

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

APPLICATION OF DUKE ENERGY  
FIELD SERVICES, LP FOR APPROVAL  
OF AN ACID GAS INJECTION WELL,  
LEA COUNTY, NEW MEXICO.

CASE NO. 13589

2006 MAY 25 PM 2 18

OBJECTION TO INTERVENTION

Duke Energy Field Services, LP (“Duke”) responds and objects to the Notice of Intervention of Madison M. Hinkle, Randolph M. Richardson, Morris E. Schertz, Rolla R. Hinkle III, Oscura Resources, Inc. and R.R. Hinkle Company, Inc. (“Proposed Intervenors”) for the following reasons:

**I. BACKGROUND**

1. Proposed Intervenors state they own mineral interests underlying the W/2 NE/4, NW/4 of Section 30, Township 18 South, Range 37 East, NMPM. *See* Notice of Intervention at p. 1.

2. The hearing before the Oil Conservation Commission (“Commission”) in the above-referenced matter was held on March 13, 2006.

3. At the hearing, certain surface owners in the north-half of Section 30 participated through counsel and gave testimony.

4. The Commission deliberated the case and rendered an oral decision at its March 20, 2006 Commission hearing.

5. Proposed Intervenors submitted a letter to the Commission on March 24, 2006, conveying their concerns with Duke’s application with regard to their mineral interests.

6. The Commission issued Order R-12546 granting Duke's application for approval of an acid gas injection well on May 5, 2006.

7. Six weeks after writing the Commission about their concerns and nearly two weeks after this order was issued, Proposed Intervenors filed their Notice of Intervention. Proposed Intervenors also seek to join in the Second Motion to Dismiss filed by Randall Smith, Dean "Beach" Snyder and AC Ranches Partnership ("Opponents").

## II. ARGUMENT

Division Rule 1209 gives the Chairman discretion whether to allow late intervenors if the intervenors have standing and can show that their participation will "contribute substantially to the prevention of waste, protection of correlative rights or protection of public health or the environment." N.M.A.C. 19.15.14.1209 (2006). Proposed Intervenors have failed to show in their Notice that they will contribute substantially to the Commission's jurisdictional mandates.

Further, New Mexico courts, as a general rule, do not allow intervention after a final judgment has been entered. *In re Norwest Bank of New Mexico, NA*, 134 N.M. 516, 80 P. 3d 98 (Ct. App. 2003). This is for the simple reason that the purpose and policy for allowing intervention is no longer being met. Intervention is permitted in order to hear and determine all claims at the same time in order to expedite a matter in a single action by a single judgment. Proposed Intervenors, although expressing concern on March 24th, made no effort to participate until almost two months later on May 16. Also untimely intervention prejudices Duke, an existing party to the case. *In re Norwest*, 80 P.3d at 104.

Furthermore, it is curious that Proposed Intervenors desire to enter the case at this time. On one hand, they seek permission to join in the pending Motion to Dismiss. However, on the other hand, they state in their Notice that they intend to present evidence showing that recoverable hydrocarbon resources will be destroyed by Duke's injection of acid gas. While expressing a desire to present additional evidence in the case they are trying to dismiss, the Proposed Intervenors have failed to file any pleading before this Commission requesting permission to submit additional evidence. At this point, Duke submits that Proposed Intervenors only purpose appears to be to give standing to Opponents' in their Second Motion to Dismiss and/or to give Opponents another opportunity to object to Duke's application.

An applicant who seeks to intervene must satisfy a three-part test showing that: (1) the applicant has an interest in the subject matter; (2) the applicant's interest may be impaired or impeded by disposition of the action; and (3) the interest sought to be protected is not adequately represented by existing parties. *Chino Mines Co. v. Del Curto*, 114 N.M. 521, 523, 842 P. 2d 738, 740 (Ct. App. 1992). Proposed Intervenors have failed to prove the second and third part of the test.

**A. Proposed Intervenors' Rights Are Not Impaired**

Proposed Intervenors provide the Commission with only bald-faced statements that their oil and gas interests *may* be affected. This is insufficient to show that they should be allowed to intervene. Duke presented testimony which showed that the proposed injection interval has good porosity and permeability, has a good geologic seal to contain the gas, has compatible fluid chemistry and is isolated from any fresh groundwater. It is a good and safe formation for the injection of acid gas. *See generally*,

Testimony of Alberto Gutierrez; Order R-12546 (Findings No. 10 & 11). Duke offered evidence by seismic and stratigraphic analysis, cross-sections and drill stem tests that confirmed Mr. Gutierrez's testimony. *See* Duke Exhibit No. 15 (Slide 4, 8-10). Mr. Gutierrez also testified that there were no significant prospects for oil and gas production from or below the proposed injection zone. Order R-12546 (Finding No. 10); *see also* Exhibit No. 15 (Slide 4). Mr. Gutierrez also testified that the injection zone is full of salt water and that there were no hydrocarbon shows. *See* Tr. at p. 155.

Duke established that existing and future oil and gas production will not be harmed by the injection of acid gas into the proposed formation.<sup>1</sup> Moreover, the Commission has already determined that the impact on mineral rights is too speculative at this time and would not be a matter within its realm of jurisdiction to consider, in any event. *See* Order R- 12546 (Paragraph 26).

