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

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

APPLICATION OF NOVO OIL & GAS NORTHERN DELAWARE, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	**Case Nos. 21275 and 21276 (Division Case Nos. 20916 and 20917) Order No. R-21420-A**

BTA OIL PRODUCERS, LLC'S RESPONSE IN OPPOSITION TO NOVO OIL & GAS NORTHERN DELAWARE, LLC'S APPLICATION FOR REHEARING

BTA Oil Producers, LLC ("BTA") submits the following response in opposition to Novo Oil & Gas Northern Delaware, LLC's ("Novo") Application for Rehearing ("Application"). As explained below, the Application should be denied.

I. INTRODUCTION

The Oil Conservation Commission ("Commission") considered Novo's compulsory pooling applications during a two-day hearing that involved the testimony of multiple witnesses and numerous exhibits. The Commission thoughtfully considered the evidence and arguments presented by each party, rendered its ruling after deliberating at the conclusion of the hearing, and issued a detailed order addressing the evidence and rejecting Novo's applications based on criteria set out in the New Mexico Oil and Gas Act, NMSA 1978 §§ 70-2-1 *et seq.* ("the Act"). Specifically, the Commission found that granting Novo's applications would not protect correlative rights, prevent waste, or prevent the drilling of unnecessary wells and that BTA's proposed development plan would best protect correlative rights by allowing each party to develop

its own acreage and would best prevent waste. Order No. R-21420-A, Conclusions of Law ¶¶ 3-12.

Novo seeks a new hearing because it is dissatisfied with the Commission's decision but has not provided any legitimate basis – such as previously unavailable evidence or a change in the law – for its request. Rather, Novo merely seeks to re-litigate matters that were already determined and raise arguments that have been considered and rejected. It should not be permitted to do so. Novo also ignores BTA's extensive evidence that controverted Novo's arguments.

The Commission issued Order No. R-21420-A after carefully considering the evidence and resolving factual issues against Novo. The Commission's decision is supported by the evidence, and there is no basis for reconsideration. Novo's Application should be denied.

II. ARGUMENT

A. The Commission should deny Novo's Application because Novo merely seeks to re-litigate matters that have already been determined.

Novo expresses disagreement with the Commission's determination regarding the evidence but fails to raise any basis for reconsideration of the Order. When a party tries to take "two bites at the apple" based on evidence and authorities that were previously available, a motion for reconsideration should be denied. *See, e.g., McCann v. St. Vincent Hosp.,* N.M. Ct. App. No. 32,444, ¶ 14 (Aug. 25, 2014) (unpublished); *Deaton v. Gutierrez,* 2004-NMCA-043, ¶ 10, 135 N.M. 423 (district court appropriately rejected motion for reconsideration based on a restatement of prior arguments). Courts have recognized that a motion for reconsideration of a judgment should be denied unless the movant is able to establish: (1) an intervening change in the controlling law; (2) new, previously unavailable evidence; or (3) the need to correct a clear, manifest error or prevent manifest injustice. *See Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000). Novo's Application fails to meet any of these requirements.

Novo fails to present any new evidence or argument that warrants reconsideration of the Commission's decision. As demonstrated by the Commission's extensive questioning of witnesses at the hearing and by the Order, the Commission thoroughly evaluated the evidence and arguments discussed in Novo's Application and found in favor of BTA.

Novo also fails to establish that a new hearing is necessary to correct a manifest error or prevent manifest injustice. As explained below, the Order is supported by the evidence. There is no reason for the Commission to re-consider its ruling, and a new hearing would only waste time and unnecessarily consume resources of the Commission and the parties. Novo's Application should be denied.

B. Novo's arguments regarding the merits of the evidence ignore the extensive evidence presented by BTA.

Novo's request for a new hearing is based on evidence that the Commission already considered and that was controverted by BTA. There is no basis for the Commission to reconsider its ruling that BTA's development plan will prevent waste and protect correlative rights more effectively than Novo's development plan.

1. The Commission correctly determined that BTA's proposed development plan will prevent waste more effectively than Novo's proposed development plan.

Novo's argument regarding the prevention of waste relies on the testimony of its geologist, Michael Hale, which BTA disputed. Specifically, with respect to the number of wells necessary to develop the Upper Wolfcamp Resource discussed in Novo's Application, the parties presented the following evidence.

