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

APPLICATIONS OF ASCENT ENERGY, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

OCC Case Nos. 21277 & 21278
(Division Case Nos. 16481 & 16482)

AMENDED APPLICATIONS OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF A HORIZONTAL SPACING UNIT AND POTASH DEVELOPMENT AREA, EDDY COUNTY, NEW MEXICO

OCC Case Nos. 21279 & 21280
(Division Case Nos. 20171 & 20202)

ORDER R-21258

ASCENT ENERGY, LLC'S REPLY TO MEWBOURNE OIL COMPANY'S RESPONSE TO APACHE CORPORATION'S (AMENDED) MOTION TO STAY *DE NOVO* HEARING IN CASE NOS. 21277 - 21280

Ascent Energy, LLC ("Ascent") submits its Reply to Mewbourne Oil Company's Response to Apache Corporation's Motion to Stay the *De Novo* Hearing in Case Nos. 21277-21280 ("Mewbourne's Response"), which was filed in support of Apache Corporation's Motion to Stay the De Novo Hearing in Case Nos. 21277 – 21280 ("Apache's Motion to Stay"). It is Ascent's position that the Commission should proceed with the *de novo* hearing as scheduled for September 17, 2020, as this procedural pathway avoids entanglement with a number of unresolved issues facing both the Commission and Division and allows for the timely and proper adjudication of the cases in a manner that does not prejudice Ascent. By deciding the unresolved issues upfront, the Commission would place the Division in the procedurally proper position to hear, after the *de novo* hearing, both the pending applications of Mewbourne Oil Company

("Mewbourne") and new applications that Apache Corporation ("Apache") intends to submit. Mewbourne's Response does not provide good cause for the Commission to adopt the procedural pathway proposed by Apache. In support of its Reply to Mewbourne's Response, Ascent states the following:

1. In its Response to Motion, Mewbourne proposes that the Commission should hold one *de novo* hearing on Mewbourne's pending applications after the Division has had the opportunity to hear the applications of both Mewbourne and Apache, since Mewbourne's "applications cover the W/2 of Sections 33 and 28". *See* Mewbourne's Response at ¶ 11. However, the inclusion of additional matters or proceedings, such as the E/2 W/2 Lands and Apache's proposed pooling applications, detract from the Commission's focus of "the matter" under review and are beyond the scope of NMAC 19.15.4.23(A).

2. The W/2 W/2 of Sections 28 and 33, Township 20 South, Range 30 East, Eddy County, New Mexico ("W/2 W/2 Lands") are procedurally distinguishable from the E/2 W/2 of Sections 28 and 33 ("E/2 W/2 Lands"). The Division has entered a valid and binding pooling order for the W/2 W/2 Lands, and neither Mewbourne nor Apache, under the pooling statutes, can collaterally challenge the existing pooling order at this point in the proceedings. Mewbourne and Apache did not submit an application to reopen Case Nos. 16481 or 16482 based on any deficiency in the proceedings or new evidence. Instead, Mewbourne and Apache chose to file applications for a *de novo* hearing seeking the Commission's review of Order No. R-21258 pursuant to the terms of a specific statute, NMSA 1978 § 7-2-13.

3. Once Mewbourne and Apache invoked this statute, the Division's rule that applies the statute to the *de novo* hearing becomes operative: "When the division enters an order pursuant to a hearing that a division examiner held…[and] [i]f a party files an application for a

de novo hearing, the commission chairman shall set the matter or proceeding for hearing before commission." NMAC 19.15.4.23(A) (emphasis added). The terms of this rule are specific, direct and forceful. The rule does not say "matters," or "related matters," but "the matter;" in other words, "the matter" that is the subject of the Commission's *de novo* hearing is the "hearing that a division examiner held." Nor does the rule say proceedings in the plural, but only the singular "proceeding" of the original hearing. The matter in Order No. R-21258, for which Mewbourne and Apache requested the *de novo* hearing, involve only the development plans for the W/2 W/2 Lands, which with respect to Apache, does not include a pooling request.

