

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

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

WINTER 1-A.

**RULING AND INTERIM
DECISION OF THE
COMMISSIONER ON
APPEAL FROM RULING
ON MOTION TO STAY
PROCEEDING**

DEC Order No.
DMN 08-04

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 of counsel),
and Nixon Peabody, LLP (Ruth E. Leistensnider of counsel),
for Fortuna Energy Inc.

-- Lipman & Biltekoff, LLP (Michael P. Joy of counsel),
for WhitMar Exploration Co.

Background and Proceedings

Fortuna Energy Inc. (Fortuna) is the operator of the Winter 1-A natural gas well. On May 13, 2008, during the issues conference convened in the above referenced proceeding, Fortuna moved for a stay of proceedings pending the resolution of a title dispute between Fortuna and WhitMar Exploration Co. (WhitMar) that is the subject of an action in State Supreme Court, Tioga County. In a written ruling, dated May 20, 2008, the Chief Administrative Law Judge (Chief ALJ) James T. McClymonds denied the motion with leave to renew.

By motion dated May 30, 2008, Fortuna sought leave to appeal to the Commissioner from the Chief ALJ's ruling seeking various forms of relief. Fortuna requested that the Commissioner grant leave to appeal from the ruling, and upon so doing, reverse the ruling and issue an order staying further Department proceedings pending a ruling by State Supreme Court, Tioga County, in the quiet title action. In addition, Fortuna requested that the Commissioner adjourn any adjudicatory hearing pending a determination of its motion for leave to appeal and any ruling on the appeal itself. Finally, and in the alternative, Fortuna

requested that, if the Commissioner denied the application for leave to appeal or the appeal itself, he should remand this matter and related submissions to the Chief ALJ to be deemed a motion to renew, as permitted in the Chief ALJ's ruling of May 20, 2008.

Affirmations in opposition to Fortuna's motion and other supporting documentation were timely received from Department staff and WhitMar.

For the reasons which follow, Fortuna's motion for leave to appeal from the Chief ALJ's ruling of May 20, 2008, is granted¹ and the ruling of the Chief ALJ, in so far as it denies the requested stay, is affirmed. Moreover, the request to remand the matter to the Chief ALJ as a motion to renew is denied and remains before me. Upon due consideration, the motion to renew is denied. The matter is remanded to the Chief ALJ for further adjudicatory proceedings consistent with this ruling and interim decision.

Discussion

Based upon the following, I find that the standards of section 624.8(d) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) have been satisfied and the appeal will be entertained.

The Proper Forum for Resolution of Title Disputes

The factual and procedural history of the matter have been set forth in the Chief ALJ's May 20, 2008 ruling and need not be repeated here. From the papers submitted on this appeal, an apparent factual dispute exists between Fortuna and WhitMar with respect to the "Huntington parcel" as to whether WhitMar's top lease became effective on July 8, 2006, and whether Fortuna's underlying leasehold interest was extinguished as of that day. The resolution of this dispute is the subject of an action to quiet title filed pursuant to article 15 of the Real Property Actions and Proceedings Law (RPAPL) and pending in State Supreme Court, Tioga County.

State Supreme Court is the appropriate forum to resolve such title issues. While clearly intended by the RPAPL, this position

¹ The parties were given an opportunity to supplement their filings before the appeal was decided but no additional filings were submitted.

is supported by both Departmental policy and the ECL. Section V.B of Department Program Policy DMN-1 entitled, Public Hearing Processes for Oil and Gas Well Spacing and Compulsory Integration, in delineating the procedures for compulsory integration hearings, states: "Title disputes or tax map errors will not be referred to [the Office of Hearings and Mediation Services]." Thus, issues involving title disputes or tax map errors are generally not proper subjects for an adjudicatory hearing conducted pursuant to 6 NYCRR part 624.

Moreover, ECL 23-0901(3)(c)(1)(ii)(I), articulating one of the statutorily mandated provisions of all compulsory integration orders, empowers the well operator on behalf of the owners in a spacing unit "to conduct all acts associated with the well and necessary facilities related thereto, including without limitation: conducting title examination and curative work on the tracts included in the spacing unit." Because the Department would not be available as a forum for such "title examination and curative work," such claims, in this instance, are more properly adjudicated in State Supreme Court.

Motion for Stay

Whether the Department should exercise its discretion and grant a stay in a matter pending before it should be guided by the same principles set forth in CPLR 2201 which provides that "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."

While the meaning of "a proper case" will vary with the factual circumstances, it is clear that a stay should be granted by the Department "only when other remedies are inadequate and the equities involved are apparent and strong" (Matter of Weinbaum's Estate, 51 Misc2d 538, 539 [1966]). As Professor David D. Siegel points out in the McKinney's Practice Commentaries to CPLR 2201, "A stay of an action can easily be a drastic remedy, on the simple basis that justice delayed is justice denied. It should therefore be refused unless the proponent shows good cause for granting it" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:7).

