

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

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APPLICATION OF THE NEW MEXICO OIL AND GAS ASSOCIATION FOR AMENDMENT OF CERTAIN PROVISIONS OF TITLE 19, CHAPTER 15 OF THE NEW MEXICO ADMINISTRATIVE CODE CONCERNING PITS, CLOSED-LOOP SYSTEMS, BELOW GRADE TANKS AND SUMPS AND OTHER ALTERNATIVE METHODS RELATED TO THE FOREGOING AND AMENDING OTHER RULES TO CONFORMING CHANGES, STATEWIDE.

CASE NO. 14784

APPLICATION OF THE INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO FOR AMENDMENT OF CERTAIN PROVISIONS OF TITLE 19, CHAPTER 15 OF THE NEW MEXICO ADMINISTRATIVE CODE CONCERNING PITS, CLOSED-LOOP SYSTEMS, BELOW GRADE TANKS, SUMPS AND OTHER ALTERNATIVE METHODS RELATED TO THE FOREGOING AND AMENDING, STATEWIDE.

CASE NO. 14785

MOTION TO RECUSE COMMISSIONER GREG BLOOM

Jalapeno Corporation respectfully moves the Oil Conservation Commission to recuse Commissioner Greg Bloom from these proceedings on the following grounds.

The State Land Office Associate Counsel filed an entry of appearance on behalf of the New Mexico State Land Office and the Commissioner of Public Lands in Cases 14784 and 14785. They became parties of record in these proceedings.

The Commissioner of Public Lands and the New Mexico State Land Office filed a pre-hearing statement in Cases 14784 and 14785 and expressed their position on some of these proposed Pit Rule 17 amendments (for closed-loop systems, siting requirements, time frames for temporary pits, volume limits for temporary pits, onsite burial trenches, definition of low chloride drilling

fluid, steel tanks for hydrocarbon-based drilling fluids and maximum chemical concentrations for closure).

In their pre-hearing statement at page 1 of 14, they state:

"The Commissioner, or his designee, sits on the Oil Conservation Commission to represent these dual interests of the Trust: encouraging productivity and at the same time protecting the health of the land and water. The following are the State Land Office and Commissioner's comments on the proposed changes to the pit rule, prior to the filing of supporting documents, and prior to testimony, based solely on the mark-ups of the rules as currently proposed."

And at page 2 of 14:

"Given this [N.M. Const. Art. XIII, Section 2], and other mandates requiring the New Mexico Commissioner of Public Lands to protect the resources under his/her jurisdiction, and the fact that much of the land leased to oil and gas exploration and production companies is managed by the State Land Office, the Commissioner has a fiduciary obligation to carefully review the amendments to Title 19, Chapter 15, Part 17 ("Pit Rule") proposed by the New Mexico Oil and Gas Association ("NMOGA") in Case No. 14784 which are substantially mirrored by the amendments to the Pit Rule proposed by the Independent Petroleum Association of New Mexico ("IPA") in Case No. 14785. These comments address major issues of concern to the SLO in the order of their appearance in the rule and the applicant's proposals for change.

According to the final Docket No. 14-12 the Commissioner of Public Lands designated Greg Bloom as a Commissioner on the Oil Conservation Commission for this meeting on May 14-18, 2012, which includes Cases 14784 and 14785.

Greg Bloom is the Assistant Commissioner, Mineral Resources, according to the New Mexico State Land Office website and, upon information and belief, was appointed by the Commission of Public Lands to this position and is a public officer of the New Mexico State Land Office.

Their pre-hearing statement advocates for their position on some of the proposed changes. A party advocates for his or her position, but a trier of fact is to be fair and impartial.

"Every litigant is entitled to a fair and impartial trial." *State v. Orlando M* (N.M. App., 2010) and *State v. Pacheco*, 85 N.M. 778, 780, 517 P.2d 1304, 1306 (Ct. App.1973).

"At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. See *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943). In addition, our system of justice requires that the appearance of complete fairness be present. See *Wall v. American Optometric Association, Inc.*, 379 F.Supp. 175 (N.D.Ga.1974), *Aff'd*, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974). The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. See generally *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1974).

These principles apply to administrative proceedings as well as to trials. *Matter of Protest of Miller*, *supra*. ..."

Reid v. New Mexico Bd. of Examiners of Optometry, 589 P.2d 198, 92 N.M. 414 (N.M., 1979)

The New Mexico Code of Judicial Conduct provides guidance when a trier of fact should be disqualified and should recuse himself or herself in a proceeding. Under Rule 21-400 NMRA of the New Mexico Code of Judicial Conduct a judge is disqualified and shall recuse himself or herself in a proceeding when:

- the judge has a relationship as officer, director, advisor or other active participant in the affairs of a party to the proceeding (Rule 21-400.A(3) NMRA),
- the judge is a party to the proceeding or an officer, director or trustee of a party (Rule 21-400.A(5)(a) NMRA) or
- if he or she makes a public statement that commits, or appears to commit, the judge with respect to an issue or the controversy in the proceeding. (Rule 21-400.A(6)(a) & (b) NMRA).

Their pre-hearing statement also commits the designee of the Commissioner of Public Lands to this pre-hearing statement: "(t)he Commissioner, or his designee, sits on the Oil Conservation Commission to represent these dual interests of the Trust: encouraging productivity and at the same time protecting the health of the land and water" and the Commissioner [of Public Lands] "has a fiduciary obligation to carefully review the amendments." Based on their pre-hearing statement, this representation and fiduciary obligation led to its filing in these proceedings. This is at least an indication of possible impartiality by the designee.

To the contrary, the Commissioner of Public Lands, or his designee, when sitting as a Commissioner on the Oil Conservation Commission has that authority and duties under the Oil and Gas Act and to afford constitutional due process in any hearing. (U.S. Constitution (5th and 14th Amendments) and New Mexico Constitution, Art. II, Section 18.)

The Commissioner of Public Lands and the New Mexico State Land Office chose to be parties in these proceedings and chose to make public their positions on certain proposed amendments to Pit Rule 17 in their pre-hearing statement. The Oil Conservation Division has statutory jurisdiction and authority (Sections 70-2-6 and 70-2-7 NMSA 1978) in these proceedings and does not have a choice as to whether it will participate as party in a rule-making proceeding. As such, upon information and belief, the OCD has established certain "Chinese walls" between the OCD Director and OCD attorneys as to communications to prevent disqualification.

Thus, Mr. Bloom should be disqualified and recused from these proceedings as an officer of a party to these proceedings, because of the prejudgment of certain proposed changes in their pre-hearing statement and/or because of the indication of his possible impartiality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following parties on May 11, 2012 by email:

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