

STATE OF NEW MEXICO  
OIL CONSERVATION DIVISION

RECEIVED OCD  
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IN THE MATTER OF

I&W INC.,  
Respondent.

REQUEST FOR ORDER HEARING  
AND ANSWER TO COMPLIANCE ORDER

Pursuant to NMSA 1978, Section 74-6-10(G), Respondent I&W, Inc. ("I&W") submits this Request for Order Hearing and Answer to the Compliance Order:

**I. FINDINGS OF FACT**

Parties:

1. The allegations in Paragraph 1 assert legal conclusions to which no response is required.
2. Responding to Paragraph 2, I&W admits that it is a corporation organized under the laws of the state of New Mexico. I&W denies that since 1995 it has operated a facility under OCD discharge permit BW-006, or that it continues to operate any facility within the geographical locations asserted in Paragraph 2.
3. I&W denies the allegations in Paragraph 3.
4. I&W admits the allegations in Paragraphs 4, 8 through 10, 13, and 15.
5. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 5 through 7, 11, 16, 17, 19, 21, 24 through 26, and 27.
6. Responding to Paragraph 12, I&W denies that OCD purportedly "recommended" that I&W cease producing brine from the Eugenie #1 well. I&W is without knowledge or

information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 12.

7. Responding to Paragraph 14, I&W admits that the OCD sent a “Brine Well Information Request” to I&W, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations concerning OCD’s purported basis for submitting such a request, or whether the cover letter allegedly sent by the OCD to operators required completion of the form by a particular date. I&W denies that it failed to respond to OCD’s request.

8. Responding to Paragraph 18, I&W denies that OCD “urged” it to cease truck operations above the existing cavern and develop an adequate contingency plan for emergency response.

9. I&W denies the allegations set forth in Paragraph 20 and 23. With respect to the allegations set forth in Paragraph 23, I&W was evicted from its site and was compelled to cease trucking operations.

10. Answering Paragraph 22, I&W denies the allegation that OCD, during the period April 1 through April 27, 2009, made a “request” that I&W cease all operations. On the contrary, OCD staff sought to compel I&W to cease all operations. I&W is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 22.

11. I&W denies the allegations in Paragraph 28.

**Claim 1: Alleged Failure to Provide a Subsidence Monitoring Program and a Health and Safety Plan**

12. I&W admits the allegations in Paragraphs 29, 31, 32, 34, 35, 39, and 44.

13. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 30, 33, 36 through 38, and 43.

14. Responding to Paragraph 40, I&W admits that OCD provided a letter to I&W counsel on or about April 23, 2009, but denies the characterization concerning monitoring data that I&W allegedly “previously promised” to provide to the OCD.

15. Responding to Paragraph 41, I&W admits that it transmitted to the OCD subsidence data describing a total of twenty-two (22) monitoring events beginning on May 9, 2008, and ending on April 13, 2009. I&W denies OCD’s characterization of that data.

16. I&W denies the allegations in Paragraph 42.

17. Responding to Paragraph 45, I&W admits that, on November 20, 2009, the OCD sent I&W a letter referencing the 2008 permit renewal condition to provide subsidence reports, including a schedule for long-term surveying and a health and safety plan. I&W denies the accuracy of OCD’s purported citation of authority for requiring certain information as part of a closure plan.

18. Responding to Paragraph 46, I&W admits that OCD’s November 20, 2009 letter demanded the posting of financial assurance in the form of a surety bond. I&W denies that BW-006 requires the submission of additional security, for the reason that BW-006 expired by its own terms.

19. Responding to Paragraph 47, I&W admits that, after the OCD approved the closure plan for BW-006, I&W undertook no further post-closure activities. I&W denies the remaining allegations in Paragraph 47.

**Claim 2: Alleged Failure to Provide a Capacity/Cavity Configuration and Subsidence Survey**

20. I&W admits the allegations in Paragraph 48 through 50, 54, 57 through 59, 62 and 64.

21. Responding to Paragraph 51, I&W admits that, on October 11, 1996, the OCD ordered I&W to cease brine production. I&W is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 51.

