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

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

CASE NO. 13215

APPLICATION OF VALLES CALDERA TRUST TO DENY APPLICATIONS OF GEOPRODUCTS OF NEW MEXICO, INC. FOR PERMITS TO RE-ENTER ABANDONED GEOTHERMAL WELLS (APDs), SANDOVAL COUNTY, NEW MEXICO.

ORDER NO. R-12093-A

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (the Commission) for hearing on preliminary questions of law on February 12, 2004 at Santa Fe, New Mexico on petition of Valles Caldera Trust (the Trust), pursuant to Pre-Hearing Order No. R-12093, and the Commission, having carefully considered the pleadings and briefs submitted by the parties hereto, now, on this 12th day of February, 2004,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties herein.

2. By the petition filed herein the Trust seeks an order denying two Applications for Permits to Drill for the re-entry of geothermal wells (APDs) filed by GeoProducts of New Mexico, Inc. (GeoProducts).

3. The wells at issue (the subject wells) are:

Baca Well No. 13, located 865 feet from the North line and 1565 feet from the East line (Unit B) of Section 12, Township 19 North, Range 3 East, Baca Location No. 1, Sandoval County, New Mexico; and

Baca Well No. 15, located 2035 feet from the North line and 85 feet from the East line of Section 11, Township 19 North, Range 3 East, Baca Location No. 1, Sandoval County, New Mexico.

4. The following facts that are recited in the pleading, briefs and attachments thereto are not disputed:

a. The subject wells were drilled by Union Geothermal Company (an affiliate of Union Oil Company of California) and were abandoned in the summer of 1984.

b. The subject wells are located on a portion of the Baca Ranch, a tract of some 98,000 acres, located in the Jemez Mountains, northwest of Santa Fe, New Mexico. The Baca Ranch comprises most of the Valles Caldera, a large resurgent lava dome with geothermal potential.

c. Prior to 2000, the surface and minerals of the Baca Ranch were privately owned fee land. In 2000, the United States acquired the surface and an undivided seven-eighths (7/8ths) of the minerals of the Baca Ranch from the private owners in a negotiated sale, authorized by special act of Congress, the Valles Caldera Preservation Act, P.L. 106-248, codified as 16 U.S.C. 698v.

d. The Valles Caldera Preservation Act (the Act) established the Trust as a government corporation pursuant to Chapter 91, Title 31 of the United States Code. Responsibility for management of the Baca Ranch is divided between the Trust and the Secretary of Agriculture, through the National Forest Service.

e. There is an outstanding one-eighth (1/8th) mineral interest in the Baca Ranch that is privately owned. The Act provides that:

> The acquisition of the Baca ranch by the Secretary shall be subject to all outstanding valid mineral interests. The Secretary is authorized and directed to negotiate with the owners of any fractional interest in the subsurface estate for the acquisition of such fractional interest on a willing seller basis . . . ." 16 U.S.C. 698v-2(e).

f. The Act further provides that:

> Upon acquisition of all interests in minerals within the boundaries of the Baca ranch . . . the lands comprising the Preserve are thereby withdrawn from disposition under all laws pertaining to mineral leasing, including geothermal leasing.

g. GeoProducts holds a geothermal lease from the owners of the outstanding mineral interest.

h. On December 12, 2003, GeoProducts filed the APDs with the Santa Fe District office of the Oil Conservation Division (OCD). The OCD has neither approved, nor disapproved the APDs.

i. GeoProducts does not have a surface use permit from the United States Forest Service or from any other federal authority authorizing it to enter upon the federally-owned surface of the Baca Ranch for the purpose of conducting the activities proposed in the APDs.

5. The Trust contends that the OCD and the Commission lack jurisdiction to approve the APDs because their jurisdiction to regulate geothermal exploration under the Geothermal Resources Conservation Act [NMSA 1978 Sections 71-5-1 through 71-5-24, as amended] is preempted by federal law. This preemption is alleged to arise from the Valles Caldera Preservation Act, the Mineral Leasing Act for Acquired Lands [30 U.S.C. Sections 351-360], the regulations of the United States Bureau of Land Management (BLM) implementing the latter act, or some combination thereof.

