

**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 PURPOSES
OF CONSIDERING:**

CASE NOS. 14640 & 14641

**APPLICATIONS OF BURNETT OIL CO., INC.
FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.**

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**MOTION TO RECONSIDER ORDER NO. R-13450-A
DENYING CONCHO'S MOTION FOR STAY**

COG Operating LLC ("Appellant" or "Concho") moves the Commission Chair to reconsider the Order Denying Motion for Stay Order No. R-13450, or, in the alternative, to amend Order No. R-13450 to clarify that Burnett proceeds with development and drilling at its own risk prior to a Commission order, and in support thereof states the following:

I. BACKGROUND

1. Concho and Burnett Oil Co., Inc. ("Burnett") are competing for operations in Sections 12, 13, 24, and 25, Township 17 South, Range 31 East, N.M.P.M., Eddy County, New Mexico (hereinafter referred to as the "Puckett leases").

2. Since November 2010, Concho has attempted to reach a voluntary agreement with Burnett for operations of the Puckett leases but has been unsuccessful.

3. In Case Nos. 14640 and 14641 and 14649 and 14650, Burnett and Concho filed competing compulsory pooling applications for vertical wells in Sections 13 and 24, Township 17 South, Range 31 East, N.M.P.M., Eddy County, New Mexico.

4. Concho had originally proposed a vertical well program to Burnett. However, after meeting with the U.S. Bureau of Land Management (“BLM”), Concho learned that very few surface locations would be granted for oil and gas wells on the Puckett leases due to widespread dunes sagebrush lizard habitat. Concho and the BLM agreed that a horizontal well program would be superior in order to maximize production and minimize surface disturbance. Shortly before the Division hearing, Concho proposed drilling horizontal wells to Burnett and other working interest owners.

5. At the Division hearing on the four competing vertical well cases, Concho argued that all four applications should be denied because they were not in the best interest of conservation, the prevention of waste, or the protection of correlative rights. *See* Order No. R-13450, Finding 8.

6. On August 26, 2011, the Division entered an order approving the vertical well applications of Burnett, noting that “COG’s compulsory pooling application has been withdrawn and Burnett should be designated operator of the subject vertical wells and Units.” *Id.* Conclusion ¶ 18.

7. On September 8, 2011, Concho timely filed an Application for De Novo Hearing before the New Mexico Oil Conservation Commission and simultaneously filed a Motion for Stay. The Commission Chair denied the Motion for Stay on October 5, 2011. Order No. R-13450-A. The de novo hearing is scheduled for February 2012.

8. Upon information and belief, Burnett has constructed a well pad on lands subject to Order No. R-13450 and plans begin drilling a well.

9. On August 29, 2011, Division Examiners heard related Case Nos. 14643 and 14674 and 14706-14718. In these consolidated cases, Burnett seeks to pool for two more vertical wells and Concho seeks to pool for 14 horizontal wells, all on the Puckett leases.

10. At that hearing, Concho presented evidence that the BLM has limited the well locations in Sections 12, 13, and 24 to just 35 approved surface locations due to lizard habitat concerns. Tr. 336:6-21 (8/29/2011); Concho Exhibit No. 27 (Case Nos. 14643 and 14674 and 14706-14718). Concho presented extensive evidence that 35 vertical wells across those three sections would produce fewer than 18% of recoverable oil reserves. *Id.*

11. Concho established at the hearing in Case Nos. 14643 and 14674 and 14706-14718, that given these highly restrictive surface-use constraints a horizontal well program is the only way to prevent waste and protect correlative rights on the Puckett leases. Tr. 286:17-22 (8/29/2011); Tr. 296:17-18 (8/29/2011); *see also* Concho Exhibit Nos. 12, 23, 25 (Case Nos. 14643 and 14674 and 14706-14718).

