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 COLGATE OPERATING, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

Commission Case No. 21744
Division Case No. 21629
Division Order No. R-21575
Commission Order Nos. R-21679, R-21679-A & R-21679-B

CIMAREX ENERGY CO.'S MOTION TO INVALIDATE AND VACATE COLGATE OPERATING, LLC'S ORDER NO. R-21575

Cimarex Energy Co., and its affiliate Magnum Hunter Production Inc. (collectively "Cimarex"), submit to the Oil Conservation Commission ("Commission") its Motion to Invalidate and Vacate Colgate Operating, LLC's ("Colgate") Order No. R-21575 ("Motion") pursuant to New Mexico statutory and case law, in particular, *Property Tax Department v. Molycorp, Inc.,* 1976-NMSC-72, 89 N.M. 603; and NMSA 1978 §§70-2-13 and 39-3-1.1.

In support of its Motion, Cimarex states the following:

I. Essential facts and procedural background relevant to this motion.

1. On March 25, 2021, the Parties made oral arguments before the Commission on both Cimarex's Application *De Novo* and Colgate's Motion to Dismiss. Given the complexity of the legal interpretations involved, the Commission requested supplemental briefs from the Parties.

2. On April 15, 2021, the Parties continued oral arguments at the Commission. The Commission ruled in favor of Cimarex, addressing defects in the application process and

granting Cimarex a hearing *de novo* before the Commission. Colgate indicated it would consider an appeal of the decision in district court.

3. The Parties reconvened before the Commission on May 13, 2021, for a Status Conference, setting dates for pleadings and the subsequent filing of Cimarex's competing applications, that would have been included in the hearing before the Oil Conservation Division ("Division") absent Colgate's mishandling of its statutory obligations preceding the hearing. At the Status Conference, questions were raised by both Parties regarding the proper procedure and forum for hearing Cimarex's competing applications. Colgate argued that it was improper to remove Cimarex's application back to the Division, as this would constitute a collateral attack on a standing Division order. Cimarex agreed with Colgate's assessment, that removing the application back to the Division-level without first invalidating or vacating Order No. R-21575 on proper grounds would constitute a collateral attack on the order subject to appeal in district court.

4. At the Status Conference, counsel for Cimarex expressed that it is in the best interest of both Parties to have the Commission evaluate and determine the proper procedural posture for hearing Cimarex's applications to ensure that any final order issued would be secure, to the extent possible, from appeal.

5. To date, a question of collateral attack of a standing order, if a case challenging such order is removed to the Division for hearing pursuant to the proceedings of a *de novo* hearing under §70-2-13, has not been addressed by the courts, and thus, it would be a question of first impression upon appeal.

II. The Commission, to secure an order to the extent possible under the facts of these proceedings, should be fully satisfied with its position on the question of collateral attack of a standing order both within the context of New Mexico case law and industry standards.

6. It is clear that the Division and Commission have broad authority under NMSA 1978 §§ 70-2-6 and 70-2-11 to address issues of conservation of oil and gas and to do whatever may be reasonably necessary to carry out the purpose of the New Mexico Oil and Gas Act ("Act"), such broad authority being important to the mission of the two agencies, but it is equally clear that the Division and Commission are agencies bound by statute. *See* Continental Oil Co. v. Oil Conservation Commission, 1962-NMSC-062, ¶ 11, 70 N.M. 310 (stating: "The [OCC] is a creature of statute, expressly defined, limited and empowered by the laws creating it."). This limitation is codified in §70-2-6 of the Act, which shows that the concurrent jurisdiction the Commission has with the Division is not absolute, but is permitted "to the extent necessary for the [C]ommission to perform its duties as required by law."

7. New Mexico case law has demonstrated instances in which the Commission's broad authority has been curtailed for the proper operation of specific, limiting statutes in relation to broader statutes of the Act such as §§70-2-6 and 70-2-11. *See Marbob v. Oil Conservation Com'n,* 2009-NMSC-013, ¶ 13, 146 M.M. 24. In *Marbob,* the court held that the Commission cannot ignore the plain language of a specific statute. *See id.* at ¶ 14. Doing so creates a contradiction in the Act, *see id.,* and "[a]s a general rule of statutory construction,…general language is limited by specific language." *Id.* at ¶ 15 (*citing Lubbock Steel & Supply, Inc., v. Gomez,* 1987-NMSC-025, ¶ 6, 105 N.M. 516).

