

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

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

**APPLICATION OF CHESAPEAKE OPERATING, INC.
FOR AN ORDER AUTHORIZING THE DRILLING OF
WELLS IN LEA COUNTY, NEW MEXICO.**

Cases Nos. 14100 & 14101

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CONTINUED OBJECTION TO SUBPOENA DUCES TECUM

Intrepid Potash – New Mexico, LLC (“Intrepid”), by and through its counsel of record, Comeau, Maldegen, Templeman & Indall, LLP, responds as follows to Chesapeake Operating, Inc.’s (“Chesapeake”) Subpoena Duces Tecum served April 3, 2008:

1. Chesapeake seeks to overturn the decision of the Division rejecting the locations of the proposed Lost Tank State Well Nos. 1 & 4 in the SW/4 SW/4 and the NW/4 NW/4 of Section 16, Township 21 South, Range 32 East, NMPM. The proposed wells are deep wells to test the Lower Brushy Canyon Formation, Lost Tank Delaware Pool (40299) to a depth of 8,700 feet. The district office properly rejected these locations because they are within Intrepid’s Life of Mine Reserve within the “Potash Area” defined under Division Order R-111-P.

2. Intrepid’s active East mine workings are located approximately three miles to the west of the proposed Chesapeake wells. Intrepid’s operations are heading east towards these locations. Intrepid owns a federal exploration license covering all of Section 17 to the West of the proposed locations. On May 14, 2007, Intrepid filed three federal potash lease applications covering all of Sections 20 and 21 to the south of the proposed locations. The half mile safety buffers for the proposed wells overlap onto Intrepid’s license and lease applications in Sections 17, 20 and 21, as depicted by the blue circles on the map attached as Exhibit A.

3. Intrepid has protested eleven federal APDs proposed by Yates Petroleum Corporation in Section 17, Well Nos. Caper BFE "17" Federal #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, and #16 (the "Yates Caper APDs"). *Intrepid Potash-New Mexico LLC v. Linda S.C. Rundell*, IBLA No. 2006-188 (filed September 19, 2006). Intrepid claims in part that the BLM has failed to properly identify potash enclave in Section 17 under the Order of the Secretary of the Interior titled *Oil, Gas and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, New Mexico*, 51 Fed. Reg. 39425 (Oct. 28, 1986), as corrected at 52 Fed. Reg. 32171 (Aug. 27, 1987). On September 28, 2007, the Interior Board of Land Appeals granted Intrepid's request for a stay of the Yates Caper APDs, finding that Intrepid was likely to succeed on the merits in establishing that Section 17 contains potash enclave and that the drilling of the wells proposed by the Yates Caper APDs could impair or prevent the recovery of this commercial potash. See IBLA Order, attached as Exhibit B.

4. The half mile buffers for the proposed Chesapeake wells overlap the federal lands in the NE/4 of Section 17 that are included in Intrepid's appeal of the Yates Caper APDs, including the lands covered by the Caper BFE "17" Federal #6, #7, #13 & #14 APDs, which APD locations are depicted on Exhibit A. These lands are currently protected by the IBLA's stay order. In light of the stay, Chesapeake will be unable to sustain its burden of proving by clear and convincing evidence that the Chesapeake wells will not result in the undue waste of commercial potash. For reasons of comity, the Division should not permit the destruction of potash that the IBLA has ruled Intrepid is likely to establish is commercial potash, at least until the Yates Caper APD appeal is resolved.

5. On April 11, 2008, the BLM notified Intrepid that BLM has issued its exploration license for Section 17. Intrepid is in the process of obtaining a drill rig and intends to drill one or

more core holes in Section 17 to provide additional evidence of commercial potash deposits in that section. Intrepid intends to commence this coring in the next 30 days (depending on rig availability) and believes the core will provide additional support regarding the existence of commercial potash in Section 17. The Division should defer any decision on the Chesapeake APDs at least until Intrepid completes its coring and core interpretation.


6. Chesapeake's Subpoena Duces Tecum is overbroad because it requests voluminous data within a *ten mile radius* of the proposed Chesapeake wells. Due to the press of other business, including deadlines for filings in the ongoing appeal of the Yates Caper APDs, the drilling of the core holes in Section 17 and the time required to interpret the results of its work, Intrepid will be unable to respond to the subpoena by May 1, 2008. Intrepid also objects to the subpoena to the extent that Intrepid's confidential and proprietary data is not adequately protected by a confidentiality agreement and protective order.

