

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

**APPLICATIONS OF DELAWARE ENERGY, LLC
FOR AUTHORIZATION TO INJECT SALT WATER
FOR PURPOSES OF DISPOSAL, EDDY COUNTY,
NEW MEXICO**

CASE NO. 16258-16261

**MINERAL COMPANIES' JOINT RESPONSE TO DELAWARE ENERGY, LLC'S
ORAL MOTION TO DISMISS**

COME NOW, Foundation Minerals, LLC, Mavros Minerals LLC, and Oak Valley Mineral and Land, L.P. (collectively, "Mineral Cos."), in response to Delaware Energy, LLC's ("Delaware") oral motion to dismiss the protestants, including Mineral Cos., at hearing on Delaware's applications for its Kodiak SWD #1, Bear Trap SWD #1, Giant Panda SWD #1, and Grizzly SWD #1 (collectively the "Wells") before the New Mexico Oil Conservation Division ("Division"), Phillip Goetz, Chief Examiner, and David K. Brooks, Legal Examiner ("Examiners"), on November 13, 2018. In support of this response in opposition to Delaware's motion to dismiss, Mineral Cos. state as follows:

RELEVANT PROCEDURAL HISTORY

1. On May 29, 2018, Delaware filed its applications for the Wells in the above matters.
2. The Wells were originally set for adjudicatory hearing on June 28, 2018.
3. Mineral Cos. learned of Delaware's applications, and entered an appearance on June 21, 2018 in opposition to Delaware's Wells.
4. On June 22, 2018, Delaware's counsel advised counsel for Mineral Cos. that the matters were to be continued until July 12, 2018. *See* Division's Pre-Hearing Proceeding of Docket No. 28-18 (June 28, 2018).

5. Mineral Cos. filed their original Pre-Hearing Statements in the pending cases on July 5, 2018 in preparation for hearing on July 12, 2018.

6. Counsel for Mineral Cos. participated in substantial e-mail correspondence regarding a second proposed continuance of the July 12, 2018 hearing date.

7. Mineral Cos. subsequently filed their Amended Pre-Hearing Statements on July 16, 2018, describing in detail their interest in the Applications and the extent to which they oppose the issuance of the order sought by Delaware:

Opponents Foundation Minerals, LLC, Mavros Minerals LLC, and Oak Valley Mineral and Land, L.P. are individual entities each owning an interest in the minerals and surface estate of the Black River Ranch, which is located in Sections 3, 4, 9, 10 and 11, Township 24 South, Range 27 East, NMPM, Eddy County, New Mexico. Opponents initially discussed with Applicant their own plans to drill and operate SWD wells near and on the Black River Ranch, but the parties were unable to come to agreement. Subsequently, Opponents entered into an agreement with 3Bear Delaware Operating - NM, LLC to drill and operate SWD wells on the Ranch. 3Bear has staked and is in the process of applying to the OCD for a permit for the first of these planned wells.

Applicant filed the instant application shortly after Opponents proposed their SWD plans near and on the Black River Ranch to Applicant. In total, Applicant has proposed four SWD wells (Case Nos. 16258, 16259, 16260 and 16261). In an apparent effort to interfere with Opponents' agreement with 3Bear, all four of Applicant's wells are located directly adjacent to the boundaries of the Black River Ranch. Applicant gave no notice to Foundation Minerals, LLC, Mavros Minerals LLC, Oak Valley Mineral and Land, L.P., or 3Bear of the filing of its SWD applications. On information and belief, Applicant does not have a business lease with the State Land Office and did not get a right of entry to survey from the State. Further, on information and belief, the State Land Office has denied Applicant's location and will not grant Applicant an SWD agreement, business lease or right-of-way. In addition, Applicant did not have the surface owners' permission to cross their lands to survey its well locations, and therefore has trespassed. For these reasons—among others to be fully supported at hearing—Opponents oppose the subject well.

8. Counsel for Mineral Cos. attended the pre-hearing conference on August 6, 2018.

9. On August 6, 2018, the Division notified all parties who had entered an appearance, including Mineral Cos., that these matters were rescheduled for a September 11, 2018 special docket. *See* Division's Pre-Hearing of Docket No. 32-18 (August 9, 2018).

10. On September 4, 2018, Delaware served Mineral Cos. with a copy of its Pre-Hearing Statement for these matters.

11. On September 12, 2018, the Division notified the parties, including Mineral Cos., that these matters had been re-scheduled for a November 13, 2018 special docket.

