

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

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION DIVISION FOR
THE PURPOSE OF CONSIDERING:

CASE NOS: 21704

APPLICATION OF VENDERA RESOURCES III LP,
VENDERA MANAGEMENT III LLC, AND HIGHMARK
ENERGY OPERATING LLC, APPLY FOR AN ORDER
APPROVING A FORM C-145 NAMING HIGHMARK ENERGY
OPERATING LLC AS SUCCESSOR UNIT OPERATOR OF
THE CENTRAL VACUUM UNIT AND REMOVING THE CURRENT
UNIT OPERATOR,
LEA COUNTY, NEW MEXICO.

REPORTER'S TRANSCRIPT OF VIRTUAL PROCEEDINGS
EXAMINER HEARING
April 8, 2021
SANTA FE, NEW MEXICO

This matter came on for virtual hearing before
the New Mexico Oil Conservation Division, HEARING OFFICER
WILLIAM BRANCARD and TECHNICAL EXAMINER DEAN McCLURE on
Thursday, April 8, 2021, through the Webex Platform.

Reported by: Irene Delgado, NMCCR 253
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A P P E A R A N C E S

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I N D E X

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|------------------------|----|
| CASE CALLED | |
| MOTION TO DISMISS | 03 |
| TAKEN UNDER ADVISEMENT | 34 |
| REPORTER CERTIFICATE | 35 |

1 HEARING EXAMINER BRANCARD: With that I will call
2 Case 21074, Vendera Resources. I believe that's Mr. Bruce.

3 MR. BRUCE: Yes.

4 HEARING EXAMINER BRANCARD: And then we have
5 Chevron, Holland & Hart?

6 MR. RANKIN: Good morning, Mr. Hearing Officer.
7 Adam Rankin appearing on behalf of Chevron in both of those
8 cases.

9 MR. BRUCE: Mr. Examiner, could we take about a
10 five-minute break before we begin?

11 HEARING EXAMINER BRANCARD: That's certainly
12 possible because this may take a little bit of time.

13 HEARING EXAMINER BRANCARD: Why don't we go until
14 10:45.

15 MR. BRUCE: Okay. thank you.

16 (Recess taken.)

17 HEARING EXAMINER BRANCARD: We will call Item 46,
18 Case 21704, Vendera Resources. This is in the form of a
19 motion hearing. I believe we have a motion to dismiss.
20 Vendera is represented by Mr. Bruce?

21 MR. BRUCE: That's correct.

22 HEARING EXAMINER BRANCARD: And we have Chevron
23 represented by Holland & Hart?

24 MR. RANKIN: Good morning, Mr. Hearing Officer.
25 Adam Rankin appearing on behalf of Chevron in this case.

1 HEARING EXAMINER BRANCARD: And I believe we are
2 here on Chevron's motion to dismiss; is that correct?

3 MR. RANKIN: That's correct, Mr. Examiner. We
4 are here on Chevron's motion to dismiss which has been fully
5 briefed, and we are happy to proceed with argument on that
6 motion, and unless the hearing examiner has questions or any
7 other concerns or issues for us to address in advance of
8 that.

9 HEARING EXAMINER BRANCARD: Not in advance. I
10 will have some questions.

11 MR. RANKIN: Okay.

12 HEARING EXAMINER BRANCARD: Mr. Bruce, are you
13 prepared to discuss this matter?

14 MR. BRUCE: Yes.

15 HEARING EXAMINER BRANCARD: Well, I will then --
16 let me see. How much time do you think you need,
17 Mr. Rankin?

18 MR. RANKIN: I don't know, five to eight, maybe
19 ten minutes on the direct. I would like to save some time
20 for rebuttal, but I think that our arguments are laid out in
21 the papers, but I think I would like to highlight a few
22 things in, in the argument.

23 HEARING EXAMINER BRANCARD: Okay. So I will give
24 ten minutes to each side. You can save some for rebuttal.
25 Mr. Rankin, please proceed.

1 MR. RANKIN: Essentially Chevron's motion should
2 be granted for two reasons, and the first, as we state in
3 our motion, the Division lacks jurisdiction to decide a
4 matter over contested operatorship that is governed by a
5 contractual, a disputed, contractual position.

6 Second, the Division's regulations governing
7 change of operator are ministerial in nature and provide
8 only for designation of a new operator when the prior
9 operator agrees on the transfer of operatorship or when the
10 prior operator is not available, and neither of those two
11 conditions are satisfied here.

12 The Division's regulations governing designation
13 of a successor operator are inapplicable. The fact that the
14 Division has regulations that provide for identification of
15 successor operator to update its records for purposes of
16 compliance and recording does not give the agency authority
17 de facto to determine the rightful operator in a contract
18 dispute and does not reflect that the agency has been
19 delegated the power to do so by any other means.