6. No party contends that the Valles Caldera Preservation Act is intended to effect a federal acquisition under U.S. Constitution, Art. I, Section 8, Clause 17, authorizing Congress "to exercise exclusive Legislation in all Cases whatsoever," or that the State of New Mexico has consented to the acquisition of the Baca Ranch on that basis.

7. Neither the Valles Caldera Preservation Act nor the Mineral Leasing Act for Acquired Lands expressly preempts state power or expressly occupies the field with respect to regulation of mineral development of the Baca Ranch. To the contrary, the Mineral Leasing Act for Acquired Lands makes applicable thereto a provision of the Mineral Leasing Act of 1920 that, "nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have . . . ." [30 U.S.C. Section 189].

8. The regulations of the BLM relating to geothermal drilling, codified at 43 CFR Section 3260 *et seq.*, although not in exactly the same words, are generally similar to the BLM regulations applicable to oil and gas drilling, codified at 43 CFR, Section 3160 *et seq.* The latter regulations clearly and expressly apply only to the activities of a person operating under a lease from the United States. *See* 35 CFR Section 3160.0-5 (f) and (h). A reasonable interpretation of these rules is that they are not applicable to the activity of a person who operates under the authority of a lease from a mineral cotenant of the United States.

9. Even where federal law neither expressly preempts state jurisdiction nor occupies the field through extensive regulation of the activity in question, there is authority indicating that state regulation may nevertheless be preempted if it stands as an obstacle to the achievement of the goals of Congress. Thus, in *Ventura County v. Gulf Oil Corporation*, 601 F.2d 1080 (9th Cir. 1979), the United States Court of Appeals for the 9th Circuit held that a county could not impose a requirement for a land use permit upon a federal lessee drilling for oil and gas on federal lands because the implied assertion of authority by the county to disallow drilling on federal lands conflicted with the purpose of Congress, in its enactment of the Mineral Leasing Act, to authorize such drilling.

10. Assuming, however, that *Ventura County* remains a viable authority in the light of the subsequent decision of the United States Supreme Court in *California Coastal Com'n v. Granite Rock Co.,* 480 U.S. 572 (1987), it does not apply in this situation for two independent reasons.

11. In the first place, an approved APD is merely an authorization to conduct an activity presumed to be otherwise lawful. It does not require an operator to drill. If drilling in accordance with the APD violates federal law or a property right, approval of the APD does not constitute any colorable authority for such violation. *See Magnolia Petroleum Co. v. Railroad Com'n,* 170 S.W.2d 189 (Tex. 1943) where the Texas Supreme Court discussed the effect of a Texas Railroad Commission permit to drill:

> [T]he order granting the permit is a purely negative pronouncement. It grants no affirmative rights to the permittee to occupy the property, ... It merely removes the conservation laws and regulations as a bar to drilling the well . . . . [170 S.W.2d at 191]

12. In the second place, the Valles Caldera Preservation Act cannot reasonably be read as evidencing a congressional purpose to preclude geothermal development of the Baca Ranch until such time as the outstanding mineral interest is acquired. The Act does not withdraw the lands from leasing until the government acquires the outstanding mineral interest. Since Congress directed that the acquisition be sought on a "willing seller" basis only, Congress must have contemplated the possibility that the seller would not be willing, and that the proposed acquisition might never take place.

13. The Trust correctly points out that the federal mineral interest cannot be force pooled pursuant to state law without federal consent. *Kirkpatrick Oil & Gas Co. v. U.S.*, 675 F.2d 1122 (10th Cir. 1982). However, compulsory pooling is not sought in this case, and, under New Mexico law, is not a prerequisite to the granting of an APD. To the contrary, NMSA 71-5-11.C provides that compulsory pooling may be sought by a party who "proposes to drill or has drilled" a well on the unit.

