

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Integration of  
Interests Pursuant to Environmental  
Conservation Law ("ECL") § 23-0901(3)  
within an Individual Spacing Unit Known  
as,

**HAKES 1.**

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**RULING ON MOTIONS  
FOR BIFURCATION,  
STAY, AND  
PROTECTIVE ORDER**

DEC Order No.  
DMN 08-31

In the Matter of the Integration of  
Interests Pursuant to Environmental  
Conservation Law ("ECL") § 23-0901(3)  
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**SODERBLOM 1.**

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DEC Order No.  
DMN 08-33

Appearances of Counsel:

- Alison H. Crocker, Deputy Commissioner and General Counsel (Jennifer Hairie of counsel), for staff of the Department of Environmental Conservation
- The West Law Firm, PLLC (Thomas S. West, Yvonne E. Marciano, Elizabeth Dailey McManus, and Gregory A. Mountain of counsel), for well operator Fortuna Energy Inc.
- Lipman & Biltekoff, LLP (Michael P. Joy of counsel), for intervenors Angela Burton and Thomas White (Hakes 1); and Western Land Services Inc. and Betty Hurley (Soderblom 1 Unit)
- The Denton Law Office PLLC (Christopher Denton of counsel), for intervenors Angela Burton and Thomas White (Hakes 1); Michael and Barbara Dandrea, John and Beverly Fridie, Michael and Silvie Wieczorek, the Fred Lewis Farm Mineral Rights and Revenue Trust and Lawrence Lewis, Trustee, and Linnie and Lisa McKee (Soderblom 1)
- Boylan, Brown, Code, Vigdor & Wilson, LLP (Sheila M. Chalifoux of counsel), for intervenor Betty Hurley (Soderblom 1 Unit)
- Intervenor Thomas A. Dunbar, appearing pro se and on

behalf of intervenor Deborah S. Dunbar (Soderblom 1 Unit)

**RULING ON MOTIONS FOR BIFURCATION, STAY  
AND PROTECTIVE ORDER**

In this administrative adjudicatory proceeding conducted pursuant to part 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR Part 624"), staff of the Department of Environmental Conservation ("Department") proposes to issue compulsory integration orders pursuant to Environmental Conservation Law ("ECL") former § 23-0901(3) integrating mineral interests in the spacing units for two natural gas wells. The two wells are the Hakes 1 well, located in Corning, Steuben County, and the Soderblom 1 well, located in Big Flats, Chemung County. Both wells are located in the Quackenbush Hill Field.

Fortuna Energy Inc., the well operator for the Hakes 1 and Soderblom 1 wells, filed two pre-hearing motions in the above referenced matters. In its first motion, Fortuna seeks a ruling bifurcating the adjudicatory hearing for the Hakes 1 and Soderblom 1 wells into two phases and staying the hearing and related discovery on the second phase pending resolution of the first phase. In its second motion, Fortuna moves for a stay of all discovery pending a ruling on its first motion, and for a protective order as to certain pre-hearing discovery demands filed by the remaining parties to the proceeding.

For the reasons that follow, Fortuna's motion to bifurcate the adjudicatory phase of this proceeding is denied. Fortuna's motion for a protective order is denied without prejudice and with leave to renew in the event the parties are unable to resolve any discovery disputes. Fortuna's request for any further stay of discovery is also denied.

Proceedings

In an issues ruling dated September 15, 2008, the undersigned presiding Administrative Law Judge ("ALJ") identified the following issues for adjudication pursuant to Part 624: (1) the adequacy of notice provided to uncontrolled owners in the Hakes 1 and Soderblom 1 units concerning pending compulsory integration proceedings, and the timeliness of objections raised by those owners to those proceedings, (2) whether the cash balancing provisions of the draft integration orders are just and

reasonable, and (3) whether intervenors Thomas A. and Deborah S. Dunbar (the Dunbars) are entitled to receive credit for the development of the Soderblom 1 well (see Ruling of the Chief ALJ on Issues and Party Status, and Order of Disposition, Sept. 15, 2008 ["Issues Ruling"]).