20 So in response Vendera makes two arguments.
21 First they argue the Division has the authority to determine
22 the operator in this case because the Division originally
23 approved the form of statutory unit agreement that governs
24 the unit at issue, and that the Statutory Unitization Act
25 prescribes the statutory unit agreements include a provision

1 for the replacement or removal of operators and a voting
2 procedure.

3 Now the argument goes, that Vendera makes, that
4 while the Oil & Gas Act does not give the Division authority
5 to adjudicate disputed contractual provisions, governing
6 voting procedures and alleged removal and selection of
7 successor operators, a Statutory Unitization Act does, they
8 say. Okay? At least for statutory units.

9 But in support the Vendera cites to a couple of
10 general, the general delegation of authority under the
11 statute and the Statutory Unitization Act, and that general
12 delegation says that the Division has authority, quote, "To
13 make and enforce such orders and do such things as may be
14 necessary or proper to carry out and effectuate the purposes
15 of the Statutory Unitization Act."

16 And also Vendera cites to a Tenth Circuit case
17 for the proposition that the agency is acting in its
18 capacity when it is approving statutory unit agreements.

19 Now, those two arguments have actually no basis
20 in law. The delegation of authority under the Statutory
21 Unitization Act is limited, and I cited to the provision in
22 the statute. I incorrectly cited -- I cited the wrong
23 provision. I cited Section 3, and I should have cited
24 Section 1, which is the 70-70-7-1 is what I should have
25 cited, and in that provision it limits -- the purposes of

1 the act are limited to prevention of waste, protection of
2 correlative rights and increasing production.

3 That's the, the limitation in the act is express,
4 and it expressly limits the authority of the Division to
5 those -- to matters relating to those issues just as the Oil
6 & Gas Act does.

7 So it's not a general grant of authority or
8 jurisdiction to decide disputed contractual matters, and it
9 does not extend to authorize the jurisdiction or contractual
10 disputes. The Act expressly provides that its purposes are
11 limited to those three topics, and those are the public
12 right issues that the agency generally has authority over,
13 as opposed to private right issues that we discuss in our
14 briefing.

15 Private right issues invoke the authority of,
16 generally the authority of courts to decide disputed or
17 contested matters relating to such private rights such as
18 contractual disputes.

19 So both the Oil & Gas Act and the Statutory
20 Unitization Act limit the Division's authority and exclude
21 it from deciding contractual disputes. So the requirement
22 in the Statutory Unitization Act to ensure that statutory
23 agreements include certain provisions such as a provision to
24 identify a successor operator and voting procedures is
25 simply a prescriptive requirement to ensure that approved

1 agreements may be perpetuated beyond the original operator.

2 And the statute does not give the Division
3 authority to make any such determinations, it simply is
4 a prescription that the Division is required to ensure is
5 contained within the agreements.

6 So nothing in the language of the Act or the
7 construct of the Act gives the authority -- the Division
8 authority to make determinations or decisions about such
9 disputes.

10 Now, Vendera cites to a Tenth Circuit case, the
11 Highman case for the general proposition that the agency is
12 acting in its official capacity, but that's not what the
13 case stands for. When you actually look at the case, it's
14 discussing whether or not an agency's decision should be
15 given preclusive effect.

16 And in that case, the Tenth Circuit makes very
17 clear that an agency's determination acting in its judicial
18 capacity should be given preclusive effect only when it's
19 resolving facts properly before it, in other words, only if
20 the agency is acting within its jurisdiction and authority
21 to make such decisions.

22 So it does not indicate generally that the
23 Division is acting in its judicial capacity properly
24 whenever it approves a unit agreement, it's limited and its
25 authority is circumscribed by the express delegation of

1 authority under the statute.

2 So the next argument that Vendera makes in its
3 response is that it's a matter of waste and protection of
4 correlative rights. And this is the first time Vendera has
5 raised that argument. It's doing so now in its response to
6 our motion. It was not alleged in its application.

7 In support of those claims, Vendera cites to two
8 cases in which the Division or the Commission has taken
9 action to appoint or designate an operator of a -- of a
10 well. But in both of those cases, the prior operator either
11 was un-, you know, was unresponsive or -- unresponsive or no
12 longer had legal authority to operate those wells.

13 In both of those cases the Division made very
14 clear in its orders there was no dispute, there was no
15 contest over any private rights, any contractual issues, any
16 legal rights to operate in those cases. And that is a
17 distinction here that is significant in this case because
18 the dispute, the central issue of this dispute is over the
19 contractual right to operate the unit. And because of that
20 issue those two cases that Vendera has cited are not, are
21 not applicable.

22 Now, subsequent to the filing of our reply brief,
23 Vendera has served us with an amended application. I have
24 not had time to study the application, but do note that some
25 of the amendments include the allegations of waste and

1 protection of correlative rights.

