

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the matter of the failure of Benjamin M. Giles) Docket No. 17-CONS-3100-CPEN
("Operator") to comply with K.A.R. 82-3-111 at)
The Clearwater #2 and Clearwater #5 wells in) CONSERVATION DIVISION
Butler County, Kansas.)
_____) License No. 5446

REPLY

Benjamin M. Giles ("Operator") submits this reply to Commission Staff's Response to Operator's June 2, 2017 Motion and the Commission's June 8, 2017 Order on Compliance with Settlement Agreement ("Response").

1. Staff's Response is non-responsive to the legal issue before the Commission

Operator's motion demonstrates that, at law, Staff breached the settlement agreement adopted by the Commission in this docket. It is well-settled that a party in breach of an agreement may not enforce the provisions against the non-breaching party.¹ To recap, Staff breached the settlement agreement by attempting to unilaterally modify its express terms to include to include a casing integrity test requirement.² Staff also breached the settlement agreement's implied covenant of good faith and fair dealing by engaging in a pattern of bad faith conduct intended to prevent Operator from performing its obligations under the settlement agreement.³ Staff's Response does not respond to the legal issues before the Commission, specifically the

¹ *Bank of America, N.A. v. Narula*, 46 Kan.App.2d 142, Syl. ¶ 3 (2011); see also *W. Plains Serv. Corp. v. Ponderosa Dev. Corp.*, 769 F.2d 654, 657 (10th Cir. 1985); ("The law is well settled that a party to a contract cannot claim its benefits where he is the first to violate its terms."); *Blann v. Rogers*, 22 F. Supp. 3d 1169, 1181 (D. Kan. 2014) ("One party's material breach of contract can relieve another party of its obligations under the contract.")

² See Motion, pp. 7-8

³ See *Id.*, pp. 9-10.

interpretation and enforcement of the Commission approved settlement agreement. Staff does not respond because it has no legal basis to deny it breached the settlement agreement.

Staff's Response does, however, acknowledge that both of the wells subject to the settlement agreement are compliant with Commission regulations.⁴ For these reasons, the Commission may grant Operator's motion without condition and find that: (1) Operator has fully performed the settlement agreement, and (2) Staff breached the settlement agreement and, as a result, at law it is not entitled to enforce the punitive provisions contained therein against Operator.

2. Staff refuses to explain its conduct

Staff's Response flat out fails to provide a credible basis as to why a casing integrity test was required for the first time after Operator's deadline to perform the settlement agreement had passed. Staff's inability to explain its conduct supports Operator's legal contention that Staff breached the settlement agreement, and Staff cannot enforce an agreement it has breached as a matter of law. Staff's Response is two things: (1) a distasteful attempt to assassinate the character of Operator, and (2) latent with contradictions that tacitly acknowledge its bad faith and unreasonable, arbitrary and capricious behavior.

Rather than respond to the legal merits of Operator's motion, Staff chose to dive into an unwarranted and repugnant assassination of Operator's character. Staff needlessly accuses Operator of "flouting" Commission regulations, being a "repeat violator", and aimlessly references dockets closed long ago (as a result of Operator's compliance) that are not relevant to the matters before the Commission.⁵ Staff makes outrageous and unsubstantiated claims that "Operator

⁴ See Staff's Response ¶ 3 ("... Operator obtained compliance at the Clearwater #2"), and ¶ 6 (explaining that Operator "obtained temporary abandonment status" for the Clearwater #5).

⁵ See Staff's Response, ¶¶ 8 (noting penalty orders unrelated to this matter), 9 ("Operator has consistently engaged in behavior that **flouts** Commission regulations."), 11 (again noting penalty orders unrelated to this matter), 27 ("Operator, a repeat violator of Commission regulations . . .")

presents unique compliance problems” and that other entities “generally appear more inclined to comply with Commission regulations[.]”⁶ Staff goes on to imply Operator lied when he submitted the fluid levels on his temporary abandonment application for the Clearwater #5 well—calling the fluid levels “unsubstantiated submissions” that “Staff has been unable to verify[.]”⁷ This is not the forum to air such accusations, and in any event it is a bizarre accusation considering the fluid level test was conducted by a third-party with no incentive to defraud Staff on behalf of Operator. While Staff’s odious opinion of Operator certainly provides the impetus for its bad faith conduct towards Operator, it is no defense to Staff’s breach of the settlement agreement it seeks to enforce.