7. Intrepid has attempted in good faith to settle this matter by finding an alternative location for the Chesapeake wells. Intrepid proposed the location shown in green on Exhibit A, from which these locations could be accessed directionally without their buffers overlapping onto Intrepid's exploration license and lease applications Sections 17, 20 and 21. Chesapeake has refused to move the proposed locations even an inch to avoid destruction of commercial potash in Sections 17, 20 and 21.

8. As depicted on Exhibit A, the location of the proposed Chesapeake Lost Tank State Well No. 1 is approximately 660 feet east of the Caper BFE "17" Federal #4 in the SE/4 SE/4 of Section 17. Chesapeake claims that the Caper #4 well is draining its state leases. The BLM erroneously permitted the Caper #4 well to be drilled and the potash within its half mile buffer wasted. In light of the waste that has already occurred, the Chesapeake Lost Tank State

Well No. 4 location could be moved as close as possible to the Caper #4 location to minimize additional potash waste. If Chesapeake is truly concerned about losing its two leases in the north half and the south half of Section 17 due to its delay in drilling, it could unitize these leases to permit both leases to be held by production if the Chesapeake Lost Tank State Well No. 1 is productive. This would minimize commercial potash waste and would permit the Chesapeake Lost Tank State Well No. 4 well to be deferred until the Yates Caper APD is resolved and additional information regarding the potash in the buffer of the Chesapeake Lost Tank State Well No. 4 is obtained.

Respectfully submitted,

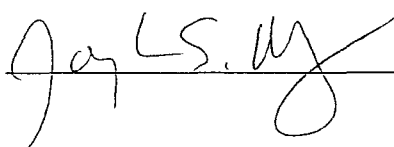


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this 15th day of April, 2008

By: _____

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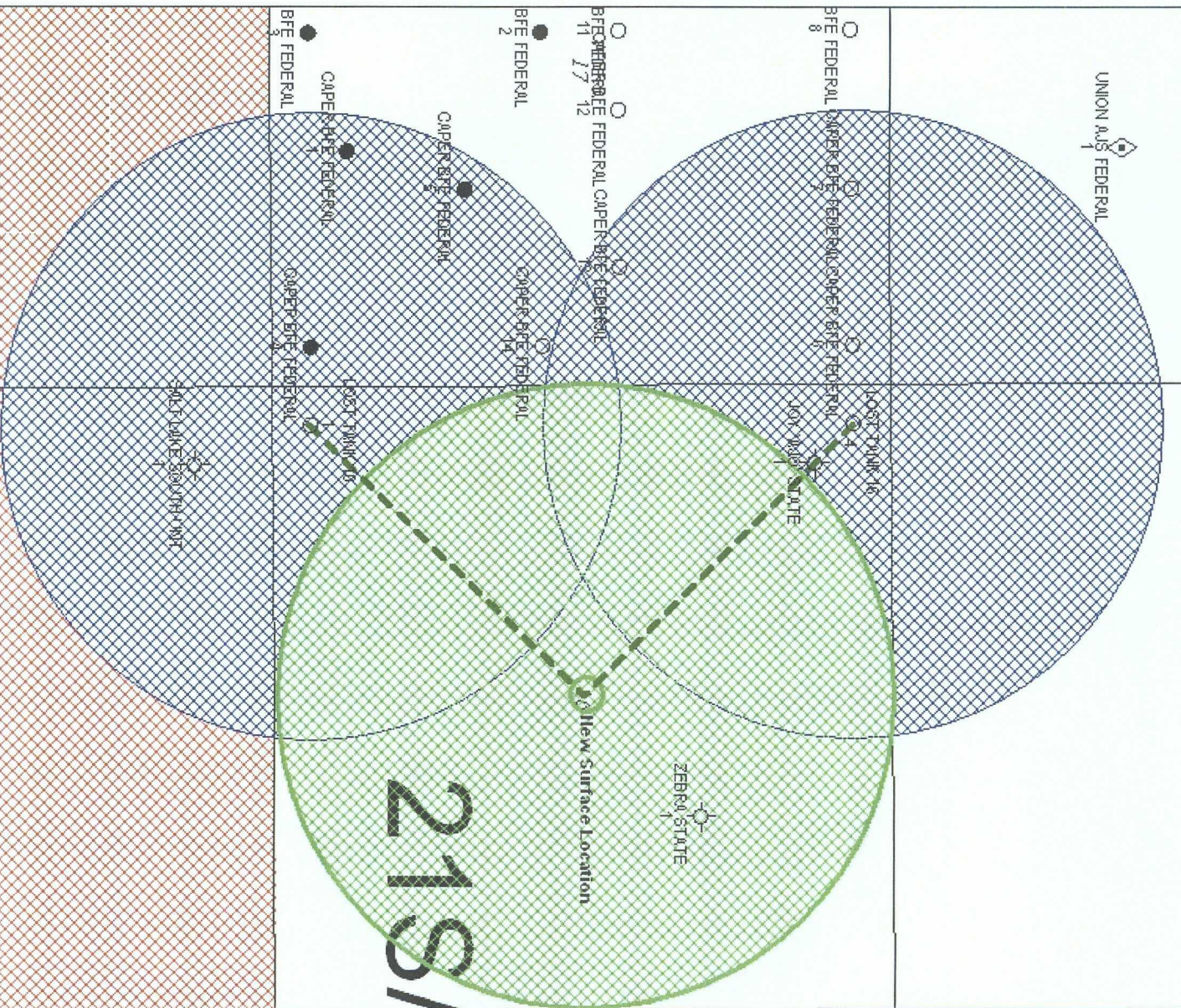
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EXHIBIT