2 Now, because this dispute is a, is a -- is a
3 contractual dispute over the election procedures, the voting
4 procedures and selection of a purported successor operator,
5 such an amendment is -- amended application is futile
6 because it does not -- it cannot avoid the issue of the
7 underlying contractual dispute which is central to the
8 matter taking this case out of the Division's jurisdiction.

9 So again, we haven't had a chance to review or
10 address, study the amended application, but my position is
11 that it would be a futile amendment because at issue would
12 be -- the issue is a contractual dispute, and what they are
13 saying here is that the motivation for the votes and the
14 effort to remove Chevron is a -- was motivated by concerns
15 over waste and protection of correlative rights, but
16 nevertheless, at issue is a contract dispute that must be
17 decided by an entity other than the Division.

18 So with that, Mr. Examiner, I would ask that
19 Chevron's motion to dismiss be granted, and that the
20 application be dismissed.

21 HEARING EXAMINER BRANCARD: Thank you. Mr.
22 McClure, do you have any questions?

23 TECHNICAL EXAMINER McCLURE: Mr. Brancard, I
24 don't have any questions at this time. I will leave them
25 for you.

1 HEARING EXAMINER BRANCARD: Okay. Mr. Rankin, I
2 guess I'm baffled by the notion of this private contract.
3 I -- I mean, this is a unit. This is a unit created by the
4 state under the Statutory Unitization Act. The statute
5 requires certain provisions to be in agreement which can be
6 written by the applicant or by the agency under the
7 Statutory Unitization Act. That agreement is incorporated
8 into the order issued by the agency. So where is this
9 private contract here?

10 MR. RANKIN: So, Mr. Hearing Examiner, I
11 understand the point. However, when -- when the Statutory
12 Unitization Act was passed, the authority delegated to the
13 agency to determine certain -- the authority was delegated
14 to the agency to determine -- make certain determinations.
15 And when you look at the statutory unitization starting at
16 70-7-1, which identifies the purposes of the Act, and then
17 70-7-2, which lays out the matter -- I'm sorry -- 70-7-6
18 which lays out the matters that are to be found by the
19 Division. When we look at the way the statute is
20 constructed, the matters to be found by the Division fall
21 within the -- the authority under the statute itself that
22 has been delegated to the agency expressly.

23 In other words, the matters to be found all
24 relate to the prevention of waste, protection of correlative
25 rights and increasing production. So what the legislature

1 has done is set up the agency has got the expertise, the
2 knowledge, the technical understanding of these issues to
3 make certain findings, and those findings are related to
4 waste, protection of correlative rights and the effort to
5 increase production.

6 What the agency doesn't have authority to do, and
7 what the legislature expressly limited in the Statutory
8 Unitization Act and precludes the agency from doing is going
9 beyond matters related to protection of correlative rights,
10 waste and increasing production.

11 You look at 70-7-3, okay, the citation that
12 Vendera relies, the additional powers and duties of the Oil
13 Conservation Division, the provision says that the Oil
14 Conservation Division, quote, "Is vested with jurisdiction,
15 power and authority, and it shall be its duty to make and
16 enforce such orders and do such things as may be necessary
17 or proper to carry out and effectuate the purposes of the
18 Statutory Unitization Act."

19 Okay? When you look at its power and authority
20 is to do such things as may be necessary to proper -- or
21 proper to carry out and effectuate the purpose of the Act,
22 when you go back to 70-7-1 to read what the purpose of the
23 Act is, it says, quote, "For the purposes hereinafter set
24 out," okay?

25 And the purposes are as stated in the provision,

1 quote, "To end -- to that end" -- I'm sorry. "To the end
2 that greater alternate recovery may be had therefrom, waste
3 prevented and correlative rights protected of all owners of
4 (unclear) in this area."

5 So the legislature has expressly limited what
6 authority this Act conveys to the Division.

7 Now, as to the provisions that should be required
8 to be included in the Act under 70-7-7, the Statutory
9 Unitization Act states that there are certain provisions to
10 be included, including a requirement to have a provision for
11 a successor operator and to have a voting -- certain voting
12 procedures.

13 Those are prescriptive in nature. They require
14 the Division simply to make sure that the unit agreement
15 provides for those, those elements, and that they meet the
16 statutory requirement. It does not give the authority to
17 the agency to make determinations when matters around those
18 provisions are disputed because those would be outside of
19 the purposes of the Act and outside of the express delegated
20 authority of the Division and its expertise.

21 The case law in New Mexico is really clear that,
22 number one, the agency is limited. It's a creature of
23 statute and is expressly limited by the authority delegated
24 to it by the legislature.

25 And the Act itself expressly provides under

1 70-7-3, as limited, you know, by the statute it says, and
2 those limitations are constrained to matters related to
3 waste, correlative rights and increasing production.

4 So, so New Mexico case laws takes that concept
5 and understands that what the agency has been delegated
6 authority to determine within this field of expertise are
7 matters that relate to public issues, public rights, and
8 those are waste, correlative rights and ensuring that
9 conservation of resources and in cases of the Unitization
10 Act, increasing production if necessary.