As evidenced above, Staff genuinely believes Operator does not desire to comply with Commission regulations. This pretext serves as the excuse for Staff’s patently unreasonable, arbitrary and capricious behavior towards Operator, and, more importantly, for its bad faith efforts to prevent Operator from performing the settlement agreement. Sixteen (16) times Staff summarily alludes to “policy”, “procedure”, or “practices” to support its 13th hour casing integrity requirement for the Clearwater #5 well.⁸ Staff claims the casing integrity test is a “policy that has been applied across tens of thousands of temporary abandonment application for years”. Yet Staff is not able to cite any policy manuals in support of this assertion, was not willing to attach copies of the policy to its Response, and chose not to submit affidavits attesting to these “general” policies.

Notably, Staff’s Response utterly fails to explain why this alleged “standard” policy was enforced for the very first time after Operator’s deadline to obtain temporary abandonment status

⁶ See Staff’s Response ¶ 15.

⁷ See Staff’s Response ¶ 17.

⁸ See Staff’s Response ¶¶ 1 (“general policy”), 4 (“Staff policy”), 11 (“Commission procedures”) and (“ignorance of procedures”), 12 (“standard policies”) and (“policies”), 13 (“Staff policy”) and (“a policy that has been applied”), n. 6 (“standard procedure”), 17 (“Commission policy”) and (“general procedures”), 19 (“standard procedures”) and (“standard method”), 20 (“Commission procedure”), 26 (“typically requires five-day notice”).

for the Clearwater #5 well. Staff does not refute it never advised Operator a casing integrity test would be required to obtain temporary abandonment status for the Clearwater #5 well, yet insatiably accuses Operator of “professing ignorance” of this requirement.⁹ The fact is, the post-facto casing integrity test advanced no Commission policy, and the idea that Staff was scrupulously adhering to policy is belied by Staff’s own conduct.

What is known is that Commission regulations do not require a casing integrity test to temporarily abandon a well¹⁰, wells with higher fluid level tests than the Clearwater #5 were granted temporary abandonment status¹¹, and that Staff does not refute it did not advise Operator that a casing integrity test would be required to obtain temporary abandonment status for the Clearwater #5 well until after his deadline had passed. What is not known or explained is how Operator could have possibly known Staff would “move the goal posts” after his performance deadline had passed.

In a wretched effort to justify its bad faith effort to prevent Operator from performing the settlement agreement, Staff now claims the Clearwater #5 well posed a “significant risk to fresh and usable water” and created continual “environmental risks.”¹² Staff’s conduct over the last 14 months directly contradicts this assertion. If Staff believed there was a casing leak that threatened fresh and usable water, why did it delay recommending a penalty order for over six months?¹³ Why did Staff not require a casing integrity test the first time operator applied for temporary abandonment status?¹⁴ Why did Staff neglect the temporary abandonment application for the Clearwater #5 well while taking action to approve applications for two identically situated wells

⁹ See Staff’s Response ¶ 12.

¹⁰ K.A.R. 82-3-111

¹¹ See Operator’s Motion ¶ 12.

¹² See Staff’s Response ¶¶ 10, 15.

¹³ Staff’s Response ¶¶ 1, 2.

¹⁴ Operator’s Motion ¶ 6, Exhibit A.

on the Clearwater lease?¹⁵ Why didn't Staff include the casing integrity test requirement in the settlement agreement? The answer is obvious, Staff did not believe the Clearwater #5 well presented an imminent threat to fresh and usable water. Staff knows its conduct in this matter runs directly afoul of the Commission's mandate to prevent waste, and protect correlative rights and fresh water, and its attempt to recharacterize this as an environmental matter is entirely disingenuous.

3. Conclusion

Every position Staff has taken in its Response to justify its misconduct in this matter is contradicted by its prior conduct. These contradictions, together with Staff's well-articulated disdain for Operator, demonstrate a pattern of bad faith conduct that is unreasonable, arbitrary and capricious, and intended to prevent Operator from performing the terms of the settlement agreement. Staff's disdain for Operator is manifested in its Response whereby Staff insists that it be permitted to punish Operator after he has indisputably brought the wells at issue into Compliance. The Commission should not allow Staff to enforce the settlement agreement it breached against Operator just so Staff can punish Operator. The law clearly forbids it, and such conduct does nothing to advance the Commission's mandate to prevent waste, and protect correlative rights and fresh water.

For the foregoing reasons, Operator respectfully requests that the Commission grant his motion.

¹⁵ Operator's Motion ¶ 12.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan A. Schlatter, hereby certify that on this 26th day of June, 2017, I caused the original of the foregoing Reply to be electronically filed with the Conservation Division of the State Corporation Commission of the State of Kansas, and emailed true and correct copies of the same to the following individuals:

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