- Novo proposed nine wells in its designated Upper Wolfcamp Resource (Third Bone Spring, Wolfcamp Sands, and Wolfcamp A) development plan but did not provide any evidence that nine wells are necessary to fully develop the resource. Novo testified that its development plan was based on XTO's Remuda Unit but admitted that Novo's plan differed because XTO's plan employed only eight wells versus Novo's nine wells, and Novo's landing points differ from XTO's. *See* Novo Exhibit 32, Spacing Comparison:

XTO's Remuda vs. Novo's Astrodog; August 20, 2020 Testimony of M. Hale.[1] Novo also admitted that the Remuda Unit is the most aggressively developed unit in the area. *See* August 20, 2020 Testimony of M. Hale. Novo did not provide a comparison to any nearby developments to quantify the incremental recovery from drilling this large number of wells. *See* 8/14/20 Tr. at 114:5-116:13; August 20, 2020 Testimony of B. McQuien; *see generally* Novo Exhibits.

- BTA witness Britton McQuien presented an analysis that compared BTA's two well per half section Ogden Development with directly offset units developed with three and five wells per half section. The comparison showed no incremental increased recovery from developments that utilized more than two wells per half section. *See* BTA Exhibits 27, 28, 29, 30; August 20, 2020 Testimony of B. McQuien. Mr. McQuien also testified that BTA's recently completed Pardue Development includes two wells per half section and is performing similarly to BTA's Ogden Development, and that the Pardue Development is the closest Upper Wolfcamp Resource development to the subject acreage and is an appropriate analog. *See* BTA Exhibit 27. Mr. McQuien explained that based on his analysis, BTA's development plan would recover greater reserves using fewer wells. *See* August 20, 2020 Testimony of B. McQuien.

- Mr. McQuien disputed Novo's comparison of the Ogden and Remuda Developments because Novo presented incomplete information and only compared the most productive Remuda wells with the least productive Ogden wells. *See* Novo Exhibit 32; August 20, 2020 Testimony of B. McQuien.

- Novo's witnesses admitted that Novo had not completed a similar development to date. *See* 8/14/20 Tr. at 111:7-10 and 129:15-22.

- Mr. McQuien also testified that BTA has the option to drill additional wells if unrecovered resources are identified but that Novo cannot correct the reduced per well recovery that would result from drilling too many wells. *See* August 20, 2020 Testimony of B. McQuien.

Based on the evidence presented by the parties, the Commission correctly determined that BTA's development plan would prevent waste more effectively than Novo's development plan. The Commission did not find, as Novo claims, that "BTA's plan to under-develop the reservoir somehow prevents waste." Application at 2. Rather, the Commission found that BTA's plan *would* fully develop the reservoir. *See* Order at ¶ 53. Novo fails to provide any reason the Commission should reconsider the evidence, and it should not do so.

[1] The August 20, 2020 hearing transcript is not available on the Commission's docket as of the date of this filing. BTA's counsel has, however, reviewed the Commission's video recording of Novo's testimony.

2. The Commission correctly determined that BTA's proposed development plan will best protect correlative rights.

Novo's argument regarding correlative rights raises matters that were already presented and addressed by the Commission. Novo argues that the Oil and Gas Act's definition of "correlative rights" does not include operatorship but ignores the entirety of the definition, the remainder of the Act, New Mexico's canons of statutory construction, and the evidence presented by BTA.

Section 70-2-33(H) of the Act defines "correlative rights" as:

> the opportunity afforded, so far as it is practicable to do so, *to the owner of each property in a pool to produce without waste the owner's just and equitable share of the oil or gas or both in the pool*, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool and, for such purpose, to use the owner's just and equitable share of the reservoir energy . . .

NMSA 1978, § 70-2-33(H) (emphasis added). Because the definition affords owners an opportunity *to produce* oil and gas and operating rights provide the mechanism for that production, BTA's operating rights are part of its correlative rights and Novo's argument lacks merit.

Novo's narrow construction of Section 70-2-33(H) is also inconsistent with the remainder of the Act and would lead to absurd results. When the interpretation of a statute leads to absurdities, or conflicts with the purpose of the statute when read as a whole, the interpretation does not reflect legislative intent and cannot be adopted. *See, e.g., Baker v. Hedstrom,* 2013-NMSC-043, ¶ 15, 309 P.3d 1047. A statute cannot be construed to defeat its intended purpose. *Id.* ¶ 21.

The Act confers upon the Commission jurisdiction to prevent waste, promote conservation, and protect correlative rights. *See* NMSA 1978, §§ 70-2-11 and 70-2-6. At the hearing, BTA witness Willis Price testified that operating rights under a joint operating agreement ("JOA") are valuable and are part of BTA's correlative rights. Mr. Price also testified that JOAs facilitate the

conservation and development of resources by allowing operators to select the most efficient development plan, control costs, and develop acreage without the necessity of a compulsory pooling proceeding. *See* August 20, 2020 Testimony of W. Price. Accordingly, BTA's operating rights under the JOA are a component of its correlative rights. Construing the Act's definition of "correlative rights" to exclude operating rights acquired under a JOA would be inconsistent with the purpose and language of the Act and would lead to an absurd result by discouraging conservation and development.