12. Concho also demonstrated that due to the limited number of BLM-approved well locations, any vertical wells approved for pooling would substantially interfere with a full horizontal well development plan, which requires all the approved surface locations to adequately drain the Puckett lease reserves. Tr. 286:17-22 (8/29/2011).

13. At hearing in Case Nos. 14640 and 14641, Burnett witnesses contemplated drilling only vertical wells and made no mention of a horizontal well drilling program and never suggested that the proposed vertical wells would be used to provide data for possible future horizontal wells. *See, e.g.*, Tr. 57:18-58:2 (5/26/2011) (Mark Jacoby indicating that Burnett intends to develop on 20-acre spacing and then eventually 10-acre spacing, if necessary).

14. In Case Nos. 14643 and 14674 and 14706-14718, Burnett's petroleum engineer testified that the company's preliminary plan is to drill four vertical wells to evaluate the possibility of drilling subsequent horizontal wells, Tr. 138, 168-171 (8/29/2011). However, Burnett has not proposed or committed to drilling any horizontal wells. Tr. 363-64 (8/29/2011).

15. Although Burnett has not presented formal plans to develop horizontal wells in any of its applications relating to the Puckett leases, Burnett has, since the hearing in Case Nos. 14640 and 14641, testified that it agrees with Concho that a horizontal well plan is the best way to develop the Puckett leases. Tr. 52 (8/29/2011).

II. Legal Standards

Parties of record adversely affected by a Division order "shall have the right to have the matter heard de novo before the commission" NMSA 1978, § 70-2-13. When "a party files an application for a de novo hearing, the commission chairman shall set the matter or proceeding for hearing before the commission." 19.15.4.23(A) NMAC. However, a Division order is not automatically stayed upon acceptance by the Commission for de novo review; rather, a party must apply for a stay of a Division Order.

Under the Oil Conservation Commission's rules, the decision to stay a Division order rests with the sole discretion of the Director if the Director determines that a stay "is necessary to prevent waste, protect correlative rights . . . or prevent gross negative consequences to an affected party." 19.15.4.23(B) NMAC.

III. ARGUMENT

In its Order denying Concho's Motion to Stay, the Commission stated that Concho had not established that a stay was "necessary to prevent waste, protect correlative rights, protect public health or the environment or prevent gross negative consequences to an affected party."

Order No. R-13450-A; *see also* 19.15.4.23(B) NMAC. The Order denied the motion to stay based on: (1) purported statements by Burnett witnesses that they plan to propose horizontal wells, thereby preventing waste and protecting Concho's correlative rights; (2) the fact that Burnett owns or controls two-thirds of the working interest in the subject lands; and (3) the fact that Concho did not cite to testimony or evidence in support of its motion to stay. The Division, however, should reconsider its order for five reasons.

1. A Stay is Necessary to Preserve the Commission's Authority and Retain its Ability to Make an Impartial Decision on the Merits.

A stay would preserve the Commission's authority and would ensure, by maintaining the status quo, that the Commission retains its freedom to render a fully impartial decision on the merits. Failure to stay would permit Burnett to commence drilling under authority of a Division order that has been accepted by the Commission for de novo review, but prior to a Commission order. Allowing that to occur would risk subordinating the Commission's authority to a Division order. This would place the Commission in an unacceptable position where its freedom to impartially decide the merits would be jeopardized simply because the order was not stayed.

Moreover, Burnett assumes all risk for proceeding with any development and drilling when the matter is still subject to a Commission order. Burnett, however, should not be permitted to proceed on a course in the interim that may significantly conflict with an eventual Commission order to the detriment of *both* parties. Rather, prudence dictates that Order No. R-13450 be stayed to protect the Commission's authority by ensuring that no drilling, or unilateral action by a party, impinges on the Commission's ability to impartially decide the merits of the case. At the very least, if the Director declines to exercise her discretion to stay the order, the Director should amend Order No. R-13450 to clarify that Burnett proceeds with development and drilling at its own risk prior to a Commission order.