11 But the agency doesn't have the authority to, to
12 make, you know, decisions that are private in nature
13 relating to the contractual rights and obligations of the
14 parties to be -- to the unitization agreement, and that's
15 the distinction.

16 HEARING EXAMINER BRANCARD: So are you saying
17 that all the parties in this unit have signed on this
18 agreement?

19 MR. RANKIN: I would have to look to see how many
20 of them, but under the statute at least 75 percent of the
21 interests have to have voluntarily committed to the unit
22 agreement.

23 HEARING EXAMINER BRANCARD: Right. And then
24 those who haven't are sort of compulsory unitized and
25 therefore forced to be part of the agreement by the agency.

1 MR. RANKIN: That's right.

2 HEARING EXAMINER BRANCARD: An agreement is
3 something imposed on the parties, not the parties coming up
4 up on their own coming up with this idea.

5 MR. RANKIN: For a certain number that's true,
6 but whether or not it's imposed on them by the agency or
7 not, it's still outside the jurisdiction of the agency to
8 determine where it's a matter of the contract. In other
9 words, the facts and issues that the agency does not have
10 the wherewithal, the expertise to determine, and the courts
11 have, have identified those as being the type of disputes
12 that are private in nature and contractual disputes that are
13 outside the scope of the agency's delegation of authority.

14 HEARING EXAMINER BRANCARD: Well, if the
15 legislature had delegated to us to approve agreements that
16 include all these provisions, presumably the legislature is
17 assuming that we have the ability to evaluate these
18 agreements.

19 MR. RANKIN: So if you look at 70-7-6 and you
20 compare it to the next provision, 70-7-7, so 70-7-6 are the
21 items or matters to be found by the Division in determining
22 whether or not to approve a statutory unitization -- unit
23 agreement.

24 So those are all matters that fall within the
25 Division's express delegation authority, waste, correlative

1 rights and increasing production, when you go to the next
2 provision, 70-7-7, which is titled Division Orders, it's a
3 list of items that the Division must ensure is included
4 within any unit agreement.

5 And in each of those instances, it's simply a
6 prescription of what must be included by the Division to
7 ensure that, that the unit agreement will function and
8 operate properly once it's been formed.

9 Now, going through that list, you will see that
10 there are a couple of items that the legislature has
11 identified fall within the agency's express jurisdiction,
12 and in those instances you will see that the express
13 language of the Act give the agency authority to make
14 determinations.

15 So, for example, under 70-7-7, Subpart F, the
16 statute requires the agency to ensure that there is a
17 provision for caring any working interest owner an a limited
18 profit basis and it goes on.

19 And then it goes on to say that the agency --
20 find the right language here. It goes on to say that, "Upon
21 such terms and conditions determined by the agency to be
22 just and reasonable."

23 Again, this is a -- this is a mirror image to
24 what authority the statutes Oil & Gas Act gives the agency
25 to determine for compulsory pooling provisions.

1 So where the, where the legislature has
2 determined matters fall within the agency's express
3 authority, they have identified and given the agency
4 authority to make determinations. Where it does not, and
5 it's outside the scope of the express limitations within the
6 Statutory Unitization Act, it's simply a prescription that
7 the agency must ensure is contained within the language of
8 the agreement.

9 So on that basis, looking at the distinction here
10 in the construction of the Act as a whole, the legislature
11 has identified, first of all, under its general delegation
12 of authority that the authority of the agency is limited by
13 the Act.

14 The limitations imposed are those expressed by
15 what the purpose of the Act is. The purpose of the Act is
16 limited to preventing waste, protecting correlative rights
17 and increasing production. And that's the way the Act is
18 constructed and written when you read it as a whole.

19 The provisions that you are talking about and
20 what Vendera is citing are simply prescriptive requirements
21 to ensure that the unit agreement will function. Where
22 there is a dispute arising around the nature of those
23 specific provisions, such as voting procedures and elections
24 and whether or not the working interest owners comply with
25 the requirements of the voting procedures to elect to remove

1 an operator, those are disputes private in nature that
2 relate to the interactions of those parties and not
3 something within the jurisdiction or experience or technical
4 know-how of the agency.

5 HEARING EXAMINER BRANCARD: So then what is
6 Vendera's remedy, to sue Chevron for breach of contract?

7 MR. RANKIN: You know, I won't say what
8 Vendera's -- I won't suggest what their remedy might be, but
9 it's certainly not to go to the Division where there is a
10 contractual dispute.

11 The Division has been very careful in its orders
12 in such situations where there is a unique circumstance
13 where the prior operator is unavailable or has, has
14 compliance issues against it or the lease is expired, those
15 are the circumstances which arose in the cases that
16 Mr. Bruce has cited. But in all of those circumstances the
17 Division has been very careful not to invoke its
18 authority -- its limited authority to appoint a new
19 operator where there is any sense of a contractual dispute
20 or a private legal issue relating to the rights underlying
21 operatorship.

