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 **Case No. 21324**

CLOSING ARGUMENT AND PROPOSED FINDINGS AND CONCLUSIONS

Applicant Tom M. Ragsdale ("Mr. Ragsdale") hereby submits closing argument, proposed findings of fact, and proposed conclusions of law, as requested by the Hearing Examiner at the hearing in this matter on September 11, 2020.

SUMMARY OF ARGUMENT

Mewbourne assumed the risk by drilling the 10/15 2H prior to obtaining a compulsory pooling order. *Cf. 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 (July 17, 2003) (referencing the testimony of the Division's petroleum engineer: "[I]f the operator has already drilled a new well prior to seeking a compulsory pooling order, that fact evidences that it was willing to assume that risk regardless of whether the pooled owners participated or not."); *id.* at 8, ¶ 41 ("An applicant who has drilled a new well prior to applying for compulsory pooling has assumed a risk no less than would have been the case had drilling been deferred until after entry of a pooling order, but instead has incurred, in addition to the economic risks otherwise associated with the operation, the legal risk that the Division may deny or limit its risk charge recovery."); *see also id.* at 2, ¶ 8. As established at hearing, Mr. Ragsdale never had the opportunity to elect to participate in the 10/15 2H under a forced pooling order. Consequently, Mewbourne cannot recover the costs of its

failed drilling attempts and, in particular, cannot do so by attempting to impose those costs on the costs of drilling the 15/10 2H. Its efforts to do so by surreptitiously pooling the 10/15 Wells together with the 15/10 Wells thwarts the Division's notice requirements and therefore cannot be condoned. In addition, Mewbourne failed to inform the Division of Mewbourne's intent to impose the costs of its failed attempts to drill one well on the estimated costs to drill another well.

Under these circumstances, the Division should revoke compulsory pooling Order Nos. 20894 and 20894-A for failure to provide sufficient notice as required by 19.15.4.8 NMAC. In the alternative, Mr. Ragsdale requests that the Division deem it unreasonable to impose costs for failed attempts to drill one well, the 10/15 2H, on costs to drill a different well, the 15/10 2H, when the latter does not constitute a "substitute" well as that term is defined in 19.15.13.8(B)(4) NMAC. Mr. Ragsdale further requests that the Division order relief from Mewbourne's improper conduct by requiring 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.

CLOSING ARGUMENT

I. Section 70-2-17 Limits Costs to Those Incurred in Drilling "the" Well; It Does Not Provide an Avenue for an Operator to Impose the Costs of Drilling and Plugging One Well on the Estimated Costs for Drilling Another.

Mewbourne argues that it is entitled to recover the costs for failed attempts to drill the 10/15H because under the compulsory pooling statute, NMSA 1978, § 70-2-17, it is the "well unit" that is pooled rather than "a specific well." *See* Tr. 39:18-23. However, a close reading of Section 70-2-17 reveals otherwise.

Section 70-2-17(C) expressly references the "well," as opposed to the "unit," when addressing costs. In the context of costs recoverable from a pooled working interest owner who elects not to participate, Section 70-2-17(C) provides that the parties advancing costs may recover "solely out of production . . . the actual expenditures required . . . in the drilling of ***such well***" and a risk charge based on the "nonconsenting working interest owner's . . . prorata share of the cost of drilling and completing ***the well***." (Emphasis added.) In the following sentence, Section 70-2-17(C) further states, "In the event of any dispute relative to such costs" (i.e., "the cost of drilling and completing ***the well***"), "the division shall determine the proper costs after due notice to interested parties and a hearing thereon." (Emphasis added.) Section 70-2-17(C) goes on to further identify the applicable costs to 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 owner . . . drilling or operating ***the well*** . . . have been paid the amount due" (emphasis added)).[1]

This reading of Section 70-2-17(C) is consistent with the Division's understanding, and industry practice, that an interest owner must be provided 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, Transcript of Hearing 9:2-7, 9:18-10:12 (May 2, 2019); *see also id.* at 7:8-9.

The costs of failed attempts to drill can be recovered when a "substitute well" is drilled. Division rules provide as follows:

[1] While the foregoing provisions are specific to an interest owner who declines to participate by paying costs in advance, it provides helpful guidance for costs to be paid by one who elects to participate by paying costs in advance. It would make no sense to provide more favorable terms to one who does not choose to participate by advancing costs.

