

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

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APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION, THROUGH THE ENFORCEMENT AND COMPLIANCE MANAGER, FOR AN ORDER AGAINST McELVAIN OIL & GAS PROPERTIES, INC [OGRID 22044], FINDING THAT OPERATOR KNOWINGLY AND WILLFULLY VIOLATED RULE 50.F(1) [19.15.2.50(F)(1) NMAC] AS TO TWO WELLS AND ASSESSING MONETARY PENALTIES FOR THOSE VIOLATIONS PURSUANT TO NMSA §70-2-14(B), AND FURTHER ORDERING THAT IN THE EVENT McELVAIN FAILS TO COMPLY WITH THE DIVISION'S ORDER, ASSESSING ADDITIONAL PENALTIES, SAN JUAN COUNTY.

CASE NO. 14186

**CLOSING ARGUMENTS OF THE OCD FOR HEARING CONDUCTED**  
**THURSDAY, OCTOBER 16, 2008**

The OCD submits these closing arguments in writing pursuant to the request of Division Hearing Examiner David Brooks at the close of the hearing held in this matter on October 16, 2008.

At the hearing, McElvain presented two exhibits purporting to represent "timelines" reflecting relevant dates for this case. It is the position of the OCD that these "timelines" – even if read together – are at the same time incomplete and over-inclusive in that they contain extraneous and irrelevant information. Alternatively, the OCD presents the following timeline summarizing those dates and events that are relevant and critical to a determination of the actual issue in this case: *whether McElvain had notice of OCD policy for calculation of the 6 month time period for pit closure under Rule 50 prior to the deadlines for the two Wiedemer wells.*

- **January 12, 2007** Wiedemer #6 and #7 Pit Applications Approved.
- **January 27, 2007** Production casing string set/cemented in #7 per C103 filed by McElvain.
- **February 5, 2007** Production casing string set/cemented in #6 per C103 filed by McElvain.
- **April 20, 2007** Inspection at Amacker #1 reveals open pit w/ liner issues, open beyond 6 month deadline.
- **May 15, 2007** NOV for Amacker pit issued by OCD to McElvain for:
  - Well sign violation,
  - Overtopping of liner, AND
  - Failing to close pit w/in 6 months of cessation of use or seeking an extension under Rule 50.
- **May 30, 2007** **Administrative conference** held at district office [M. Steuble, A. Merrick of McElvain; K. Roberts, C. Perrin from OCD] to address 2 violations noted in NOV issued 5/15/07. Roberts and Perrin specifically inform McElvain of Rule 50 requirements including 6 month closure requirement as calculated from date last casing string is run/cemented. Overtopping of liner, well sign issues also addressed. Numerous other open pits and plans for closure and/or requests for extensions are also discussed.
- **June 8, 2007** Email transmission from J. Steuble to C. Perrin and K. Roberts, attaching "Pit Closure List" (OCD Exhibit F) and indicating that for those wells on

list for which they have not indicated an extension is being sought, closure procedures had been initiated. List notes Wiedemer wells are open and scheduled to be closed without extension.

- July 27, 2007 **Deadline** for closure of Wiedemer #7 pit - no extension filed.
- August 5, 2007 **Deadline** for closure of Wiedemer #6 pit - no extension filed.
- August 6, 2007 Inspection of Badger 14 #1A reveals torn liner & open beyond closure deadline.
- August 13, 2007 Telephone conference (B. Powell, C. Perrin of OCD; A. Merrick of McElvain) regarding 2 violations discovered at Badger site - reiterate Rule 50 requirements and OCD calculation of 6 month time period for closure measured from date last casing string is set/cemented AND address environmental concerns of torn liner at site.
- September 11, 2007 Inspection of two Wiedemer sites reveal open pits beyond 6 month deadline; tears in #7 liner.
- September 25, 2007 McElvain executes an ACO to resolve the NOV issued on 5/15/07 for the Amacker site. The ACO includes an acknowledgement by McElvain that a finder of fact could determine that McElvain had knowingly and willfully violated Rule 50.F(1) by keeping the pit open longer than 6 months past "cessation of use." [p. 4, ¶9].
- January 25, 2008 OCD issues NOV for Wiedemer #6 and #7 for failure to close well within 6 months of cessation of use or request an extension under Rule 50.
- February 27, 2008 **Administrative conference** to address Wiedemer NOV held at district office [B. Powell, C. Perrin and K. Roberts of OCD, and A. Merrick and J. Steuble of McElvain]. Rule 50 requirements for closure, including calculation of 6 month time period per OCD policy is reiterated for operator; reference is made to previous discussion regarding same at Amacker conference 5/15/07. 6/8/07 "Pit Closure List" is reviewed for status - 3 wells on list still remain open as of this date, 7.5 months later.

