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December 6, 2007

VIA HAND DELIVERY

Ms. Florene Davidson
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87505

Re: Case 14015: Application of the New Mexico Oil Conservation Division for Repeal of Existing Rule 50 Concerning Pits, etc.

Controlled Recovery Inc.'s Brief on Legal Issues

Dear Ms. Davidson:

Pursuant to the Commission's several Orders relating to briefing of legal issues in this proceeding, Controlled Recovery, Inc. hereby submits its Brief.

First Issue

(a) Whether the proposed Subparagraph (c) of Paragraph (1) of Subsection F of 19.15.17.13 NMAC, which provides that surface owner consent is one of the requirements for on-site closure, violates the sub-surface owners right to reasonable use of the surface and whether the Oil Conservation Commission has the authority to require surface owner consent.

CRI believes the answer to the first question is "No," and the second question is "Yes," as a matter of law.

This is so because the option granted in the draft Rule, for an operator under an oil and gas lease to leave oilfield waste in a permanent subsurface on-site waste dump known as a "deep trench burial" is *not* a legally permissible use of the surface owner's property incident to the development of oil and gas. Accordingly, if a permanent subsurface waste dump is to be established pursuant to OCC regulations, the OCD must have the authority to satisfy itself that the dump is being established with the surface owner's consent.

The applicable legal principle is that the surface owner owns the surface *and* the subsurface, subject only to a reservation of the minerals. The mineral rights owner can exploit the mineral deposits in the subsurface, but he has no other right to use the subsurface.

[A] reservation of mineral rights creates two independent, distinct and co-existing interests in one parcel of land; one in the whole property, surface and subsurface, subject to a reservation of mineral rights; and one in the minerals, and only in the minerals, beneath the surface of the land. *Calvert Joint Venture # 140 v. Snider*, 373 Md. 18, 48-49, 816 A.2d 854, 871, 155 Oil & Gas Rep. 511 (Md.App. 2003). Elements beneath the surface of land that do not constitute minerals under mineral rights laws, for instance subsurface soil and groundwater, remain the property of the surface owner. *Id., at fn.19.* So, may an oil and gas lessee permanently dispose of waste by burying it under the surface of the leased property? The legal answer is "no," because he has no right to use the subsurface *for that purpose*. To do so would amount to a subsurface trespass. Permanent burial of contaminated waste amounts to an appropriation of the subsurface owner's property that would be actionable in tort (trespass or nuisance). The oil and gas lessee's right to use the subsurface of the property leased is limited to exploring for and producing the oil and gas that may be there. He does not have any other right to use the subsurface.

We concede that in New Mexico an oil and gas lessee is allowed to use as much of the surface area as is "reasonably necessary" for its drilling operations. *Kysar v. Amoco Production Co.*, 135 N.M. 767, 773, 93 P.3d 1272, 1278 (2004); *Amoco Production Co. v. Carter Farms Co.*, 103 N.M. 117, 119, 703 P.2d 894, 896 (1985). But, permanent subsurface on-site waste burial is *not* a use that is a necessary part of the operation of *drilling* an oil and gas well. It is, instead, an *unnecessary post*-drilling disposal of waste that is produced incidental to the operation of drilling a well. Oil and gas well drilling operations require that drilling mud containing drill cuttings be produced during the operation. Oil and gas well drilling operations do *not* require that drilling mud containing drill cuttings be disposed of on-site, by permanently burying the waste beneath the surface owner's land.

The oil and gas lessee has no more right to leave waste underground than he does to leave it above ground. No one would argue that an oil and gas lessee could leave ordinary trash and sewage generated during the drilling of a well on, or under, the surface owner's land. Instead, ordinary trash and sewage must be carried away and disposed of properly. There is nothing different about drilling mud and drill cuttings after the well is completed. They are waste that must be carried away and disposed of properly. These are not benign materials. They are contaminated with high levels of chlorides that present a known risk to groundwater and water wells, and to revegetation.

An oil and gas lease does not grant permanent rights. Rights under an oil and gas lease only last as long as oil and gas are produced. The idea that, as an incident to such a lease, an oil and gas lessee could establish a *permanent* waste dump on the premises would imply a *permanent* right not included within the lease itself.

Amoco Production Co. v. Carter Farms Co., 103 N.M. 117, 119, 703 P.2d 894, 896 (1985), is distinguishable from the circumstances in this proceeding. In that case, the question was whether the driller had an implied contractual duty to restore the surface estate immediately following the conclusion of drilling operations (a question that appears to have been preempted by the Surface Owners Protection Act, N.M.S.A. 1978, § 70-12-1 (2007)). But the case is also distinguishable because it was predicated on "customary practice in the oil and gas industry" in the 1980s that would blatantly violate OCC Rules and OCD Guidelines in effect since at least the early 1990s, and that would never be tolerated in 2007 because of their threat to the environment. There was no issue of environmental risk in the *Carter Farms* case, and the acceptance of the environmental

risk associated with deep trench burial is not "reasonably necessary" to oil and gas drilling operations.

To summarize, an oil and gas lessee may take all the oil and gas off the lease. At the end of the lease he must remove all that was necessary to production. He has no other rights to use the subsurface. The establishment of a permanent subsurface waste dump is not "reasonably necessary" or permitted by law.

Finally, the Oil Conservation Commission has no authority to take part of a surface owner's property for use as a permanent waste dump. The surface owner may grant that right, but the Commission cannot. Accordingly, it is not only appropriate, it is required that the Commission have the authority to ensure that the surface owner consent to the use of his property for the permanent disposal of waste before the Commission authorizes it.

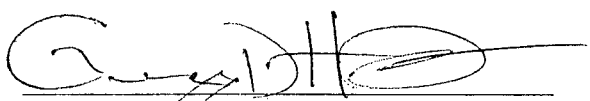
Second issue

(b) Whether the proposed requirement in Subparagraph (a) of Paragraph (1) of Subsection F of 19.15.17.13 NMAC that limits use of on-site closure to those situations where the proposed pit's location is outside of a 100-mile radius of a division-approved facility or an out-of-state waste management facility violates the Commerce Clause of the United States Constitution.

The United States Constitution reserves to Congress the "power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S.C.A. Const. Art. I § 8, cl. 3. A limitation of the use of on-site closure of pits used in oil and gas production in a single state, whether by a 100 mile radius or otherwise, in no way implicates "Commerce . . . among the several states."

Respectfully submitted,

HUFFAKER & MOFFETT LLC



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2007, a copy of Controlled Recovery Inc.'s Brief on Legal Issues in the above-captioned case were delivered to the following:

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