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

APPLICATION OF HILCORP ENERGY COMPANY TO AMEND THE WELL DENSITY AND LOCATION REQUIREMENTS AND ADMINISTRATIVE EXCEPTIONS OF THE SPECIAL RULES FOR THE BLANCO-MESAVERDE GAS POOL, RIO ARRIBA AND SAN JUAN COUNTIES, NEW MEXICO.

Case No. 16403

HILCORP'S MOTION TO STRIKE SJCA's SECOND NOTICE OF INTERVENTION

Hilcorp Energy Company ("Hilcorp") hereby moves to strike the second Notice of Intervention ("Second Notice") filed by the San Juan Citizens Alliance ("SJCA"). This Second Notice espouses the same arguments SJCA asserted in support of its initial Notice of Intervention stricken by the Commission following argument at the September 13th hearing. Since this Second Notice remains legally deficient to support intervention in this highly technical matter involving the management of an oil and gas reservoir, it too must be stricken.

A. Hilcorp's Application Involves Highly Technical Reservoir Management Issues That Do Not Implicate Surface, Environmental or Public Health Issues.

The legislature has tasked the Commission with the duty to promote the production of oil and gas without waste and in conformance with correlative rights. *See* NMSA 1978, §§70-2-6, 70-2-11, and 70-2-12. The Commission is authorized to examine surface-related issues and issues of public health and environment when (a) addressing the drilling, operation or production of wells, or (b) when addressing the disposition of oilfield wastes. *See* NMSA 1978, § 70-2-12.B (7), (15), (21) and (22). As the Commission has already found, Hilcorp's application does not involving the drilling, operation or production of any well nor does it involve the disposition of oilfield wastes. Rather, Hilcorp's application is simply a continuation of the Commission's

oversight of the well density necessary to efficiently and effectively drain the Blanco-Mesa Verde Gas Pool and avoid underground waste.

The Commission's oversight of the Blanco-Mesaverde Gas Pool began in 1949 with the issuance of Commission Order R-799 creating the spacing units for this pool. This oversight continued in 1974 with the issuance of Order R-1670-T doubling the well density for each spacing unit and was last addressed by the Commission in 1998 under Order R-10987, again doubling the well density for each spacing unit. *See, e.g.,* Order R-10987-A at ¶¶ (7)-(12) (outlining the history of this pool). Armed with another 20 years of production data, Hilcorp merely seeks an Order from the Commission increasing the potential well density so operators can plan future drilling programs to efficiently and effectively drain this reservoir.

This highly technical application falls directly under the Commission's mandate to prevent "underground waste" defined in Section 70-2-3:

> A. "underground waste" as those words are generally understood in the oil and gas business, and in any event to embrace the inefficient, excessive or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas;

The Commission noted this limited subject matter when it struck the SJCA's first Notice of Intervention at the September 13th hearing:

> The Commission finds that the notice fails to show that the intervenor has standing in the particular issues in this matter, which relate to the reservoir and the management of the pool at issue here...

Tr. at pp. 43-44.

Since Hilcorp's application does not involve the drilling, operation or production of any well or the disposition of oilfield wastes, it does not implicate surface, public health or environmental issues. SJCA's "fears" and "concerns" do not arise out of the Commission's decision on the well density necessary to prevent underground waste. Rather these unsubstantiated "fears" and "concerns" arise in the future when operators undertake action to recomplete or drill the additional wellbores the Commission has determined are necessary to efficiently and effectively drain this reservoir.

B. The SJCA Has Not Established Legal Standing for The Subject Matter Before The Commission: The Prevention of Underground Waste.

To establish legal standing, the SJCA must show (1) that its members will suffer an injury that is concrete, particularized and actual or imminent, as opposed to merely conjectural or hypothetical (*i.e.*, an "injury in fact"), (2) that the "injury in fact" SJCA alleges will be caused by the relief requested from the Commission in this matter (*i.e.*, a "causal relationship"), and (3) that a denial of the relief requested from the Commission will remedy the purported "injury in fact" (*i.e.*, "redressability"). *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, at ¶7.[1] The SJCA rests legal standing on the unsubstantiated proposition that the recompletion or drilling of any gas well causes unwarranted "surface damage, water loss, contamination, ranching interferences, and health problems." *See* Second Notice at p. 5. As this Commission concluded at the September 13th hearing, these allegations do not establish legal standing on the underground waste issues before the Commission.