8. In the present case, the concern would be whether the specific statute, §70-2-13, allows the Commission to re-litigate at the Division-level a standing order issued by the Division. The hermeneutics of statutory construction rely heavily on the precision of the statutory language, and counsel for Colgate asserted in discussions before the Commission on May 13, 2021, that a *de novo* hearing should not go backward to the Division-level, which would

result in a collateral attack on the standing order, but must go forward with the *de novo* hearing at the appellate-level of the Commission. Although Cimarex would benefit, in the short term, from a return to the Division to hear its competing application, a successful challenge of such procedure in district court would not benefit Cimarex in the long term, and therefore, counsel for Cimarex would tend to agree with Colgate's assessment, that as long as Colgate's final pooling order remains in place, a return to the Division would constitute a re-litigation of the matter and an improper collateral attack under the Act and case law.

III. Under the facts of this case, the cleanest and safest way to avoid challenge or appeal is to invalidate and vacate Order No. R-21575.

9. In the present case, there is opportunity, consistent with case law and statutory language, to avoid the issues of re-litigation and collateral attack. Under *Molycorp, Inc.,* 1976-NMSC-072, ¶ 11, *res judicata* applies "to rulings of administrative bodies under the proper circumstances," a holding which would likely be applicable to the Division as an administrative body. Cimarex is concerned that this precedent may have traction in district court.

10. However, the *Molycorp* court noted that an agency has the inherent power to cancel and revoke an order that is found to be "issued in conflict with the statutes governing and limiting the issuance thereof." *Id.* In Order No. R-21679, the Commission properly focused on Cimarex's allegations of Colgate's material misrepresentations, concluding that they were "not only compelling but concerning given that misrepresentations in pleadings undermine both the administrative and judicial legal systems, specifically as to the integrity of any particular case." Order No. R-21679 at § II.i.

11. Based on such misrepresentations, it is clear that Order No. R-21575 was issued in conflict with the statutes governing and limiting the issuance thereof, specifically §70-2-17(C), which became apparent after Cimarex "supplied evidence previously unseen by the

Division." *See* Order No. R-21679 at §II.j. Thus, there are proper grounds to invalidate and vacate Order No. R-21575, not because the Division improperly issued the order at the time, but because, in retrospect, given the new evidence, the order should be invalidated and vacated; otherwise, at this point in the proceedings, the order could be viewed as unauthorized and ultra vires. *See Molycorp*, 1976-NMSC-072, ¶ 12 (holding that the agency in issuing its order in violation of its rules "was unauthorized and ultra vires"). Thus, the invalidation of Order No. R-21575 would allow the Division to properly hear Cimarex's completing applications to determine whether its plan would better prevent waste and protect correlative rights, thereby avoiding a challenge of collateral attack in district court.

12. Cimarex realizes that the Division and Commission have recently given consideration to whether *res judicata* is applicable to the re-litigation of a matter previously litigated by the Division and final order issued. *See, i.e.,* Division Order No. R-21675 at ¶ ¶ 2-3 (ruling that *res judicata* does not bar the Division's consideration of Apache's application in Case Nos. 21489, 21490 and 21491 or Mewbourne's applications in Case Nos. 21362 and 21364). Cimarex respectfully submits that further consideration of this issue would be beneficial to obtain the perspective of a party, Cimarex, who faces the prospect of a challenge in district court to any order it might receive from the Commission under the facts of the present case. Cimarex reasonably desires to avoid, to the extent possible, any challenge alluded to by Colgate. Since this issue would be a question of first impression in district court, Cimarex remains uncertain of the final outcome.

13. The courts will generally defer to the agency's interpretation in resolving ambiguities in the statutes or regulations which an agency is charged with administering, if it implicates the agency's technical expertise. *See Sierra Club v. New Mexico Mining Com'n* 2003-

NMSC-5, ¶ 17, 133 N.M. 97. However, if the question involves only a matter of law, the appellate court "will not defer to the Commission's or the district court's statutory interpretation," as a matter of law is reviewed *de novo*. *See id.;see also* NMSA 1978 §39-3-1.1(D)(3) (proper basis of appeal is that the agency did not act in accordance with the law).