As the OCD attempted to impress upon examiners at the hearing, the sole question to be determined in this matter is:

- **Whether McElvain Oil and Gas Properties [not any other operator and/or industry in general] had notice of the Division's policy for enforcing Rule 50 with regard to pit closures prior to their failure to effect the closure of the Wiedemer #6 and #7 pits within the designated 6 month time period and failed to do so despite this knowledge.**

This determination requires a specific determination regarding whether McElvain was aware of what the Division considered to be the date of "cessation of use" for purposes of calculating the 6-month period, and whether McElvain then chose to apply their own "interpretation" and disregard what it knew to be that of the OCD in spite of this knowledge.

Respondent spent a great deal of time trying to divert the examiners' attention to the off-point issue of what might or might not have been conveyed to the oil and gas community as a whole regarding the OCD policy for determining cessation of use for Rule 50. The testimony and evidence presented in this regard, however, is simply not relevant to the issue at hand. To be clear, the issue to be

determined in this matter *is not* whether *any* operator had been provided with information regarding the Division's policy, or whether *industry in general* had been notified in some form by the Division. The only relevant inquiry is what notice the OCD provided to *McElvain* regarding the policy for determining cessation of use. The evidence establishes that McElvain received specific notice from the OCD at the administrative conference for the Amacker #1 well on May 30, 2007, well in advance of the deadlines for closure of the Wiedemer pits.

Despite initially testifying that the only matter addressed at the Amacker conference was the liner issue, Mr. Steuble directly contradicted his own testimony when he admitted that pit closure issues were discussed at the Amacker conference. Steuble conceded that part of the discussion at the conference involved disclosure by McElvain of a number of other McElvain wells with open pits that were either in violation of or at risk of becoming in violation of Rule 50, and that he wished to work with the OCD regarding these sites. Not all of the wells discussed (as were later more specifically identified on the list submitted by Steuble the following week) were over their due date for closure at the time of the conference. Therefore, discussions of closure pursuant to Rule 50, including the timeframe for such closures, would certainly have ensued.

Although testimony was provided by both McElvain representatives that they "did not recall" having been provided with this information at the Amacker conference, both witnesses also conceded that neither of them took notes during that conference, nor did they take notes at the subsequent conference in February of 2008 when the issue was revisited. In contrast, the OCD witnesses did take notes at those conferences that they, unlike the McElvain witnesses, were then able to use to refresh their memories at the time of hearing.

In addition to the specific information recorded in each of their notes, both Mr. Roberts and Mr. Perrin testified that when conducting a conference with an operator cited with a Rule 50 violation involving untimely pit closure, their **standard practice** was to advise the operator not only of the language of Rule 50, but also of the specific enforcement policy of the OCD with regard to calculating the 6 months from the date of cessation of use. This includes specifically advising such operators of the policy for measuring cessation of use from the date that the last casing string is set/cemented. Mr. Roberts and Mr. Perrin both testified that this discussion and notification did, in fact, occur at the Amacker conference, as per their standard practice. Finally, Mr. Steuble's testimony and the documentary evidence confirm that McElvain was aware of the option for applying for an extension under Rule 50, and further confirms the fact that McElvain had "forgotten" to submit the request for an extension on the Amacker pit was one of the items discussed at the conference. Again, then, Rule 50 was obviously discussed in great detail at the conference on May 30, 2007.

Interestingly, the list of open pits, subsequently submitted by Mr. Steuble in early June to follow up on the discussion at the Amacker conference, included the Wiedemer #7 and #6 pits (whose casing strings had been set 1/27/07 and 2/5/07 and were due for closure 7/27/07 and 8/5/7, respectively). However, the list specifically noted that both Wiedemer pits were scheduled for closure without the need for requesting an extension or awaiting "completion" processes.

