

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

**IN THE MATTER OF THE APPLICATION OF THE BOARD
OF COUNTY COMMISSIONERS OF RIO ARRIBA COUNTY
FOR CANCELLATION OR SUSPENSION OF APPLICATIONS
FOR PERMITS TO DRILL (APD'S) FILED BY APPROACH
OPERATING, LLC, RIO ARRIBA COUNTY, NEW MEXICO**

CASE NO. 14134

**IN THE MATTER OF THE APPLICATION OF APPROACH
OPERATING, LLC FOR APPROVAL OF SIX APPLICATIONS FOR
PERMITS TO DRILL, RIO ARRIBA COUNTY, NEW MEXICO**

CASE NO. 14141

**IN THE MATTER OF THE APPLICATION OF APPROACH
OPERATING, LLC FOR APPROVAL OF FOURTEEN APPLICATIONS FOR
PERMITS TO DRILL, RIO ARRIBA COUNTY, NEW MEXICO**

CASE NO. 14278

**INTERVENOR RICE FAMILY LIVING TRUST'S
MOTION TO CONTINUE OCTOBER 7, 2009 HEARING**

Intervenor Rice Family Living Trust ("Trust") respectfully moves the Commission for an order continuing the currently scheduled October 7, 2009 hearing in these consolidated cases until the Commission meeting of December 16, 2009. The grounds for this motion arose only hours

ago, and for this reason the Trust was not able to comply with the 48 hour rule of NMAC 19.15.4.13(C). As grounds for this motion to continue, the Trust represents as follows:

(1) On the eve of the October 7, 2009 hearing, Approach Operating, LLC (“Approach”) filed two motions with the Commission: a motion styled as a “Motion to Strike” and a motion styled as “Agreed Motion to Remand to the Division.” Approach’s last-minute filing of these motions prevents the Trust from filing any responsive memoranda to the motions in advance of the Commission’s hearing on October 7, 2009.

(2) The “Motion to Strike” and the “Agreed Motion to Remand to the Division” raise important legal issues of first impression and public significance. It would be unfair to the Trust for the Commission to resolve these motions without affording the Trust an opportunity to respond.

(3) More importantly, it is in the public interest to have the novel issues raised by Approach’s last-minute motions fully briefed by the parties so that the Commission may make the best informed decisions on the important legal issues raised by the “Motion to Strike” and the “Agreed Motion to Remand.”

(4) The “Motion to Strike” raises important legal issues as to the scope of standing in adjudicatory proceedings relative to Applications for Permit to Drill (“APDs”). In its motion, Approach takes the narrowest possible view of standing and appears to assert that only surface landowners where drilling will occur have standing to participate as affected parties in an APD proceeding. The Trust respectfully submits that Approach’s position is incorrect. The New Mexico Oil and Gas Act vests the Commission with the authority and duty to assure that oil and gas exploration and production does not unreasonably impair New Mexico’s surface water,

groundwater, human health, or the environment. See for example §§70-2-12(B)(15),(21),(22).

Insofar as all three of the cases are concerned, the Trust falls within the “zone of interest” intended to be protected by the New Mexico Oil and Gas Act and therefore has standing to participate in each of the cases.

(5) Given the public importance of the legal issue of the appropriate scope of standing in adjudicatory hearings on APDs, the Trust respectfully requests that the Commission continue the October 7, 2009 hearing until December 16, 2009, at which point in time the parties will have fully briefed the legal issue for the Commission’s consideration and resolution.

(6) If the October 7, 2009 hearing is continued until December 16, 2009 – as requested by the Trust – the Trust will also be afforded the opportunity to show that its intervention in this proceeding “will contribute significantly to the . . . protection of public health and environment” and should be allowed, even if the Commission ultimately determines that the Trust does not have standing. NMAC 19.15.4.11(C).

(7) The “Agreed Motion to Remand” raises important and novel issues as to the administrative record that must be created by the Division and the Commission in adjudicatory APD proceedings. In the Motion, Approach proposes that eight of the 24 APDs that are the subject of this proceeding “would be remanded back to Division for administrative approval.” (Emphasis in original.) However, there is absolutely no evidentiary basis supporting a Commission order requiring remand and administrative approval and, accordingly, any such action on the part of the Commission would be arbitrary and capricious and would not be supported by substantial evidence. NMSA §39-3-1.1(D).

(8) Particularly in the case of the Chama watershed – a “Frontier Area” where there is no

current oil and gas production, where the environmentally important and fragile resources have been acknowledged by Governor Richardson, and where the Oil Conservation Division has not yet developed a special rule to protect these valuable resources as requested by Governor Richardson – the Commission should decline to accept Approach’s suggestion that APDs be approved “in the ordinary course of the Division’s established administrative approval process” as proposed by Approach.

(9) Of course, Approach’s proposal – boiled down to its essentials – is that the Commission and the Division give “rubber-stamp approvals” to APDs in the Chama watershed “Frontier Area” without prior factual review and without creation of a record for purposes of judicial review pursuant to NMSA §39-3-1.1(D). The Trust respectfully submits that this issue raises a matter of significant public importance that should not be resolved by the Commission unless and until the Trust has been given an opportunity to respond to the “Agreed Motion to Remand,” and the issue of the appropriate scope of record for an APD decision is fully briefed for the Commission’s consideration and resolution.

In short, the two last-minute motions filed by Approach call upon the Commission to decide important legal issues of first impression concerning procedures for the approval of APDs without the benefit of briefing. The Commission’s decision on these motions will have a significant and lasting impact on the affected public’s right to participate in decision-making relative to APDs in ecologically critical areas. In light of the public importance of these issues, and in fairness to the Trust which only received the motions on the eve of the October 7, 2009 hearing, the Commission should continue the October 7, 2009 hearing in these cases until December 16, 2009 and establish a briefing schedule that will afford all parties an opportunity to

brief the issues raised by the “Motion to Strike” and the “Agreed Motion to Remand to the Division” for the Commission in an orderly and meaningful fashion.

Respectfully submitted,

/s/ Steven Sugarman
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Attorney for Proposed-Intervenor Rice Family
Living Trust

I hereby certify that a true and correct copy of the foregoing was sent by e-mail to Ms. Cheryl Bada (attorney for the Commission) at cbada@state.nm.us, by e-mail to Mr. J. Scott Hall (attorney for the Applicant) at shall@montand.com and, by e-mail to Mr. Adan Trujillo (attorney for Rio Arriba County) at adantrujillo@gmail.com on this 6th day of October, 2009.

/s/ Steven Sugarman
Steven Sugarman