4. New Mexico case law provides limited guidance regarding the proper jurisdiction of the Division and Commission in this matter, but Oklahoma courts, dealing with similar pooling statutes, have thoroughly litigated this question. In *Chesapeake Operating Inc., v. Burlington Resources Oil and Gas Company,* 60 P.3d 1052, 1055 (Oka. Civ. App. 2002), the court noted the OCC properly dismissed an application that infringed upon an existing order, "determining that the matter was *res judicata* based on prior orders of the Commission." Thus, by this example, reinforced by NMAC 19.15.4.23(A), the Division should not hear the applications of Mewbourne and Apache that compete directly with Order No. R-21258 and the W/2 W/2 Lands. At this juncture in the proceedings, statutory and regulatory authority only permit the Commission to hear applications involving the W/2 W/2 Lands under *de novo* conditions. *See* Continental Oil Co. v. Oil Conservation Commission, 373 P.2d 809, 813 (N.M. 1962) (stating: "The [OCC] is a creature of statute, expressly defined, limited and empowered by the laws creating it.")

5. In addition, the W/2 W/2 Lands are factually distinguishable from the E/2 W/2 Lands. Based on precedent, the Commission has the authority to credit working interest to

Ascent that it earned under its Pooling Order. *See* Order No. R-10731-B, ¶ 23(d). Such distribution of interest would result in Ascent having 50% working interest in the W/2 W/2 Lands, matching Mewbourne's 50% interest. This would allow the Commission to consider the remaining factors of (1) who did the work to initiate and pursue development of the W/2 W/2 Lands, and (2) who should be viewed as a prudent operator. Denying Ascent the opportunity to make its case for this distribution, prior to the Division's review of the E/2 W/2 Lands, would be highly prejudicial to Ascent.

6. Mewbourne's claim that its correlative rights were violated, and therefore, the Division must intervene on behalf of Mewbourne is misplaced. *See* Mewbourne's Response at ¶ 7, fn 4; *see also,* Response at ¶ 12. The role of the Division and Commission, by legislative mandate, is to protect "the public interest" by determining that each owner receive its share of production "without waste." *Continental*, 373 P.2d at 818. In this way, the Division performs "its functions to conserve a very vital resource." *See id.* Absent their role in this regard, "the public would not be represented." *See id.* Mewbourne, although present during the hearing, chose not to present any evidence nor did it indicate that it would be adversely affected by the Division's ruling on correlative rights.

7. Mewbourne's claim regarding its correlative rights arises not from the Division's mandate to protect correlative rights on behalf of public interest but from a private dispute between Mewbourne and Ascent over the application and interpretation of a the Letter Agreement and subsequent discussions as set forth in Ascent's Response at ¶ 8. This distinction made by New Mexico's *Continental* court is fully fleshed out by Oklahoma's *Chesapeake* court, in which it held that "disputes over *private rights* are properly brought in the district court …. The [C]ommission's jurisdiction is limited to protection of public rights in development and

production of oil and gas. *Leck v. Continental Oil Co.,* 1989 OK 173, ¶ 7, 800 P.2d 224, 226 (emphasis in the original). Interpretation of the applicability of the [contract] would be beyond the Commission's conferred jurisdiction because it concerns a dispute in which the public interest in correlative rights is not concerned." *Chesapeake* 60 P.3d at 1057 (Footnotes omitted, emphasis in the original).

8. As noted in *Continental,* "the commission cannot perform a judicial function." *Continental,* 373 P.2d 809 at 819. Thus, because Mewbourne's suggestion that its correlative rights were violated is founded on a breach of contract claim, the only venue for adjudicating this claim is district court, where a remedy for the alleged breach is available. If Mewbourne prevails on its claim, the court could award either damages or specific performance which would restore Mewbourne to its original position prior to the hearing; however, if Ascent demonstrates that Mewbourne did not satisfy the requirements for the closing on March 6, 2019, and thereafter the parties were unable to reach an enforceable agreement, Ascent would prevail. The Division properly accounted for correlative rights at its hearing, and neither the Division nor Commission is authorized, under NMSA 1978 § 7-2-13 or NMAC 19.15.4.23(A), to vindicate either party in this contractual dispute. *See* Leede Oil & Gas v. Corporation Comm'n, 747 P.2d 294, 296 (Okla. 11987) (holding that "where [a] dispute concerned private rights arising from contract rather than a public issue right regarding conservation of oil and gas arising from the Commission order, we found jurisdiction to properly lie in the district courts rather than in the Corporation Commission.")

