

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

**IN RE APPLICATION OF TITUS OIL & GAS PRODUCTION,  
LLC FOR APPROVAL OF PRODUCTION ALLOCATION**

**CASE NO. 21872**

**OIL CONSERVATION DIVISION'S PREHEARING STATEMENT**

The New Mexico Oil Conservation Division ("OCD") submits this Pre-Hearing Statement in support of its Opposition to Titus Oil & Gas Production, LLC's ("Titus") Application for Approval of Production Allocation from the El Campeon Fed Com 404H Well.

**I. IDENTIFICATION OF PARTY AND COUNSEL**

OCD intervenes, opposes the Application, and is represented by undersigned counsel.

**II. STATEMENT OF THE CASE**

Titus proposes to develop a spacing unit extending from Lea County, New Mexico into Loving County, Texas. The focus of Titus' application is the El Campeon Fed Com 404H well. While the instant application purports to affect a single well, any order in this matter will establish precedent for potentially more than forty Titus wells that the company has already admitted it intends to develop in the future. Ex. A045, lines 16-24. There is also a possibility of substantial future cross-border development originating in either New Mexico or Texas in response to this outcome of this proceeding and Titus' broader proposed development. Currently, neither OCD nor the Commission has an agreement with its counterpart, the Railroad Commission of Texas ("RRC"), concerning such interstate development. Thus, the real question before the Commission is to determine whether any interstate development or production is appropriate prior to execution of a written agreement between New Mexico and Texas concerning the approach to such development generally.

OCD is already engaged in good faith discussions with representatives of the RRC. Both agencies agree that a written agreement is necessary for any such interstate development to provide certainty regarding issues such as allocation, reporting, financial assurance, permitting, environmental issues (both resource waste and environmental releases), notice, well construction, inspection, plugging and abandonment, etc. to both states and any regulated entities. *See* Ex. F218, page 36. Development absent such an agreement creates uncertainty about jurisdiction and greatly increases the potential for conflict among the agencies responsible for regulating such development in each state. The possibility and likelihood of future proposed interstate development require that this negotiation process continue and be resolved prior to any such interstate development or production occurring. As the Railroad Commission observed, the case is unprecedented as prior cross-border developments involved wells that were “perforated and completed in one state, not both.” Ex. D116.

However, the Commission should not approve Titus’ current request, as it would essentially short circuit the required process and force terms on two agencies attempting to draft a complex interstate agreement prematurely. By taken such actions, it is the OCD’s position that the Commission would be acting beyond its authority and could result in drilled or completed well(s) not subject to clear controlling legal requirements.

This matter was set for hearing before the Commission on an accelerated timeline due to Titus’ voluntary decisions about its current active drilling operations. Titus’ urgency should not create an emergency for OCD, New Mexico, Texas, or this Commission. First, Titus created the urgency by knowingly proceeding with drilling plans absent an agreement between the states, which its own witnesses admit is necessary. Further, Titus acknowledged at OCD hearing and in its application that the states require a written agreement. Ex. A040-A041. Representatives from

both New Mexico and Texas have repeatedly indicated the necessity of a written agreement. For example, OCD has presented its concerns with interstate development to Titus, consistently since April of 2021. Last, Titus retains the ability to drill and complete the bulk of its current operation entirely within New Mexico, subject to current rules and setback requirements.

Titus' application and representations seem to imply that issues of controlling law may either be worked out between states while Titus proceeds with its project, or that control is simply defined by well location. OCD strongly disagrees. Significant differences in regulatory structure between New Mexico and Texas require the adoption of a written agreement prior to the drilling of any interstate wells, regardless of well pad location. While Titus may comply with all New Mexico rules, Texas has not expressly agreed to subject resources recovered from Texas to New Mexico rules. Likewise, New Mexico has not agreed to relinquish control of New Mexico resources inevitably accessed from Texas. Given the typical lifespan of an oil and gas well lasting decades, the potential for future disputes, and the need for as clear of a regulatory environment as possible, OCD recommends execution of a legally binding agreement between New Mexico and Texas before any interstate development and production occurs.

While OCD does not express specific concerns with the technical aspects of this application, this Commission's approval of this application, in the absence of a written agreement, will likely result in a fully drilled or completed interstate lateral for which controlling regulations will likely be in dispute.

