MONTGOMERY
& ANDREWS
LAW FIRM

J. SCOTT HALL
Cell: (505) 670-7362
Email: shall@montand.com
www.montand.com

October 7, 2016

HAND-DELIVERED

Mr. William Jones
Mr. David Brooks
New Mexico Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87505

Re: CASE NO. 15519; APPLICATION OF MEWBOURNE OIL COMPANY TO REVOKE THE INJECTION AUTHORITY GRANTED UNDER SWD-744 FOR THE WILLOW LAKE WELL NO. 1 OPERATED BY PYOTE WELL SERVICE, LLC, EDDY COUNTY, NEW MEXICO

Gentlemen:

Earlier, counsel for Mewbourne Oil Company and Kaiser-Francis Oil Company provided you with copies of orders to which they had referred in their closing statements. Accordingly, I am providing you with copies of the two orders I referred to: (1) Order No. R-13247, which established special pool rules for the Southeast Willow Lake Bone Spring Pool; and (2) an unnumbered Commission Order Allowing Reservoir Pressure Testing from Case No. 11996, along with its attendant motion (without exhibits) to provide context.

I also referenced Mewbourne's failure to provide notice as required by NMSA §70-2-23 (notice of revocation, change, renewal or extension of orders) or 19.15.26.8B(2) NMAC (injection). Accordingly, the New Mexico Supreme Court's opinions from *Uhden v. New Mexico Oil Conservation Comm'n,* 1991-NMSC-089, and *Johnson v. New Mexico Oil Conservation Comm'n,* 1999-NMSC-021, warrant review and copies are enclosed. Mewbourne's Application seeks the revocation of operating authority for an oilfield facility in which unnotified third-parties have contractual rights to access or otherwise rely on for disposal services. Mewbourne's application also asserts that the correlative rights of offsetting operators may be affected, but it did not notify those operators whose identities are readily ascertainable. Neither did it notify the

REPLY TO:
325 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone (505) 982-3873 • Fax (505) 982-4289

Post Office Box 2307
Santa Fe, New Mexico 87504-2307

surface owner. These omissions require the denial of Mewbourne's Application, consistent with the authorities cited.

Very truly yours,

J. Scott Hall

JSH:dl
cc (via email): Mike Feldewert, Esq.
James Bruce, Esq.
Brian F. Antweil, Esq.

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 NO. 14419
ORDER NO. R-13247

APPLICATION OF MARBOB ENERGY CORPORATION FOR SPECIAL RULES AND REGULATIONS FOR THE SOUTHEAST WILLOW LAKE-BONE SPRING POOL, EDDY COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 8:15 a.m. on February 4, 2010, at Santa Fe, New Mexico, before Examiner Richard I. Ezeanyim.

NOW, on this 30th day of April, 2010, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner,

FINDS THAT:

(1) Due public notice has been given, and the Division has jurisdiction of this case and of the subject matter.

(2) Case Nos. 14419 and 14420 were consolidated for the purpose of testimony; however, separate orders will be issued for each case.

(3) In Case No. 14419, Marbob Energy Corporation ("Applicant" or "Marbob") seeks an order establishing special rules and regulations for the Southeast Willow Lake-Bone Spring Pool (**96217**), including a limiting gas-oil ratio of 5000 cubic feet of gas for each barrel of oil produced.

(4) The Southeast Willow Lake-Bone Spring Pool was created by Division Order No. R-10124, dated June 1, 1994, and currently covers the following lands:

Township 25 South, Range 29 East, N.M.P.M.

Section 8: NE/4
Section 9: W/2

Section 16: W/2
Section 21: NW/4

(5) Under the Division Rules, spacing in the Pool is 40 acres, with wells to be located no closer than 330 feet to a quarter-quarter section line. The Pool has a depth bracket allowable of 187 barrels of oil per day with a limiting gas-oil ratio of 2000 cubic feet per barrel of oil produced. For a horizontal well with a 160-acre project area or proration unit, the depth bracket allowable will be 748 (187 X 4) barrels of oil with a limiting gas-oil ratio of 2,000 cubic feet of gas per barrel of oil produced.

