BEFORE THE NEW MEXICO OIL CONSERVATION DIVISION

APPLICATION OF LOS LOBOS RENEWABLE POWER, LLC TO PLACE GEOTHERMAL WELLS LDG-55-7 AND LDG 53-7 ON INJECTION IN SECTION 7, TOWNSHIP 25 SOUTH, RANGE 19 WEST, NMPM, HIDALGO COUNTY, NEW MEXICO

Case No. 14948

LOS LOBOS' PRE-HEARING BRIEF ON THE ISSUE OF WHETHER THIS HEARING IS NECESSARY

Los Lobos Renewable Power, LLC ("Los Lobos"), by and through its attorney Michelle Henrie, LLC, respectfully disagrees with Intervenor Oil Conservation Division's legal analysis of whether this hearing is necessary. Los Lobos appreciates that the Intervenor filed a brief advising the Examiners of its position and articulating the reason for its position. Upon further research, however, Los Lobos cannot acquiesce in Intervenor's position. The law does not support the position that a hearing is required before Los Lobos' G-112 Applications can be acted upon.

BACKGROUND

On or about December 13, 2012, Los Lobos submitted Form G-112 packages seeking approval to re-inject native geothermal water back into the geothermal reservoir via two existing wells: LDG 55-7 and LDG 53-7. AmeriCulture sent a protest letter dated December 26, 2012. It also sent an email dated January 10, 2013. In these communications, AmeriCulture alleges two grounds for its protest. First, it speculates regarding "migration" of disposed geothermal power plant "fluids" which it alleges will include "copious quantities of cooling tower chemicals." Even if Los Lobos were to build a water-cooled cooling tower (it no longer plans to do so), the issue of cooling tower "chemicals" was already addressed at the 2009 hearing and the Discharge Permit expressly addresses mitigation measures. Second, AmeriCulture claims that its geothermal well

in direct hydraulic connection with one of the proposed injection wells, LDG-55-7. However, Los Lobos' request is to re-inject into well LDG-55-7—i.e., to add water—so it is hard to understand how AmeriCulture could be harmed by any direct hydraulic connection.

On January 4, 2013, the Oil Conservation Division set this matter for hearing. On January 29, 2013, the Oil Conservation Division entered its appearance as an "Intervenor" party to the proceeding and filed a Pre-Hearing Statement noting that "The Division does not oppose the Application." On February 4, 2013, Intervenor filed a Pre-Hearing Brief addressing (among other issues) whether this hearing is necessary.

INTERVENOR'S ARGUMENT

The Intervenor's argument is essentially as follows. First, Intervenor starts with the accurate proposition that "An order, under either the Oil and Gas Act or the Geothermal Resources Conservation Act, requires a hearing unless all affected parties have waived that right by failing to protest after receiving [an] appropriate notice." Second, however, Intervenor incorrectly escalates the action to be taken on a G-112 application to an "order." Third, Intervenor looks to the regulations promulgated under the Oil and Gas Act and improperly treats these regulations as having weight in the geothermal context. Steps two and three are leaps that are unsupported by both logic and law. A hearing is not required. OCD Staff have everything they need to evaluate and act on the pending G-112 applications, and they should be allowed to do so.

LEGAL ANALYSIS

1. The regulations do not require a hearing.

The applicable provision from the geothermal regulations is as follows:

> If no objection is received within 20 days from the date of receipt of the application, and the division director is satisfied that all of the above requirements have been complied

> with, that the proposal is in the interest of conservation and will prevent waste and protect correlative rights, and that the well is cased, cemented, and equipped in such a manner that there will be no danger to any natural resource, including geothermal resources, useable underground water supplies, and surface resources, form G-112 will be approved. In the event the form is not approved because of objection from an affected geothermal lease owner or for other reason, the application will be set for public hearing, if the applicant so requests.

