**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 No. R-21454**

**ASCENT ENERGY, LLC'S REPLY TO MEWBOURNE OIL COMPANY'S RESPONSE IN OPPOSITION TO ASCENT ENERGY LLC'S MOTION TO REHEAR ORDER NO. R-21454**

Ascent Energy, LLC ("Ascent") submits its Reply to Mewbourne Oil Company's ("Mewbourne") Response in Opposition to Ascent Energy, LLC's Motion to Rehear Order No. 21454 ("Mewbourne's Response") in order to provide the Oil Conservation Commission ("Commission") a clarification of Ascent's position in relation to the arguments advanced by Mewbourne. In support of its Reply to Mewbourne's Response, Ascent states the following:

1. It is beyond dispute that when the Oil Conservation Division ("Division") issued Order No. R-21258, it had finalized its adjudication of all facts and issues for protecting correlative rights and preventing waste in the subject lands and units. However, Mewbourne and Apache Corporation ("Apache") are seeking to re-litigate these same facts and issues in Mewbourne's new applications for the W/2 W/2 of Sections 28 and 33 ("W/2 W/2 Lands")

T20S, R30E, and Apache's yet to be submitted applications for the N/2 of Sections 28 and 29, and NE/4 of Section 30 ("Apache Unit") T20S, R30E.

2. The Division completed its statutory duties for these lands and units pursuant to the Oil and Gas Act; thus, it is not authorized to hear or rehear these same matters after the Commission has granted Mewbourne's application for a *de novo* hearing. Mewbourne did not apply to the Division to reopen the cases in order to have the order modified based upon a procedural omission or defect. Instead, Mewbourne relied on N.M.S.A. 1978, § 70-2-13 to initiate an appellate review by the Commission. Consequently, Mewbourne misapplies its case authority of *Property Tax Dept. v. Molycorp., Inc.* 555 P.2d 903 (N.M. 1976) and disregards the relevant holdings in Ascent's case authority of *Amoco Production Co. v. Heiman*, 904 F.2d 1405, 1414 (10th Cir. 1990) that gives preclusive effect to an agency's decision. *See* Mewbourne's Response p. 4, ¶ 6.

3. An agency can modify an existing order pursuant to a proper reopening of the case for a valid reason; but neither Mewbourne nor Apache have requested the Division to reopen the cases nor have they provided any valid reasons for doing so. They requested an appellate review by the Commission under *de novo* conditions. In its original hearing, the Division issued a final order that is subject to *de novo* review by the Commission under § 70-2-13, the same way a final order by a district court is subject to a *de novo* hearing by an appellate court. Contrary to Mewbourne's assertion that the Division order is not final because it is subject to appellate review by the Commission, the fact that an order is subject to appellate review does not erase the Order's finality insofar as it applies to the Division's jurisdiction to reconsider the facts and issues it has already decided, as provided under case law, statutory mandate, principles of civil procedure and *res judicata*. The Division's order is ripe for appellate

review by the Commission and the Commission has agreed to hear it precisely because it is a final order pursuant to a final decision. If it were not final, the order would not qualify for the appellate review provided by the Commission's *de novo* hearing.

4. New Mexico has adopted "the transactional approach in analyzing the single-cause-of-action element of *res judicata*," which considers "all issues arising out of a 'common nucleus of operative fact' as a single cause of action," as follows: (1) how they relate in time, space or origin; (2) whether, taken together, they form a convenient trial unit, and (3) whether their treatment as a single unit conforms to the parties' business understanding or usage. *See Potter v. Pierce*, 342 P.3d 54, 57 (N.M. 2015). When the Division adjudicated Apache's and Ascent's applications in the presence of Mewbourne, it satisfied all three criteria, thus creating a final decision with preclusive effect at the Division level for the matter and issues involving the protection of correlative rights and the prevention of waste.

5. Furthermore, the *Amoco* court found that the NMOCC's adjudicatory process is entitled to preclusive effect because: (1) the parties who appeared before the agency were represented by counsel; (2) witnesses were cross-examined; (3) documentary evidence was introduced; and (4) the agency rendered findings. *See Amoco,* 904 F.2d at 1419. Again, the Division satisfied these criteria when it rendered in a judicial capacity its final decision on correlative rights and waste for the W/2 W/2 Lands and the Apache Unit; and therefore, the Division is precluded from repeating such hearings on this matter. Mewbourne and Apache must abide by the appellate procedure inscribed into the plain language of § 70-2-13. As Mewbourne asserts, its new pooling applications for the E/2 W/2 of Sections 28 and 33 are "no different from the other pooling applications heard by the Division,"[1] and therefore they should be heard by the

[1] It may true that in form Mewbourne's applications are no different from other pooling applications, but the context and genesis of the application are unique, in that "but for" its breach of contract claim,

Division in the first instance, under normal procedures, and must not be included in the *de novo* hearing designed specifically for review of correlative rights and waste in the W/2 W/2 Lands and the Apache Unit.