22. Responding to Paragraph 52, I&W admits that it completed a sonar survey of the Eugenie #1 brine extraction well on or about October 18, 1996. I&W also admits that it did not perform a sonar test of the Eugenie #2 on that date. I&W is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 52.

23. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 53 and 56.

24. Responding to Paragraph 55, I&W admits that, on or about August 30, 2007, it retained a third-party to conduct a sonar logging on the Eugenie #1 well. I&W is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 55.

25. Responding to Paragraph 60, I&W admits that, on or about August 1, 2008, the OCD sent to I&W a "Brine Well Information Request Form." I&W denies that it did not respond to the OCD's request for information.

26. Responding to Paragraph 61, I&W admits that OCD provided I&W's counsel with a letter dated April 23, 2009, in which OCD stated its belief that I&W could not demonstrate the integrity of the brine well system. I&W denies the remaining allegations in that Paragraph, including any implication that I&W has violated any condition or term of its permit. I&W affirmatively states that the OCD required I&W to plug and abandon its wells, thereby

preventing a determination of the integrity of the brine well system and further compliance with any applicable permit conditions.

27. I&W denies the allegations in Paragraphs 63 and 65.

**Claim 3: Alleged Failure to Provide Ground Water Monitoring**

28. I&W admits the allegations in Paragraphs 66 and 67.

29. Responding to Paragraph 68, I&W admits that the “Brine Well Information Request Form”, sent by the OCD on August 1, 2008, requested information concerning ground water monitoring. I&W denies the remaining allegations in Paragraph 68.

30. Responding to Paragraph 69, I&W admits that it provided ground water analyses in April 2000, September 2001, and December 2002. I&W denies any implication in that Paragraph that the analyses were insufficient for any purpose.

**Claim 4: Alleged Failure to Provide Injection/Production Volumes**

31. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 70.

32. I&W denies the allegations in Paragraphs 71 and 72.

33. Responding to Paragraph 73, I&W admits that it shut in the Eugenie #1 well on July 22, 2008. I&W denies the remaining allegations in Paragraph 73.

**Claim 5: Alleged Failure to Provide Analysis of Brine and Fresh Water**

34. I&W admits the allegations in Paragraphs 74 and 75.

35. I&W is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 76.

36. Responding to Paragraph 77, I&W admits that the “Brine Well Information Request Form” submitted by the OCD requested whether the operator had submitted all reports to the OCD. I&W denies the remaining allegations in Paragraph 77.

## **II. APPLICABLE STATUTES AND RULES**

37. Paragraphs 1 through 11 of Section II set forth legal conclusions to which no response is required. However, I&W denies that the Water Quality Act and/or the Water Quality Control Commission Regulations permit the OCD to issue a Compliance Order purporting to impose significant penalties.

## **III. CONCLUSIONS OF LAW**

38. The purported legal conclusions set forth in Paragraph 1 through 9 of Section III do not require a response. However, to the extent that a response is permitted, I&W admits the allegations in Paragraph 1 and denies the allegations in Paragraphs 2 through 9.

## **IV. COMPLIANCE ORDER**

39. The matters set forth in Section IV do not require a response, but are barred by the denials and affirmative defenses set forth in this Response.

## **V. CIVIL PENALTY**

40. The matters set forth in Paragraphs 1 and 2 of Section V do not require a response from I&W. However, I&W affirmatively states that the OCD’s purported imposition of a penalty through a Compliance Order is *ultra vires* and contrary to law. Additionally, I&W has not violated any requirement, regulation, or water quality standard, or any condition of a permit issued pursuant to the Water Quality Act.

## **VI. RIGHT TO ANSWER AND REQUEST A HEARING**

41. Pursuant to NMSA 1978, Section 74-6-10(G), I&W hereby requests a hearing to contest this Order.

## **VII. FINALITY OF ORDER**

42. The matters set forth in Section VII do not require a response from I&W.

## **VIII. SETTLEMENT CONFERENCE**

43. Concurrently with the hearing proceedings requested by I&W to contest the validity of the Order, I&W requests a settlement conference consistent with the provisions and objectives of the Water Quality Act.