19.14.93.8(B) NMAC. Intervenor interprets this regulation to say "the Division Director has discretion to approve a form G-112 pursuant to the first sentence of Subsection C only if no objection is received within 20 days." But that's not what the regulation says. The regulation says that if no objection is received, and the additional requirements are met, the Division "will" approve the G-112 form. In other words, in that one scenario (no objection/meets requirements), the approval is actually non-discretionary: the Division "will" approve. But what about other scenarios?

The four scenarios are stated in graphic form at Exhibit 1. The scenario just described (no objection/meets requirements) is "Track 1." The regulation also addresses Track 2 and Track 4, which are the scenarios that occur "[i]n the event the form is not approved because of objection from an affected geothermal lease owner or for other reason." In these scenarios, the applicant has the right to request a hearing. The regulation nowhere grants anyone else the right to request a hearing—not the affected geothermal lease owner and not the Division either. The regulation nowhere states that a hearing must be held if an objection is received. To the contrary, the regulation says that the application "will be set for public hearing, if the applicant so requests" after a form G-112 is not approved. Contrary to the Intervenor's position, the right to a hearing triggers only after the Division has taken action on form G-112. The regulations allow only a post-deprivation hearing. Not a hearing on the merits.

2. There is no required order.

The Intervenor suggests that the Division's action must be in the form of an order. Yet the regulations nowhere require an order. Naturally, if the applicant requested a post-deprivation hearing under the Track 2 or Track 4 scenario, an order would result from the hearing. But there is absolutely no requirement for an order otherwise. Los Lobos notes that its prior form G-112 applications, which all fell under Track 1, were approved without an order.

The Geothermal Resources Conservation Act provides further support. It is informative to consider specifically how the GRCA the uses the word "order." If one excludes nonspecific uses of the word "order" such as court orders ("court order," "temporary restraining order"), procedural orders (orders "to compel," "rules of order," "order or decision" of the Division on rehearings and appeals, orders limiting hearing examiner scope), and the generic lists ("rules, regulations and orders" of the division or commission"), there are only three specific uses of the word "order":

- An order limiting, allocating and distributing production from geothermal reservoir, which requires notice and hearing. 71-5-10 (B), (C) NMSA
- A pooling order, which also requires notice and a hearing. 71-5-11 (C) NMSA, 71-5-13 (A),(B) NMSA
- Orders relating to spacing units (increase size, increase reservoir, nonstandard units). 71-5-13 NMSA

These categories are very different in nature than a form G-112 approval described at 19.14.93.8(B) NMAC. See Exhibit 2.

3. Intervenor is bound by the geothermal regulations; it cannot import oil and gas regulations.

Intervenor cites an oil and gas regulation at 19.15.26.8.A and D NMAC ("[a]n operator shall not inject . . . except pursuant to a permit the division has granted after notice and hearing,

or that the division has granted by administrative order. . . " and "[i]f a written objection is filed . . .the division shall set the application for hearing") as support for its assertion that "the Commission has determined by rule that its authority to issue injection permits is an authority that requires an order." The rules of administrative law and statutory construction do not support this conclusion.

It is a fundamental principle of administrative law that the Division, as any other administrative agency, is bound by its own rules and regulations. Atlixco Coaltion v. County of Bernalillo, 127 N.M. 549, 984 P.2d 796, 1999 -NMCA- 088, ¶16; New Mexico State Racing Comm'n v. Yoakum, 113 N.M. 561, 829 P.2d 7 (Ct.App.1991); Saenz v. New Mexico Dept. of Human Services, 98 N.M. 805, 653 P.2d 181 (N.M.App., 1982); Martinez v. Health and Social Services Department, 90 N.M. 345, 563 P.2d 608 (Ct.App.); City of Albuquerque v. State Labor and Indus. Comm'n, 81 N.M. 288, 466 P.2d 565 (1970).