14. For the foregoing reasons, the Commission concludes that the authority conferred on the Commission and the OCD by the Geothermal Resources Conservation Act to regulate geothermal drilling on the Baca Ranch is not preempted, and the Commission has jurisdiction of the subject matter.

15. The Trust also argues that the granting of the APDs at this time would be premature because GeoProducts does not have authority for the use of the surface that will be required to conduct the proposed re-entry operation.

16. The Commission does not have jurisdiction to determine title or the rights of any party to occupy property. However, prudence dictates that the Commission ought not to issue a permit where the party applicant for the permit clearly does not have the right to conduct the contemplated activity. As stated by the Texas Supreme Court, "the Railroad

Commission should not do the useless thing of granting a permit to one who does not claim the property in good faith." *Magnolia Petroleum Co., supra,* 170 S.W.2d at 191.

17. A majority of American jurisdictions hold that a mineral co-tenant has the right to produce minerals from the co-owned property without the consent of the a non-joining co-tenant, subject to the requirement that it account to the non-joining co-tenant for its share of proceeds. 2 H.Williams and C. Meyers, *Oil and Gas Law,* Section 502, at 574.

18. New Mexico has implicitly recognized that a cotenant has this right by allowing a cotenant who produced oil from co-owned premises to recover its development costs out of the share of production allocable to a non-joining cotenant, in the absence of either an agreement or a pooling order. *Bellet v. Grynberg,* 114 NM 690, 845 P.2d 784 (Sup. Ct. 1992).

19. A mineral lessee has a right under New Mexico law to use so much of the surface as is reasonably necessary to extract the minerals. *Amoco Production Co. v. Carter Farms Co.,* 103 N.M. 117, 703 P.2d 894 (Sup. Ct. 1985). Jurisdictions that have addressed the question generally extend that right to the owner of a severed mineral interest, by implication without the necessity of a specific grant of that right in the instrument of severance. 1 H. Williams and C. Meyers, *supra,* Section 218, at 198.7.

20. It is therefore reasonable to conclude that any owner of a mineral interest or its lessee has the right to occupy the surface to the extent necessary to explore for or produce the minerals. Accordingly it would not be appropriate, in ordinary cases, for OCD to require an applicant for APD approval to demonstrate a specific right to use the surface.

21. In this case, however, both parties agree that exploration can only begin after approval by the United States Forest Service of reasonable use of the federally owned surface based on an operating plan submitted by GeoProducts. It is also undisputed that GeoProducts has neither obtained nor applied for a surface use authorization from the Forest Service for its proposed operation. Accordingly Commission concludes that approval of APDs for re-entry of the subject wells at this time would be improvident.

22. In its brief, GeoProducts contends that approval of APDs by the state conservation authority is a condition precedent to its obtaining surface use authority from the Forest Service. GeoProducts Brief at 5. However, the Forest Service Memorandum that it cites in support of that contention does not so state.

23. The cited memorandum states that "[t]he mineral owner or lessee must provide the Forest Supervisor with proof of right to exercise mineral rights." The right to exercise mineral rights arises, if at all, from the ownership of the mineral interest, and not from the approval of an APD which merely confirms that the specific operation proposed complies with OCD's spacing and technical requirements.

24. The Forest Service use permit might require changes in the APDs or might limit GeoProducts to accessing its minerals by a completely different operation than the

proposed re-entries. Because the Commission cannot foresee the limitations that might be imposed, it is particularly appropriate that the Forest Service authorization process should proceed first, before APDs are approved.

25. Because the above conclusions are sufficient to dispose of the matter presently before the Commission, it is not necessary at this time to address other issues raised in the briefs.

IT IS THEREFORE ORDERED THAT:

1. The District Supervisor of the Santa Fe District of the Oil Conservation Division is hereby ordered to deny the APDs filed by GeoProducts for re-entry of the subject wells for the reasons stated in this order.

2. Jurisdiction is hereby retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

LORI WROTENBERY, CHAIR

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

SEAL