By motion dated September 22, 2008, Fortuna moved to bifurcate the adjudicatory hearing scheduled to commence November 18, 2008, to address, on a preliminary and separate basis, the issue whether certain uncontrolled owners received legal and sufficient ninety (90) day notice of the pending integration proceedings, and for a stay of the hearing on remaining issues, as well as all related discovery, until a final determination is made on the threshold notice issue. The uncontrolled owners Fortuna alleges received legally sufficient notice, but failed to raise timely objections, include all intervenors in these proceedings except Angela Burton and Thomas White (Hakes 1), and the Fred Lewis Farm Mineral Rights and Revenue Trust and Lawrence Lewis, Trustee, also known as the Lewis heirs or the Lewis Trust (Soderblom 1).

In a second motion dated September 22, 2008, Fortuna moved for a stay of all discovery pending a ruling on the motion to bifurcate, and for a protective order concerning the pre-hearing discovery demands filed by Department staff and all intervenors except the Burton/Whites. During a September 19, 2008, pre-hearing conference call among the parties, I granted Fortuna's request to stay a September 29, 2008 deadline for the filing of discovery responses pending resolution of Fortuna's motions. By email memoranda to the parties dated October 2, 2008, based upon a request from intervenors, I further stayed the deadline for the filing of pre-filed testimony and the commencement of the adjudicatory hearing pending resolution of Fortuna's motions.

Timely responses to Fortuna's motions were filed by Department staff; intervenors Western Land Services Inc. and Betty Hurley, jointly; the Dandrea, Fridie, Wieczorek, the Lewis Trust, and the McKee intervenors, jointly; and the Dunbar intervenors.

By email dated October 13, 2008, counsel for the Lewis Trust informed the parties that negotiations between the Lewis Trust and Fortuna had failed to reach a settlement, and that the Lewis Trust intended to proceed to hearing on the merits. By letter dated, October 15, 2008, Fortuna requested leave to file replies to the responses filed in opposition to its motions.

I conducted a conference call with the parties on October 16, 2008. After further discussions concerning Fortuna's motions, and after Fortuna withdrew its request for leave to file replies, I ruled verbally on Fortuna's motions. This written ruling documents the rationale for my rulings.

### Discussion

#### Fortuna's Motion to Bifurcate

In its written submissions on its motion, and during the October 16, 2008 conference call, Fortuna expressed the view that those intervenors who received notice during 2004 through 2005 of compulsory integration proceedings concerning the Soderblom 1 unit, but who failed to file objections within 90 days of the notice, lack standing to object to their integration on any basis other than as a royalty interest, or to participate in adjudicatory proceedings concerning the cash balancing provisions of the draft integration order for the Soderblom 1 unit. Accordingly, Fortuna seeks bifurcation of the hearing to first address issues concerning the legal sufficiency of the notice provided to the uncontrolled owners during 2004 and 2005, and the timeliness of the uncontrolled owners' objections, if any, and whether the Dunbars are entitled to any credit for the development of the Soderblom 1 well. Once these issues are finally determined by the ALJ and the Commissioner, Fortuna proposes to proceed with discovery and hearings on the remaining issues identified in the Issues Ruling.

In support of its motion, Fortuna argues it will be prejudiced if it must respond to the discovery demands of those parties it deems non-objectors beyond those demands related to the threshold issue of standing. Fortuna contends that the discovery demands of non-objecting parties beyond the scope of the standing issue are unduly burdensome and will result in the disclosure of confidential business information to parties not entitled to receive such information. Resolving the threshold standing issue first, in Fortuna's view, will foster efficiency in the hearing process, may render the discovery demands of non-objectors academic, and will avoid the disclosure of confidential information to those parties it asserts lack standing.

Intervenors oppose the motion to bifurcate. Intervenors challenge Fortuna's assertion that providing responses to discovery demands on all issues is burdensome. Intervenors point out that because the threshold standing issue does not implicate the Lewis Trust, a hearing on the merits of

the cash balancing provisions must be conducted in any event. Intervenors contend that because responses to discovery on the cash balancing issues must be provided anyway, the provision of responses to intervenors other than the Lewis Trust is not unduly burdensome. Intervenors contend that, contrary to Fortuna's assertion, the preparation of cost and revenue statements for all intervenors and the calculation of when cash balancing might occur under different scenarios merely requires the application of a formula based upon the pro-rata share each intervenor holds in the Soderblom unit.