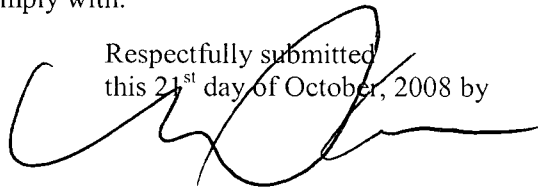
A liner violation was *one* of the issues addressed at the Amacker conference. However, the NOV that issued for the Amacker site arose out of 3 violations: 1.liner violation, 2.sign violation and 3.untimely closure issues. The administrative conference was held to resolve *all* of the violations cited in that NOV. McElvain chose to fixate solely on the liner issue in its description of the conference discussions, despite the fact that it was only one of the violations cited in the NOV for which the conference was being held. It does not automatically follow that simply because McElvain *chose* to focus only on one of the cited violations in that matter that the remainder of the discussions conducted to resolve the other violations cited in that NOV – including the issue of untimely closure – just never took place.

Not only did both Mr. Perrin and Mr. Roberts testify regarding their standard practice in conferences held to resolve Rule 50 violations, but both witnesses took notes at the Amacker conference, and again at the Wiedemer conference, in which they refer back to the discussions at the Amacker conference. Further, although not in attendance at the initial conference addressing the Amacker site, Mr. Powell did attend the second conference addressing the Wiedemer wells. Mr. Powell confirmed the standard practice regarding advising operators regarding Rule 50 and Division policy for cessation of use in cases where pit closure and Rule 50 is an issue, and confirmed that, at the Wiedemer conference, reference was made back to discussions that took place during the Amacker conference regarding Rule 50 and cessation of use. Like his colleagues, Mr. Powell also took notes to which he was able to refer for the purpose of refreshing his memory at the time hearing. The testimony of Mr. Roberts, Mr. Powell and Mr. Perrin is thus more reliable than that of the McElvain representatives, which was based solely on their recollections, relied on and/or was refreshed by no documented notes, and for which no standard company practice was referenced.

The evidence presented in this case, particularly when considering the credibility and reliability of the testimony presented at hearing, is clear. Regardless of what notice or knowledge any other operator in New Mexico might have had during the relevant time period, **McElvain** had specific knowledge of both Rule 50 *and* the Division's method of determining the date of cessation of use for calculating the 6 month time period for pit closure. More importantly, McElvain had been provided with this information at least as early as May 30, 2007, well before the closure deadlines in late July and early August for the Wiedemer pits. McElvain was again reminded of the Rule 50 requirements and Division policy shortly after the deadlines for closure had passed, and still did not pursue either immediate closure or a belated request for an extension at that time. Indeed, McElvain did not close these pits until almost October, and only after being contacted by OCD and being specifically instructed to do so. McElvain has established a pattern of repeated disregard of OCD Rules and policy despite being repeatedly informed of such, personally and directly by district employees and the district supervisor. This is exemplified by the fact that McElvain has admittedly maintained *numerous* pits (such as a number of those included on the list in OCD Exhibit F) well beyond their closure deadlines in violation of Rule 50.

While only the Amacker #1 well and the Wiedemer wells have had formal enforcement actions taken by the OCD, when McElvain's patterns and practices as a whole are considered, including those sites for which the OCD gave informal warnings and/or attempted to informally work toward a resolution with McElvain, it becomes clear that McElvain's failure to abide by Rule 50 was not mere inadvertence, but rather was **knowing and willful** disregard of a Rule and/or policy that it did not agree with and therefore *chose* not to comply with.

Respectfully submitted  
this 21<sup>st</sup> day of October, 2008 by



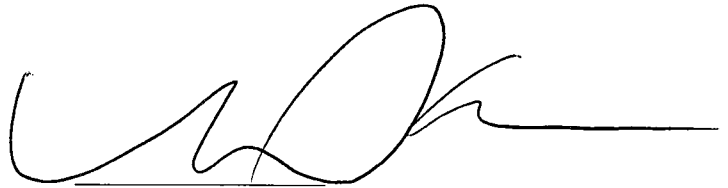
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# **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading was mailed to counsel for McElvain via first class mail this 21<sup>st</sup> day of October, 2008 at:

MICHAEL FELDEWERT  
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P.O. Box 2208  
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A handwritten signature in black ink, appearing to read 'Mikal Altomare', with a long horizontal line extending to the right.

Mikal Altomare