### **III. LEGAL ISSUES**

OCD's opposition to Titus' application is limited to the interstate aspect of the proposed lateral. Essentially, in the event of a reasonably foreseeable dispute regarding the applicability of law and rules, a Commission order will not be legally sufficient to control and provide certainty

for all parties. Underscoring the concern and likelihood of conflicting regulation, recent approvals of this proposed well from the RRC already present a conflict of rules. Both the Texas permit and Final Order are silent to the issue of controlling law. However, the Final Order from Texas conditions the well located in New Mexico to RRC rules. *See* Exhibits B & E. OCD is not opining on the adequacy of the specific RRC rules at issue; however, it is unclear how such rules can be applied to a well drilled in New Mexico absent an express agreement between the states extending its application across state lines (as the record demonstrates in this case the majority of the proposed lateral is in New Mexico). That Titus is subject to both entities' jurisdiction is not sufficient or determinative of the question of which rules apply and how.

Similarly, the OCD cannot identify any express or implied authority by which the OCC can correct this deficiency. There is no authority authorizing the Commission to dictate the terms of an interstate agreement or define controlling law independent of any input from the State of Texas, other interested New Mexico agencies, or other parties that might be subject to such interstate development. Absent a written agreement between the states, the Commission's authority extends only to the regulation of Oil and Gas activities within New Mexico. *See* generally, NMSA 1978, Sections 70-2-1, et seq. The extent of Commission's authority with respect to an agreement with Texas is to direct OCD to continue to pursue a written agreement.

It is OCD's position that the only way to provide the necessary legal certainty for the proposed interstate development is for OCD and the RRC to enter into an agreement concerning such development. At this time, OCD believes that the State Land Office would likely be a necessary party to any such agreement. OCD identifies the Joint Powers Agreement Act as the probable legal mechanism for undertaking such an agreement. NMSA 1978, Sections 11-1-1, et seq. The Act authorizes a public agency "if authorized by their legislative or other governing

bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties, even though one or more of the contracting parties may be located outside this state.” NMSA 1978, Sec. 11-1-3 (1983). The Act defines ‘public agency’ as, “[...] this state, another state or a state department, agency or instrumentality [...].” NMSA 1978, Sec. 11-1-2 (A) (2009). The contemplated agreement fits squarely within in these requirements, which OCD submits, under information and belief, parallel authority exists under Texas state law applicable to the RRC. In addition to the foregoing, the New Mexico Act also requires that agreements must be approved by the Secretary of the Department of Finance and Administration. NMSA 1978, Sec. 11-1-3 (1983).

While OCD recognizes there is a statutory pathway for it to execute a binding agreement with the RRC, the process contemplated by the Act involves an arm’s length negotiation between the parties to the agreement and involves third parties, e.g., the Department of Finance and Administration, that are not subject to Commission jurisdiction. As result, while the OCD can be given the direction to pursue such an agreement, the process cannot be subject to substantive constraints put in place by Commission Order or the voluntary drilling schedules arbitrarily set forth by an operator prior to the execution of an agreement that they know needs to be put in place.

OCD remains skeptical that approving Titus’ application contingent upon execution of an interstate agreement prior to production from the lateral is appropriate or prudent. Of all interested parties, only Titus is responsible for the logistical challenge presented by its drilling schedule. Execution of a written agreement between states, whether pursuant to the Joint Powers Agreement Act or otherwise, is a time-intensive process dependent upon approval by entities outside of OCD’s control. Despite the best intentions of the OCD, there is no way to know how long production could be delayed pending such an agreement.

#### **IV. OCD'S WITNESS**

OCD intends to call one witness, Tiffany Polak, OCD Deputy Director. Ms. Polak is a petroleum engineer with more than twenty years of diverse industry experience including conventional, unconventional, international and domestic, and operations and development. Ms. Polak has been working with the OCD as a regulator for almost two years. She currently leads the Engineering and Environmental Bureaus, which are responsible for regulating all aspects of the proposed well. Ms. Polak will testify that, while Titus' proposed interstate plan has the potential to reduce waste, its contention about avoidable waste is overstated. Existing setbacks rules reflect the geographic extension of OCD's and the Commissions jurisdiction. They exist in essentially every other producing well that approaches a border. These setbacks and the nominal waste associated with them are necessary and justified by significant countervailing policy considerations, most notably the OCD's jurisdiction. Ms. Polak will discuss additional policy considerations that should be considered in an agreement with the RRC, including: venting; flaring; gas capture; reporting; release management and response; well design and inspection; pits and storage; well access; metering requirements; and defining how such agreement works in the context of other state and federal agency requirements. Ms. Polak will provide her perspective that this and subsequent interstate development without a prior written agreement with Texas would undermine OCD's ability to discharge its statutory obligations beyond waste. Her testimony is expected to be thirty (30) minutes.

#### **V. EXHIBITS**

Exhibits A through F are attached (number A001 – F227).

**VI. PROCEDURAL MATTERS**

The OCD has not identified any procedural matters to be resolved prior to the hearing.

Respectfully submitted,

*Jesse Tremaine*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this pleading was mailed electronically on September 21, 2021, to:

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