[1] *See also ACLU* ¶10 (further stating "at least as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate injury in fact, causation, and redressability to invoke the court's authority to decide the merits of a case."); *Forest Guardians v. Powell*, 2001-NMCA-028, ¶16 ("To acquire standing, a plaintiff must demonstrate the existence of "'(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.'").

1. The SCJA has failed to establish any "direct" or "special" injury "in fact" arising from the regulatory action at issue: The prevention of underground waste.

In *ACLU*, the Court noted the long-standing requirement that the "injury in fact" must be a "special injury" and that it "is not enough that the community in which he resides will be injuriously affected by some governmental or legislative action." *ACLU,* 2008-NMSC-045, ¶10. The Court further held the intervening party must be injured or threatened in a "direct and concrete way" (*id.* at ¶19) (emphasis added), that the alleged injury cannot be "speculative" (*id.* at ¶24), and that a "hypothetical possibility of injury will not suffice to establish the threat of direct injury required for standing." *Id.* at ¶29.

By incorrectly assuming this hearing seeks to authorize the actual drilling, operation or production of individual wells at specific surface locations, the SJCA leaps to the conclusion surface, environmental and public health issues are germane to this proceeding. *See* Second Notice at p. 4, citing NMSA 1978, § 70-2-12.B (7), (15), (21) and (22). The SJCA cites affidavits from non-mineral surface owners raising "fears" and "concerns" that oil and gas development creates risks "for my own health," "water loss," "additional leak and spill opportunities," and "air quality emissions." *See, generally,* SJCA Ex. A, (Schreiber Aff.), Ex. B (Eisenfeld Aff.) and Ex. D (Scott Aff.). The SJCA sums up its standing argument by noting it seeks intervention for the sole purpose "of protecting the public and environment from harm resulting from oil production." Motion at p. 12. The cited "fears" and "concerns" do not constitute the "special" or unique "injury in fact" necessary to confer standing.

First the legislature, with knowledge of the "fears" and "concerns" from oil and gas development, specifically tasked the Commission to promote oil and gas development to prevent the waste of this valuable natural resource. *See* NMSA 1978, §§70-2-3, 70-2-6, 70-2-11, and 70-

2-12. Accordingly, the mere fact that isolated instances of harm could arise from oil and gas development is not the "injury in fact" necessary to confer standing. Indeed, the hypothetical "fears" and "concerns" espoused in the affidavits exist independent of the well density the Commission determines necessary to prevent underground waste; they exist with the drilling and production of ANY oil and gas well and remain whether Hilcorp's application is granted or denied. Put simply, the "fears" and "concerns" espoused by the SJCA do not constitute a "special" or unique "injury in fact" arising out of the subject matter of the pending application.

Second, the "fears" and "concerns" espoused in the affidavits rest solely on past, isolated instances of conduct allegedly inconsistent with the rules and regulations governing oil and gas surface activities. The SJCA leaps to the conclusion that these alleged, isolated transgressions will occur with any future development. However, Courts have held that "[w]hen a threatened future injury is dependent upon conjecture about how individuals will intentionally act in the future, that injury will be cast into the realm of conjecture and speculation." *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1300, 2013 U.S. Dist. LEXIS 108426, *38-39, 2013 WL 3976626 (M.D. Ala. August 2, 2013). The SJCA complaints of potential harms from future recompletion or drilling actions by third parties assume future operators will act contrary to the myriad of rules and regulations governing the drilling, operation and production of oil and gas wells. These allegations amount to pure "conjecture about how individuals will intentionally act in the future" and does not constitute the injury in fact necessary to confer standing. *Id.* at 1300. *See also ACLU,* 2008-NMSC-045, ¶29 (resting standing on the assumption a party will be "wrongly arrested for DWI" is a "hypothetical possibility of injury" that does not confer standing); *Maiden Creek Assocs., L.P. v. United States DOT*, 823 F.3d 184, 194 (3d Cir. 2016) (finding a shopping center developer and a local government lacked standing to address a