2. A Stay is Necessary to Prevent Waste, Protect Correlative Rights, and Prevent Gross Consequences to Concho.

Contrary to Order R-13450-A, a stay *is* necessary here “to prevent waste, protect correlative rights . . . or prevent gross negative consequences to an affected party.” 19.15.4.23(B) NMAC.

A. A Stay is Necessary to Prevent Waste and Protect Concho’s Correlative Rights.

All parties are in agreement that horizontal wells are necessary in the subject lands to prevent waste and protect correlative rights; however, nothing in the record underlying Order No. R-13450 indicates that Burnett has committed to horizontal development. Allowing Burnett to proceed to drill on this record, therefore, would result in waste and impairment of correlative rights.

In Case Nos. 14640 and 14641, Burnett applied for compulsory pooling for two *vertical* wells. Burnett has not brought horizontal well proposals on the subject lands for consideration before the Division in any of the related cases. Contrary to Burnett’s assertion in its Response in Opposition to Concho’s Motion to Stay that it proposed several vertical wells to evaluate a horizontal well program, *see* Response at 2 ¶ 3a., Burnett witnesses made no mention of such plans, definite or contemplated, to pursue a horizontal well program nor did they make reference to using data from vertical wells to evaluate a potential horizontal well development plan at the hearing in Case Nos. 14640 and 14641. *See* Tr. 5-30, 30-43, 44-72 (5/26/2011) (Burnett witnesses never mention a proposed horizontal well program).¹ Consequently, Order No. R-13450 incorrectly adopted as true this assertion by Burnett. In fact, after a *voir dire* examination

¹ It must be assumed that Burnett inadvertently suggested that Burnett witnesses testified at the May 26, 2011, hearing of Case Nos. 14640 and 14641 that data from its proposed vertical wells would be used to evaluate the potential for horizontal wells, when such testimony actually came in the subsequent hearing on August 29, 2011, in Case Nos. 14643 and 14674 and 14706-14718.

of a Concho witness, Burnett's attorney *objected* to admission of an exhibit and testimony regarding Concho's proposal for horizontal wells as "meaningless and objectionable" because the applications before the Division were for vertical wells only. Tr. 100:24-101: 3 (5/26/2011).

As the testimony and evidence in these related cases demonstrate, all parties and the BLM now agree that a horizontal well program is the best way to develop the subject lands. *See* Tr. 52 (8/29/2011) (Burnett witness stating the horizontal wells are the best way to develop the Puckett leases); Tr. 262:4-7 (8/29/2011) (stating that BLM prefers a horizontal well program); Tr. 286:17-22 (Concho witness stating that horizontal wells are the only way to adequately produce the Puckett lease). But, a horizontal well program is not what was evaluated or contemplated by Order No. R-13450, nor was it addressed by Burnett's underlying applications and testimony. Instead, Burnett's applications at issue were for vertical wells without reference to a potential horizontal well plan. Order No. R-13450 was entered without the benefit of the extensive evidence on surface-use issues and Concho's horizontal well plan that were part of Case Nos. 14643 and 14674 and 14706-14718.

Evidence in those consolidated cases established that a vertical well program would be limited to 35 surface locations and would produce less than 18% of the underlying reserves, resulting in waste and impairment of Concho's correlative rights. It also established that Concho's plan for triple lateral wells, as opposed to Burnett's contemplated use of dual single laterals, is the only way to target and produce all 1,700 vertical feet of the Yeso formation. However, the only evidence and testimony at the hearing underlying Order No. R-13450 is that Burnett proposes, through its two applications, a *vertical* well program. Given the demonstrated surface-use constraints, granting Burnett's applications for pooling its two vertical wells would

undeniably result in waste and irreparably impair Concho's correlative rights because Burnett's vertical well plan will fail to effectively drain the subject lands.

If Burnett now wishes to rely on its testimony and informally contemplated horizontal well plans from another series of cases not before the Director in Order No. R-13450, then all Puckett lease cases should be consolidated for review by the Commission so it also may consider Concho's full horizontal development plan.