(6) Mewbourne Oil Company, XTO Energy, Inc., and OXY USA, Inc. appeared in this case through legal counsel, but did not oppose the granting of this application.

(7) The Applicant presented the following geological and engineering testimony:

(a) Wells in this area are producing from the Avalon Shale of the Bone Spring formation. Production from horizontal wells in the Avalon Shale are characterized by high gas-oil ratios.

(b) The Pressure-Volume-Temperature (PVT) analysis indicates that there is free oil in the reservoir; therefore, the reservoir is a volatile oil and gas condensate type reservoir.

(c) The average gas-oil ratios from wells producing from this reservoir range from 3,900 to 20,000 cubic feet per barrel of oil produced.

(d) If the gas-oil ratio is not increased, a number of wells in the Pool will have production restricted.

(e) The horizontal wells in this area are expensive to drill, require large fracture treatments, and produce large volumes of water; therefore, Marbob needs to produce these wells at high gas rates in order to clear the wellbore of liquids, and also be able to pay for these expensive horizontal wells.

(f) The older wells in this area are not affected by the increase in gas-oil ratio because they are already producing below their allowable.

(g) At current average oil production rate of 90 barrels of oil per day, any increase in gas-oil ratio will not harm the reservoir.

(8) Approval of the subject application will afford applicant and other operators the opportunity to recover their just and equitable shares of oil and gas reserves

from the Southeast Willow Lake-Bone Spring Pool, thereby preventing waste, and will not violate correlative rights.

IT IS THEREFORE ORDERED THAT:

(1) The application of Marbob Energy Corporation for an order establishing special rules and regulations for the Southeast Willow Lake-Bone Spring Pool is hereby approved.

(2) The following "***Special Rules and Regulations for the Southeast Willow Lake-Bone Spring Pool***" are hereby adopted:

Rule 1: Each well completed or recompleted in the Southeast Willow Lake-Bone Spring Pool, or within one mile thereof and not nearer to or within the limits of another Bone Spring pool, shall be drilled, spaced, operated, and produced in accordance with the Special Rules hereinafter set forth.

Rule 2: The limiting gas-oil ratio within the pool shall be 5000 cubic feet of gas per barrel of oil. The oil depth bracket allowable for the pool shall not be exceeded.

Rule 3: All other rules shall conform to the Division's statewide rules.

(3) Jurisdiction of this case is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

SEAL

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

MARK E. FESMIRE, P.E.
Acting Director

5-9-1999

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

CASE NO. 11996
DE NOVO

APPLICATION OF PENDRAGON ENERGY PARTNERS, INC., PENDRAGON RESOURCES, L.P., AND J. K. EDWARDS ASSOCIATES, INC. TO CONFIRM PRODUCTION FROM THE APPROPRIATE COMMON SOURCE OF SUPPLY, SAN JUAN COUNTY, NEW MEXICO.

ORDER ALLOWING RESERVOIR PRESSURE TESTING

This matter came before the Commission on April 22, 1999, on Pendragon Energy Partners, Inc., Pendragon Resources, L.P., and Edwards Energy Corporation's ("Pendragon") Motion to Conduct Reservoir Pressure Tests. Maralex Resources, Inc. and Whiting Petroleum Corporation ("Whiting") filed a response to the motion, and on May 19, 1999, Pendragon filed its reply. The pleadings have been reviewed and considered.

The proposed testing may yield information relevant to the issues in this case. Therefore, Pendragon's motion is hereby granted, and Pendragon may conduct the testing as proposed in its motion provided Pendragon meets the following conditions:

1. Pendragon must obtain permission of the District Court to restore to production the Chaco No. 4 well, which well was ordered shut in by the Court in *Whiting Petroleum Corporation et al. v. Pendragon Energy Partners, Inc., et al.*, First Judicial District, No. D-0101-CV-98-01295.