22 HEARING EXAMINER BRANCARD: Okay. We will move
23 on then. Mr. Bruce?

24 MR. BRUCE: Yes. There is a few main points.
25 First of all, Chevron is trying to make this more

1 complicated than it really is. As I have noted in the
2 pleadings, this is a Statutory Unitization Act whereby the
3 Division not only approved of the unit agreement and unit
4 operating agreement, they incorporated the provisions of
5 that in its order. That's number one.

6 And really, it all comes down to one simple
7 thing, whether or not Vendera got 90 percent of the vote of
8 the working interest owners excluding Chevron USA Inc. to
9 remove it as operator.

10 There is only one provision, it is a contractual
11 provision, but it's been approved by the Division. There is
12 only one paragraph that needs to be looked at. It's Section
13 7 of the unit agreement, not even the whole Section 7, just
14 one part. The unit operator may be removed at any time by
15 the affirmative vote of working interest owners having 90
16 percent or more of the voting interest remaining after
17 excluding the voting interest of the unit operator. Such
18 removal shall be effective upon notice to the Commissioner
19 of Public Lands.

20 As I stated in the pleadings, this does not
21 require interpretation; it requires arithmetic. Did they
22 get 90 percent? The answer is yes. Let me go into
23 something that is set forth in the amended application that
24 I filed on behalf of Vendera.

25 Despite being voted out as operator of the unit,

1 Chevron took steps immediately after learning of the vote
2 to, to dilute all non-working interest owners. It assigned
3 all of it's right, title and interest in the unit except for
4 one percent on November 30, 2020, just days after being
5 notified of its removal to Chevron Mid Continent LP, an
6 affiliated entity.

7 They were clearly making it -- attempting to make
8 it impossible for anyone to ever remove Chevron as unit
9 operator unless Chevron Mid Continent voted against its
10 affiliate, which is obviously not in the cards. Now, why
11 would Chevron do such a thing if it was confident it had not
12 and could not be removed?

13 Funny thing is, in its haste to get something of
14 record, which -- and by the way, part of Chevron's complaint
15 is they were not fully notified of everything early in the
16 fall until November, well, Chevron did all of this stuff
17 without notifying any of the working interest owners in the
18 unit. They did it in such haste they forgot to include a
19 description of the Central Vacuum Unit in the assignment, so
20 they had to go back a couple of months later and amend the
21 assignment. And again, they didn't tell anybody about that.

22 Chevron's concealment against its own partners is
23 consistent with its practice as alleged in the application
24 of being an unreasonable and wasteful operator and which is
25 the reason why 90 percent of the remaining working interest

1 owners voted to remove Chevron as operator.

2 Last year at this time the unit was losing \$1.5
3 million a month. And Vendera went on over and over, over
4 two years to get Chevron to contact them many, many times
5 and say, "We can improve this. Let's work together."
6 Chevron would never respond. Now it's trying to stack the
7 deck against the Central Vacuum Unit Partners, and that's
8 improper.

9 The second thing I would like to point out is
10 that when you get into that argument of private contract,
11 the cases that Chevron pointed out or cited in its briefs
12 had to do with title issues or ownership of a well. This
13 last nothing to do with that. This is purely unit
14 operatorship.

15 I suppose that Chevron considers that a personal
16 property right, but the unit agreement provides a way out as
17 does the Statutory Unitization Act. And Mr. Rankin said the
18 Division has no authority to determine unit operator. Well,
19 70-7-4 says that the unit operator is the person appointed
20 by the working interest owners or -- not and -- or by the
21 Division.

22 So the OCD has independent authority to determine
23 who the operator should be, and it also has, when you are
24 talking about prevention of waste and protection of
25 correlative rights, of course, let me point out, the

1 application we put together -- the original application that
2 we are here on today, we pointed out that no reason is
3 necessary to vote to remove the unit operator. It can be
4 done for cause, it can be done without cause. The
5 application just stated the basic facts.

6 But Chevron wanted more, so those are in the
7 amended application I filed, how they mismanaged the unit,
8 how waste is occurring, how the correlative rights of the
9 interest owners, all working interest owners, not only the
10 working interest owners, but the royalty interest owners
11 which includes New Mexico State Land Office, all of them are
12 being -- having their correlative rights adversely affected
13 by Chevron's improper management of the unit -- money-losing
14 operation of the unit.

15 When you are looking at this, one of Chevron's
16 arguments was, "Well, Vendera didn't make enough specific
17 allegations about waste and prevention of correlative
18 rights. Well, that's the Division's duty, and I don't think
19 the fact that -- I know in the application it didn't contain
20 one sentence that almost all applications contains, the
21 granting of this application is in the interest of
22 conservation and prevention of waste. That's kind of
23 superfluous language because that's the Division's duty is
24 to look after prevention of waste and protection of
25 correlative rights.