B. A Stay is Necessary to Prevent Gross Negative Consequences to Concho.

Without a stay of Order No. R-13450, Burnett may immediately initiate its vertical well drilling program, resulting in gross negative consequences to Concho, despite Concho's pending appeal to the Commission to review the Order. The imposition of vertical wells in an area where only 35 surface locations have been approved by the BLM will directly conflict and substantially impair Concho's proposed horizontal well program now under consideration by the Division in Case Nos. 14643 and 14674 and 14706-14718. Allowing Burnett to proceed with its drilling prior to an order in those consolidated cases would result in gross negative consequences to Concho. Instead, the Commission should stay Order No. R-13450 and consolidate Case Nos. 14640 and 14641 with Case Nos. 14643 and 14674 and 14706-14718 for comprehensive review, as the applications and proposed development plans are overlapping, mutually exclusive, and should be considered together.

3. A Stay Would Enable Comprehensive Review of All Puckett Lease Applications and Render a Uniform Order on these Competing Applications.

A stay would enable the Commission to comprehensively review *all* of Concho and Burnett's competing applications for development of the Puckett leases while ensuring that no irreversible wasteful development takes place. A Division order is imminent in Case Nos. 14643

and 14674 and 14706-14718, which address the remaining competing Puckett lease applications proposed by Concho and Burnett. Whatever order the Division issues in those cases, either Concho or Burnett will apply for de novo review by the Commission, as well. Together with Case Nos. 14640 and 14641, these cases are highly interdependent and present an array of complex geological, technical, and surface-use issues that demand careful consideration as a group to determine the most feasible plan of development in the best interest of preventing waste and protecting correlative rights.

The Division's Order No. R-13450 was based on incomplete information, however, because not all the facts and evidence were available or presented to the Division in Case Nos. 14640 and 14641. Because a final order awarding operatorship in all the Puckett lease cases will determine the future development of four sections of land, representing significant reserves, the Division's and Commission's interest is to ensure that the best plan is approved based on complete information. Drilling should occur, therefore, only after the Commission has had the opportunity to fully assess all competing development plans and all relevant evidence through a de novo hearing on all the Puckett lease cases, which should be consolidated for review by the Commission.

4. Burnett Applies the Wrong Standard for Staying a Division Order.

Without citation to authority or any Division or Commission precedent, Burnett asserts in its Response in Opposition to COG's Motion to Stay that "the Division uses the general factors for granting an injunction under District Court rules[,]” provided by Rule 1-066 NMRA. That standard, however, is not applicable here; rather, it is applicable only in the context of a district court considering whether to stay an administrative order or rule. *See generally, Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986),

superseded by statute on other grounds by N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n, 2007-NMCA-010, 141 N.M. 41, 150 P.3d 991 (filed 2006). In the present context, where Concho requests the Director to stay an order of the Division, the applicable standard is provided by Rule 19.15.4.23 NMAC. It provides that the Director may stay an order "if the stay is necessary to prevent waste, protect correlative rights . . . or prevent gross negative consequences to an affected party." As demonstrated by the evidence and testimony in Case Nos. 14643 and 14674 and 14706-14718 discussed above, Burnett's plan for pooling vertical wells on the subject lands will cause waste, impair Concho's correlative rights, and result in gross negative consequences to Concho.

Nevertheless, Concho's request that the Commission stay Order No. R-13750 meets all of the factors imposed under the *Tenneco* standard, which is the same standard under Rule 1-066. *See LaBalbo v. Hymes*, 115 N.M. 314, 318 (Ct. App. 1993) (interpreting Rule 1-066 to require a showing "that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits"). A stay of the Order, pending Concho's appeal, would impose no significant burden on Burnett, which has made no move to develop its Yeso interests in the subject lands for decades until Concho proposed to drill Yeso wells on these lands. *See* Tr. 56, 206:21-23 (8/29/2011). Rather, a stay of the Order would merely ensure that the status quo is maintained and that the Commission may undertake a comprehensive review of the competing proposals in all related applications. For this same reason a stay also is in the public's interest to ensure that a wasteful vertical well program is not irreversibly commenced prior to evaluation by the Commission. Moreover, given the evidence presented in Case Nos.