2. Pendragon must satisfy any financial security the District Court may order for the lost production from Whiting's three wells as well as the ten-day production of the Chaco No. 4 Well.
3. Pendragon must notify Whiting and the New Mexico Oil Conservation Division's Aztec District Office of the dates for the testing so that Whiting and the Aztec District Office can be present for the testing.

Done this 19th day of May, 1999.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

LORI WROTENBERY

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

BEFORE THE NEW MEXICO OIL CONSERVATION COMMISSION

IN THE MATTER OF:

APPLICATION OF PENDRAGON ENERGY PARTNERS, INC., PENDRAGON RESOURCES, L.P., And EDWARDS ENERGY CORPORATION TO CONFIRM PRODUCTION FROM THE APPROPRIATE COMMON SOURCE OF SUPPLY, SAN JUAN COUNTY, NEW MEXICO

CASE NO. 11996
ORDER NO. R-11133
De Novo

MOTION TO CONDUCT RESERVOIR PRESSURE TESTS

Pendragon Energy Partners, Inc., Pendragon Resources, L.P., and Edwards Energy Corporation ("Together, Pendragon") move pursuant to, inter alia, Order No. R-8768 for entry of an order authorizing the conduct of reservoir pressure build-up and pulse tests through the sequential temporary shut-in and subsequent simultaneous restoration of production for certain of the wells that are the subject of this proceeding. The pressure build-up tests are in aid of the Commission's determination that the subject wells are producing from the appropriate common source of supply. In support, Pendragon states:

1. Central to the resolution of this dispute are the issues of (1) the existence (2) location and (3) extent of communication between the Fruitland Coal and Pictured Cliffs formation. To facilitate the Commission's determination of these issues, Pendragon seeks authorization to conduct shut-in pressure build-up and pulse tests to obtain bottom hole pressures, either actual or calculated, from fluid levels, surface pressure readings or from down-hole pressure bombs. It is anticipated that the information derived from the pressure build-up test would yield compelling and reliable empirical data probative of the communication issue, useful to the parties as well as to the Division and the Commission.

2. It is proposed that the pressure build-up test be implemented as follows:

(a). The Gallegos Federal 26-12-6 No. 2[1] would be shut-in first, followed by the shut-in ten days later of the Gallegos Federal 26-12-7 No. 1,[2] (during which time the Gallegos Federal 26-12-6 No. 2 would remain shut in); followed in turn after another ten days by the shut-in of the Gallegos Federal 26-13-12 No. 1[3].

[1] 886' FSL & 1475' FWL, Unit N, Sec. 6, T-26-N, R-12-W
[2] 2482' FSL & 1413' FWL, Unit K, Sec. 7, T-26-N, R-12-W
[3] 1719' FNL & 1021' FEL, Unit H, Sec. 12, T-26-N, R-13-W

(b). Pressure bombs would be installed in the Chaco No. 1[4] the Chaco No. 4[5], and the Chaco No. 5[6] wells to read the bottom hole pressure response in the Pictured Cliffs formation to the sequential shut-in of the three Fruitland Coal formation wells.

(c). Once the pressure build-up data from the response to the shut-in of the second of the Fruitland coal wells is obtained, it would then be determined whether additional reservoir pressure data from the Pictured Cliffs formation should be obtained. On that determination, then the Chaco No. 4 would be temporarily restored to production for a period not to exceed 10 days following the sequential shut-in of the three Fruitland coal wells. During such time, the three Gallegos Federal Fruitland coal wells should remain shut-in so that the pressure interference between the Chaco No. 4 and Chaco No. 5 can be accurately determined.

(d). Thirty days from the shut-in of the first well, or forty days from the shut-in of the first well if the Chaco No. 4 test is conducted as described in (c), above, all three of these Fruitland coal wells would be simultaneously restored to production.