1 And insofar as interpreting the terms of its
2 order, because that's what Vendera is asking the Division to
3 do, not as such to interpret the terms of a contract -- and
4 there is only one provision and it's very simple to
5 understand -- they are asking it to interpret the terms of
6 its own order, and in that the Division has wide, wide
7 leeway.

8 There is an order, it is Order Number R-1960B.
9 This was an application -- and there was a pooling order
10 issued in 1961. Almost 50 years later the well drilled
11 under that order in the petroglyphs formation in the
12 San Juan Basin was still producing, and one interest owner
13 unleased as to -- was under a gas balancing situation where
14 it was trying to take its gas and sell it because it was
15 under-produced, the operator, Energen Resources Corporation,
16 filed an application to amended the cost recovery provision
17 of the compulsory pooling order, determine reasonable costs
18 and authorize recovery of costs against the objector which
19 is a company called JAS Oil & Gas.

20 And JAS Oil & Gas entered an appearance and
21 fought this matter and said they were -- they were under-
22 produced, they needed their gas, Energen wouldn't give it to
23 them, Energen just said, "Well, you can cash balance when
24 the gas runs out, when the well is dry."

25 They presented evidence that the well would

1 produce another 40 years. Now, who is going to be the
2 operator then? Who is going to be the liable party? And of
3 course, being an old pooling order, or even being a new
4 pooling order of today there was no gas balancing agreement
5 attached to the order, but the Commission, not the Division,
6 the Commission imposed a gas balancing requirement against
7 Energen on behalf of JAS Oil & Gas and made them do an audit
8 of what was owed JAS and pay them out of cash balancing.
9 Clearly, that shows that the Commission or the Division has
10 wide authority to interpret and to enforce its own orders.

11 Another thing is that the motion to dismiss by
12 Chevron is more or less akin to when somebody files in court
13 a pleading and a company doesn't answer, but they file a
14 motion to dismiss on the pleadings. What you have to do in
15 that instance is take everything that's pled in the
16 complaint or the petition as true.

17 And if you take everything that's taken in the
18 petition or application filed by Vendera, if you take that
19 as true, then you have to remove Chevron as operator. But
20 in order to do that, you have to have the matter heard
21 before the Examiners.

22 As I said, no reason is necessary to remove a
23 unit operator. In one of -- I think in its motion to
24 dismiss, it more or less accused Vendera of theft -- that's
25 not exact right word, but that's pretty much it -- trying to

1 wrongfully take away Chevron's right to operate the unit.

2 Well, as pointed out numerous times, Chevron
3 doesn't have an absolute right to be unit operator, and
4 number two, that has nothing to do with the statute -- the
5 statutory definition of correlative rights. It only talks
6 about the ability of an interest owner to recover his or her
7 fair share of production. It has nothing to do with
8 operatorship. So merely renaming the -- naming a new
9 operator of the unit is not affecting the correlative rights
10 of Chevron, as a matter of law.

11 I think with that I'm probably up to my ten
12 minutes, but if anybody has any questions, I would like to,
13 like to answer them.

14 HEARING EXAMINER BRANCARD: Thank you. Mr.
15 McClure?

16 TECHNICAL EXAMINER McCLURE: I guess the only two
17 questions I guess I would have, and it's not weighing in on
18 what the OCD is going to want to do in this case, but in
19 regards to this particular contract, is there any dispute as
20 to this paragraph being in there in regards to the 90
21 percent minus Chevron's interest?

22 MR. BRUCE: As to -- no, there is no dispute
23 that it is the operator removal provision. I think Chevron
24 has raised other issues, but that is the key provision that
25 you look at.

1 TECHNICAL EXAMINER McCLURE: Is there any dispute
2 as to the vote that went on and the validity of the fact
3 that 90 percent was reached minus their interest.

4 MR. BRUCE: I think that's a two part answer, and
5 you can ask Mr. Rankin about this, too. Chevron has made
6 claims in letters that went back and forth between the
7 parties and the land commissioner and Eric Ames at the
8 Division that the vote was not properly taken.

9 Vendera disputes this. It was a simple
10 procedure, but regardless, as to the 90 percent threshold,
11 there is absolutely no way to dispute that Vendera got 90
12 percent of the vote.

13 TECHNICAL EXAMINER McCLURE: I have no more
14 questions at this time, Mr. Brancard.

15 HEARING EXAMINER BRANCARD: Thanks. So, Mr.
16 Bruce, to get back to a bit to what Mr. Rankin was referring
17 to in what is the Division's authority to administer this
18 agreement, or more importantly, the implementation of the
19 agreement, I guess my concern is, does this lead the
20 Division down a slippery-slope where every dispute amongst
21 the parties to this unit gets brought to the Division for a
22 resolution?