The New Mexico Supreme Court has repeatedly held that the court "... will not read into a statute or ordinance language which is not there." Burroughs v. Board of Cnty. Comm'rs, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975). This is particularly telling when words have been specifically omitted from a statute or ordinance. "[W]hen the [legislative body] includes a particular word in one portion of a statute and omits it from another portion of that statute, such omission is presumed to be intentional." State v. Jade G., 2007-NMSC-010, 141 N.M. 284, 293, 154 P.3d 659, 668.

Contrary to what the Intervenor argues, the Division's omission of a hearing requirement in the geothermal regulations illustrates its intent. It is well known that the geothermal regulations and statutory scheme were borrowed from the oil and gas regulations and statutory scheme. The geothermal regulations are circa 1983. Los Lobos checked the history of the oil

and gas regulation cited by Intervenor, 19.15.26.8 NMAC, and traced it back to its origins as Rule 701 in 1982, preceding the geothermal regulations. Exhibit 3. From 1982 to today, the oil and gas provision has contained the mandatory hearing provisions (shall not inject . . . except pursuant to a permit the division has granted after notice and hearing" and "[i]f a written objection is filed . . .the division shall set the application for hearing."). When the geothermal regulations were written, the rulemaker specifically omitted this language and this concept from the geothermal regulations. "[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed". General Electric Co. v. Southern Construction Co., 383 F.2d 135, 138 n. 4 (5th Cir. 1967).

Contrary to Intervenor's argument, the inclusion of a hearing requirement in the oil and gas regulations and the omission of a hearing requirement in the geothermal regulations does not suggest an additional right to a hearing should be created at this time. To the contrary, the omission of any hearing requirement establishes that no hearing is required. No basis in law or logic suggests the need to create additional hearings on the basis of the lack of a hearing requirement in the geothermal regulations.

HARM TO LOS LOBOS

Los Lobos is prejudiced by the continued delay created by the hearing process. Los Lobos is facing serious deadlines outside of its control. Los Lobos is contractually bound to PNM to build its plant and deliver electricity in 2014. PNM needs Los Lobos' geothermal power to meet the "other" quota of its renewables portfolio, and this source of electricity has been specifically approved by the NM Public Regulation Commission (Case No. 12-000131-UT, Order dated December 11, 2012). Furthermore, the federal program in which Los Lobos

participates, the Section 1603 Program of the American Recovery and Reinvestment Act, requires Los Lobos to build its plant and deliver electricity before 2014. If Los Lobos cannot deliver electricity before 2014, Los Lobos' contract with PNM is in jeopardy and Los Lobos loses the Section 1603 incentives that have allow this project to stay financially viable.

Los Lobos has already conceded it will need to develop the project in phases and has scaled back its Phase 1 plant from 15 MWh (which would require drilling more wells) to 5-10 MWh (using existing wells) to meet these timeframes. The upcoming test that would be authorized by the protested G-112 forms is a necessary threshold. Without this test, Los Lobos cannot engineer and size the geothermal power plant. With each passing day, it becomes less likely that Los Lobos will be able to build the power plant and transmission prior to the December 31, 2013 deadline. If Los Lobos comes to a point where it cannot complete these tasks on time, it will likely stop the project and not spend any more money in New Mexico—a loss of jobs in Hidalgo County[1] and a loss of revenues (royalties) that BLM shares with the State (50%) and with Hidalgo County (25%).

Los Lobos cannot afford to lose any more time if this geothermal power facility is going to be built. If there were meritorious concerns, the situation would be different. However, AmeriCulture's "protest" is nothing more than an attempt to reopen the 2008/2009 Hearing (which AmeriCulture did not appeal) and to force reconsideration of decided issues and rejected claims. AmeriCulture has admitted that it wants to build its own personal-use geothermal power plant, and apparently it is not sure that the geothermal resource is big enough to sustain both power plants (Los Lobos believes it is). This seems to be the real situation fueling

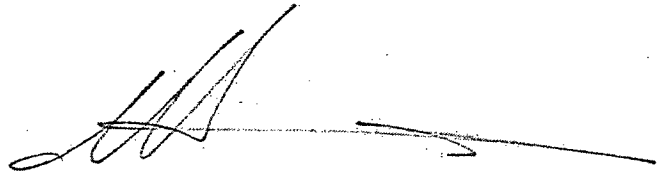
[1] Meghan Starbuck Downs, Ph.D., concluded that plant construction would generate a total impact of 1,151 jobs for the state, and a total increase in Gross State Product (Value Added) of $65.5 million.

