

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

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IN THE MATTER OF THE APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION FOR REPEAL OF EXISTING RULE 50 CONCERNING PITS AND BELOW GRADE TANKS AND ADOPTION OF A NEW RULE GOVERNING PITS, BELOW GRADE TANKS, CLOSED LOOP SYSTEMS AND OTHER ALTERNATIVE METHODS TO THE FOREGOING, AND AMENDING OTHER RULES TO CONFORMING CHANGES STATEWIDE.

CASE NO. 14015

The Industry Committee and the New Mexico Oil and Gas Association submit this brief to address the legality of the provision in the proposed Pit Rule that requires an oil and gas operator to obtain the surface owner's written consent to the operator's proposed on-site closure method. N.M.A.C. 19.15.17.13(F)(1)(c). This provision violates sub-surface owner rights as established under the common law and by statute.

It is well-established that a mineral owner (i.e. the dominant estate) has the right to reasonable use of the surface estate to develop the underlying minerals. *Amoco Production Co. v. Carter Farms*, 103 N.M. 117, 703 P. 2d 894 (1985)(mineral lessee is entitled to use as much of the surface area as is reasonably necessary for its drilling and production operations); *Kysar v. Amoco Prod. Co.*, 135 N.M. 767, 773, 93 P. 3d 1272, 1278 (2004)("[W]hen an oil and gas lease grants to the lessee a particular tract of land for the purpose of exploring, drilling, mining and producing oil and gas, the lessee gains by implication the right to enter upon and use as much of the surface as may be necessary for the lessee's operations."); *Amoco v. Sims*, 97 N.M. 324, 639 P. 2d 1178 (1981). The New Mexico Supreme Court has found that "the basis for this rule is that 'when a thing is granted all the means to obtain it and all the fruits and effects of it are also granted.'" *Kysar v. Amoco Prod. Co.*, 93 P. 3d at 1278 (internal citations omitted). Requiring

written consent from the surface owner for on-site closure is inconsistent with a mineral owner's right to reasonable use of the surface.

The Surface Owner's Protection Act (SOPA) is a result of a compromise between landowners and oil and gas operators and took three legislative sessions to be passed into law. The SOPA requires an oil and gas operator to give notice to the surface owner of its planned oil and gas operations. "Oil and gas operations" are defined under the SOPA as "all activities affecting the surface owner's land that are associated with exploration, drilling or production of oil or gas, through final reclamation of the affected surface." H.B. 827, Section 3(A). The notice must include a description of the planned activity including "construction, maintenance and placement of all **pits**..." and "interim and final reclamation." *Id.* Section 5(B)(c) and (i) (emphasis added). Thus, the SOPA requires notice of an operator's plans for on-site closure of pits. The surface owner consent provision in the proposed pit rule upsets the compromise reached in the SOPA and violates the intent of the SOPA to allow notice rather than written consent.

Further, the SOPA also provides that an oil and gas operator propose a surface use and compensation agreement to the surface owner. If the parties are unable to reach agreement after thirty days, the operator may enter and conduct operations after depositing a surety bond or other financial assurance. In other words, if the parties have a dispute as to any part of the proposed oil and gas operations –including pits – then an operator may still bond on to the property. Accordingly, the proposed rule conflicts with the Act by requiring written consent when under the Act an operator may bond on to a property. The proposed surface owner consent provision gives a landowner a veto for any reason – even for extorting money from the oil and gas

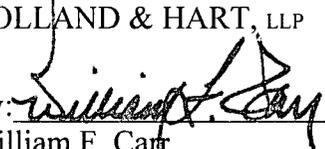
operator. This veto has the effect of voiding the SOPA provisions allowing an operator to bond on to a property.

This landowner veto also abdicates the Division's and Commission's duties under the New Mexico Oil and Gas Act to prevent waste, protect correlative rights and protect the public health and the environment. An administrative agency is allowed to make rules and regulations to effectuate the purpose(s) of a statute. *Sandoval v. Valdez*, 91 N.M. 705, 580 P. 2d 131 (Ct. App. 1978). The regulations must be consistent with the legislative objective. *Willey v. Farmers Ins. Group*, 86 N.M. 325, 523 P. 2d 1351 (1974). The Commission's primary jurisdiction is to prevent waste and protect correlative rights. N.M.S.A. 1978, § 70-2-1 *et seq.* (2007). The Commission has also been granted certain enumerated powers including the authority to regulate the disposition of oil and gas waste "to protect public health and the environment." N.M.S.A. 1978, § 70-2-12 (2007). The surface owner consent provision relinquishes those duties because a surface owner may veto an oil and gas operator's plans for on-site closure for any reason. Moreover, as the legislature recently spoke to surface owner rights and did not grant the Commission any additional authority or duties related thereto, this proposed rule should be stricken.

A landowner veto of an operator's on-site closure method could also make it impossible to proceed with the drilling of a well. If the surface owner may prevent an operator from a pit from being placed on the property for any reason, it may drive the costs up to point where it is no longer economic to proceed with the drilling of the well. This in turn will cause waste of oil and gas.

For all these reasons, the provision in the proposed Pit Rule requiring written consent from the surface owner should be deleted.

Respectfully submitted,
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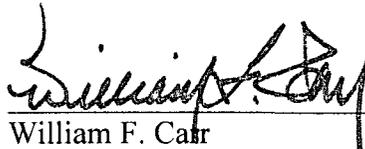
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