23 MR. BRUCE: I don't think so for a couple of
24 reasons. As I said 70-7-4 allows the Division to change the
25 operator of the unit. The Division's rules under change of

1 operator allow the Division to remove the operator.

2 Of course as Mr. Rankin pointed out, it says the
3 Division can approve a C-145 if it's signed by both the old
4 operator and successor operator, but if it's only signed by
5 one, the Division should approve even -- should approve if
6 the old operator is not available.

7 Well, frankly, Chevron, of course, is physically
8 available, but they have absolutely refused to do anything,
9 so they are practically unavailable. But independent of
10 that, the Matador order from the Division that I quoted in
11 the response brief, the Division looked at that and they
12 said they refuse to go down the -- the provision in the
13 NMOCD's rules about unavailability because in that case the
14 operator was available, but again, refused to act, so they
15 cited 70-2-11 where in order to prevent waste and protect
16 correlative rights, and in that case Matador submitted
17 sufficient evidence on that issue.

18 They had the right to do -- they had the right
19 to remove the operator because under that statutory
20 provision of the Oil & Gas Act, the Division has the right
21 to do anything and everything it needs to do to protect
22 correlative rights and prevent waste whether or not
23 specified in the rules for the Oil & Gas Act, and that's
24 what we are here for today.

25 In the amended application, with attachments, you

1 will see that there is substantial reason for removing
2 Chevron as operator. No cause was necessary, so in the
3 original application we tried to make it simple, but since
4 Chevron has raised these issues, well, we are going to hit
5 back.

6 And Vendera is very confident of its position,
7 but it's either, you can look at the rule on, on approving a
8 C-145, you can look at the Provision Section 7 of the unit
9 agreement, which is very easy to read and apply, or you can
10 look at prevention of waste and protection of correlative
11 rights, and you can look at 70-7-4 by which the Division --
12 the provision in the statute says the Division can approve
13 the operator. And it doesn't say for this reason or that
14 reason, it just says the Division does the have the
15 authority to approve change of operator.

16 So I think what you are looking at is there are
17 multiple ways to look at this, but it's all limited to the
18 fact, once again reviewing the Statutory Unitization Act,
19 and that's a special act, and I don't think when it comes to
20 most of these things people would rather go to court, but
21 this is so basically simple, why not get it done quick and
22 fast at the Division which has the authority, the
23 jurisdiction and the knowledge of how to do it.

24 HEARING EXAMINER BRANCARD: So if we denied
25 Chevron's motion to dismiss, how do you see a hearing

1 proceeding in this matter?

2 MR. BRUCE: Well, we would come forward, I think
3 when you see the amended application you will probably see
4 the path that Vendera would take. We would come in and put
5 on evidence of land as to the unit agreement, the interest
6 ownership in the unit, the vote on the removal, the
7 percentage vote, and then we would put on technical data
8 showing how the unit is not being properly operated and
9 waste is occurring and correlative rights are being
10 impaired.

11 So it would -- of course under the current -- I
12 don't know how long the hearing would take, but I imagine it
13 would be a half a day under the current rules, and we have
14 to prefile testimony it cuts down on the length of time, but
15 I'm sure there would be a lot of stuff going on at the
16 hearing.

17 And I think, really, the Division has to hear
18 this case on the merits or it's ignoring its obligations
19 under the unit agreement that it approved and incorporated
20 into its order.

21 HEARING EXAMINER BRANCARD: Thank you.

22 Mr. Rankin, a very brief rebuttal?

23 MR. RANKIN: Thank you, Mr. Hearing Examiner, a
24 couple of things on follow-up. I think it is a grave
25 concern that the Division should have that allowing this

1 case to proceed, asserting jurisdiction over all of these
2 matters is a slippery slope.

3 Does that mean now -- it would mean that the
4 agency is declaring it has authority and jurisdiction to
5 determine every contract dispute under this, under this unit
6 agreement. Suddenly the Division will become the judge and
7 jury for every aspect of the event including those disputes
8 that go beyond and outside of the scope of what is waste,
9 protection correlatives rights and what is required to
10 increase production.

11 So absolutely it is a concern, and that is why
12 the legislature has expressly limited the agency's authority
13 with respect to the Statutory Unitization Act to only
14 matters that give rise to -- that implicate waste,
15 correlative rights and increasing production, so it is
16 absolutely a slippery slope.

17 And so in that regard, your question about how
18 this case will proceed then is not a simple matter. Chevron
19 disputes many aspects of the -- not only the vote itself,
20 whether or not the interests that were committed to the
21 vote, where they came from, what they represent, as well as
22 the voting procedure itself. There are serious concerns
23 about the way the voting procedure and notice was conducted
24 that implicates several different aspects and provisions
25 within the unit agreement.