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[4] 1846' FNL & 1806' FWL, Unit F, Sec. 18, T-26-N, R-12-W
[5] 790' FNL & 790'FWL, Unit D, Sec. 7, T-26 N, R-12-W
[6] 790' FNL & 790' FWL, Unit D, Sec. 1, T-26-N, R-13-W

(e). The pressure build-up tests would be conducted under the joint supervision of the parties, as well as by the Division's Aztec District Office. The raw data from the tests would be made available to Pendragon, Whiting and the Division as soon as it is collected.

3. The particular wells referenced in Paragraph 2, above, have been identified as having the potential to yield the most useful data from pressure build-up and pulse testing due to their close proximity to one another. The relative proximity of each of the wells is demonstrated by the attached surface plat (Exhibit 1). A more particularized explanation of the proposed testing and the anticipated usefulness of the data is set forth in the Affidavit of Dave Cox (Exhibit 2), a consulting reservoir engineer.

4. There should be no question about the Commission's ability to authorize the proposed test in this circumstance. The Division and Commission, through their concurrent powers, are expressly authorized by Order No. R-8768[7] to require operators of Fruitland Coal wells and Pictured Cliffs wells to provide such data. The Special Rules and Regulations For The Basin-Fruitland Coal Gas Pool adopted under Order R-8768 provide:

> Rule 2. A gas well within the Basin-Fruitland Coal gas Pool shall be defined by the division director as a well that is producing from the Fruitland coal seams as

[7] Order No. R-8768 Creating and Adopting Temporary Operating Rules for the Basin-Fruitland Coal Pool, San Juan, Rio Arriba, McKinley and Sandoval Counties, New Mexico. Exhibit 3, attached.

demonstrated by a preponderance of data which could include the following:...

h. Reservoir Performance
i. Other evidence which may be utilized in making such determination.

Rule 3. The Division Director may require the operator of a proposed or existing Basin-Fruitland Coal Gas well, Fruitland Sandstone well, or Pictured Cliffs Sandstone well, to submit certain data as described in Rule (2) above, which would not otherwise be required by Division Rules and Regulations, in order to demonstrate to the satisfaction of the Division that said well will be or is currently producing from the appropriate common source of supply.

In addition, the Commission's authorization for the pressure build-up and pulse testing is well within the broad grant of statutory authority to the agency under NMSA 1978 Sec. 70-2-11, generally, and more specifically, under NMSA 1978 Sec. 70-2-12 (A). (See Santa Fe Exploration Co. v. Oil Cons. Com'n, 835 P.2d 819, 114 N.M. 103 [1992].) This latter statute provides:

70-2-12. Enumeration of powers.

A. Included in the power given to the oil conservation division is the authority to collect data; to make investigations...and...to examine, check, test and gauge oil and gas wells..." (emphasis added.)

5. For several months now, Pendragon and Whiting have been cooperating in the joint collection and exchange of pressure and production data

from their respective Pictured Cliffs and Fruitland Coal formation wells. Such field data is collected and exchanged on a routine basis and has assisted the parties in their ongoing analysis of the fundamental issues involved in these proceedings. Similarly, it is anticipated that the joint data to be derived from the pressure build-up and pulse testing will be of even greater value and may even hasten the ultimate resolution of this dispute. Therefore, good cause exists for the conduct of the tests.

6. The hearing De Novo is scheduled for June or July of this year. As the testing will take at least forty days to perform, or longer, it is requested that this motion be considered and an order entered on an expedited basis. A proposed draft order accompanies this motion.

WHEREFORE, Pendragon requests that the Commission, acting either as a whole, or through its Chairman, in her capacity as Division Director, enter an Order authorizing the conduct of the pressure build-up and pulse testing. It is further requested that the testing commence no later than five days following the entry of the Commission's order.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, PA.