> 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.

Mewbourne appears to concede that the 15/10 Wells do not satisfy the Division's definition of a "substitute well" under 19.15.13.8(B)(4) NMAC. Instead, Mewbourne argues that "there has to be some flexibility in the Division's regulations," Tr. 39:23-40:20; suggesting that the Division should ignore the plain language of the rule and, instead, conclude that Mewbourne can impose the costs of drilling and plugging the first well on the estimated costs of drilling a subsequent well at a surface location two miles away, because Mewbourne considers drilling all of these wells a "continuous operation." *See generally* Tr. 44:2-19.

Mewbourne has to date provided no support for this novel concept, and undersigned counsel has discovered none. The term "continuous operation" is pertinent to avoiding expiration of a lease when there is no production. *See, e.g.*, *Maralex Resources, Inc. v. Gilbreath*, 2003-NMSC-023, ¶¶ 5-6, 134 N.M. 308. The term has no application to the circumstances at issue here.

The substitute well provision in 15.14.13.9(B)(4) NMAC allows the recovery of costs under the original order 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." *See* Order No. R-11992 at 4, ¶ 19 (referencing the testimony of the Division's petroleum engineer). Here, no such purpose was served. In fact, a supplemental application to the Division was required, and the 15/10 2H was not drilled until a year after Mewbourne's failed efforts with respect to the 10/15 2H. Tr. 43:15-18.

Similarly, Mewbourne contends that this is a "replacement well," which the Hearing Examiner suggested could "be deemed replacement wells by industry custom or usage." *See* Tr. 48:8-50:14 (suggesting further that "this was still . . . one continuous drilling program to develop the acreage"); *see also* Tr. 93:21-23. Again, to date, Mewbourne has provided no legal authority in support of this position. More importantly, Mewbourne provided no evidence of industry custom and usage in this regard. *See* Tr. 45:14-20 (Mewbourne's engineer testifying that he is "not entirely certain" how often Mewbourne has determined that a well such as the 15/10 2H is a substitute well for one such as the 10/15 2H). *See*:*generally* Tr. Undersigned counsel has endeavored to find legal authority relating to such a concept, but has been unable to discover any. *See generally* 19.15.13 NMAC (devoid of any reference to a "replacement" well).

Chesapeake's efforts to recover costs in *In re Application of Chesapeake Op'g, Inc. for Compulsory Pooling and an Unorthodox Well Location*, Case No. 12325, are similar to Mewbourne's efforts here. The resulting order in that case thus provides guidance. 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 pursuant to the provisions of COPAS Bulletin No. 2 "Determination of Values for Well Cost Adjustments - Joint Operations" as Chesapeake had requested *Id.* at 5, ¶ 24.[2] 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; *see id.* at 6, ¶ 28

[2] The parties subsequently entered into a joint operating agreement and jointly requested that certain portions of Order No. R-11327 be vacated. *See* Order No. R-11326-A (Aug. 23, 2000) (vacating paragraphs 12 and 15-42 of the findings and paragraph 1 and 5-22 of the ordering paragraphs of Order No. R-11327).

(recognizing that Chesapeake 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"). The ruling in the Chesapeake case is consistent with the current rule in this regard. 19.15.13.8(B)(1) NMAC provides that well costs as to a well that "was previously abandoned without completion," *inter alia*, "shall mean only the reasonable costs of reentering, 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." This is analogous to the circumstances here.

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.

II. The Application in Case No. 20809 Failed to Satisfy the Notice Requirements of 19.15.4.8 NMAC.

Division rules 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. Mewbourne failed to provide the requisite information in each step of the procedure.

Rules 19.15.4.8 and 19.15.4.9 NMAC set forth the information that must be provided in the application and notice of hearing. 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) ("[B]efore any . . . order . . . shall be made under the provisions of [the Oil and Gas Act], a public hearing shall be held . . . [and t]he division shall first give reasonable notice of such hearing . . . ."). Apparently, 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. 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. (stating that Mewbourne sought to pool the two 15/10 wells). In addition, neither the application nor the notice letter in Mewbourne's Case No. 20809 adequately informed the interest owners of the purpose of the proceeding. Thus, notice was not reasonable. *See* § 70-2-23.