With respect to efficiency, intervenors assert that conducting a hearing on the threshold issue of notice will create, rather than eliminate, inefficiency in the hearing process. A hearing and an ALJ ruling on the notice issue, with the attendant appeal to the Commissioner, will certainly serve to delay the resolution of the cash balancing issues, and will prejudice those parties entitled to challenge the merits of the draft integration order.

As indicated during the conference call, Department staff also opposes the bifurcation motion, primarily on the ground that it would delay the ultimate resolution of these matters. Department staff also asserts that the response to discovery demands for parties that might ultimately be determined to lack standing to raise objections to integration as royalty interests are not unduly burdensome.

Adjudicatory hearings on draft compulsory integration orders provided for in Environmental Conservation Law § 23-0901(3)(d) are conducted pursuant to the Department's Permit Hearing Procedures under 6 NYCRR Part 624 (see Matter of Dzybon 1, ALJ Ruling on Procedural Issues, June 6, 2007, at 3, appeal pending before the Commissioner). Pursuant to Part 624, the ALJ has the "discretion to determine and adjust the order of events and presentation of evidence, and to establish procedures to promote the conduct of a fair and efficient hearing" (6 NYCRR 624.8[a]). The ALJ also has the authority to "take any measures necessary for maintaining order and the efficient conduct of the hearing" (6 NYCRR 624.8[b][1][xv]). The authority to take measures necessary for the efficient conduct of hearings includes the authority to bifurcate proceedings and conduct separate hearings on threshold issues, particularly where the resolution of a threshold issue may be dispositive and, thus, render the remaining issues in the case academic (see Matter of Al Turi Landfill, Interim Decision of the Commissioner, Sept. 14, 1998, at 4).

The Civil Practice Law and Rules ("CPLR") provides for a similar procedure, which may be consulted for guidance. Pursuant to CPLR 603, a trial court may order the separate trial of any claim or separate issue prior to the trial of other claims or issues, "[i]n the furtherance of convenience or to avoid prejudice." The trial court's determination whether to bifurcate an issue for separate hearing rests within the court's discretion, and will not be overturned on appeal absent an abuse of that discretion or prejudice to a substantial right (see Chenango County Indus. Dev. Agency v Lockwood Greene Engrs., Inc., 111 AD2d 508 [3d Dept 1985]). Consistent with Departmental precedent, discretion to grant a separate trial on an issue is soundly exercised where the separate issue is potentially dispositive of the entire case (see Morford v A. Sulka & Co., Inc., 79 AD2d 502, 502-503 [1st Dept 1980]). Where multiple parties and interdependent issues are involved, however, bifurcation is generally disfavored (see Chenango County Indus. Dev. Agency, 111 AD2d, at 510). In that circumstance, one complete and comprehensive hearing in which all the issues involved between the parties can be determined at the same time is preferred by the courts (see id.; Shanley v Callahan Indus., Inc., 54 NY2d 52, 57 [1981]).

In this case, Fortuna has failed to establish that bifurcation of the standing issue will lead to greater efficiency in the hearing process. Although the issue of standing may be dispositive as to some of the intervenors, parties remain in the litigation that Fortuna concedes would not be affected by a ruling against those intervenors Fortuna refers to as non-objecting. Hearings must still be conducted to determine the terms by which the Burton/Whites and the Lewis heirs are integrated, even assuming without deciding that all the remaining intervenors lack standing to object. Thus, in contrast to the Departmental and case law precedent cited by Fortuna, the threshold standing issue would not be dispositive of the entire case.

In addition, an ALJ ruling on standing as to some of the parties would likely lead to interlocutory administrative appeals that will further delay final resolution of this case for those parties not affected by the standing issue. The delay that interlocutory appeals would inject into the proceeding is not consistent with the efficiency that bifurcation is intended to accomplish (see Bank of New York v Ansonia Assocs., 172 Misc 2d 70, 72, 76 [Sup Ct, New York County 1997] [noting that interlocutory appeals may result in unnecessary delays and prejudice that are inconsistent with the attempt to speed and streamline a case through bifurcation]).