14. The strongest argument for not applying *res judicata*, and not having concern that a re-litigation of a standing order at the Division-level is a collateral attack, is the view that a Division order is not final because a *de novo* hearing at the Commission-level is still available. Recent arguments before the Division for the inapplicability of *res judicata* have relied on *Ruyle v. Continental Oil Company,* 44 F.3d 837 (10th Cir. 1994), a case which made a passing reference to the potential effect of a subsequent *de novo* hearing, but which ultimately ruled that the agency's order does provide preclusive effect pursuant to collateral estoppel and *res judicata. See id.* at 846. The *Ruyle* court raised the possibility that a pending *de novo* hearing might negate the finality of an agency order by referencing Wright & Cooper, Federal Practice & Procedure, §4433, at 308 (1981) followed by the court's reference to Restatement (Second) of Judgements §83 cmt. at (1980). *See id*. However, the statement in Wright's Federal Practice & Procedure provides: "The Supreme Court long ago seemed to establish the rule that a final judgment retains all of its *res judicata* consequences pending decision of the appeal, apart from the *virtually nonexistent* situation in which the 'appeal' actually involves a full trial *de novo*." Federal Practice & Procedure (Wright & Miller) §4433 (3rd ed.) (emphasis added). Thus, such reference does not apply to the type of *de novo* hearing contemplated at the Commission-level.

15. In order for *res judicata* to be inapplicable, and a collateral attack avoided, the *Ruyle* court's references regarding the potential effect of a *de novo* hearing must apply to the Division's order in New Mexico; in effect, they must negate the finality of the order. However,

under current New Mexico law, this is not the case. In *Alarcon v. Albuquerque Pub. Sch. Bd. of Educ.*, 2018-NMCA-021, ¶ 32, 413 P.3d 507, Albuquerque Public Schools attempted to argue that a teacher could not apply for a writ of mandamus, which requires a final order by an administrative body, because under the statute, the teacher "could appeal an adverse decision from a discharge hearing conducted by the superintendent to an independent arbitrator who hears the case *de novo*…." *Id.* The *Alarcon* court rejected this argument, illustrating that the *de novo* hearing does not supplant the initial hearing for purposes of finality, nor does the opportunity to have a subsequent or pending hearing *de novo* preclude the establishment of finality of the initial order. *See id.* at ¶¶ 32-33

16. The Commission's *de novo* hearing was not envisioned by the original drafters to be a *tabula rasa* proceeding completely divorced from the findings at the Division's hearing. *See* Commission Case No. 903 at p. 24 (showing that for reasons of constitutionality and due process, the form of *de novo* hearing favored by the drafters was one in which "the record [from the Division] will be considered and you can introduce additional evidence"). This reflects New Mexico case law which consistently shows, as does case law from other oil producing states, that when an administrative body, such as the Division, makes a decision after opportunity for a full and fair adjudication, the decision is final and *res judicata* applies. [1]

[1] *See Property Tax Dept. v. Molycorp,* Inc., 1976-NMSC-72, 89 N.M. 603 (holding *res judicata* does apply to rulings of administrative bodies); *Amoco Production Co. v. Heimann,* 904 F.2d 1405, 1419 (10th Cir. 1990) (holding that where a state agency in a judicial capacity, resolves facts before it during which the parties had opportunity to litigate, the agency's decision has the same preclusive effect to which it would be entitled in state's courts); *Ruyle v. Continental Oil Co.,* 44 F.3d 837, 846 (10th Cir. 1994)(agency order provides preclusive effect pursuant to collateral estoppel and *res judicata*); *City of Socorro v. Cook,* 1918-NMSC-072, 24 N.M. 202 (showing that courts have uniformly held decisions of administrative adjudications, when rendered by an officer or a board, have the preclusive force and effect of a judgement); *Hystad v. Mid-Con Exploration Co. Exeter,* 489 N.W.2d 571, 574-576 (N.D. 1992)(holding that when the Industrial Commission of ND issues a spacing order, after a full and fair agency hearing, it has preclusive effect, and a challenge of such order constitutes a collateral attack); *Trahan v. Superior Oil Company,* 700 F2d 1004, 1024-25 (5th Cir. 1983)(holding that a challenge to the agency's order, absent fraud, or other comparable exception, constitutes an impermissible attack on the order); *Leck v. Continental Oil Co.,* 971 F.2d 604 (10th Cir. 1992)(holding that Appellants are collaterally estopped from attacking the Oklahoma Corp. Commission's order because the order found no basis for Appellants' claim of drainage).

17. Thus, the only way to secure with any modicum of certainty that a competing application returned to the Division-level for hearing would not constitute a collateral attack of a standing order is to invalidate and vacate the order prior to the Division hearing, and in the present case, there are sufficient grounds for invalidating Colgate's pooling order.