As explained in Mr. Ragsdale's Response to Mewbourne's Motion to Dismiss, which is fully incorporated herein, 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 (stating that it may be "particularly misleading" when notice omits facts pertinent to an administrative approval); *see also Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 3, 127 N.M. 120 (concluding that the Commission's order was invalid with respect to appellees, because they "were not afforded reasonable notice of the proceedings as required by the OGA and its implementing regulations"); *Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 3, 91 N.M. 455 ("Where substantial compliance with mandatory publication requirements is not met, the action of the [administrative authority] is invalid."). Under the circumstances here, notice was deficient, and the orders are therefore void

and invalid. *See Johnson*, 1999-NMSC-021, ¶ 3 (declaring Commission's order invalid for failure to provide reasonable notice); *see also Maggiore*, 2003-NMCA-043, ¶ 28 (Pickard, J., specially concurring) ("[I]t is the constellation of defects in the notice procedure that rendered the hearing ineffectual . . . .").[3]

In addition, 19.15.4.12(A)(1)(b) NMAC specifies the information that must be submitted to the Division when no interest owner has appeared to oppose the application. In pertinent part, the Division requires "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." 19.15.4.12(A)(1)(b)(vi) & (ix) NMAC. Mewbourne admits, however, that it did not propose the 15/10 Wells to Mr. Ragsdale. Tr. at 93:24-94:2; *id.* at 94:19-24. Moreover, the AFE submitted to the Division for the 15/10 2H was not the AFE that was submitted to Mr. Ragsdale. As recognized by the Division in its Notice: Material Changes or Deficiencies in Applications Submitted to the OCD Engineering Bureau (June 11, 2020), a change to financial evidence, including expenditures, is a material change or deficiency. Thus, Mewbourne failed to satisfy the requirements of 19.15.4.12(A)(1)(b) NMAC, and the Orders should be revoked for this reason as well.

In defense of its failures to inform Mr. Ragsdale and the Division that it considered the 15/10 Wells to be "substitute" wells for the 10/15 Wells and, on that basis, intended to impose the costs of failed attempts to drill the 10/15 2H on the estimated costs to drill the 15/10 2H, Mewbourne argues that applications for compulsory pooling are "notice pleadings." Tr. 41:17-

[3] To the extent that Mewbourne still contends that Mr. Ragsdale's application is a collateral attack on a final order, Mr. Ragsdale fully incorporates herein its Response to Mewbourne's Motion to Dismiss.

23. Mewbourne's application in Case No. 20809, however, 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. It cannot be disputed—the application in Case No. 20809 provided no notice, to Mr. Ragsdale or to the Division, 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. Here, however, Mewbourne failed to raise this issue with the Division at hearing. The affidavits and exhibits submitted to the Division provide no indication that Mewbourne sought to forcepool the 15/10 2H as a substitute for the 10/15 2H, and thereby impose the costs of the 10/15 2H on the costs of the 15/10 2H. *See generally* affidavits, exhibits, and transcript in Case No. 20809. Thus, Mewbourne failed to satisfy the requirements of and rationale for notice pleading. *See Schmitz*, 1990-NMSC-002, ¶ 9 ("[G]eneral allegations of conduct are sufficient, as long as they show that the party is entitled to relief and the averments are set forth with sufficient detail so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief.").

III. Mr. Ragsdale Timely Elected to Participate and Paid Estimated Costs Consistent with the AFEs Submitted to the Division by Mewbourne in Case No. 20809.

Mewbourne contends that even if the Division determined the costs for the two junked holes were disallowed, Mr. Ragsdale waived his right to object to well costs by failing to timely elect. Tr. 41-42. Similarly, Mewbourne contends that Mr. Ragsdale cannot challenge Mewbourne's imposition of improper costs because he did not enter an appearance in Case Nos.

20580 or 20809 and cannot collaterally attack the resulting orders. Mewbourne's PHS at 2, ¶¶ 2 & 5 (Sept. 4, 2020). Both arguments fail.

First, as explained at the hearing in this matter, Mewbourne agreed that Mr. Ragsdale had additional time to elect to participate and, in fact, Mewbourne has deemed Mr. Ragsdale consenting in the 15/10 1H. 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 has improperly imputed to the estimated costs for the 15/10 2H. Mr. Ragsdale timely paid his share of estimated costs for drilling the 15/10 2H. *See infra*, Proposed Findings of Fact, ¶ 5. Under these circumstances, Mr. Ragsdale should be considered consenting for purposes of disputing these improper actual costs. To conclude otherwise would encourage operators to send out election notices with inaccurate AFEs and improper costs, inconsistent with AFEs that had been presented to the Division.