In this matter, Fortuna has not demonstrated good cause for a stay. Whether Fortuna's initial ownership tabulation identifying WhitMar as the uncontrolled owner of the "Huntington

parcel" in the spacing unit² was erroneous, and whether Fortuna's lease remained effective beyond July 8, 2006, is not a matter to be resolved before the Department, but rather in State Supreme Court. Moreover, any delay of the Department's proceedings will not unduly impact or prejudice Fortuna since it will continue to receive production from the Winter 1-A well throughout the pendency of the quiet title proceedings. Indeed, because only WhitMar's parcel is affected, any Departmental delay in determining the scope and nature of WhitMar's potential working interest in the spacing unit would be prejudicial to it alone. All of the owners of the other parcels in the spacing unit of this producing well will continue to receive their respective proportionate shares of production. Accordingly, the Chief ALJ properly denied Fortuna's motion for a stay.

Motion to Renew

In his ruling of May 20, 2008, the Chief ALJ stated, "Fortuna may renew the motion [for a stay] upon a showing that a decision from Supreme Court, Tioga County is imminent, or upon a showing of a substantial likelihood of success on the merits of the quiet title action" (CALJ Ruling, at 6).

The ruling's optional direction to Fortuna that, upon renewal of its motion, it must demonstrate "a substantial likelihood of success on the merits of the quiet title action" will first be addressed. The standard thus articulated by the Chief ALJ, "a substantial likelihood of success on the merits," is, in fact, the standard required to obtain a preliminary injunction under CPLR article 63 (see Doe v. Axelrod, 73 NY2d 748 [1988]). However, Fortuna's application in this matter is only for a stay of the proceedings presently pending before the Department and not for any form of preliminary injunctive relief. As noted above, the guidance of CPLR 2201 and not CPLR article 63, is applicable here. The CPLR 2201 standard for granting a motion for a stay, "in a proper case, upon such terms as may be just," is not the same as the standard necessary to obtain a preliminary injunction. This being said, however, the article 63 standard, if met, could provide guidance in determining whether the matter is "a proper case" justifying a stay pursuant to CPLR 2201. This is the tenor of the Chief ALJ's ruling.

I have reviewed the papers submitted by the parties, including the complaint served by Fortuna in the quiet title

² The tax identification number for the "Huntington parcel" is 92.00-1-19.1 (see CALJ Ruling, at 2).

action, the pleadings filed in response to the complaint and the various annexed exhibits. These exhibits include correspondence among certain of the parties after submission of the Winter 1-A well permit application by Fortuna to the Department and prior to the integration hearing held in this matter. The papers submitted by the parties indicate the existence of sharply divergent and triable issues of fact. From this review, I conclude that Fortuna has not demonstrated a substantial likelihood of success on the merits in the quiet title action justifying a stay of the Department's proceedings.

Finally, in the circumstances of this case and upon this record, I conclude that the imminence of any decision in the quiet title action is uncertain and does not provide a basis for a stay of the Department's proceedings.

While Fortuna may pursue whatever injunctive relief it believes is appropriate in State Supreme Court, it has not met the threshold required to grant a stay of this agency's proceedings. I reserve to myself Fortuna's motion to renew, and, upon due consideration of the matter, I deny the motion to renew.

Conclusion

For the foregoing reasons, Fortuna's motion for leave to appeal from the Chief ALJ's ruling of May 20, 2008, is granted and the ruling of the Chief ALJ, insofar as it denies the requested stay, is affirmed. The request to remand the matter to the Chief ALJ as a motion to renew is denied and remains as such before me. Upon due consideration, the motion to renew is denied. The matter is hereby remanded to the Chief ALJ for further adjudicatory proceedings consistent with this ruling and interim decision.

/s/

Alexander B. Grannis
Commissioner

Dated: October 20, 2008
 Albany, New York

TO: Jennifer Hairie, Esq.
Associate Attorney
New York State Department
of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, NY 12233-1500

Thomas West, Esq.
Yvonne E. Marciano, Esq.
The West Firm
677 Broadway, 8th Floor
Albany, NY 12207

Ruth E. Leistensnider, Esq.
Nixon Peabody LLP
677 Broadway, 10th Floor
Albany, NY 12207

Janice Hart
Fortuna Energy, Inc.
203 Colonial Drive, Suite 101
Horseheads, NY 14845

Mark Scheuerman, Esq.
Fortuna Energy Inc.
337 Daniel Zenker Drive
Horseheads, NY 14845

Laura Rippentrop
Whitmar Exploration Co.
555 17th Street, Suite 880
Denver, CO 80202-3908

Michael P. Joy, Esq.
Lipman & Biltekoff
333 International Drive, Suite B-4
Williamsville, NY 14221