

State of New Mexico
Energy, Minerals and Natural Resources Department
Oil Conservation Division

OCD Case 16206

Application of the OCD Compliance and Enforcement Bureau for a Compliance
Order against D.J. Simmons, Inc.

Pre-Hearing Statement of Edward B. Cordes,
Chapter 11 Trustee of D.J. Simmons, Inc.

Edward B. Cordes, Chapter 11 Trustee of D.J. Simmons, Inc., hereby submits his Pre-Hearing Statement in connection with the hearing currently scheduled for June 28, 2018.

1. Party. Edward B. Cordes, Chapter 11 Trustee of D.J. Simmons, Inc. The Trustee is not currently represented by counsel in this matter.
2. Statement of the Case.

a. *Bankruptcy Proceedings*

D.J. Simmons, Inc. and two affiliates, D.J. Simmons Company Limited Partnership and Kimbeto Resources, LLC (jointly, the “Debtors”) filed petitions under Chapter 11 of the Bankruptcy Code on March 1, 2016, pending in the United States Bankruptcy Court for the District of Colorado, under jointly administered case number 16-11763. Mr. Cordes was appointed as the Chapter 11 Trustee for all three entities by orders entered on July 13, 2017.

The Trustee is charged with maximizing the value of the assets of the bankruptcy estates for the benefit of the creditors of the Debtors, including D.J. Simmons, Inc. D.J. Simmons, Inc. is indebted to its primary lender, Bank of Oklahoma, for amounts in excess of \$10 million.

In furtherance of those obligations, the Trustee promptly commenced a marketing process for the assets of the Debtors. The Trustee worked with Rod Seale, the President of the Debtors to secure an understanding of the assets, operations, revenues, and plugging & abandonment and reclamation obligations, and to package the assets for sale. The Trustee established a drop box of information relevant to all of the Debtors’ assets, and solicited offers from approximately 80 potential purchasers who were the logical purchasers of the assets. The Trustee required all offers to be submitted by January, 2018.

b. *Pending Sale of New Mexico Properties*

The Trustee received several offers for the primary operating assets in New Mexico (the "New Mexico Properties"). After further discussions, the Trustee accepted the leading offer, from Hilcorp San Juan, LP ("Buyer"). Attached as Exhibit 1 is the original offer letter submitted by Hilcorp. The Trustee has concluded negotiations of the terms of the asset sale to the Buyer. Attached as Exhibit 2 Purchase and Sale Agreement negotiated with the Buyer. The proposed Lease Assignment attached to the Purchase and Sale Agreement as Exhibit D makes clear that the Buyer agrees to assume all express and implied obligations under the Leases, which, of course, includes completion of plugging, abandonment, and reclamation obligations.

The Buyer had requested a diligence contingency in the contract, which the Trustee was unwilling to agree to, as it is more common in bankruptcy proceedings to present only unconditional, binding contracts for Court approval. Bankruptcy Counsel to the Trustee was advised, by in-house counsel to the Buyer, on Thursday, July 5, that the Buyer was reviewing the final proposed list of wells and contracts to be assigned to the Buyer, and anticipated the purchase contract would be signed no later than Monday, July 9.

As reflected in Exhibit 2, the final agreed purchase price for the New Mexico Assets which are the subject of the Purchase and Sale Agreement is \$2,800,000. From the offers received, the New Mexico Assets are the most valuable assets of the Debtors' estates, and a loss of the ability to sell those assets would be devastating to the Debtors and their creditors.

The Trustee has recently received a backup offer for a substantial portion of the same assets, which the Trustee will pursue, should the negotiations with the Buyer fail to result in an executed contract. The Trustee anticipates the Purchase and Sale Agreement will be finalized, approved by the Bankruptcy Court, and closed by September 15, 2018.

c. *Impact of Sale on Bankruptcy Estate and OCD*

D.J. Simmons, Inc. is insolvent. Attached as Exhibit 3 are the Schedules of Liabilities filed by the Debtor in its bankruptcy case. The Schedules reflect that the Debtor is indebted to its primary secured lender, Bank of Oklahoma, in a scheduled amount of \$9,156,050, and to general unsecured creditors in the amount of \$1,750,800.85. The total value of the assets of the Debtor are a fraction of the Debtor's obligations to these creditors. Thus, the sale of the New Mexico Assets is a material and significant transaction which will result in a meaningful distribution to the Debtor's creditors. At the same time, ownership of the New Mexico Assets will be assumed by the Buyer, which will assume responsibility for all operating obligations of the Debtor related to the New Mexico Assets, including plugging and abandonment obligations. Thus, the value of the bankruptcy estate will be maximized for the benefit of creditors, and operation will be assumed by a solvent operator with the ability to fulfill all regulatory obligations.

d. *Relief Requested by Bureau as a Violation of the Bankruptcy Automatic Stay*

The Bureau requests entry of an order directing the Debtors to suspend production on all current producing wells until operations are brought into P&A compliance. The relief the

Bureau requests exceeds the presumptive governmental exception to the automatic stay set forth in Section 362(b)(4) of the Bankruptcy Code.

