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

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

APPLICATION OF COLGATE OPERATING, LLC FOR COMPULSORY POOLING EDDY COUNTY, NEW MEXICO.

Commission Case No. 21744
Case Nos. 21629
Order No. R-21575
Order No. R-21575-A

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS APPLICATION FOR DE NOVO HEARING

Colgate Operating, LLC, in accordance with the Commission's directive to submit supplemental authorities, states:

A. Introduction.

The rules and regulations of the Division and the Commission disclose that compulsory pooling cases are adjudicatory proceedings. See, NMAC 19.15.4. The rules and regulations define how adjudicatory hearings will be conducted, including the notice to interest owners subject to the proceeding initiated by an interest owner, such as Colgate Operating in this case. In this case, Cimarex received notice of the hearing in Case 21629, but did not enter an appearance or otherwise participate in the case until after the hearing was held. Cimarex contends that it timely entered an appearance. Colgate contends that Cimarex's entry into the case was too late, and therefore, cannot qualify as a party of record in order to apply for de novo consideration before the Commission.

B. Rules and Regulations, and Statutory Authorities.

The rules and regulations of the Division and the Commission for adjudicatory hearings applicable to the issue before the Commission are as follows:

> **19.15.4.10 PARTIES TO ADJUDICATORY PROCEEDINGS:**
> **A.** The parties to an adjudicatory proceeding shall include:
> **(1)** the applicant;
> **(2)** a person to whom statute, rule or order requires notice (not including those persons to whom 19.15.4.9 NMAC requires distribution of hearing notices, who are not otherwise entitled to notice of the particular application), who has entered an appearance in the case; and
> **(3)** a person who properly intervenes in the case.
> **B.** A person entitled to notice may enter an appearance at any time by filing a written notice of appearance with the division or the commission clerk, as applicable, or, subject to the provisions in Subsection C of 19.15.4.10 NMAC, by oral appearance on the record at the hearing.
> **C.** A party who has not entered an appearance at least one business day prior to the pre-hearing statement filing date provided in Paragraph (1) of Subsection B of 19.15.4.13 NMAC shall not be allowed to present technical evidence at the hearing unless the commission chairman or the division examiner, for good cause, otherwise directs.
> **D.** A party shall be entitled to a continuance of any hearing if it did not receive notice of the hearing at least three business days prior to the date for filing a timely appearance as 19.15.4 NMAC provides.
> [19.15.4.10 NMAC - Rp, 19.15.14.1208 NMAC, 12/1/2008]

From the foregoing rule, the following are parties to an adjudicatory proceeding before the Division or the Commission:

1. The applicant;

2. A person who is given notice of the proceeding and enters an appearance; under 19.15.4.10 (2), Cimarex was given notice but did not enter an appearance;

3. A person who properly intervenes in the case.

Subsection B of the § 19.15.4.10 indicates that a person entitled to notice may enter an appearance in writing or orally at the hearing. This part of the rule contemplates that an entry of appearance or intervention would occur before or at the hearing. No other interpretation makes sense.

Cimarex did not enter an appearance in accordance with the rule.

The next rule quoted below clearly establishes who is a party of record:

> **19.15.4.24 COPIES OF COMMISSION AND DIVISION ORDERS:** Within 10 business days after the division or commission issues an order in an adjudicatory case, including an order granting or refusing rehearing or order following rehearing, the division or commission clerk shall mail a copy of such order to each party or its attorney of record. For purposes of 19.15.4.24 NMAC only, the parties to a case are the applicant and each person who has entered an appearance in the case, in person or by attorney, either by filing a protest, pleading or notice of appearance with the division or commission clerk or by entering an appearance on the record at a hearing. (emphasis added).

This rule makes absolute sense as to who is entitled to receive a copy of an order upon issuance of an order by the Division or the Commission. Only the parties of record receive a copy of an order.