planned highway improvement project because the allegations of increased stormwater and groundwater contamination rested on assumptions of future events and was therefore "hypothetical" and "highly speculative"); *Stewart v. Kempthorne*, 554 F.3d 1245, 1254 (10th Cir. 2009) (rejecting as "merely conjectural or hypothetical" a local government's assertion that issuance of BLM's grazing permits to a party without any intention to graze livestock would result in a decrease of sales tax revenues, a decrease in property taxes and negatively impact the aesthetic appeal of the land); *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127, 138, (D.D.C. 2013) (where a party's "theory of injury requires guesswork as to how independent decisionmakers will exercise their judgment, and consequently, guesswork as to whether [the party] will suffer an injury-in-fact, the need for such guesswork defeats [the party's] attempt to demonstrate that it faces an imminent injury"), *aff'd in part, rev'd in part*, 795 F.3d 48 (D.C. Cir. 2015) (affirming lack of standing).

2. Due process rights are not impacted by the Commission's decision on the number of wellbores necessary to prevent underground waste.

The SJCA suggests any approved increase in density will deprive members of their "due process right" to challenge wells that "would specifically harm their property." Second Notice at p. 8. However, the current rules governing the Blanco-Mesaverde Gas Pool do not require notice or provide intervention rights to surface owners when individual exceptions are sought to the approved density. Notice and intervention rights to surface owners are protected by the Surface Owner Protection Act, BLM surface owner requirements, NMSLO surface owner requirements, private contracts and Division regulations governing oil and gas surface activities. Hilcorp's application does not change, alter or take-away any current surface owner notice or intervention rights.

3. The SCJA has failed to establish that their "fears" and "concerns" are caused or can be alleviated by the Commission's decision on the well density necessary to prevent underground waste.

The Commission's Order will not authorize the re-completion or drilling of any well or group of wells at any particular surface location and will not address how additional wellbores will be equipped at the surface. Rather, the Commission is merely addressing whether any additional wellbores are needed to efficiently and effectively drain the reservoir, thereby allowing operators to plan and eventually initiate the necessary recompletion or drilling programs. Under these circumstances, it is impossible for the SJCA to demonstrate causation and redressability.

First, a party alleging standing must demonstrate they are within "the zone of interests" sought to be protected or regulated by the pending action. *See City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, ¶40 ("Even where a party demonstrates these three elements, standing may be denied if the interest the complainant seeks to protect is not within the 'zone of interests' protected or regulated by the statute or constitutional provision the party is relying upon."); *Forest Guardians*, 2001-NMCA-028, ¶16 (conservation group lacked standing because they were "not within the zone of interest to be protected" by the applicable law). Here, the Commission has been asked to address how many wells are necessary in a spacing unit to efficiently and effectively drain the Blanco-Mesaverde Gas Pool. The "zone of interests" sought to be protected by this regulatory action are the State's interests in the prevention of underground waste and the protection of the correlative rights of operators in this pool. The members of the SCJA have no interests that fall "within the zone of interests to be protected" by this regulatory action. *Forest Guardians*, 2001-NMCA-028, ¶16. *See also* ¶21 (holding a conservation group does not have standing unless its members would otherwise have standing in their own right).

Second, courts have held causation and redressability do not exist when the alleged injury is dependent upon "the response of the regulated third party to the government action or inaction — and perhaps on the response of others as well." *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d at 134-35. Since the implementation of the necessary well density is not the object of this proceeding, standing cannot rest on assumptions about that implementation. If the Commission determines additional wellbores are necessary to efficiently and effectively drain the Blanco-Mesaverde Gas Pool, how many wellbores are actually recompleted or drilled will depend on economics, will take years to implement, and the details of how those wells are recompleted or drilled will determine whether the harms the SJCA allege actually occur. The SJCA concerns are more appropriate for another time, when operators undertake action to recomplete or drill additional wells.