By T. Scott Hall

J. Scott Hall, Esq.
Post Office Box 1986
Santa Fe, New Mexico 87504
(505) 989-9614

ATTORNEYS FOR PENDRAGON ENERGY PARTNERS, PENDRAGON RESOURCES, L.P. AND EDWARDS ENERGY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Conduct Reservoir Pressure Test was mailed on this 22 day of April, 1999 to the following:

Dr. Robert Lee
Petroleum Resource Recovery Center
801 Leroy Place
Socorro, New Mexico 87801

Jamie Bailey
New Mexico State Land Office
310 Old Santa Fe Trail
Santa Fe, New Mexico 87504

Marilyn Hebert
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

J.E. Gallegos, Esq.
460 St. Michaels Drive, #300
Santa Fe, New Mexico 87505

T. Scott Hall

J. Scott Hall, Esq.

112 N.M. 528
Supreme Court of New Mexico.

Virginia P. UHDEN, Plaintiff–Appellant,
v.
The NEW MEXICO OIL CONSERVATION COMMISSION and Amoco Production Company, Defendants–Appellees,
and
Meridian Oil, Inc., Intervenor–Appellee.

No. 19281.
|
Sept. 24, 1991.

Oil Conservation Commission denied application of owner in fee of oil and gas estate to vacate prior order granting increase in spacing pursuant to lessee's application. Owner appealed. The District Court, San Juan County, Benjamin S. Eastburn, D.J., upheld orders of Commission. Owner appealed. The Supreme Court, Franchini, J., held that: (1) proceeding on lessee's application for increase in spacing was adjudicatory and not rule making proceeding; (2) owner of fee in oil and gas estate had right to actual notice of proceeding on lessee's spacing application; and (3) increase in spacing was effective with respect to owner of fee from date of Commission's order denying owner's application to vacate increase in spacing order.

Reversed and remanded.

Montgomery, J., dissented and filed opinion.

West Headnotes (5)

[1] **Administrative Law and Procedure**
⇦ Rules, Regulations, and Other Policymaking

Mines and Minerals
⇦ Procedure Before Commissions as to Location

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak381 In general
260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.32 Procedure Before Commissions as to Location
260k92.32(1) In general
(Formerly 260k92.32)

Proceeding of Oil Conservation Commission pursuant to application seeking increase in well spacing on oil and gas estate was adjudicatory and not rule making proceeding, where applicant presented witnesses and evidence regarding engineering and geological properties of particular reservoir, after hearings, Commission entered order based on findings of fact and conclusions of law, and order was not of general application, but rather pertained to limited area, persons affected were limited in number and identifiable, and order had immediate effect on owner in fee of oil and gas estate. NMSA 1978, § 70–2–7.

2 Cases that cite this headnote

[2] **Mines and Minerals**
⇦ Effect of determination;presumption of validity

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.32 Procedure Before Commissions as to Location
260k92.32(2) Effect of determination; presumption of validity
(Formerly 260k92.33)

Spacing order can only be modified upon substantial evidence showing change of condition or change in knowledge of conditions, arising since prior spacing rule was instituted.

Cases that cite this headnote

[3] **Mines and Minerals**

⇦ Procedure Before Commissions as to Location

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.32 Procedure Before Commissions as to Location
260k92.32(1) In general
(Formerly 260k92.32)

Owner in fee of oil and gas estate was entitled to actual notice of state proceeding on lessee's application for increase in well spacing, and failure to give notice deprived owner of property without due process of law, where owner's identity and whereabouts were known to party filing spacing application. NMSA 1978, § 70–2–7; Const. Art. 2, § 18; U.S.C.A. Const.Amends. 5, 14.

3 Cases that cite this headnote

[4] **Constitutional Law**
⇦ Mineral, oil, and gas rights

Mines and Minerals
⇦ Rights and liabilities

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4084 Mineral, oil, and gas rights
(Formerly 92k277(1))
260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of Oil and Gas Leases
260k79 Rent or Royalties
260k79.1 In General
260k79.1(1) Rights and liabilities

Mineral royalty retained and reserved in conveyance of land is itself real property subject to due process protection. U.S.C.A. Const.Amends. 5, 14.