Second, Mr. Ragsdale did not enter an appearance in Case Nos. 20580 or 20809 because Mewbourne's applications failed to alert Mr. Ragsdale to the issues that are now disputed. As testimony at the hearing revealed, Mr. Ragsdale would have entered an appearance in Case No. 20809, if Mewbourne had provided notice of its position that the 15/10 Wells should be approved 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.

IV. The Rights and Obligations of an Interest Owner Subject to a Compulsory Pooling 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 state's equivalent of the JOA" and that Mr. Ragsdale should be "subject to all well costs, just like the JOA owners." Tr. 41:5-10. On this basis, Mewbourne argues that Mr. Ragsdale is subject to the costs for failed attempts to drill

the 10/15 2H because the 15/10 2H is a "replacement well." Mewbourne's PHS at 2, ¶ 7. 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.

It cannot be disputed that force-pooling is governed by Section 70-2-12, by the Division's regulations implementing the same, and by the order force-pooling the uncommitted interest owners. *See, e.g.*, NAVIGATING AN IMPERFECT OILFIELD: DRILLING WITH NO JOA OR WITH MULTIPLE JOAS, 62 RMMLF-INST 25-1 (2016) , 25-10 ("The various forced pooling statutes typically provide little detail of the substantive rights and obligations of the cotenants bound by a compulsory pooling order. Some of those details are often provided in the forced pooling order itself."); *see also id.* (noting that owners under a statutory pooling order may enter into a "formal operating agreement . . . to fill in many of the details left unaddressed by the pooling order").

Commonly, disputes between parties without an operating agreement are resolved based on common law, the forced pooling statute, and oil and gas agency decisions. 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) (stating that disputes between force pooled parties are frequently "resolved differently under a force pooling scheme than they would be under a JOA"). Indeed, the Division lacks authority to construe contractual rights between those who are parties to a contract. *See, e.g.*, *In re Application of*

Bold Energy, LP for Approval of an Application for Permit to Drill and to Allow Two Operators on a Well Unit, Case No. 13877, Order No. R-12747 at 2, ¶ 8 (Apr. 20, 2007).

Finally, it is fundamental law that a contract is not binding on one who is not a party. *See Richards Energy Compression, LLC v. Dick Glover, Inc.*, No. 13CV0640 WJ/SMV, 2013 WL 12147626, at *3 (D.N.M. Sept. 16, 2013). For all of these reasons, it would be improper to impose the requirements of a joint operating agreement on Mr. Ragsdale when he is not a party to the same.

V. Absent a Voluntary Agreement or Compulsory Pooling Order, Mewbourne Can Only Recover Costs from Production; Without Production from the 10/15 2H, Mewbourne Has No Recourse Against Mr. Ragsdale.

New Mexico law is clear— in the absence of a forced pooling order or voluntary agreement to pool, 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. As explained by our Supreme Court in *Bellet*, "the operating cotenant may only recover '*out of the share in actual production*' for money spent speculatively." *Id.* ¶ 18 (quoting *Neeley v. Intercity v. Mgmt. Corp.*, 732 S.W.2d 644, 646 (Tex. Ct. App. 1987); adopting Texas law on this issue). "If a cotenant drills a dry hole, he does so at his own risk and without the right to reimbursement for the drilling cost." *Neeley*, 732 S.W.2d at 646. 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."

STIPULATED FINDINGS OF FACT

The following findings of fact were stipulated to by the parties, as reflected in the Statement of Undisputed Material Facts filed September 4, 2020.

1. Order No. R-20924 (entered in Case No. 20580) pooled the Bone Spring formation underlying the E2/E2 of Sections 10 and 15, Township 23 South, Range 34 East, NMPM, in Lea County, New Mexico, for the purpose of drilling the Ibex 10/15 B1AP Fed. Com. Well No. 2H, API# 30-025-46188 ("10/15 2H") and the Ibex 10/15 B3AP Fed. Com. Well No. 1H, API# 30-025-46189 ("10/15 1H") (collectively, "10/15 Wells").