14643 and 14674 and 14706-14718 on Burnett's lack of good faith negotiations and Concho's plan to fully horizontally develop all 1,500 vertical feet of the Yeso formation, the equities weigh in Concho's favor and, under Division precedent, it is likely that Concho will prevail. *See* Order No. R-10731-B, ¶ 23(f) (holding that if a force pooling party "does not negotiate in good faith, the application is denied. . .").

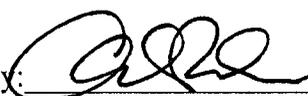
5. Burnett's Working Interest

The fact that Burnett controls two-thirds of the working interests in the land is negated as a factor in the assignment of operatorship due to its failure to negotiate in good faith and the demonstrable waste and impairment of correlative rights that would result under its proposed plan of development. Order No. R-10731-B made clear that ownership interest is a controlling factor when designating operatorship *only* when there are no other compelling factors at play, such as any reason why one operator would economically recover more oil or gas by virtue of being awarded operations than the other, or where one party failed to negotiate in good faith. *See* Order No. R-10731 ¶ 24. As demonstrated by the evidence in Case Nos. 14643 and 14674 and 14706-14718, Burnett lacked good faith in its negotiations with Concho and its proposals for pooling vertical wells will demonstrably fail to recover as much oil as Concho's proposed horizontal well program. Burnett expressly used its position in an unrelated Division case as leverage against Concho in the Puckett lease cases, refusing to consider Concho's reasonable attempts at resolution. And, as Concho demonstrated in Case Nos. 14643 and 14674 and 14706-14718, its proposed horizontal well program is the only way to adequately drain the subject lands and is far superior to Burnett's proposed pooling for vertical wells—which are the only Burnett applications before the Division. Thus, the fact that Burnett controls two-thirds of the working interest in the subject lands does not control here.

IV. CONCLUSION

For the foregoing reasons, Concho respectfully requests that the Commission reconsider Order No. R-13450-A and stay Order No. R-13450, or, in the alternative, to amend Order No. R-13450 to clarify that Burnett proceeds with development and drilling at its own risk prior to a Commission order.

Respectfully submitted,
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ATTORNEYS FOR COG OPERATING LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Stay was delivered by U.S. Mail and E-Mail on this 14th day of November 2011 to the following:

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**APPLICATIONS OF BURNETT OIL CO., INC.
FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.**

PROPOSED ORDER GRANTING MOTION TO STAY ORDER NO. R- 13540

This matter having come before the Division Director pursuant to Rule 19.15.4.23(b) NMAC on the Motion for Stay of Order No. R-13450 submitted by COG Operating LLC, the Director finds:

1. Order No. R-13450 was entered on August 26, 2011, approving the applications of Burnett Oil Co., Inc. ("Burnett") for compulsory pooling of the uncommitted interest owners in the Glorieta-Yeso formation in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 24, Township 17 South, Range 31 East, to drill its proposed Nosler Federal Well No. 1 and for compulsory pooling of the uncommitted interest owners in the Glorieta-Yeso formation in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 17 South, Range 31 East to drill its proposed Partition Federal Well No. 1.

2. COG Operating LLC ("Concho") objected to the applications because Concho asserts that the applications will cause waste and impair correlative rights.

3. Upon reconsideration, Division Order No. R-13450 should be stayed while this matter is on appeal before the Commission.

IT IS THEREFORE ORDERED THAT:

Division Order No. R-13450 is STAYED pending final resolution on appeal.

STATE OF NEW MEXICO OIL CONSERVATION DIVISION

JAMI BAILEY
Director