12. On October 18, 2018, Delaware filed Amended Applications for the Grizzly SWD #1 and the Kodiak SWD #1 wells.

13. On October 19, 2018, Delaware provided the protesting parties, including counsel for Mineral Cos., with updated C-108s reflecting the new locations of the Grizzly SWD #1 and the Kodiak SWD #1 wells and requested their positions on the Amended Applications.

14. On October 24, 2018, Delaware served counsel for Mineral Cos. with formal notice of the Amended Applications for the Wells, along with updated C-108s for the Bear Trap SWD #1 and the Giant Panda SWD #1 wells.

15. Mineral Cos. again opposed Delaware's applications for the Wells.

16. On November 6, 2018, Delaware served Mineral Cos. with its Pre-Hearing Statements.

17. Prior to the November 13, 2018 hearing, counsel for Mineral Cos. prepared for hearing with representative of Mineral Cos. and testifying witness, Brian Arnold, Jr., vice president of land for Foundation Minerals, LLC, manager of Mavros Minerals, LLC, and secretary of Oak Valley Mineral and Land, LP.

18. Mineral Cos. appeared at the hearing on the Wells on November 13, 2018, with Brian Arnold, Jr., as representative of the Mineral Cos. appearing as an expert land witness.

19. Mineral Cos. cross-examined witnesses and offered testimony into evidence at the hearing on the Wells.

20. At hearing, Delaware orally made "a standing objection as to all three protestors," *see* Tr. 109:15-110:5, including Mineral Cos., along with the following oral motion to dismiss Mineral Cos. from the proceeding:

Mr. Examiner, my intention is to raise an objection to the participation and testimony of each of the parties in this case on the basis that none of them are -- well, first of all, they're not the Applicant. Number two, they are not a leasehold operator in the area of review. And number three, they're not a lessee of record that's in the area of review. And number four, they are not a -- they did not file a notice of intervention to appear in the case to plead their -- to plead their complaints.

And so on that basis, under the Division rules, not only after apprising them of the fact that they haven't filed a notice of intervention with my motion last week, they still have not sought to do so sitting here today. And so, you know, my -- the point of all that is to say that their objections on behalf of other entities I think are misplaced. I'm not sure that they have standing to make those complaints. Be that as it may, you know, if the Division is concerned about notice to those parties, Delaware works a lot with MRC Permian and the Matador entity, and I would ask that they would look to see if they can get a notice waiver from that company with respect to those two leases -- fee leases that intersect with their areas of review of the two cases, the Bear Trap and the Grizzly.

Now, I understand that both Mr. McMillan and Ms. Callahan are interested in responding to my motion to dismiss on those grounds, and I have no problem with them having some reasonable time to write -- prepare a written motion in response.

With respect to Mr. Craig, I have the same -- I'd like to make the same motion orally, and with respect to Mr. McMillan's clients as well, I would make that same motion orally, to dismiss them from the proceeding on the basis that they didn't have standing and didn't file a notice of intervention, and they weren't a party entitled -- they weren't a party under the Division's rules.

Tr. 247:20-249:7.

21. At hearing, counsel for Mineral Cos. orally moved to intervene in these proceedings. Tr. 250:1-5.

22. At hearing, the Examiners dismissed Delaware's application for the Kodiak SWD #1 well, Case No. 16261, *sua sponte*. Tr. 277:12-279:16.

ARGUMENT

A. Mineral Cos.' participation in these proceedings is proper.

Delaware's oral motion demonstrates that it is grasping for a procedural device by which to remove opposition to its Applications. In so doing, Delaware's motion elevates form over function, and ignores months of unopposed participation by the Mineral Companies in these matters. By any reasonable reading of the Division's rules, the Mineral Cos. were properly before the Division on November 13, 2018, and remain so.

In this proceeding, the Examiners "have the power to perform all acts and take all measures necessary and proper for the hearing's efficient and orderly conduct, . . ." 19.15.4.19 NMAC. The Division's rules provide several methods for intervention to an adjudicatory proceeding, and the Examiners have discretion to allow intervention "by oral appearance on the record at the hearing." 19.15.4.11(B) NMAC. An intervention may be struck only where an intervenor "fails to show that the intervenor has standing, unless the intervenor shows that intervenor's participation will contribute substantially to the prevention of waste, protection of correlative rights or protection of public health or the environment." 19.15.4.11(C) NMAC. *See also In re Norwest Bank of New Mexico, N.A.*, 2003-NMCA-128, ¶ 17, 134 N.M. 516, 522, 80 P.3d 98 ("The timeliness requirement [for intervention] lacks 'precisely measurable dimensions,' and whether the requirement is met lies within the trial court's discretion," depending on the circumstances of each case. (internal citations omitted)).