2. Order No. R-20924-A (entered in Case No. 20809) pooled the same unit for the purpose of drilling the 10/15 Wells *and* for drilling the Ibex 15/10 B1PA Fed. Com. Well No. 2H, API# 30-025-47060 ("15/10 2H"), and the Ibex 15/10 B3PA Fed. Com. Well No. 1H, API# 30-025-46948 ("15/10 1H") (collectively, "15/10 Wells").

3. Mewbourne relies on Order No. R-20924-A to assert that it can impute the costs of attempts to drill the 10/15 2H and a substitute well, the Ibex 10/15 B1AP Fed Com No. 2Y ("10/15 2Y"), as part of the estimated costs for the 15/10 2H.

Procedural History and Chronology of Events

4. Mewbourne mailed well proposals for the 10/15 Wells on March 19, 2019, which were received by Mr. Ragsdale on March 21, 2019.

5. Mewbourne visited with a representative of Mr. Ragsdale via phone conversation on April 3, 2019 regarding the 10/15 Wells.

6. On April 4, 2019, Tracy Anderson elected to participate in the 10/15 Wells under the governing Joint Operating Agreement. This interest would later be acquired by Mr. Ragsdale.

7. Mewbourne exchanged emails on April 8, 2019 with a representative of Mr. Ragsdale regarding the 10/15 Wells.

8. Mewbourne visited with a representative of Mr. Ragsdale via phone conversation on April 16, 2019 regarding the 10/15 Wells.

9. On April 17, 2019, Mewbourne sent Mr. Ragsdale a copy of the Joint Operating Agreement covering the 10/15 Wells.

10. On or about May 20, 2019, Mewbourne filed an application in Case No. 20580, seeking to pool the Bone Spring formation underlying the E2/E2 of Sections 10 and 15, Township 23 South, Range 34 East, NMPM, in Lea County, New Mexico, for the purpose of drilling the 10/15 Wells.

11. On June 6, 2019, Mr. Ragsdale received notice of the application in Case No. 20580.

12. Mr. Ragsdale did not enter an appearance in Case No. 20580.

13. On June 13, 2019, Case No. 20580 was presented by affidavit.

14. On June 27, 2019, after notice by publication was complete, Case No. 20580 was taken under advisement.

15. On July 3, 2019, Mewbourne's applications for permits to drill ("APD") the 10/15 Wells were approved.

16. On July 12, 2019, Mewbourne spudded the 10/15 2H, had drilling issues, and abandoned the operation.

17. On July 24, 2019, Mewbourne received approval from the Bureau of Land Management to drill a substitute well, the 10/15 2Y.

18. On July 24, 2019, Mewbourne plugged and abandoned the 10/15 2H, due to drilling issues.

19. On July 26, 2019, Mewbourne subsequently spudded the substitute 10/15 2Y well, again had drilling issues, and plugged and abandoned the well.

20. On August 27, 2019, Mewbourne applied for permits to drill the 15/10 2H and the 15/10 1H.

21. On September 3, 2019, Mewbourne filed its application in Case No. 20809, again seeking to pool the Bone Spring formation underlying the E2/E2 of Sections 10 and 15, Township 23 South, Range 34 East, NMPM, in Lea County, New Mexico, but for the purpose of drilling the 15/10 Wells, which were the same target interval, same ownership and same dedicated spacing unit as the 10/15 Wells.

22. Mewbourne's application for Case No. 20809 states that Mewbourne was seeking to pool the Bone Spring formation underlying the E2/E2 of Sections 10 and 15, Township 23 South, Range 34 East, NMPM, in Lea County, New Mexico for the purpose of drilling the 15/10 Wells.

23. Mewbourne's application in Case No. 20809 did not reference the 10/15 Wells.

24. The application in Case No. 20809 did not request that all four wells be pooled together.

25. The notice letters in Case No. 20809 did not inform interested parties, which included Mr. Ragsdale, of Mewbourne's intent to combine all four wells in the order requested in Case No. 20809, which was ultimately issued as Order No. R-20924-A.

26. At no time did Mewbourne inform Mr. Ragsdale that Mewbourne intended to incorporate the 10/15 Wells in Case No. 20809, along with the 15/10 Wells.