The § 362 automatic stay prevents the continuance or commencement of actions against a bankrupt debtor's estate, subject to certain limited exceptions. 11 U.S.C. § 362(a). The governmental exception allows the commencement or continuation of an action by a governmental unit to enforce its police or regulatory power, "including the enforcement of a judgment other than a money judgment" obtained through the unit's police or regulatory power. 11 U.S.C. § 362(b)(4). This exception, however, does not extend to permit enforcement of money judgments, even if obtained through an action not subject to the stay. *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175, 1183 (5th Circuit 1986). The rationale behind this "exception to the exception" is that, while the government has an interest in enforcing its regulatory and police powers, to permit enforcement of monetary judgments would extend beyond those powers, allow the government to withdraw funds from which all creditors are entitled to share, and give the government preferential treatment to the detriment of all other creditors. *Id.*

To determine whether a governmental action qualifies for exemption from the automatic stay, courts have two tests: the "public policy" test and the "pecuniary purpose" test. *Eddleman v. U.S. Dep't of Labor*, 923 F.2d 782, 791 (10th Cir. 1991); *see also In re JSS of Albuquerque, LLC*, 2017 Bankr. LEXIS 2255 at *10 (Bankr. N.M. August 10, 2017) (applying the public policy and pecuniary purpose tests in the context of consumer protection). The public policy test examines whether an action is aimed at effectuating public policy or at adjudicating private rights—actions taken to advance private rights are not subject to the stay. *Id.* Under the pecuniary purpose test, "the court asks whether the government's proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property and not to matters of public policy. *Id.* An important consideration under the pecuniary purpose test is whether "the specific acts the government wishes to carry out would result in an economic advantage to the government *vis a vis* other creditors of the debtor's estate." *In re Commonwealth Cos.*, 913 F.2d 518, 523 (8th Cir. 1990). Instances, therefore, in which a governmental act would tend to reduce assets of an estate available for all creditors to share, even under the guise of an exercise of regulatory or police powers, are not subject to a presumed exemption from the automatic stay.

In this case, the Bureau seeks an injunction against production at all wells belonging to the estate until such time as a limited number of non-producing wells are brought into compliance. The Trustee has negotiated a sale of all of the Debtors' operations in New Mexico, including the wells which are the subject of the pending compliance proceeding. Execution of the sales contract is imminent. An injunction preventing further production from those wells, however, will reduce the value of these wells to zero and destroy the pending sale. The Bureau's proposed injunction has the immediate result of harming other creditors of the Debtors' estates, gives the Bureau an advantage in the form of regulatory blackmail, and is an impermissible expansion of the Bureau's authority beyond the limited exemption from the automatic stay applicable to regulatory proceedings.

3. Names of Witnesses. Mr. Cordes will call Rod Seale, President of D.J. Simmons, Inc., and himself, as witnesses in this matter.
4. Time to Present Case. Mr. Cordes anticipates requiring two hours for presentation of his case.
5. Procedural Matters to be Resolved Prior to Hearing.
 - a. *Relief from Stay.* For the reasons set forth above, the Bureau is in violation of the automatic stay applicable to D.J. Simmons, Inc. as a result of its bankruptcy filing. The hearing may not proceed until the Bureau secures appropriate relief from the Bankruptcy Court.
 - b. *Request for Continuance.* The Trustee has requested a continuation of the hearing premised on the pending sale of the applicable properties, and the assumption of all P&A obligations by the purchaser. If the request for continuance has not been ruled upon prior to the hearing, that request should be addressed at the commencement of the hearing.

Dated July 5, 2018.

D.J. Simmons, Inc.



By: _____

Edward B. Cordes, Chapter 11 Trustee

STATE OF COLORADO

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County of Arapahoe

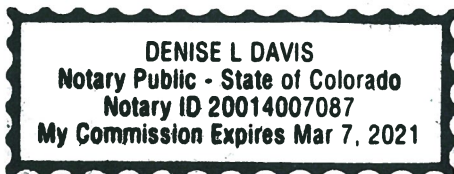
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D.J. Simmons, Inc.

Ed B. Co.

By: _____

My commission expires: 3-7-21



Danise Davis

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