The foregoing rules are in harmony with NMSA 1978, § 70-2-13, which governs applications for de novo hearings. It states in part:

> …The division shall promulgate rules and regulations with regard to hearings to be conducted before examiners, and the powers and duties of the examiners in any particular case may be limited by order of the division to particular issues or to the performance of particular acts. In the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence subject to such objections as may be imposed, and shall cause a complete record of the proceeding to be made and transcribed and shall certify the same to the director of the division for consideration together with the report of the examiner and his recommendations in connection therewith. The director of the division shall base the decision rendered in any matter or proceeding heard by an examiner upon the transcript of testimony and record made by or under the supervision of the examiner in connection with such proceeding, and such decision shall have the same force and effect as if the hearing had been conducted before the director of the division. When any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party of record adversely affected shall have the right to have the matter heard de novo before the commission upon application filed with the division within thirty days from the time any such decision is rendered. (emphasis added).

To have the right under Section 70-2-13 to request a de novo hearing before the

Commission, Cimarex would have had to be a "party of record." This statutory provision is firmly fixed. It does not provide for extensions of time due to mistake, inadvertence, or excusable neglect.

C. Case law supports the conclusion that only parties may appeal from administrative decisions.

It makes ultimate sense that appeals, or de novo applications as here, are not open to non-parties who did not participate in any manner in an adjudicatory proceeding. Gila Resources Info. Project v. New Mexico Water Quality Control Commn., 124 P.3d 1164, 1166 (N.M. App. 2005) illustrates this concept as such:

> Any party who participates in a permitting proceeding before the Department may appeal the Department's decision by filing a petition for review before the Commission. § 74–6–5(N). Gila Resources Information Project (GRIP) participated in the permitting proceeding in this case and therefore had standing to appeal the Department's permitting decision to the Commission. The Commission regulations contain adjudicatory rules that set forth specific requirements for filing petitions for review and for conducting a hearing on the petition. *See generally* 20.1.3 NMAC (2001). More particularly, 20.1.3.2(A)(1) NMAC governs "Appeal Hearings," which includes, among other proceedings, appeals from permitting actions under Section 74–6–5(N). 20.1.3.2(A)(1), (B)(1) NMAC. The regulations refer to the "petition for review" described in Section 74–6–5(N) as an "Appeal Petition." 20.1.3.7(A)(12)(b) NMAC. (emphasis added).

A U.S. Supreme Court case, Marino v. Ortiz, 484 U.S. 301, 304 (1988) states that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."

Southern Utah Wilderness Alliance. v. Kempthorne, 525 F.3d 966, 968 (10th Cir. 2008), citing Marino v. Ortiz, held that non-parties who failed to timely intervene in a case involving a BLM decision to lease sixteen parcels of land could not file a notice of appeal saying that attempts by non-parties to appeal must fail. In that case the non-parties failed to timely intervene, and then tried to appeal.

In this case, Cimarex is a non-party who did not participate in the original hearing. By not doing so, it gained no right to appeal or to ask for a de novo hearing before the Commission.

D. Conclusion.

The rules and regulations of the Division and the Commission are clear and unambiguous. NMSA 1978, § 70-2-13 is equally clear. The practice and procedure at Division hearing for interested parties is that entries of appearance are routinely made to preserve appellate rights. Cimarex has considerable experience and involvement in Oil Conservation Division and Commission proceedings. It is one thing to have contested hearings before the Division that progress to the Commission level as de novo proceedings. It is another, for an oil and gas operator like Cimarex after having received Colgate's well proposals and hearing notice, to blunder in the manner that it did, and then try to make a case as an adverse and aggrieved party.

Should the Commission grant the de novo application, then it would set precedent for anyone to effectively challenge valid orders of the Division as collateral challenges to valid Division orders. Currently, and after the fact, Cimarex has filed "competing applications" which are collateral attacks on Order R-21575. Potentially, even Commission orders are subject to challenge on appeals to the District Court without participation as a party in any of the Division or Commission proceedings.

Colgate's motion to dismiss Cimarex's request for de novo hearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record by electronic mail on April 5, 2021.

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