover the minerals from beneath the surface without causing waste or impacting correlative rights. The application before the Commission does not implicate or consider surface impacts. It is entirely a downhole, subsurface matter.
>
> To the extent that there are surface considerations, those are considered and regulated by the relevant surface owner or manager, BLM, State Land Office and fee owners and managers. If the Commission were to approve the application being considered today, that would not mean that the Applicant had the necessary approvals and permits to drill any well. Rather, an approval would simply mean that the pool in question is able to effectively drain by the well density approved by the Commission. It is not the jurisdictional charge of the Commission to waive [sic] potential surface issues against subsurface resource recovery management considerations. Those considerations are for another day and would be before the relevant surface owner or manager, not the OCD or the OCC.
>
> Someone has raised the specter of impropriety regarding certain Commissioners participating in this proceeding alleging conflict of interest. Each Commissioner here takes their role as impartial adjudicator very seriously. The allegation of conflict has been examined by counsel, who determine that there is no conflict of interest for any of us to hear this matter.

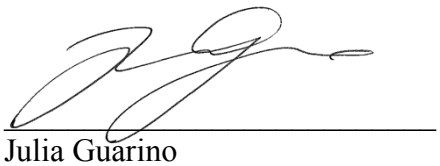
Case No. 16403, Reporter's Transcript of Proceedings, Commissioner Hearing, (November 19, 2018) at 8-10.

In making this statement, Chairwoman Riley summarily dismissed the substance of SJCA's pending arguments presented in its motions, before the hearing even began or argument was heard. This concern is magnified by Hilcorp's failure—with the OCC's blessing—to bring its expert witnesses to the November 19th hearing for cross examination. Furthermore, SJCA was not served with nor aware of Hilcorp's supplemental filings in support of its application for the November 19th hearing, and those filings were not available on the OCC's website until after the hearing had concluded. Put simply, the OCC's hearing appeared to only be held to confirm its predetermined decision to approve Hilcorp's application. OCC's actions are therefore arbitrary and capricious, unsupported by substantial evidence, and contrary to law. Accordingly, the OCC should grant SJCA's motion and hold a new hearing to provide a full and fair opportunity for SJCA to participate in and to ensure the OCC makes a reasoned and informed—rather than predetermined—decision.

CONCLUSION

SJCA respectfully requests that OCC reverse its decision in the December 4th Order and hold a new hearing on Hilcorp's application, giving due consideration to the concerns SJCA presents in this Motion.

Respectfully Submitted,



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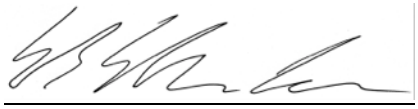

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2018, I served a copy of the foregoing documents to the following counsel of record via Electronic Mail:

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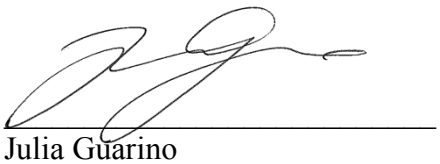

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