Moreover, the delay in final resolution of compulsory integration proceedings will primarily prejudice those intervenors Fortuna concedes are not affected by the standing issue. The wells that remain the subject of this proceeding were permitted, drilled, and spaced prior to 2005, and may have already reached the point of overproduction (that is, Fortuna may have already produced that proportionate share of gas to which it is entitled) (see Issues Ruling, at 3, 10). During this time, Fortuna has benefited from the fruits of production, while intervenors must await completion of the integration process.

In contrast to the prejudice that further delay would impose on intervenors, Fortuna claims it will suffer prejudice if it must respond to the discovery demands filed by parties it believes it will establish lack standing. Fortuna asserts that the discovery demands are burdensome, time consuming, and would lead to the provision of confidential business information to parties not entitled receive such information. However, the parties expect that the bulk of documents to be produced will be furnished by Department staff, not by Fortuna, thereby diminishing the burden upon Fortuna. Moreover, those documents in the control of Fortuna relevant to the integration issues must be produced in any event due to the circumstance that the Burton/Whites and the Lewis heirs will remain in the case irrespective of the outcome of the standing issues. Discovery demands relevant to the terms of integration for uncontrolled owners have been filed by Department staff, and will soon be filed by the Lewis heirs now that settlement discussions have broken off. Department staff and intervenors convincingly assert that the production of information relevant to alternative integration scenarios involving the remaining intervenors does not constitute an unduly burdensome exercise, even if those scenarios ultimately prove academic as a result of the outcome of the standing issue.

With respect to confidential business information, the information's confidentiality can be maintained through the imposition of measures ordinarily used by court and administrative tribunals for that purpose, including use of confidentiality agreements, in camera proceedings, executive sessions, or other devices (see Matter of New York Tel. Co. v Public Serv. Commn. of State of New York, 56 NY2d 213, 220 [1982]; Matter of County Line Field, Interim Decision of the Assistant Commissioner, May 24, 2005, at 20; Matter of Glodes Corners Road Field, Interim Decision of the Commissioner, Feb. 25, 2000, at 5). Such measures will minimize any prejudice that might result if some intervenors are ultimately determined to

lack standing.

In sum, the prejudice claimed by Fortuna is insufficient to outweigh the procedural inefficiency and prejudice to the remaining parties that would result if bifurcation is granted at this time. Accordingly, in the exercise of discretion, Fortuna's motion for bifurcation is denied.

#### Fortuna's Motion for a Protective Order

In support of its motion for a protective order, Fortuna argues that certain of the outstanding discovery demands are vague, overbroad, or unduly burdensome. Fortuna also asserts that some documents sought are irrelevant, reasonably available from other sources, or subject to various privileges, including trade secret, confidential business information, attorney-client, work product, or deliberative process privileges.

Based upon the parties' submissions received in opposition to Fortuna's motion, it appears that many, if not all, of Fortuna's objections may be resolved by agreement of the parties and without the intervention of the ALJ. Accordingly, Fortuna's motion for a protective order is denied without prejudice to renew. The parties have agreed to conduct a conference call without the ALJ for the purpose of resolving Fortuna's objections. If objections remain after a final good faith attempt has been made to resolve them, the parties are authorized to renew or file new discovery motions.

#### RULINGS

Fortuna's motion to bifurcate the hearing and for a stay of discovery on remaining issues pending resolution of the standing issue is denied.

Fortuna's motion for a protective order is denied without prejudice to renew.

The parties are directed to conduct a conference call on or before 10:00 AM on Friday, November 7, 2008 and make a good faith effort to resolve the objections raised by Fortuna in its motion for a protective order. If discovery disputes remain after such good faith effort is attempted, Fortuna is authorized to renew its discovery motion, and the remaining parties are authorized to file new discovery motions. Any discovery motion should be served and filed by close of business on Monday,

November 24, 2008. Previously authorized filing procedures apply.

A conference call will be convened at 10:00 AM on Monday, December 1, 2008, to determine the status of discovery, among other things.

/s/

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James T. McClymonds  
Chief Administrative Law Judge

Dated: November 5, 2008  
Albany, New York

TO: Attached Active Party Counsel Service List