27. On October 3, 2019, Case No. 20809 was presented by affidavit ("15/10 Hearing").

28. On October 15, 2019, Order No. R-20924 was entered in Case No. 20580, pooling the proposed unit for the purpose of drilling the 10/15 Wells.

29. Mr. Ragsdale never received a copy of Order No. R-20924(Case No. 20580) and Mewbourne never informed Mr. Ragsdale that he had been forcepooled in Order No. 20924.

30. On February 13, 2020, Mr. Ragsdale received a well proposal for the 15/10 Wells for an interest that is not at issue in this proceeding, which was subject to the joint operating agreement ("Subsequently Acquired Interest"). Mr. Ragsdale timely elected to participate in the 15/10 Wells with respect to the Subsequently Acquired Interest. The Authorizations for Expenditure ("AFE") tendered to Mr. Ragsdale for the Subsequently Acquired Interest did not impose the costs of attempts to drill the 10/15 Wells, because those elections were previously received from Mr. Ragsdale's predeccessor and accounted for under the joint operating agreement.

31. On February 19, 2020, Order No. R-20924-A was entered in Case No. 20809, pooling the proposed unit for the purpose of drilling both the 10/15 Wells and the 15/10 Wells. Order No. R-20924-A expressly superseded Order No. R-20924.

32. On February 27, 2020, Mewbourne received approval of its APD for the 15/10 1H.

33. On March 10, 2020, Mr. Ragsdale received an election notice, under Order No. R-20924-A for the 15/10 Wells.

34. On March 11, 2020, Mr. Ragsdale received an election notice under Order No. R-20924-A (Case No. 20809) and AFEs for the 15/10 Wells. The AFE for the 15/10 2H included

an additional $3,102,500 attributed to Mewbourne's attempts to drill the 10/15 2H and the 10/15 2Y. *See* Applicant's Exhibit 5.

35. On March 12, 2020, Mewbourne visited with a representative of Mr. Ragsdale regarding the AFE costs.

36. The AFE provided to Mr. Ragsdale for the 15/10 2H along with the election letter was not the AFE that was submitted to the Division in Case No. 20809. *See* Letter, Mitch Robb to Tom Ragsdale (Mar. 5, 2020). The AFE submitted to the Division did not include the imputed costs for the attempts to drill the 10/15 2H and the 10/15 2Y. *See* Case No. 20809, Verified Statement of Mitch Robb at 2, ¶ 2(i) and Attachment C.

37. Mr. Ragsdale's elections were due by April 10, 2020, however, Mewbourne did not receive such elections nor did Mewbourne receive any further communication from Mr. Ragsdale past the conversation on March 12, 2020.[4]

38. By letter dated April 15, 2020, Mr. Ragsdale sent in executed AFEs to Mewbourne. The AFE for the 15/10 2H was not the AFE provided to Mr. Ragsdale along with the pooling order. Mr. Ragsdale was past the due date as provided for under the respective pooling order. *See* Applicant's Exhibit 5.

39. Mewbourne responded to Mr. Ragsdale's letter dated April 15, 2020, allowing Mr. Ragsdale the opportunity to still participate in the subject wells under certain conditions. *See* Letter, Bruce Insalaco to Karen Stanford & Tom Ragsdale (May 15, 2020).

40. Mr. Ragsdale met the subsequent conditions set out by Mewbourne for participation in the 15/10 1H and was allowed to participate in said well. Mr. Ragsdale did not

[4] Subsequently, testimony at hearing clarified the substance and timing of communications between the parties during this time period. *See infra* at Proposed Findings of Fact, ¶¶ 3-4; Applicant's Rebuttal Exhibit No. 1.

meet the subsequent conditions set out by Mewbourne for participation in the 15/10 2H, specifically, he did not tender his share of the costs at issue in this proceeding because Mr. Ragsdale believes that Mewbourne lacks authority to impose those costs.

41. The AFE signed by Mr. Ragsdale on April 15, 2020 for the 15/10 2H was the same AFE that Mewbourne submitted to the Division in Case No. 20809.

42. Mr. Ragsdale tendered payment for his share of the 15/10 1H and was deemed consenting therein. *See* Letter, Bruce Insalaco to Karen Stanford & Tom Ragsdale (May 15, 2020).