6. Contrary to Mewbourne's description of the scope of the Commission's and Division's concurrent jurisdiction, NMSA 1978 §§ 70-2-6 and 70-2-11 do not provide cart blanche license for the Division and Commission to undertake an unqualified, indiscriminate review of correlative rights and waste; both statutes state the "commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law." *See id.* at § 70-2-6(B) and -11(B). This language of limitation restricts the Division and Commission to mutually exclusive roles in the Oil and Gas Act when specific statutes so prescribe.[2] Thus, when the Division enters an order pursuant to a hearing that a division examiner held, the singular role of the Commission, as required by § 70-2-13 and Rule 19.15.4.23(A), is to set the matter for hearing before the Commission, and not include, as required by law, other matters, new applications or rehearings by the Division that risk inconsistent decisions, prejudice or gratuitous advantage.

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Mewbourne would not have filed these applications, a fact that not only was acknowledged by Mewbourne in its briefings, but was immediately identified by both Apache and Ascent in their briefings, that Mewbourne's applications arose from a contract dispute and therefore the Commission does not have jurisdiction to hear them as part of its *de novo* hearing unless they were part of the original hearing. Proper venue is in district court. However, Mewbourne's new application for the W/2 W/2 Lands only might be part of a sufficient nexus with the original hearing to warrant review by the Commission.

[2] Not only are separate and distinct roles of the Division and Commission prescribed by § 70-2-13 in relation to § 70-2-6, but separate roles of the Division and Commission appear throughout the Oil and Gas Act. For example, the Division "may make rules and orders" for specific subject matter under the Oil and Gas Act, *see* NMSA 1978 § 70-2-12, but the Commission, not the Division, is the body that "shall" adopt a rule pursuant to the Oil and Gas Act only "after hearing by the Commission." *See* NSMA 1978 § 70-2-12.2. Such distinctions are further reflected in NMSA 1978 § 70-2-31(E), which states "[t]he commission shall make rules, pursuant to Section 70-2-12.2 NMSA," in which it assesses penalties for violations. This authority is not granted to the Division by restrictions in § 70-2-12.

7. The Commission has encountered a similar circumstance in *Marbob Energy v. Oil Conservation Com'n*, 206 P.3d 135 (N.M. 2009) where it argued that the Division's and Commission's broad jurisdiction to protect correlative rights and prevent waste under the general statutes of §§ 70-2-6 and -11 allowed the Division to assess penalties for violations pursuant to specific statutes found at §§ 70-2-28 through -31. Mewbourne correctly points out that where the interpretation of a statute conflicts with the purpose of the statute and therefore does not reflect the legislative intent, such interpretation cannot be adopted, s*ee* Mewbourne Response, p. 3, ¶ 4, and this is precisely what the *Marbob* court found when it ruled against the Commission, holding that the Commission and Division cannot use their broad powers under §§ 70-2-6 and -11 to override the requirements of a more specific statute, as this creates a "contradiction" because the "Legislature cannot have intended both." *See id.* at 141. In the same way, the Commission must not use §§ 70-2-6 and -11 to override the provisions of § 70-2-13.

8. Contrary to Mewbourne's suggestion, Ascent is not seeking to restrict or curtail the important and necessary roles that the Division and Commission perform for the protection of correlative rights and the prevention of waste. Ascent advocates only for the proper maintenance of procedural due process and the integrity of statutory language in order to provide applicants a judicially fair playing field where the Division and Commission can properly exercise their roles to the full extent of the law under the statutory provisions of the Oil and Gas Act. Applicants should be provided a basis that allows them to reasonably rely on orders issued by the Division, and if an opposing party rightfully applies for appellate review pursuant to § 70-2-13, then under such circumstances, all parties involved should be provided a reasonable basis for anticipating how the proceedings of the *de novo* hearing will be conducted and what matter or proceeding the Commission will review. Even if the factors of efficiency of process and the

preservation of administrative resources argued against Ascent's position, which they do not, these factors should not be the main considerations in the Commission's review. Fairness, avoidance of prejudice, procedural due process, reliability, and compliance with proper statutory guidance and legislative intent should be given equal priority, if not more.

For the foregoing reasons, Ascent maintains its position that Order No. R-21454 should be reheard and therefore respectfully requests that the Commission grant Ascent's Motion to Rehear.

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 Commission and was served on counsel of record via electronic mail on September 16, 2020:

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