Further, the Act favors voluntary agreements over compulsory pooling. This is evident in Section 70-2-17's prohibition of compulsory pooling when all parties have entered into a voluntary agreement and in the requirement that a party seeking a compulsory pooling order must first attempt to secure the voluntary participation of the parties it seeks to pool. In this regard, the Oil and Gas Act is consistent with New Mexico law in general, which favors voluntary agreements. *See, e.g., McMillan v. Allstate Indemnity Co*., 2004-NMSC-002, ¶ 10, 135 N.M. 17 ("public policy favors freedom to contract and enforces contracts that do not violate law…"). These policies support the Commission's determination that BTA's development plan would best protect correlative rights by allowing each party to develop its own acreage.

Novo's argument that BTA's plan would require it to drill a half-mile dead hole and incur risks drilling tangents does not relate to correlative rights and was disputed by BTA. *See* Application at 2. Specifically, BTA witness Nick Eaton testified that 403' of additional tangent would be necessary and would be less aggressive than the tangent Novo permitted in the Astrodog South Unit. *See* BTA Exhibits 18-21 and August 20, 2020 Testimony of N. Eaton. Novo's engineer admitted that Novo plans to drill the permitted tangent to access its wells in the Astrodog South Unit. *See* 8/14/20 Tr. at 140:7-20.

Novo also disregards BTA's testimony that including BTA's acreage in Novo's proposed spacing units would impair BTA's correlative rights by forcing BTA into a development plan that would not efficiently develop the reservoir. *See* August 20, 2020 Testimony of B. McQuien. Contrary to Novo's argument, BTA's evidence regarding correlative rights was not premised entirely on its JOA.

Novo's argument regarding correlative rights lacks merit and should be rejected. BTA's evidence, as well as the language and purpose of the Oil and Gas Act and New Mexico public policy, support the Commission's determination that BTA's development plan would best protect correlative rights by affording each party an opportunity to develop its own acreage.

3. The Commission correctly determined that Novo failed to establish that its proposed development plan would prevent the drilling of unnecessary wells.

Novo's argument regarding the efficiency of two-mile laterals, well spacing and the number of wells, and surface disturbance ignores BTA's evidence on these issues and relies on general statements rather than evidence presented in this case.

With respect to the efficiency of two-mile laterals, Novo witness Alex Bourland offered general opinions but no quantification to support his testimony. *See generally* Novo Exhibits. Novo's reliance on evidence presented by Marathon in Case Nos. 21273 and 21274 is misplaced, as Marathon's applications have been denied, and the Commission found that Marathon failed to present a sufficient analysis to support its claims regarding the efficiency of two-mile laterals. *See* Order No. 21416-A, Conclusions of Law, ¶ 10. Novo's reliance on the Oil Conservation Division's October 10, 2020 docket is similarly unfounded, as hand-written notes on the docket list do not establish that longer laterals are more efficient, and Novo elected not to present similar evidence at the hearing. *See* Application at footnote 2 and Exhibit A; *see generally* Novo Exhibits. Further,

the Commission considers numerous factors in evaluating proposed development plans – not just lateral length. *See, e.g.,* Order No. R-20223.

Novo's argument regarding well spacing and the number of wells should also be rejected. As explained above, BTA presented testimony and exhibits opposing Novo's evidence. *See* August 20, 2020 Testimony of B. McQuien; BTA Exhibits 27-30.

With respect to surface disturbance, BTA witness McQuien testified that three surface disturbances would be required to develop the reservoir even if Novo's applications were approved because neither Novo nor Marathon included BTA's Second Bone Spring rights in the N/2 N/2 Section 7 and N/2 NW/4 Section 8 in their proposals, obligating BTA to develop these resources independently. *See* August 20, 2020 Testimony of B. McQuien. Novo's argument regarding the size of well pads should be rejected because Novo declined to present it at the hearing. And with the denial of Marathon's applications, three surface disturbances will be required regardless.

III. CONCLUSION

The Commission issued Order No. R-21420-A after carefully considering the evidence presented by the parties at a multi-day hearing. Novo has failed to provide any legitimate basis for the Commission to reconsider its decision and merely seeks to relitigate matters that were already decided. Novo's Application should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2020 I served a true and correct copy of the foregoing pleading via email to:

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