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United States Department of the Interior

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FAXED
CERTIFIED

September 28, 2007

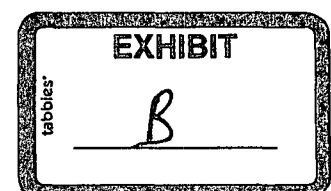
IBLA 2006-288)	NMNM-94095
)	
INTREPID POTASH - NEW)	Applications for Permits to Drill
MEXICO, LLC)	
)	
)	Petition for Stay Granted

ORDER

In an order dated November 1, 2006, the Board addressed numerous preliminary motions filed in this case in which Intrepid Potash - New Mexico, LLC (Intrepid) has appealed from the September 19, 2006, decision of the State Director, New Mexico State Office, Bureau of Land Management (BLM), declining, on State Director Review (SDR), to reconsider or to stay the effect of August 17, 2006, approvals of 11 applications for permits to drill (APDs) oil and gas wells, filed by Yates Petroleum Company (Yates).¹ All 11 wells are to be located within a 491,916-acre "Potash Area," designated by the Secretary of the Interior, pursuant to an October 21, 1986, Order (Secretary's 1986 Order).² The August 2006 approvals, which were issued by the State Director, were based on a June 2, 2006, Environmental Assessment (EA) (NM-520-06-0869), and 11 separate Decision

¹ The 11 wells are the Caper BFE "17" Federal Nos. 6 through 16 (hereinafter, Caper Nos. 6 through 16), to be drilled on public lands in sec. 17, T. 21 S., R. 32 E., New Mexico Principal Meridian, Lea County, New Mexico, which are subject to Federal oil and gas lease NMNM-94095, issued effective Dec. 1, 1994. The lease is currently held by Yates, Yates Drilling Co., Abo Petroleum Corp., and Sharbro Oil Ltd. Co. Yates is the designated operator for the 11 wells, as well as 5 other wells in the section, the Caper BFE "17" Federal Nos. 1 through 5 (hereinafter, Caper Nos. 1 through 5) wells, for which APDs had been approved prior to BLM's August 2006 approvals.

² The Secretary's 1986 Order is entitled "Oil, Gas and Potash Leasing and Development within the Designated Potash Area of Eddy and Lea Counties, New Mexico." 51 Fed. Reg. 39425 (Oct. 28, 1986); see 52 Fed. Reg. 32171 (Aug. 27, 1987).



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Records/Findings of No Significant Impact issued by the Field Manager, Carlsbad Field Office, BLM, on July 3, 2006.

In each of the August 2006 approvals, the State Director addressed the question of whether the proposed well met the four criteria for approval, identified as "1) prevent undue waste of potassium reserves, 2) regard the safety of miners, 3) serve the best interests of the U.S., and 4) not interfere with the orderly development of potash mining."³ In each case, she concluded that the criteria were met, stating that the proposed well was situated "a safe distance from potash (potassium) mine workings and the measured ore ('potash enclave')." She stated that "[t]he proposed well does not intersect measured ore (potash enclave)," which is defined as an area "where potash ore is known to exist in sufficient thickness and quality to be mineable under existing technology and economics," Secretary's 1986 Order at III.D.1.c. (51 Fed. Reg. at 39425).⁴ She also stated that each well would be situated more than one mile from both "Open Mine Workings" and "a current Three-Year Mine Plan," adding that the well was "outside the life of mine reserves for Intrepid Potash - New Mexico, LLC." See EA at unpaginated 14-15.