Mineral Cos. ask the Examiners in this proceeding to exercise discretion to allow Mineral Cos. intervention by oral appearance on the record at hearing on November 13, 2018 pursuant to 19.15.4.11 NMAC. Any defect under the technical requirements of the intervention rule was cured when Mineral Cos. appeared on the record at hearing, and the Mineral Cos. seek their intervention to be deemed to relate back to their entry of appearance filed on June 21, 2018. As described above, Mineral Cos. have actively been involved in the pre-hearing proceedings related to the Wells. *See* ¶¶ 2-20 above.

In Pre-Hearing Statements, amended Pre-Hearing Statements, and at hearing, Mineral Cos. affirmatively showed their participation would contribute substantially to the prevention of waste and the protection of correlative rights. *Id.* At hearing, testimony and exhibits demonstrated that Delaware's wells are in close proximity to the Mineral Companies' Black River Ranch, located in Sections 3, 4, 9, 10 and 11. Delaware's land expert admitted familiarity with the Ranch. Tr. 63:7-10. And Delaware's own exhibit shows that the first well the Mineral Companies have planned for the Ranch, 3Bear's Foundation Minerals SWD #1 well, is within the 1.5-mile area of review of the Bear Trap SWD #1 well. Delaware Exhibit 5. While no formal notice of intervention was filed, Mineral Cos. request the Examiners allow intervention on oral motion because Mineral Cos. have shown their participation contributes substantially to the protection of the Mineral Cos.' correlative rights.

There certainly can be no argument that Delaware was prejudiced by Mineral Cos. appearance and oral intervention on the record at the hearing. Since the inception of these proceedings in May 2018, Mineral Cos. have made known to Delaware of their opposition to the Wells. In addition to appearing on the record at the hearing, the Pre-Hearing Statements of the Mineral Cos. provided Delaware with every piece of information required under rule of a notice

of intervention. *See* 19.15.4.11(A) NMAC (listing the requirements for notice of intervention). After entering an appearance in these matters on June 21, 2018, Mineral Cos. filed Pre-Hearing Statements as Opponents to the proceeding, which included the names and contact information for Mineral Cos. Moreover, the reasons for Mineral Cos. opposition to the Wells are described in detail in their Pre-Hearing Statements. *See* ¶ 5.

For these reasons, Mineral Cos. request the Examiners deny Delaware's motion to dismiss and grant the Mineral Cos.' oral request for intervention.

B. Mineral Cos. were made parties to these proceedings under rule and may not now be dismissed.

In the alternative, the Mineral Cos. became parties to these adjudicatory proceedings under Rules 19.15.4.12 and 19.15.4.10 NMAC, and are not now subject to dismissal. The Division's rules provide that "parties" to an adjudicatory proceeding shall include those persons "to whom statute, rule or order requires notice, . . . who [have] entered an appearance in the case." 19.15.4.10(A)(2) NMAC. Both prongs are met here. First, after learning of Delaware's applications for the Wells, the Mineral Cos. filed an entry of appearance on June 21, 2018. Second, after the Mineral Cos. filed their entry of appearance, the Division served notice on the Mineral Cos. that the applications for the Wells had been set for hearing. As such, Mineral Cos. are categorically a party "to whom statute, rule or order requires notice, . . . who has entered an appearance in the case." 19.15.4.10(A)(2) NMAC. Subsequently, the Mineral Cos. participated in discussions regarding rescheduling the hearing on the Wells several times as described above and received notice of every scheduled hearing from the Division.

For these reasons, the Mineral Cos. became parties to the adjudication on the Wells and may not be dismissed from these proceedings.

C. The Examiners' *sua sponte* dismissal of Case No. 16261 is unaffected by the Division's determination of the instant motion.

Finally, a determination as to the intervention of Mineral Cos. will not affect the Examiner's *sua sponte* dismissal of Case No. 16261 for the Kodiak SWD #1. The record of the hearing is clear that the Examiners dismissed that proceeding due to Delaware's change of the surface location for this well, and that they did so not on the Mineral Cos.' motion, but *sua sponte*. Tr. 12:12-13:16. Regardless of the disposition of Delaware's motion to dismiss the Protestants to these proceedings, including Mineral Cos., the Examiners' dismissal of Case No. 16261 remains intact. Tr. 277:10-279:16.

WHEREFORE, Mineral Cos. respectfully request that the Division deny Delaware's oral motion to dismiss Mineral Cos. from these matters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following counsel of record by electronic mail on December 10, 2018:

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