43. Mr. Ragsdale tendered payment for his share of the 15/10 2H, based on the AFE cost to drill that well only, and did not include the imputed costs for the attempts to drill the 10/15 2H and the 10/15 2Y. *See* Ex. 4. This payment was rejected by Mewbourne, which thereafter considered Mr. Ragsdale non-consenting in the 15/10 2H. *See* Letter, Bruce Insalaco to Karen Stanford & Tom Ragsdale (May 15, 2020).

PROPOSED FINDINGS OF FACT

1. Mr. Ragsdale never received a well proposal letter for the 15/10 Wells. Direct Testimony of Karen Stanford at 2, attached to Mr. Ragsdale's Amended Prehearing Statement, filed September 4, 2020 ("Stanford Written Testimony").

2. Prior to the hearing in Case No. 20809, Mr. Ragsdale was not informed that Mewbourne intended to forcepool the 10/15 Wells, which were the subject of Case No. 20580, along with the 15/10 Wells in Case No. 20809. *Id.* at 3.

3. When Mr. Ragsdale received the election notice letter on or about March 10, 2020, his representative Karen Stanford contacted Mewbourne to inquire about the propriety of

including the P&A costs for a previous well in the AFE for one of the 15/10 Wells. Tr. 16:21-17:3; Applicant's Rebuttal Exhibit 1.

4. On March 18, 2020, Ms. Stanford spoke with Mewbourne's landman Mitch Robb about the basis for Mewbourne imposing the costs for a previous well in the AFE for one of the 15/10 Wells. She was told that Mewbourne believed the 15/10 2H was a substitute well for the 10/15 2H under title 19 of the Division's regulations. Tr. 17:4-23. When Ms. Stanford questioned Mewbourne's position, Mr. Robb referred her to Mewbourne's counsel, Mr. Bruce. *Id.* 17:24-18:9; *see also id.* 20:17-21:3.

5. Mewbourne did not deem Mr. Ragsdale non-consenting as a result of providing the signed AFEs four days late; Mewbourne agreed to accept the election so long as Mr. Ragsdale timely paid within the 30-day payment period. Mr. Ragsdale timely paid the estimated costs in the AFEs submitted to the Division in Case No. 20809 within the 30-day period. *See* Tr. 21:25-23:5; *see* Applicant's Exhibits 7 & 8.

6. Mewbourne deemed Mr. Ragsdale non-consenting because he refused to include payment for the failed attempts to drill the 10/15 2H as part of the estimated well costs to drill the 15/10 2H. Tr. 21:15-23:1; *see* Applicant's Exhibits 7 & 8.

7. Mewbourne did not inform Mr. Ragsdale about the two junked wells prior to the election letter he received in March of 2020. Tr. 92:12-15.

8. Mewbourne never sent Mr. Ragsdale the order that was issued in Case No. 20580. Tr. 92:16-20.

9. Mr. Ragsdale was not informed that Mewbourne considered the 15/10 Wells to be substitute wells for the 10/15 Wells until after he received the election notices for the 15/10

Wells, which were sent to him after the compulsory pooling order was issued in Case No. 20809. Stanford Written Testimony at 3.

10. Mewbourne did not inform the Division that Mewbourne considered the 15/10 Wells to be "substitute" wells for the 10/15 Wells prior to the issuance of the order in Case No. 20809. *See id.* at 4. *See* Case No. 20809, Verified Statements of Mitch Robb Jordan Carrell and exhibits attached thereto; *see also* Order No. R-20924-A (Feb. 19, 2020). *See generally* Case No. 20809, Transcript (Oct. 3, 2018).

11. The exhibits in Case No. 20809 did not indicate that Mewbourne considered the 15/10 Wells to be "substitute" wells for the 10/15 Wells. Case No. 20809, Verified Statements of Mitch Robb Jordan Carrell and exhibits attached thereto.

12. Mewbourne did not send a well proposal to Mr. Ragsdale proposing the 15/10 Wells prior to filing the application in Case No. 20809. Tr. 93:24-94:2; *id.* at 94:19-24.

13. Had Mewbourne provided notice that it intended to impose the costs of the two failed wells on the estimated costs of the 15/10 2H, Mr. Ragsdale would have entered an appearance in Case No. 20809. Tr. 32:5-10.

