

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

MOTION OF THE NEW MEXICO OIL CONSERVATION DIVISION TO
QUASH RESPONDENT'S "SECOND DOCUMENT SUBPOENA"

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The New Mexico Oil Conservation Division (OCD) hereby moves to quash the Subpoena *Duces Tecum* entitled "Second Document Subpoena" (hereinafter "Second Subpoena") served by Respondent McElvain Oil & Gas Properties, Inc. (McElvain) on October 9, 2008 on the bases that McElvain did not set a date for compliance that was at least fourteen (14) days subsequent to the date of service, fails to allow a reasonable time for compliance, and places an undue burden upon the OCD. In support of this Motion, the OCD states the following:

1. McElvain submitted its Second Subpoena to the OCD at 3:00 p.m. on Thursday, October 9, 2008, requiring production of certain documents and items on October 15, 2008 at 8:15 a.m.

2. The Second Subpoena (request numbers 1, 2 and 3) seeks files created and maintained by the OCD District III office, located in Aztec, New Mexico.

3. At least portions, if not most of, the "well files" for each of the specified wells in request numbers 1, 2 and 3 have been scanned in and uploaded to the OCD-online system. These documents are publically available for viewing online, and are therefore electronically accessible to Respondent and its counsel.

4. Those portions of the referenced files that have not been scanned and uploaded to the OCD-online system for electronic-online viewing, if any, are physically located at the District III office in Aztec, New Mexico.

5. The hearing in this matter is scheduled for Thursday October 16, 2008. Monday October 13, 2008 is a State holiday, and the OCD office is closed. Essentially, then, Respondent has served a subpoena on the OCD demanding the production of off-site documents and providing a mere **two days** in which to produce the items for inspection and copying (Friday the 11th and Tuesday the 14th).

6. Neither the Oil and Gas Act nor the OCD Rules specifically addresses issues of notice and timing for subpoenas for OCD hearings. However, the Supreme Court has addressed issuance of subpoenas for production of documents, by way of the New Mexico Rules of Civil Procedure,

and has set out a very specific framework for parties. The language of Rule 1-045, NMRA 2008 is instructive in this case, and provides:

C. Protection of persons subject to subpoenas.

(1) In general. A party or an attorney responsible for the issuance and service of a subpoena **shall take reasonable steps to avoid imposing undue burden** or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty

(2) Subpoena of materials or inspection of premises.

(a) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises:

* * *

(ii) **absent a court order, shall not respond to the subpoena prior to the expiration of fourteen (14) days after the date of service of the subpoena;**

(iii) if a written objection is served or a motion to quash the subpoena is filed, shall not respond to the subpoena until ordered by the court;

* * *

Emphasis added.

7. Respondent has failed to take reasonable steps to avoid imposing an undue burden on the OCD in issuing this Second Subpoena. Indeed, the demands of this subpoena - making the requested items available for inspection at 8:15 a.m. on Wednesday October 15, 2008, having been served two business days (and two hours) prior to the time set for production, imposes a significant burden, particularly given that the demanded items are located in another city.

8. Additionally, some documents included in the referenced files likely constitute communications between OCD counsel and compliance officers, and are protected from production by attorney client privilege. Given the

timeframe, counsel has insufficient time to obtain and review said files to determine which such documents meet this criteria.

9. Likewise, some documents sought by No. 4 of the subpoena potentially constitute communications between the District and OCD counsel, and would also be protected from production. As above, there is simply insufficient time for counsel to review the files for these items, which are presently, physically located in Aztec, New Mexico, and determine what documents constitute attorney-client communications.

10. Moreover, the standard fourteen (14) day notice requirement, as specified by Rule 1-045C(2)(a)(ii), has been completely disregarded in this instance.

11. Rule 1-045, NMRA 2008, further provides the following:

(C)(3)

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (i) **fails to allow reasonable time for compliance,**
- (iii) **requires disclosure of privileged or other protected matter** and no exception or waiver applies; or
- (iv) subjects a person to **undue burden.**

Emphasis added.

12. The Respondent's Second Subpoena fails to allow reasonable time for compliance, places an undue burden on the OCD and requires the disclosure of material protected by attorney client privilege. The Subpoena should therefore be quashed pursuant to Rule 1-045, NMRA 2008.

The OCD therefore respectfully requests that the Respondent's "Second Document Subpoena" be QUASHED. The OCD further requests that if a pre-hearing conference is scheduled on this Motion, that it be scheduled for Wednesday, October 15, 2008, and wishes to advise the Division that **Counsel for the OCD will be unavailable on Tuesday, October 14, 2008.**

Respectfully submitted
this 11th day of October, 2008 by



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was emailed to counsel for McElvain, Mr. Michael Feldewert at MFeldewert@HollandHart.com, this 11th day of October, 2008.



Mikal Altomare