IV. An order, if left standing and not invalidated, can be properly reconsidered at the Commission-level concomitant with hearing a competing application under §70-2-13.

18. Should the Commission decide to leave Colgate's order standing, then Cimarex respectfully submits that the proper procedure would be to move forward with Cimarex's competing application at the Commission-level as part of the *de novo* proceedings, a procedural posture that is endorsed by counsel for both Cimarex and Colgate. Since the Commission's decision was made in part to restore Cimarex to its unharmed status that existed prior to the Division's original hearing, and since its competing development plan would have been heard at the original hearing had Colgate fulfilled its statutory obligations, it would be reasonable for Cimarex's plan to be reviewed as a "matter" of the original hearing, pursuant to §70-2-13. Thus, Cimarex, adversely affected, has a "right to have the *matter* heard *de novo* before the [C]ommission." *See* NMSA 1978 §70-2-13 (emphasis added).

19. Cimarex would prefer to have its application heard at the Division-level to receive the benefit of the Division's technical expertise, but Cimarex is fully satisfied with the level of technical expertise and background currently embodied at the Commission for making determinations of waste, protection of correlative rights, and optimal production. If a pooling order is left standing as valid, then the remaining forum for review of a party's application, one that was not presented at the original hearing, should be the hearing *de novo* at the Commission. This may be one of the inherent consequences of a party missing its opportunity to present its

development plan at the original hearing, that since returning to the Division would constitute a collateral attack, the proper procedure is to move forward, allowing the party to receive its remaining opportunity to demonstrate that its development plan is preferrable.

V. Observance and application of *res judicata* and collateral estoppel to prevent an improper collateral attack on a standing order establishes policies of efficiency, due process, and fundamental fairness in the proceedings.

20. When a party decides to present its development plan to the Division, the underlying assumption should be that the party has made a good-faith effort to devise a plan for optimal development of the unit lest it waste the Division's time and resources reviewing a substandard plan. A lack of accountability in this regard places a substantial burden on all operators and applicants, large and small alike. A company that invests significant resources and risk in the development of its plan, both for the benefit of the company and the state of New Mexico, deserves a level of security and confidence that it can rely on the Division's final order without threat of collateral attack. *Res judicata* and collateral estoppel are the principles of proper civil procedure that provide this security. If a party has any objections to an order as issued, the appellate process under §70-2-13 provides a fair and proper procedure for addressing such objections, by moving forward with a *de novo* hearing, and not subjecting the applicant to the burden of re-litigating the matter at the Division.

21. Being subject to re-litigation is especially burdensome on smaller operators, placing a strain on limited financial resources to defend against such collateral attacks. Without protective measures such as *res judicata*, an operator could face two, three, perhaps more challenges at the Division-level before an order is finally secure.[2] Smaller operators, who

[2] Theoretically, without the protections provided by *res judicata* and collateral estoppel, an operator could face multiple collateral attacks at the Division-level, a loophole inviting gamesmanship and abuse of process that the Commission should consider closing.

historically have played a vital role in developing the natural resources of New Mexico during market downturns, as a result of their greater agility, should be free of such hardships through proceedings that are fair, predictable and reliable.

22. It is true that the practical considerations of high costs, time constraints, and other burdens involved with appealing a decision to district court provide a general deterrence against most appeals. However, such deterrence should not be relied on as a substitute for clean and secure proceedings under the Act and case law, when a safer, more secure and procedurally proper option for avoiding appeals is available, based on the law, through a valid interpretation of the statutes in harmony with current legal precedent.

VI. Conclusion:

For the foregoing reasons, Cimarex respectfully requests that the Commission invalidate and vacate Division Order No. 21575, on the grounds that, since new evidence shows Colgate failed to meet its statutory obligation under §70-2-17(C), the order issued by the Division, should be viewed, retrospectively, as an invalid order. This request would avoid a claim of collateral attack of a standing order and allow the Division to hear Cimarex's development plan with a significantly reduced risk of challenge in district court.

In the alternative, should the Commission maintain the validity of Colgate's pooling order, Cimarex respectfully requests that the Commission exercise its authority under §§ 70-2-13, 70-2-6, and 70-2-11, to include Cimarex's competing applications as a "matter" to be reviewed during the Commission's hearing *de novo* to ensure, to the extent necessary under the law, the prevention of waste and protection of correlative rights.

Respectfully Submitted,

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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, or on the party of record, if no counsel was provided, via electronic mail on June 2, 2021:

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