AmeriCulture's continued opposition to Los Lobos' project since 2008 and its misuse of agency processes. Los Lobos has serious concerns about the delays caused by the hearing process and the threat of appeals.

CONCLUSION

For the foregoing reasons, Los Lobos respectfully disagrees with Intervenor's position. A hearing is not mandated by the geothermal regulations. To the contrary, absent a request from applicant after the Division has acted on the G-112 application, the geothermal regulations—to which the Division is bound—do not authorize a hearing.

Respectfully Submitted,
MICHELLE HENRIE, LLC



Michelle Henrie
P.O. Box 7035
Albuquerque, NM 87194
Attorney for Lightning Dock Geothermal HI-01, LLC

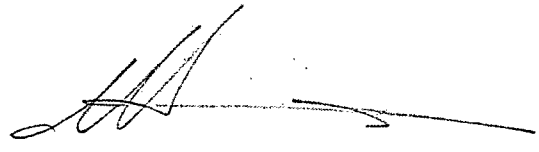
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Pre-Hearing Statement was e-mailed and mailed first-class, postage pre-paid, to the following on February 8th, 2013:

Damon Seawright, President
AmeriCulture, Inc.
25 Tilapia Trail
Animas, NM 88020
dseawright@gmail.com

David Brooks
EMNRD
1220 South St. Francis Dr
Santa Fe, NM 87505
david.brooks@state.nm.us

Dated this 8th day of February, 2013.



Michelle Henrie

EXHIBIT 1

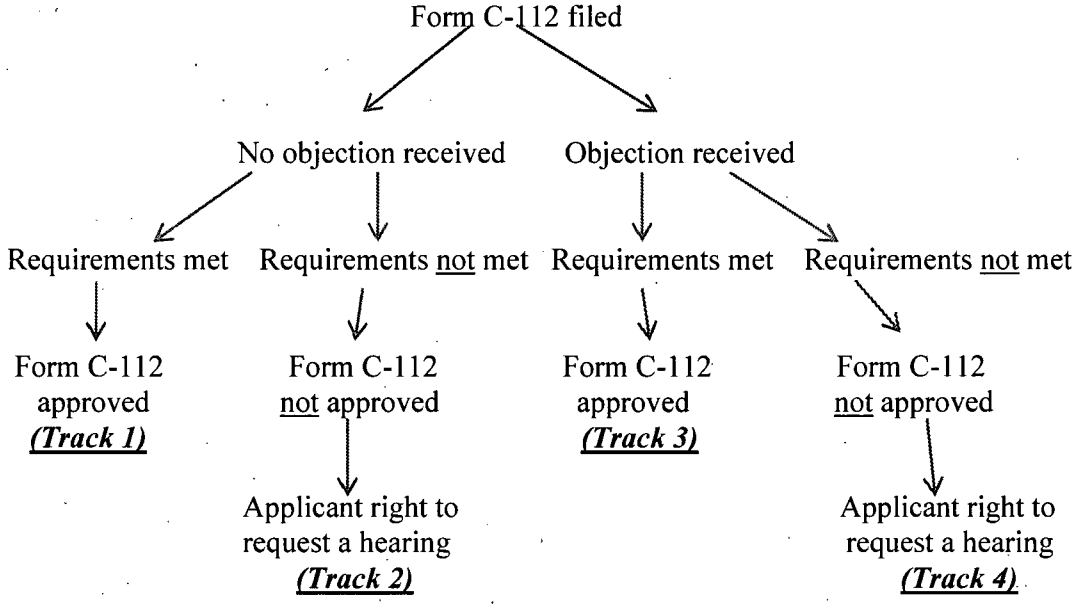

Form C-112 filed
No objection received
Objection received
Requirements met
Requirements not met
Requirements met
Requirements not met
Form C-112 approved (Track 1)
Form C-112 not approved
Form C-112 approved (Track 3)
Form C-112 not approved
Applicant right to request a hearing (Track 2)
Applicant right to request a hearing (Track 4)