9. Another question that now complicates the procedural matters for the Division and Commission is how to address the BLM's interest in the W/2 W/2 Lands. In its Motion to Dismiss, EOG first raised the issue of whether the Division should hear Apache's competing

application in the original hearing because primary jurisdiction for granting rights for the Development Area ("DA") resides with the BLM. *See* Testimony of Mr. Padilla discussing his Motion to Dismiss at the August 20, 2020 Division Hearing, at p. 88:19-22 ("Based on the Secretaries Order, [the BLM] ultimately have jurisdiction over anything, and they could bypass the OCD on this issue."). Copies of the pertinent pages of the Hearing Transcript are attached hereto as Exhibit A.

10. In fact, Apache agreed with EOG's assessment "that the issue concerning approval of the development area within the potash area is a decision for the BLM. *See* August 20, 2019 Hearing Transcript at 84: 9-10, Exhibit A. On April 16, 2020, the BLM granted the development and operations of the W/2 W/2 Lands to Ascent. Zink Affidavit at ¶ 12, attached to Ascent's Response at Exhibit A. Not only should the Division refrain from hearing the applications of Apache and Mewbourne under *res judicata* and the proper application of the Division's rule for a *de novo* hearing, but hearing their applications without the Commission first reviewing the impact of the BLM's decision could result in an inefficient waste of the Division's resources.[1]

11. Mewbourne's Response in support of Apache's Motion to Stay fails to establish good cause to stay the *de novo* Commission hearing on the W/2 W/2 Lands. If the normal, orderly course of procedure is followed, the Commission will address unsettled issues, including whether the BLM's grant of Ascent's development plan bars Mewbourne's and Apache's competing applications, thereby achieving an efficient, fair and timely resolution of all competing development plans.

[1] EXAMINER BRANCARD: So essentially what we have here is the BLM refusing to make a decision on an application that is before the BLM and suddenly somehow morphing that application before a state agency. That's what it looks like to me. August 20, 2019 Hearing Transcript at 157: 24-25 and 158: 1-3, attached as Exhibit A.

For the foregoing reasons, Ascent remains opposed to Apache's Motion to Stay and respectfully requests from the Commission that it be denied.

Respectfully Submitted,

ABADIE & SCHILL, PC

/s/ Darin C. Savage

_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the New Mexico Oil Conservation Division and was served on counsel of record via electronic mail on August 18, 2020:

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

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF ASCENT ENERGY, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.	CASE NOs. 16481, 16482
AMENDED APPLICATION OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF A HORIZONTAL SPACING UNIT AND POTASH AREA DEVELOPMENT AREA, EDDY COUNTY, NEW MEXICO.	CASE NO. 20171
APPLICATION OF APACHE CORPORATION FOR COMPULSORY POOLING AND APPROVAL OF A HORIZONTAL SPACING UNIT AND POTASH AREA DEVELOPMENT AREA, EDDY COUNTY, NEW MEXICO.	CASE NO. 20202

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

August 20, 2019

Santa Fe, New Mexico

BEFORE: WILLIAM V. JONES, CHIEF EXAMINER
DYLAN ROSE-COSS, TECHNICAL EXAMINER
BILL BRANCARD, LEGAL EXAMINER

This matter came on for hearing before the New Mexico Oil Conservation Division, William V. Jones, Chief Examiner; Dylan Rose-Coss, Technical Examiner; and Bill Brancard, Legal Examiner, on Tuesday, August 20, 2019, at the New Mexico Energy, Minerals and Natural Resources Department, Wendell Chino Building, 1220 South St. Francis Drive, Porter Hall, Room 102, Santa Fe, New Mexico.

REPORTED BY: Mary C. Hankins, CCR, RPR
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EXHIBIT
A

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EXAMINER BRANCARD: So, Mr. DeBrine, I guess I was confused by your opening statement. What exactly are you asking the Division for in this hearing?

MR. DeBRINE: We are not asking for an order pooling the uncommitted interests that were identified -- for the wells that are identified in our application because we don't believe that the pooling issue is ripe for decision.