³ BLM addressed the four criteria in order to determine whether Yates satisfied the "Potash Stipulation," incorporated into lease NM-94095, which embodies the standards for APD approval taken from section III.A. of the Secretary's 1986 Order (51 Fed. Reg. at 39425). The Stipulation provides, *inter alia*, that no wells will be drilled unless it is established to BLM's satisfaction that drilling "will not interfere with the mining and recovery of potash deposits, or the interest of the United States would best be subserved thereby," or when BLM concludes that drilling "would result in undue waste of potash deposits or constitute a hazard to or unduly interfere with mining operations being conducted for the extraction of potash deposits." See 43 C.F.R. § 3161.2.

⁴ Included in each casefile is a copy of a map entitled "Yates Caper Locations," which depicts the situs of all of the existing and proposed Caper Nos. 1 through 16 wells in sec. 17, the boundary lines for "Measured," "Indicated," and "Inferred" potash ore, the eastern boundary lines of Intrepid's potash lease to the west, and its "LMR" (life-of-mine reserves). Most of the existing and proposed wells are placed in an area of Inferred ore: "This identifies potash resources which are probable, but tonnage and grade cannot be computed due to the absence of specific data." EA at unpaginated 7. The remainder are in an area of Indicated ore, which "identifies potash resources that are computed partly from specific measurements, samples, or production data and partly from projection for a reasonable distance on geologic evidence," and "[t]he sites available for inspection, measurement, and sampling are too widely, or otherwise inappropriately, spaced to permit the mineral bodies to be outlined completely or the grade established throughout." *Id.* at 8.

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Intrepid sought from this Board an immediate stay of approval of the APDs, alleging that Yates had already received approved APDs for the Caper Nos. 1 through 5 wells in sec. 17 and had drilled or was drilling three of those wells. Petition for Immediate Stay (Petition) at 4. It stated that all of the remaining Caper wells "could be drilled in a matter of weeks[.]" *Id.* at 13.

In our November 2006 order, we took the petition for stay under advisement in light of Yates' agreement to defer approved drilling under the APDs in question until May 1, 2007, later extended by Yates to October 1, 2007. We also took under advisement Yates' motion to compel production of documents, and we encouraged the parties to engage in negotiations leading to disclosure for all parties of information necessary for a proper evaluation of the potash resource in the area in question.

Although the parties met, they were unable to agree on disclosure of information. Intrepid now seeks a ruling on its petition for stay. Yates and BLM oppose a stay.⁵

Departmental regulation 43 C.F.R. § 3165.4(c) provides that a decision of a BLM State Director concerning onshore oil and gas operations "shall remain effective pending appeal," unless the Board determines otherwise, and that an appellant, who petitions for a stay of the effect of such a BLM decision, pending a determination by the Board of the merits of its appeal, bears the burden of demonstrating sufficient justification for the stay, based on the following four standards: (1) the relative harm to the parties if the stay is granted or denied; (2) the likelihood of the appellant's success on the merits; (3) the likelihood of irreparable harm to the appellant or resources if the stay is not granted, and (4) whether the public interest favors granting the stay. See *Colorado Environmental Coalition*, 135 IBLA 356, 357-58 (1996), *aff'd*, *Colorado Environmental Coalition v. BLM*, 932 F. Supp. 1247 (D. Colo. 1996).

We turn, therefore, to Intrepid's petition to stay the effect of approval of the APDs in question. For good cause shown, we grant that petition.

The present dispute fundamentally centers on the question whether sec. 17, where all of the approved oil and gas drilling is to occur, is properly deemed to be a potash enclave within the meaning of the Secretary's 1986 Order. See, e.g., Petition

⁵ The Board is aware of Yates' position, most recently stated in a letter to the Board dated Sept. 26, 2007, that, despite its generalized opposition to Intrepid's petition for stay, it is been unable to secure access to information that it considers to be critical to a complete response to the petition.