EXHIBIT 2

Use	Location	Notes
Order limiting, allocating and distributing production from geothermal reservoir	71-5-10 (B), (C) NMSA	Order fixing allowable production requires notice and hearing
Pooling order	71-5-11 (C) NMSA 71-5-13 (A),(B) NMSA	Pooling order requires notice and hearing
Orders relating to spacing units (increase size, increase reservoir, nonstandard units)	71-5-13 NMSA	
Orders limiting hearing examiner scope	71-5-17.5 NMSA	
"Order or decision" of the division/ rehearings and appeals (don't describe what an "order" is)	71-5-18 NMSA	
"Rules of order"	71-5-17.1 NMSA 71-5-17.5 NMSA	
Order to compel	71-5-17.3 NMSA	
"Temporary restraining order" or court order	71-5-12 NMSA 71-5-19 NMSA 71-5-20 NMSA 71-5-22 NMSA 71-5-24 NMSA	
Generic term: "rules, regulations and orders" of the division or commission (don't describe what an "order" is)	71-5-7 NMSA 71-5-8 NMSA 71-5-10(C) NMSA 71-5-14 NMSA 71-5-15 NMSA 71-5-16 NMSA 71-5-17 NMSA 71-5-17.1 NMSA 71-5-17.4 NMSA 71-5-19 NMSA 71-5-20 NMSA 71-5-21 NMSA 71-5-23 NMSA 71-5-24 NMSA	

ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION
P.O. BOX 2088
SANTA FE, NEW MEXICO

RULE 701. INJECTION OF FLUIDS INTO RESERVOIRS

A. Permit for Injection Required

The injection of gas, liquefied petroleum gas, air, water, or any other medium into any reservoir for the purpose of maintaining reservoir pressure or for the purpose of secondary or other enhanced recovery or for storage or the injection of water into any formation for the purpose of water disposal shall be permitted only by order of the Division after notice and hearing, unless otherwise provided herein.

B. Method of Making Application

1. Applications for authority for the injection of gas, liquefied petroleum petroleum gas, air, water or any other medium into any formation for any reason, including but not necessarily limited to the establishment of or the expansion of water flood projects, enhanced recovery projects, pressure maintenance projects, and salt water disposal, shall be by submittal of Division Form C-108 complete with all attachments.

2. The applicant shall furnish, by certified or registered mail, a copy of the application to the owner of the surface of the land on which each injection or disposal well is to be located and to each leasehold operator within one-half mile of the well.

3. Administrative Approval

If the application is for administrative approval rather than for a hearing, it must also be accompanied by a copy of a legal publication published by the applicant in a newspaper of general circulation in the county in which the proposed injection well is located. (The details required in such legal notice are listed on Side 2 of Form C-108.)

No application for administrative approval may be approved until 15 days following receipt by the Division of Form C-108 complete with all attachments including evidence of mailing as required under paragraph 2 above and proof of publication as required by paragraph 3 above.

If no objection is received within said 15-day period, and a hearing is not otherwise required, the application may be approved administratively.

C. Hearings

If a written objection to any application for administrative approval of an injection well is filed within 15 days after receipt of a complete application, or if a hearing is required by these rules or deemed advisable by the Division Director, the application shall be set for hearing and notice thereof given by the Division.