Partly we agree with Mr. Padilla, that the issue concerning the approval of a development area within the potash area is a decision for the BLM. The BLM has essentially punted and said, "Okay. Go forward, present evidence to the Division, and then we'll make a decision ultimately on what the approved development area will be." But based on the discussions that we had with working interest owners when we proposed the wells, you know, they were willing to commit either to a JOA or sell interest, and the testimony will bear this out. But they felt that pooling was inappropriate until they knew that one plan or the other was going to be in place to whether they should commit to one plan or the other.

And that's a problem that you have with competing development areas like this. It's really not ripe. You can't really make an intelligent decision if you're going to participate in one or the other until

MR. BRUCE: I think -- I agree with Mr. Padilla, that development areas are totally within the purview of the BLM, and this is all federal land. And I don't think -- I know the Division has never approved a development area, and I don't think it's anything the Division has any authority over. And since -- they've said they're not pooling anything. The only company here with a concrete application is Ascent, and I would ask that their objections be -- to Ascent's plan be overruled and that Ascent's applications be granted.

EXAMINER BRANCARD: Mr. Padilla, what was the basis for your motion to dismiss? I'm sorry. I haven't read it.

MR. PADILLA: The basis of the motion was jurisdictional. Ultimately -- well, here you're faced with two development plans, and EOG is faced with two development plans, the east-west proposal advanced by Apache, the north-south advanced by Ascent. And EOG has very limited acreage but still limited acreage. They're looking to see which development plan is going to strand less of their acreage that's not included in either of the north-south proposal or the east-west proposal. EOG believes that some of their acreage is going to get stranded.

But the problem -- the main problem is that you can have all the discussion, you can go back and forth here, and come up with some decision, whether it's approval of the development plan proposed by Apache or the compulsory pooling application that specifies a spacing unit under Ascent. And compulsory pooling obviously is within the jurisdiction of the OCD.

But the main thing is that because of the potash area, the BLM is ultimately going to decide, based on potash and based on the recommendation by the OCD probably -- I don't think they're going to ignore the OCD's decision. But their concern is that they can't jump to either side or support one or the other the way things are given that the BLM ultimately will make a decision and approve the APDs whether they're Apache's or Ascent's.

My experience has been OCD decisions are basically followed by the BLM, but by the same token, they could say, "No, we don't agree." Based on the Secretary's order, they ultimately have jurisdiction over anything, and they could bypass the OCD on this issue. And I haven't seen anything that really says that the BLM wants the OCD to make the decision. There's nothing there that I've seen in these cases that say we're ultimately going to go by what the OCD

explains the 30-day notice period, and within that 30 days, that's where you protest. So Ascent did theirs. We protested. We filed ours. They protested us. So nothing happens with those permits until this is resolved.

Q. (BY EXAMINER BRANCARD) I'm sorry. "This" being?

A. The conflict of the development areas.

Q. Right.

Which is before the BLM. This is a conflict before the BLM. How did it end up here? That's what I want to know.

A. So if you read further in your email, in the email that's in front of you, this where he walks through the process. So he talks about 30-day notice. He talks about the parties coming together to try to collaborate. And then in the second-to-the-last sentence of that middle paragraph, he says, "If still no resolution, the protest goes before OCD. Until recently, we have not had any of the meetings progress to that point, but in the last six months, I believe at least three, maybe four have gone to hearing." And if you needed --

EXAMINER BRANCARD: So essentially what we have here is a BLM official refusing to make a decision

on an application that is before the BLM and suddenly somehow morphing that application into an application before a state agency. That's what it looks like to me.

MR. BRUCE: I would agree with you, Mr. Examiner.

EXAMINER BRANCARD: Okay. We'll try to resolve this here.

MR. DeBRINE: Mr. Examiner, just so I can speak to the issue. We had a prehearing conference with Mr. Brooks, who was the Division's counsel, back in January. These issues were argued and fleshed out there, and it was agreed and the ruling was that the issue was ripe for decision because the BLM had told the parties to go to the Division to get a decision with regard to the competing development areas. And so we proceeded in accordance with the ruling by the hearing examiner at the hearing conference. And, you know, we could have amended applications to do things differently, but we were on a path that the Division had blessed at that point.

And I know you're coming to this hearing fresh, without having the benefit of participating in that hearing, but we think it was very clear that the BLM told the parties to come to the Division because it has a process, an adversary process, in which witnesses