### **FIRST AFFIRMATIVE DEFENSE**

Section 74-6-10 of the Water Quality Act does not allow the assessment of penalties that the OCD seeks against I&W through the issuance of a Compliance Order.

### **SECOND AFFIRMATIVE DEFENSE**

The OCD's issuance of a Compliance Order, which seeks to impose substantial civil penalties, is *ultra vires* and contrary to the Clean Water Act because I&W has not violated any requirement, regulation or water quality standard adopted pursuant to the Water Quality Act, nor has I&W violated any condition of a permit issued pursuant to the Act

### **THIRD AFFIRMATIVE DEFENSE**

As a result of the appropriate plugging and abandonment of wells, as approved by the OCD, I&W's performance of further investigative, remedial, or corrective action is barred by the doctrine of frustration of purpose and/or commercial impracticability.

### **FOURTH AFFIRMATIVE DEFENSE**

As a result of the OCD's demand for and approval of the plugging and abandonment of the I&W wells, the OCD's claims in this proceeding are barred by the doctrine of estoppel.

#### **FIFTH AFFIRMATIVE DEFENSE**

The OCD's claim for substantial civil penalties constitutes a claim for punitive damages that is barred by the due process clause of the United State Constitution, Amendment V and Amendment ,XIV, § 31, and the Constitution of the State of New Mexico, Article II, § 18, because New Mexico law governing punitive damages does not provide adequate procedural protections against arbitrary or capricious awards of such damages.

#### **SIXTH AFFIRMATIVE DEFENSE**

OCD's claim for substantial civil penalties is a claim for punitive damages that is barred by the due process clause of the United States Constitution, Amendment V and Amendment XIV, § 18, and the due process clause of the Constitution of the State of New Mexico, Article II, § 18, because punitive damages, as awarded in New Mexico may impermissibly discriminate against corporate defendants, including I&W.

#### **SEVENTH AFFIRMATIVE DEFENSE**

The OCD's purported imposition of civil penalties that are so extreme constitutes the imposition of criminal liability, without the protections of due process of law afforded by the United States and New Mexico Constitutions.

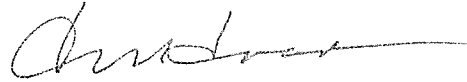
#### **EIGHTH AFFIRMATIVE DEFENSE**

I&W presently has insufficient knowledge or information sufficient to form a belief as to whether it has or may have additional, as yet unstated, affirmative defenses available to it and reserves the right to assert additional affirmative defenses in the event they would be appropriate.



Respectfully submitted,

HINKLE, HENSLEY, SHANOR &  
MARTIN, L.L.P.



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*Counsel for I&W, Inc.*

**CERTIFICATE OF SERVICE**

I certify that on this 19<sup>th</sup> day of February 2010, I served a true and correct copy of the foregoing *Request for Order Hearing and Answer to Compliance Order* by first-class mail to the following:

Mark Fesmire, P.E.  
Director, Oil Conservation Division  
1220 South St. Francis Drive  
Santa Fe, NM 87505



STATE OF NEW MEXICO  
OIL CONSERVATION DIVISION

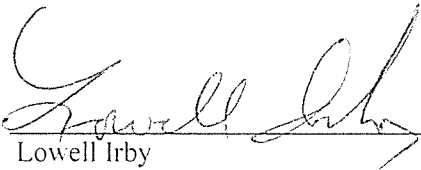
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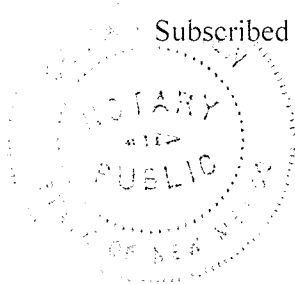
VERIFICATION


EDDY COUNTY                    )  
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STATE OF NEW MEXICO    )

My name is Lowell Irby. I am the President of I&W, Inc. ("I&W"). I have reviewed I&W's Request for Order Hearing and Answer to Compliance Order and the information contained therein is, to the best of my knowledge and belief, true and correct.

By:   
Lowell Irby

Subscribed and sworn to before me this 16th day of February, 2010, by Lowell Irby.



By:   
Notary Public

My Commission Expires: 7-17-11

Verification