D. Salt Water Disposal Wells

1. The Division Director shall have authority to grant an exception to the requirements of Rule 701-A for water disposal wells only, without notice and hearing, when the waters to be disposed of are mineralized to such a degree as to be unfit for domestic, stock, irrigation, or other general use, and when said waters are to be disposed of into a formation older than Triassic (Lea County only) which is nonproductive of oil or gas within a radius of two miles from the proposed injection well, and provided no objections are received pursuant to Rule 701-B(3).

EXHIBIT 3

2. Disposal will not be permitted into zones containing waters having total dissolved solids concentrations of 10,000 mg/l or less except after notice and hearing, provided however, that the Division may establish exempted aquifers for such zones wherein such injection may be approved administratively.

3. Notwithstanding the provisions of paragraph 2. above, the Division Director may authorize disposal into such zones if the waters to be disposed of are of higher quality than the native water in the disposal zone.

E. Pressure Maintenance Projects

1. Pressure maintenance projects are defined as those projects in which fluids are injected into the producing horizon in an effort to build up and/or maintain the reservoir pressure in an area which has not reached the advanced or "stripper" state of depletion.

2. All applications for establishment of pressure maintenance projects shall be set for hearing. The project area and the allowable formula for any pressure maintenance project shall be fixed by the Division on an individual basis after notice and hearing.

3. Pressure maintenance projects may be expanded and additional wells placed on injection only upon authority from the Division after notice and hearing or by administrative approval.

The Division Director shall have authority to grant an exception to the hearing requirements of Rule 701-A for the conversion to injection of additional wells within a project area provided that any such well is necessary to develop or maintain efficient pressure maintenance within such project and provided that no objections are received pursuant to Rule 701-B(3).

F. Water Flood Projects

1. Water flood projects are defined as those projects in which water is injected into a producing horizon in sufficient quantities and under sufficient pressure to stimulate the production of oil from other wells in the area, and shall be limited to those areas in which the wells have reached an advanced state of depletion and are regarded as what is commonly referred to as "stripper" wells.

2. All applications for establishment of water flood projects shall be set for hearing.

The project area of a water flood project shall comprise the proration units owned or operated by a given operator upon which injection wells are located plus all proration units owned or operated by the same operator which directly or diagonally offset the injection tracts and have producing wells completed on them in the same formation; provided however, that additional proration units not directly nor diagonally offsetting an injection tract may be included in the project area if, after notice and hearing, it has been established that such additional units have wells completed thereon which have experienced a substantial response to water injection.

3. The allowable assigned to wells in a water flood project area shall be equal to the ability of the wells to produce and shall not be subject to the depth bracket allowable for the pool nor to the market demand percentage factor.

Nothing herein contained shall be construed as prohibiting the assignment of special allowables to wells in buffer zones after notice and hearing. Special allowables may also be assigned in the limited instances where it is established at a hearing that it is imperative for the protection of correlative rights to do so.

4. Water flood projects may be expanded and additional wells placed on injection only upon authority from the Division after notice and hearing or by administrative approval.

   The Division Director shall have authority to grant an exception to the hearing requirements of Rule 701-A for conversion to injection of additional wells provided that any such well is necessary to develop or maintain thorough and efficient waterflood injection for any authorized project and provided that no objections are received pursuant to Rule 701-B(3).

C. Storage Wells

The Division Director shall have authority to grant an exception to the hearing requirements of Rule 701-A for the underground storage of liquafied petroleum gas or liquid hydrocarbons in secure caverns within massive salt beds, and provided no objections are received pursuant to Rule 701-B(3).

In addition to the filing requirements of Rule 701-B, the applicant for approval of a storage well under this rule shall file the following:

1. With the Division Director:

   (a) A plugging bond in accordance with the provisions of Rule 101;

2. With the appropriate district office of the Division in TRIPLICATE:

   (a) Form C-101, Application for Permit to drill, Deepen, or Plug Back;

   (b) Form C-102, Well Location and Acreage Dedication Plat; and

   (c) Form C-105, Well Completion or Recompletion Report and Log.