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BEFORE THE OIL CONSERVATION DIVISION
STATE OF NEW MEXICO

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APR 20 1992

IN THE MATTER OF

OIL CONSERVATION DIVISION

APPLICATION OF YATES PETROLEUM
CORPORATION FOR AUTHORIZATION TO
DRILL, EDDY COUNTY, NEW MEXICO

CASE NO. 10448
ORDER NO. R-9654

APPLICATION FOR EMERGENCY ORDER STAYING ORDER OF DIRECTOR
PENDING DE NOVO HEARING BY OIL CONSERVATION COMMISSION

NEW MEXICO POTASH CORPORATION ("New Mexico Potash") applies for an emergency order pursuant to Rule 1202 of the New Mexico Oil Conservation Division ("OCD") Rules on Procedure staying the decision and order issued by William J. LeMay, Director of the OCD ("Director"), on March 20, 1992, and in support thereof shows the following:

1. On March 20, 1992, following a hearing before a hearing examiner, the Director of the OCD entered an Order in this matter approving the application of Yates Petroleum Corporation ("Yates") to drill its Flora "AKF" State Well No. 1 at a standard oil well location 660 feet from the South line and 2310 feet from the West line (Unit N) of Section 2, Township 22 South, Range 31 East, NMPM, Undesignated Lost Tank-Delaware Pool or Undesignated Livingston Ridge-Delaware Pool, Eddy County, New Mexico.

2. On April 3, 1992, within the time specified in Rule 1220 of the Rules on Procedure, New Mexico Potash filed an Application for Hearing de novo before the New Mexico Oil Conservation Commission ("OCC"). That Application was received by the OCD on April 7, 1992.

3. A copy of the Application for Hearing by the OCC was served on counsel for Yates. A certification of service was attached to the Application and filed with the OCD.

4. Notwithstanding the filing and service of this Application, which New Mexico Potash submits renders moot the decision and order of the Director, New Mexico Potash has learned that Yates is in the process of drilling the well approved by the OCD, which is the subject of New Mexico Potash's Application for Hearing by the full OCC. We understand that the first string of casing has been set and that drilling is proceeding on a 24-hour basis. Therefore, unless an emergency order is entered granting the requested stay, the well will be drilled through potash deposits and to the bottom hole location before the OCC hears the matter and New Mexico Potash's statutory right to a de novo hearing by the OCC will be rendered moot.

5. The OCD has the authority to enter the order requested by New Mexico Potash. Under Rule 1202, an emergency order granting a stay may be entered where, as here, an emergency is found to exist. That Rules provides that:

Notwithstanding any other provision of these rules, in case an emergency is found to exist by the Division, which, in its judgment, requires the making of a rule, regulation, or order without a hearing having first been had or concluded, such emergency rule, regulation, or order when made by the Division shall have the same validity as if a hearing with respect to the same had been held before the Division after due notice. Such emergency rule, regulation, or order shall remain in force no longer than 15 days from its effective date, and in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation, or order becomes effective.

6. The conditions specified in Rule 1202 exist in this case. Indeed, as stated earlier, the decision and order issued by the Director on March 20, 1992, which is the subject of New Mexico Potash's Application for Hearing by the OCC, is not a valid authorization for Yates to drill the subject well. On the contrary, Rule 1220 of the OCD's Rules of Procedure, as well as Section 70-2-13, NMSA 1978, specifically provide that when a matter is referred to an examiner for hearing, as was done here, and a decision is rendered, as happened here, any party of record "shall have the right" to have the matter heard de novo before the OCC provided that within 30 days of such order an application for hearing is filed with the OCD.

5. This statutory "right" to a "de novo" hearing renders invalid any decision entered by the OCD which is the subject of a timely application for hearing before the OCC. Any other interpretation would render meaningless this statutory "right" to a de novo hearing.

6. For this reason, New Mexico Potash submits that the well being drilled by Yates is without authorization. An emergency order should, therefore, be entered staying the March 20, 1992 approval of the well for a 15 day period and a hearing immediately scheduled so that this issue can be heard by the Director.

7. Alternatively, New Mexico Potash submits that an emergency order should be entered to preserve the jurisdiction of the OCC. Since it is as clear as words can express that New Mexico Potash has a statutory "right" to have Yates' application to drill this well heard and decided "de novo" by the OCC, this can only

occur if an order is entered directing Yates to stop the present drilling until a decision is made by the OCC. Without such a stay, or the issuance of an order directing Yates to stop drilling, the well in issue will be drilled and completed before the OCC has an opportunity to perform its statutory duty to decide if the well should or should not be allowed.