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at 6 ("Intrepid's gamma ray [log] analysis of the potash in Section 17 over the last year has revealed mineable potash in this Section, which BLM's [potash] enclave map erroneously ignores"). In her August 2006 approvals, the State Director held that each of the proposed wells "does not intersect measured ore (potash enclave)." However, Intrepid asserts on appeal, supported by a considerable body of proffered evidence, that sec. 17 contains a sizeable deposit of potash of sufficient quality and thickness to render the area part of a potash enclave. See, e.g., Affidavit of James P. Lewis, Chief Geologist, Intrepid, dated Sept. 13, 2006, at 1, ¶3 ("I have furnished extensive scientific information and studies to [BLM] . . . establishing beyond any reasonable scientific doubt that gamma ray logs predict with an acceptable degree of accuracy the presence, grade and thickness of potassium-bearing ore"), 2, ¶6 ("Using the methodology demonstrated in my [June 8, 2006,] report entitled *Evaluation of Potash Content in the Conoco Phillips Peakview II Well* [Ex. 23 attached to Petition] and the available gamma ray log data for Section 17, I have determined that potassium-bearing minerals are present in Section 17 and the adjacent sections in ore zones 2, 3, 4, 5, 7, 8, and 10"); Protest, dated June 9, 2006, at 10-11 ("[The Intrepid Peakview Report by Lewis] identifies 14 wells in the Potash Area that were logged with modern tools as well as assayed for K₂O content and thickness. By means of a standard cross plot of this data from these wells, Intrepid has derived a formula to equate gamma ray values to K₂O values. . . . [Two independent] reviews verify the methodology of the Intrepid Peakview Report and conclude that the gamma ray log is a sound method for estimating the potassium content of a potash zone of interest.").

Intrepid correctly notes that, as the Board recognized in *IMC Kalium Calsbad, Inc.*, 170 IBLA 25 (2006), significant questions have been raised regarding the accuracy of BLM's determinations of the existence of a potash enclave, including whether the longstanding Van Sickle Standard is the appropriate measure of whether potash ore is present in sufficient thickness and quality to be considered mineable under existing technology and economics.⁶ See 170 IBLA at 34-40. The Board was unable to resolve those questions in its September 7, 2006, decision in *IMC Kalium*. Instead, we affirmed Judge McDonald's order setting aside BLM's APD denial decisions based on potash enclave determinations and remanded the case to BLM for reexamination of the matter.

Our decision in *IMC Kalium* was issued after the State Director's August 2006 approvals, which set forth BLM's potash enclave determinations here, and which the

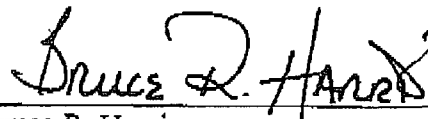
⁶ In designating the potash enclaves at issue in *IMC Kalium*, BLM had employed a thickness and grade standard of 4 feet of 10 percent K₂O as sylvite and 4 feet of 4 percent K₂O as langbeinite, or an equivalent combination of the two. 170 IBLA at 31, n.6, 34. This is known as the Van Sickle Standard, having been developed in 1974 by Donald M. Van Sickle, a geologist with the U.S. Geological Survey.

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State Director confirmed in her September 2006 SDR decision. While *IMC Kalium* involved upholding the setting aside and remanding of BLM APD denial decisions, the rationale set forth there is equally applicable to BLM APD approval decisions, when the basis for those decisions are potash enclave determinations that have been called into question. In this case, we cannot be sure, given these questions, whether BLM accurately determined that the lands in section 17 covered by the APDs in question were not within a potash enclave.⁷

We hold that Intrepid has shown a likelihood of success on the merits of its appeal, in light of the Board's ruling in *IMC Kalium*. Given the possibility that oil and gas drilling will impair or prevent the recovery of potash ore from sec. 17, Intrepid has established that the balance of the harms and the public interest weigh in favor of staying the effect of BLM's APD approvals.⁸ See EA at unpaginated 14 ("Due to evidence gathered from Gamma [ray] logs, it may be possible that some loss of Potash Reserves could occur"). Thus, it is appropriate to stay the effect of BLM's APD approvals.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the petition for stay is granted. All other motions not yet ruled on, either explicitly or implicitly, remain pending.



Bruce R. Harris
Deputy Chief Administrative Judge

⁷ Our rationale in *IMC Kalium* also calls into question whether BLM properly satisfied section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000), in its EA by considering the potential impacts of oil and gas drilling on the potash resource.

⁸ While Yates claims that Intrepid cannot show that it will be irreparably harmed by denial of the petition for stay, the regulation at 43 C.F.R. § 3165.4(c) does not limit consideration of irreparable harm to the appellant. It also allows consideration of irreparable harm to "resources."

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