

Brooks, David K., EMNRD

From: Brooks, David K., EMNRD
Sent: Tuesday, May 20, 2008 8:15 AM
To: 'Joseph E. Manges'; Michael Feldewert
Cc: Jones, William V., EMNRD
Subject: RE: Case No. 14116 Subpoena Duces Tecum

Gentlemen:

OK.

Let's try for Tuesday, May 27, at 1:30 P/M, if that works for you, Mike?

Sincerely,

David K. Brooks
Legal Examiner

From: Joseph E. Manges [mailto:JManges@cmtisantafe.com]
Sent: Tuesday, May 20, 2008 8:06 AM
To: Brooks, David K., EMNRD; Michael Feldewert
Cc: Jones, William V., EMNRD
Subject: RE: Case No. 14116 Subpoena Duces Tecum

Dear Mr. Brooks and Feldewert,

I am sorry, but I have a previously scheduled Supreme Court Rules committee meeting which I must attend on Thursday morning to assure a quorum. Next week is pretty open. Also, I will confirm with my clients that they have no objection to Mr. Brooks presiding over this matter. I haven't heard back from them yet.

Thanks,

Joe

Joseph E. Manges
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505.982.4611
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JManges@cmtisantafe.com

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5/20/2008

From: Brooks, David K., EMNRD [mailto:david.brooks@state.nm.us]
Sent: Monday, May 19, 2008 3:30 PM
To: Michael Feldewert; Joseph E. Manges
Cc: Jones, William V., EMNRD
Subject: Case No. 14116 Subpoena Duces Tecum

Dear Mr. Feldewert and Mr. Manges:

I am in receipt of Mr. Feldewert's letter of May 16 concerning objections to the reference subpoena.

We need to schedule a pre-hearing conference to address these matters. I propose that it be held on Thursday, May 22 at 9:00 a.m. at OCD offices. If this time is not convenient for either counsel, please advise, and suggest alternative times.

I recognize that I have not received a final response from Intrepid as to whether they will object to my participation in this case, but in order not to delay matters, I will assume that there will be no objection unless I am advised otherwise.

Sincerely
David K. Brooks
Legal Examiner
505-476-3450

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5/20/2008

**FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO**

No. D-0101-CV-2006-01935

DEVON ENERGY PRODUCTION COMPANY, L.P.,

Appellant,

vs.

**THE NEW MEXICO OIL CONSERVATION
COMMISSION,**

Appellee.

MEMORANDUM OPINION

This matter comes before the Court on an appeal from the New Mexico Oil Conservation Commission's (or "Commission") Order No. R-12402-A, Case No. 13367, denying Appellant Devon Energy Production Company's (or "Devon") application for authorization to drill a well in the potash area of Eddy County, New Mexico. Devon challenges the denial on multiple grounds pursuant to Rule 1-074(Q) NMRA. Having reviewed the whole record and briefing, and having heard oral argument, this Court concludes that the order is not supported by substantial evidence, is not in accordance with the law, and is arbitrary and capricious. *See* Rule 1-074; NMSA 1978, § 39-3-1.1.D (1999). The Commission's order denying Devon's application is, therefore, invalid and void and the matter is to be remanded for action consistent with this opinion.

BACKGROUND

The record¹ shows that potash mining and drilling of oil and gas wells appear to be the nearly

¹The record on appeal includes the transcript and documents for this matter and for *Bass Enterprises Production Company v. New Mexico Oil Conservation Commission*, First Judicial District Court No. D-101-CV-2006-01936, because both cases were heard by the Commission on a consolidated basis for purposes of the administrative proceedings (although one should note

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Mexico Oil and Gas Act does not provide that issues of waste of oil and gas trump waste of potash.” See OCC Response, at 3. However, as Devon points out, the reverse of that proposition is just as true. That is, the Act does not indicate that preventing waste of potash trumps preventing oil and gas waste.

The Commission also argues that “[t]here is no provision limiting the Commission’s power and duty to prevent waste of potash to those situations only where doing so will result in no impairment of recoverable oil or gas reserves.” OCC Response, at 4. The Commission states:

While the Commission undoubtedly also has a duty to prevent waste of oil and gas, it is not reasonable to assume that the Legislature supposed that both objectives could be satisfied in every case. Thus it is unreasonable to require that every order involving potash prevent waste of oil and gas *as well as* potash.

OCC Response, at 4 (emphasis in original). However, a closer reading of the plain language of the statutory scheme indicates that the Commission has minimized its role. Although, given the incompatible nature of reaping both resources, it may be impossible to simultaneously preserve both, the statutory language does provide means by which the Commission can analyze the stakes and arrive at a reasoned course of action. *Cf. Continental*, 70 N.M. at 319, 373 P.2d at 814-15; *see also New Mexico Mining Ass’n*, 2007-NMCA-010, at ¶ 11, 150 P.3d at 995. In addition, the Commission must provide its rationale for its decision to elevate one interest over the other to show that it has acted reasonably and in accordance with the law. *Cf. Fasken*, 87 N.M. at 294, 532 P.2d at 590; *see also New Mexico Mining Ass’n*, 2007-NMCA-010, at ¶ 22, 150 P.3d at 999.

Subsection F of Section 70-2-3 provides a definition of “waste” that, like the other definitions, should guide the Commission’s decision-making process. That provision defines “waste” as “drilling or producing operations for oil and gas within any area containing commercial

deposits of potash where such operations would have the effect *unduly* to reduce the total quantity of such commercial deposits of potash which may *reasonably* be recovered in commercial quantities or where such operations would interfere *unduly* with the orderly commercial development of such potash deposits.” (Emphasis added); *see also* § 70-2-12.B(17). The Legislature’s use of words like “unduly” and “reasonably” when defining waste of potash, juxtaposed with its definition of “waste” that includes “inefficient . . . use or dissipation of the reservoir energy . . . of any [crude petroleum oil or natural gas] pool,” and locating and operating any well “in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool,” indicate that the Commission must show that it considered the relationship between the potential loss of potash and of oil and gas resources in its decision-making process and provide its rationale for protecting one by potentially sacrificing the other. *See generally* BLACK’S LAW DICTIONARY 1265 (defining “reasonable” to include “[f]air, proper, just, moderate, suitable under the circumstances,” “[f]it and appropriate to the end in view,” and “being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable”); 1528 (defining “undue” as “[m]ore than necessary; not proper; illegal,” and indicating that the term “denotes something wrong, according to the standard of morals which the law enforces in relations of [people], and in fact illegal, and qualifies the purpose with which influence is exercised or result which it accomplishes”). The statutory language and case law suggest a cost-benefit analysis of one industry’s proposed actions as compared to that of the other—in terms of protecting the resources as a matter of public interest rather than litigating the private interests of the industries—and analyses of whether the loss of one resource will be caused by the other industry’s actions and, if so, whether the actions are unjustified in light of the costs and benefits judged according to the statutory goal of protecting both resources. *See* § 70-2-3; *cf. Grace*,