8. Finally, New Mexico Potash submits that an emergency order should be entered to prevent irreparable harm to New Mexico Potash. While the OCD has no procedures for the seeking or granting of a stay pending hearing by the OCC of an order issued by the OCD and, therefore, no standards for deciding such matters (which New Mexico Potash submits is because OCD decisions to be heard by the OCC are superseded by an application for hearing), New Mexico Potash submits that it is entitled to stay based upon traditional equitable standards considered by the courts when deciding whether agency action should be stayed during an appeal. See e.g., Tenneco Oil Company v. New Mexico Water Quality Control Commission et al., 105 N.M. 708 (App. 1986) (test for determining whether to enjoin agency action during appeal requires consideration of (1) likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to the applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.)

8. With respect to the first condition, there is at least a likelihood that New Mexico Potash will prevail on its Application for Hearing before the OCC. New Mexico Potash claims that the

proposed well is located within an area designated by New Mexico Potash as its "life-of-mine reserves" within the meaning of OCC Order R-111-P. While this will be contested by Yates on various grounds, which New Mexico Potash believes are without merit, the evidence will show that New Mexico Potash has complied with all requirements imposed on it by Order R-111-P for the designation of Section 2 as "life-of-mine" reserves. If it is successful in establishing this, as it believes it will be, then the well should be disallowed in accordance with Section G(3) of Order R-111-P, which states that wells in an LMR area may only be approved with the consent of New Mexico Potash. This condition, therefore, is clearly met.

9. Second, if a stay is not granted, New Mexico Potash will suffer irreparable harm in that its statutory right to have this matter heard and decided by the OCC will be rendered moot because the well will be completed before it is even heard by the OCC. Such deprivation of a statutory right, under any standard, is irreparable injury. Further, the proposed well is located in an area of commercial grade potash under lease to New Mexico Potash. Indeed, a core hole to the East of the proposed well location shows 5 feet one inch of 16.04% K₂O sylvite on the 10th ore zone and 4 feet 11 inches of 5.86% K₂O langbeinite on the 4th ore zone. If a stay is not entered, an enormous amount of potash will be wasted before the OCC has an opportunity to determine if the well will result in an undue waste of potash. Still further, if the well is completed before the OCC hears the matter, it will present a safety hazard to underground miners which cannot be removed even if New

Mexico Potash prevails before the OCC. The obvious and indisputable fact that this safety hazard and waste of potash cannot be reversed or eliminated if New Mexico Potash prevails before the OCC constitutes irreparable injury and satisfies the second factor.

10. With respect to the third factor, there can be no substantial harm to Yates not of its own doing if a stay is granted. Both the OCD Rules of Procedure and the Oil and Gas Act provide for a determination of this matter by the OCC regardless of the decision by the OCD. Yates was clearly aware of this before it started drilling and also knew that applications for hearing would be filed with the OCC if the decision was adverse to New Mexico Potash. At the hearing before the hearing examiner, counsel for each party informed the other that the issues involved were of such importance that they should be heard by the OCC. It was for this reason that both chose not to present evidence after nearly four hours of argument. Thereafter, and before drilling began, counsel for New Mexico Potash prepared, filed, and served on Yates' counsel its application for hearing on the Director's approval of this well. Given these facts and Yates' knowledge that the issue would be heard by the OCC, there is no basis on which Yates can now claim that it will suffer substantial harm if a stay is granted pending a decision by the OCC.

11. Finally, there can be no claim that the granting of a stay will result in harm to the public interest. On the contrary, the public interest mandates that New Mexico Potash receive that to which it is entitled by statute - a decision by the OCC on whether

this well should be allowed. This is only possible if it occurs at a time before the well is drilled.

WHEREFORE, New Mexico Potash respectfully requests that the OCD find this to be an emergency matter and enter an order either staying the OCD Order approving the well or directing Yates to stop drilling until the matter can be heard and decided de novo by the OCC and grant New Mexico Potash such other and further relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Emergency Order Staying Order of Director Pending De Novo Hearing by Oil Conservation Commission was sent by facsimile and mailed by certified mail, return receipt requested on this 20th day of April, 1992, to Ernest L. Carroll, Attorney for Yates Petroleum Corporation, Losee, Carson, Haas, & Carroll, P. A., P. O. Drawer 239, Artesia, New Mexico 88210.


Clinton Marrs