#### **B. Proposed Intervenors Interests were Adequately Represented**

Proposed Intervenors offered no argument in their Notice as to why their interests were not adequately represented by existing parties. In fact, their interests were adequately represented by certain surface owners in the north-half of Section 30 who participated in the March 13 hearing as well as by the Oil Conservation Division ("Division"). Counsel for the surface owners (who now represents the Proposed Intervenors as well) also was given the opportunity to orally argue the first Motion to Dismiss which focused on notice and title/sub-surface trespass issues. *See* Tr. at pp. 17-23. Surface owners' counsel also examined Duke's expert regarding the position of an injected acid gas front with time. *See* Tr. at pp. 203-206. The motion and the underlying

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<sup>1</sup> Counsel for the surface owners had a full opportunity to cross-examine Duke's expert witnesses about the effect the injection would have on oil and gas production in the area. *See* Tr. at p.188.

arguments were rejected by the Commission. In Order No. R-12546, the Commission concluded that:

Although there is some evidence that fluids injected pursuant to the license granted by this order might migrate beyond the lateral limits of the particular tract on which the injection facility will be located, the commission concludes that it is unnecessary that the Commission make a finding with respect to that possibility...If, at some future time, activity conducted within the scope of the permit exceeds those property rights, this would be a matter for adjudication in the courts, and not within the jurisdiction or competence of the Commission.

Paragraph 26, Order R-12546.

The Oil Conservation Division also timely intervened and fully participated in the hearing. Like the Commission, it is the Division's statutory obligation to prevent waste, protect correlative rights and protect human health and the environment. *See* NMSA §§ 70-2-6 & 70-2-11 & 70-2-12 (2006). Under these circumstances, Proposed Intervenor must make a "concrete showing" that the representation was inadequate. *See Chino Mines Co. v. Del Curto*, 114 N.M. 521, 524, 842 P. 2d 738, 741 (Ct. App. 1992)("Where the state...is named as a party to an action and the interest the [intervenor] seeks to protect is represented by a governmental entity, a presumption of adequate representation exists.") This they wholesale failed to do.

In short, the issue of whether oil and gas production would be effected was fully discussed by existing parties in the case and considered by the Commission. Thus, Proposed Intervenor's rights were not impaired and their participation at this late date does not substantially contribute to the Commission's jurisdictional mandates.

**C. This Attempt to Intervene is Untimely and Prejudices Duke**

Proposed Intervenor's effort to insert themselves in this case after a final judgment has been rendered is not timely and would prejudice Duke. *In re Norwest*

*Bank of New Mexico, NA*, 134 N.M. 516, 80 P. 3d 98 (Ct. App. 2003). Intervention must take place while the action is pending and will not be permitted after a final judgment or decree has been entered absent extraordinary circumstances. *Richins v. Mayfield*, 85 N.M. 578, 514 P. 2d 854 (1973); *Tom Fields, Ltd. v. Tigner*, 61 N.M. 382, 301 P. 2d 322 (1956); *Cooper v. Albuquerque City Commission*, 85 N.M. 786, 518 P. 2d 275 (1974)(Finding motions to intervene filed after judgment are viewed with disfavor).

When looking at timeliness, “a crucial factor for the trial court is whether the intervenor knew of its interest and could have sought to intervene earlier in the proceedings.” *Norwest Bank*, 80 P. 3d at 104. Although Proposed Intervenors claim they did not know of the application until sometime in March, they did not seek to intervene until almost two months after they knew of the application and two weeks after the Order was entered in this case. *See Weaver v. Synthes, Ltd.*, 784 P. 2d 268 (Ariz. App. 1989)(Motion to Intervene was denied when it was filed two months after judgment and four months after prospective intervenors knew of judgment and they did not show their interest was impaired by being denied participation).

Proposed Intervenors have not shown any extraordinary circumstances. Proposed Intervenors assertion that they only just learned of Duke’s application is not extraordinary and is simply not supported by the facts of this case. It is not an appropriate reason to permit the Proposed Intervenors to be allowed to participate at this late date.

Proposed Intervenors were not entitled by rule to receive notice of the application. As discussed in the Sur-reply, the additional notice recommended by the

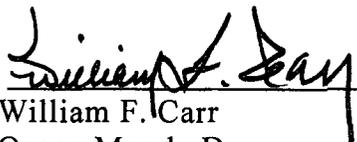
Division was not a requirement and accordingly does not give Proposed Intervenors a legal right which they can claim has been violated.

The courts also consider whether an untimely application to intervene will prejudice existing parties to a case. *Norwest*, 80 P.3d at 104. In this case, Duke will be prejudiced by this intervention. Although it is unclear how Proposed Intervenors seek to proceed, it is clear that their late intervention will cause further delay to Duke which in turn prejudices Duke. If the Commission strikes this attempt to intervene, Proposed Intervenors are not foreclosed from protecting their interests, if and when those interests are in fact harmed by Duke's injection operations.

For these reasons, the Notice of Intervention should be stricken.

**Respectfully submitted,**

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**ATTORNEYS FOR DUKE ENERGY FIELD  
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**CERTIFICATE OF SERVICE**

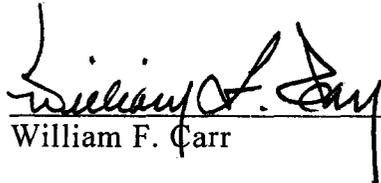
I certify that on May 25, 2006 I served a copy of the foregoing document to the following by

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