14. Mewbourne deemed Mr. Ragsdale non-consenting in the 15/10 2H because he did not tender payment for his share of the costs attributed to the failed attempts to drill the 10/15 2H, which are the costs at issued in this proceeding. Stanford Written Testimony at 4-5; Tr. 22:22-23:1.

15. Mr. Ragsdale never had the opportunity to participate in the 10/15 Wells after the compulsory pooling orders were issued in Case Nos. 20580 and 20809. *Id.* at 31:4-9, 32:12-16.

16. Mr. Ragsdale has two separate interests in the subject acreage. The first interest is the one at issue here, which was forcepooled in Case Nos. 20580 and 20809. The second interest

is one acquired by Mr. Ragsdale in or about January 2020, several months after the 10/15 2H and 2Y were junked. The second interest is subject to the joint operating agreement and has no relation to the issues raised in this proceeding. Tr. 90:1-92:11.

17. Mewbourne did not inform Mr. Ragsdale that Mewbourne considered the 15/10 Wells as substitute or replacement wells for the 10/15 Wells prior to the time Order No. 20894-A was issued. *See, e.g.*, Tr. 36:6-13, 37:8-21.

18. The Application in Case No. 20809 did not reference Case No. 20580; nor did it reference the 10/15 Wells. *See* Case No. 20809, Application.

19. The notice letters in Case No. 20809 did not inform interested parties, which included Mr. Ragsdale, of Mewbourne's position that the 15/10 Wells were substitute or replacement wells for the 10/15 Wells. *See* Case No. 20580, Exhibit 2, Attachment A thereto.

20. At the hearing in Case No. 20809, Mewbourne did not inform the Division that the first two wells had been junked. Tr. 78:7-10, 83:14-18.

21. Mr. Ragsdale never had the opportunity to elect to participate in the junked 10/15 Wells under a forcepooling order. Tr. 79:12-19; *see id.* at 99:17-100:2.

22. During the election period, Ms. Stanford, on behalf of Mr. Ragsdale, asked Mewbourne about the costs for the junked wells, 10/15 2H and 10/15 2Y, that were imposed on the estimated costs for the 15/10 2H. *See* Tr. 84:7-24, 85:22-86:17.

23. Only two election letters were sent out after the order was issued in Case No. 20809. Tr. 102:14-10.

24. Mewbourne did not provide Mr. Ragsdale or the Division with the actual costs for the two failed attempts to drill the 10/15 2H within 180 days of incurring those costs. *See* Tr. 98:12-21.

25. Mewbourne did not drill the 15/10 2H until more than a year after its failed attempts to drill the 10/15 2H. Tr. 43:15-18.

26. Mr. Ragsdale timely elected to participate and paid estimated costs consistent with the AFEs submitted to the Division by Mewbourne in Case No. 20809**.**

PROPOSED CONCLUSIONS OF LAW

1. The application filed by Mewbourne in Case No. 20809 failed to satisfy the notice requirements set forth in Section 70-2-23 and 19.15.4.8(A) NMAC.

2. As a result of the deficient notice in the application in Case No. 20809, the adjudicatory hearing notice failed to satisfy the requirements of 19.15.4.9 NMAC.

3. In the absence of a forced pooling order or voluntary agreement to pool, an operator has no recourse for recovery of costs incurred to drill an unsuccessful well. *Bellet v. Grynberg*, 1992-NMSC-063, ¶¶ 16-19, 114 N.M. 690.

4. When Mewbourne filed its application in Case No. 20809, a new compulsory pooling application was not required when drilling a "substitute well," as that term is defined by Division regulation. *See* 19.15.13.8(B)(4) NMAC.

5. The 15/10 2H is not a "substitute" well as defined by the Division in 19.15.13.8(B)(4) NMAC.

6. The provisions of a joint operating agreement do not govern the relationship between an operator and non-operator under a compulsory pooling order when the pooled party is not a party to the joint operating agreement.

7. Failed attempts to drill one well cannot be imposed on costs to drill another well under a compulsory pooling order if the subsequent well is not a "substitute" well as defined by the Division in 19.15.13.8(B)(4) NMAC.

8. Section 70-2-17(C) contemplates the imposition of costs on a well-by-well basis under a forced pooling order.

Respectfully submitted,

By: */s/Sharon T. Shaheen*

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, a true and correct copy of the foregoing pleading was served upon counsel of record as follows:

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