1 So in order for us to conduct this case, we would
2 need to conduct some discovery about the nature of the
3 interest and ownership of the working interest owners that
4 voted, the nature of the vote and how it was conducted. A
5 lot of that stuff has yet to be disclosed to us. So there
6 is, from our view, we would have to conduct some extensive
7 discovery to understand exactly what happened and how the
8 vote was conducted and the ownership interests that were
9 committed to the votes.

10 So it's not a simple matter. You can tell,
11 Mr. Hearing Examiner, by the nature of the correspondence
12 that Vendera submitted to the Division there are numerous
13 hotly contested issues related to various aspects and
14 provisions within the unit agreement. So it's not a simple
15 matter of whether or not the 90 percent was reached, it
16 implicates other issues within the unit agreement. So it's
17 not a simple case by any stretch.

18 Number three, Mr. Bruce suggests that somehow a
19 definition provision within the unit, Statutory Unit Act can
20 override the express limited authority delegated by the
21 legislature. The language in the definitions on what an
22 operator is allows -- stating that the Division can
23 designate it is simply -- should be interpreted simply as
24 the authority of the agency to designate an operator based
25 on either the approval of the parties or the initial

1 application designating an operator. It simply cannot be
2 read to override the express limitations of the -- of the
3 Act itself. That was number three.

4 Finally, on that same point, the fact that the
5 agency is going to be put, is going to have to interpret not
6 just its order, but the language of the unit agreement, what
7 do the voting procedures mean, and were those voting
8 procedures followed correctly. Were the interests correctly
9 committed to the votes in conducting the vote, all of those
10 things are going to be coming up in this case and those are
11 well beyond the expertise and technical ability of the
12 agency here.

13 So it's obvious to me, Mr. Examiner, that the
14 legislature understood the distinctions and various roles
15 that the agency should play and correctly limited the
16 agency's jurisdiction and authority over deciding and making
17 determinations under the Statutory Unitization Act to waste,
18 correlative rights and matters related to increasing
19 production.

20 Finally, if there is any doubt about it, the unit
21 agreement itself is very clear about who may approve a
22 successor operator and whether or not, you know, the
23 Division has authority, I think, is very clear.

24 If you look at Section 8 of the unit agreement
25 itself -- and I'm happy to share it on my screen if that

1 would help -- but under Section 8 of the unit agreement
2 entitled successor unit operator, the language of the unit
3 agreement provides that -- that the selection of a successor
4 has to be approved by the Commission, in other words, the
5 State Land Office Commissioner.

6 So while we have all sorts of disputes about the
7 nature of the vote, the authority of whether or not -- what
8 the ownership of the interests were that committed to the
9 vote and notice that was required to give rise to the vote
10 itself, so finally, under the unit agreement, it doesn't
11 give authority to the Division to decide a successor
12 operator, it's given to the Commissioner to decide and
13 approve any successor operators.

14 So with that, Mr. Examiner, I would, you know,
15 ask that, you know, Vendera's application be dismissed. I
16 think that their amended application, while I haven't
17 studied it, it appears to simply -- or at least or at least
18 allege, attempt to allege the waste and correlative rights
19 issues. My view is that's completely futile because the
20 agency doesn't have the authority to make a determination of
21 this nature where there are contract matters outside the
22 scope of the delegated authority at issue.

23 HEARING EXAMINER BRANCARD: Thank you. Mr.
24 McClure, any more --

25 MR. BRUCE: Could I say one thing very briefly.

1 The provision does say that the land commissioner has the
2 authority to approve, but the land commissioner has asked
3 the Division to rule on this first.

4 HEARING EXAMINER BRANCARD: Thank you. Mr.
5 McClure, any questions of the parties?

6 TECHNICAL EXAMINER McCLURE: Mr. Brancard, I
7 don't have any questions, I think Mr. Rankin addressed my
8 prior question to Mr. Bruce.

9 HEARING EXAMINER BRANCARD: Well, thank you. An
10 interesting question under an Act we rarely implement, the
11 Statutory Unitization Act. Unfortunately we don't have a
12 lot of case law or regulations implementing the statute, so
13 we have to work with the words of the statute.

14 There are cases in other states that you all did
15 not bring up which could be useful, but I will leave it at
16 that, and we will take this motion under advisement and be
17 rendering a decision. Thank you.

18 (Taken under advisement.)

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1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

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4 REPORTER'S CERTIFICATE

5

6 I, IRENE DELGADO, New Mexico Certified Court
7 Reporter, CCR 253, do hereby certify that I reported the
8 foregoing virtual proceedings in stenographic shorthand and
9 that the foregoing pages are a true and correct transcript
10 of those proceedings to the best of my ability.

11 I FURTHER CERTIFY that I am neither employed by
12 nor related to any of the parties or attorneys in this case
13 and that I have no interest in the final disposition of this
14 case.

15 I FURTHER CERTIFY that the Virtual Proceeding was
16 of poor to good quality.

17 Dated this 8th day of April 2021.

18

/s/ Irene Delgado

Irene Delgado, NMCCR 253
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