Put simply, there is no "causal relationship between" the fears and concerns raised by SJCA and the highly technical subject matter of this hearing. *ACLU,* ¶7, 2008-NMSC-045 (standing requires "a causal relationship between the injury and the challenged conduct...."). The hypothetical "fears" and "concerns" cited by the SJCA do not arise out of the Commission's technical decision on how many wellbores are necessary to efficiently and effective drain this reservoir. Rather, they rest on assumptions about future actions by third parties when implementing the density determined necessary by the Commission. Further, the "fears" and "concerns" raised by the SJCA will not be alleviated by this hearing. The recompletion, drilling, operation and production of individual wells in this reservoir is ongoing under the current pool rules. Development of this gas reservoir will continue irrespective of the outcome of Hilcorp's application. The SJCA's "fears" and "concerns" about the surface impacts from oil and gas development will not be redressed by the Commission's decision in this case. *ACLU*, ¶7, 2008-

NMSC-045 (standing requires "a likelihood the injury will be redressed by a favorable decision.").

C. The SJCA Has Not Demonstrated the Ability to "Contribute Substantially" to the Underground Waste Issues Before the Commission

Alternatively, the SJCA suggests it is entitled to permissive intervention "on the grounds that it will substantially contribute to the protection of the public health and the environment under NMAC 19.15.4.11(C)." Second Notice at p. 2. However, as noted above, Hilcorp's application does not give rise to the surface, environmental or public health issues raised by the SCJA.

Further, the Commission order adopting NMAC 19.15.4.11(C) specifically notes that persons or entities desiring to intervene in highly technical cases must show "they have special expertise or interest the Commission determines would be helpful to its decision-making process." *See* SJCA Ex. G (Order R-12327-A) at ¶ 8. During deliberations over this rule, the Commissioners describe this type of intervention as "a fairly narrow sort of discretionary intervention." Transcript for Case No. 13,482 (8/18/05) at p. 219.

Hilcorp's application raises highly technical, down-hole, reservoir management issues requiring expertise in geology and reservoir engineering. The SJCA pre-hearing statement does not identify any technical witnesses nor has it pre-filed any technical exhibits. *See* NMAC 19.15.4.13.B. Instead of providing technical evidence on the management of the Blanco-Mesaverde Gas Pool, the SJCA seeks permissive intervention to "better inform" the Commission generally on the public health and environmental impacts of ANY oil and gas development in ANY reservoir. The SJCA cites "more than 30 years" of advocating for "clean air, pure water and healthy lands" through participation in work groups; commenting on Environmental Impact Statements; and commenting on state and federal regulations addressing emissions, waste disposal

and oil and gas surface impacts, including the "New Mexico Pit Rule" and the "Surface Owner Protection Act." Second Notice at p. 16. Yet, Hilcorp's application does not implicate surface issues or any of the myriad of state regulations governing the drilling, production and operation of oil and gas wells and the disposal of oilfield wastes. *See, e.g.,* NMAC 19.15.18 (Production Operating Practices); NMAC 19.15.19 (Natural Gas Production Operating Practices); NMAC 19.15.23 (Off Lease Transport of Oil or Contaminants); NMAC 19.15.30 (Remediation); NMAC 19.15.34 (Produced Water); NMAC 19.15.35 (Waste Disposal); and NMAC 19.15.36 (Surface Waste Management Facilities).

It is for this reason that all prior Commission hearings addressing the management of the Blanco-Mesaverde Gas Pool did not involve non-mineral surface owners. Rather, all prior hearings on the proper well density in this pool involved notice to and participation by operators because they possess the technical knowledge needed to periodically examine whether enough wells are authorized over time to efficiently and effectively drain the reservoir. Subsequent surface impacts from specific wells at specific locations are addressed by existing rules and other proceedings when actual recompletion or drilling plans are presented. The necessary surface equipment and how particular oilfield wastes will be handled are likewise addressed by existing rules and other proceedings. The surface issues raised by the SJCA do not arise under this application nor are they potentially cured by this application. What is at issue under Hilcorp's application is merely the avoidance of underground waste, not surface impacts from the drilling, operation and production of wells.

WHEREFORE, Hilcorp Energy Company respectfully requests that the second Notice of Intervention field by the San Juan Citizens Alliance be stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2018 I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

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