4 Cases that cite this headnote

[5] **Mines and Minerals**

⇦ Effect of determination;presumption of validity

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.32 Procedure Before Commissions as to Location
260k92.32(2) Effect of determination; presumption of validity
(Formerly 260k92.33)

Increase in spacing of oil and gas well was effective as to owner in fee of oil and gas estate on date on which Oil Conservation Commission denied owner's application to vacate order granting increase in spacing on lessee's application, even though owner did not receive actual notice of initial proceeding in which Commission granted increase in spacing. NMSA 1978, § 70–2–18, subd. A.

Cases that cite this headnote

Attorneys and Law Firms

****721** ***528** Hinkle, Cox, Eaton, Coffield & Hensley, James Bruce, Albuquerque, for appellant.

Robert G. Stovall, Santa Fe, for appellee Oil Com'n.

Campbell & Black, William F. Carr, Santa Fe, for appellee Amoco Production.

W. Thomas Kellahin, Santa Fe, for appellee Meridian Oil.

****722** ***529** OPINION

FRANCHINI, Justice.

{1} On motion for rehearing, the opinion previously filed is hereby withdrawn and the opinion filed this date is substituted therefor.

{2} This case comes before us on appeal from a district court judgment which affirmed a decision of the New Mexico Oil Conservation Commission. The issues presented are whether the proceeding was adjudicatory or rulemaking, and whether the royalty interests reserved by

the lessor of an oil and gas estate were materially affected by a state proceeding so as to entitle the lessor to actual notice of the proceedings. We hold that the proceeding was adjudicatory and the lessor was so entitled under due process requirements of the New Mexico and United States Constitutions. Accordingly, we reverse.

{3} Appellant Uhden is the owner in fee of an oil and gas estate in San Juan County. She transferred certain rights by lease to appellee Amoco Production Company (Amoco) in 1978. The lease included a pooling clause. Amoco drilled the Cahn Well, spaced on 160 acres. Uhden executed a division order with Amoco which entitled her to a royalty interest of 6.25 percent of production from the Cahn Well. Amoco began to remit royalty payments pursuant to the division order.

{4} In late 1983, Amoco filed an application with the New Mexico Oil Conservation Commission (the Commission) seeking an increase in well spacing from 160 to 320 acres. The Cahn Well and Uhden's oil and gas interests were included in the area covered by Amoco's application. A hearing date was set to consider the application. At the time of application, NMSA 1978, Section 70–2–7 provided that notice of the Commission hearings and proceedings shall be by personal service or by publication. [1] It is undisputed that Amoco had knowledge of Uhden's mailing address, for Amoco had been sending royalty checks to Uhden. Nevertheless, Amoco chose to provide notice by publication only. After a hearing in January 1984, the Commission issued Order No. R–7588 which granted temporary approval of Amoco's application. Uhden did not attend or participate in the hearing.

{5} A further hearing on the application was held in February 1986. The Commission issued Order No. R–7588–A, which granted final and permanent approval of Amoco's application. As before, Uhden was given notice only by publication. Uhden neither attended nor participated in the hearing. The result of the hearing had the effect of reducing Uhden's royalty interest from 6.25 percent to 3.125 percent of production. After Order No. R–7588 was issued, Amoco continued to pay royalties to Uhden based on 160 acre spacing. Amoco finally notified Uhden of the spacing increase in May 1986, made demand upon her for an overpayment of royalties, and retained all royalties due Uhden since then, claiming the right of offset. The asserted overpayment was approximately $132,000.00. Uhden subsequently filed her application with the Commission, designated Case No. 9129, seeking relief from the Commission Order Nos. R–7588 and R–7588–A based in part on her lack of notice. Her application was denied by the Commission by Order No. R–8653, dated May 11, 1988. Uhden unsuccessfully sought relief through the New Mexico Oil Conservation Commission appeal process. She then appealed to the district court, which upheld the orders of the Commission. This appeal followed.

{6} Uhden argues that the lack of actual notice of a pending state proceeding deprived her of property without due process of law, in contravention of article II, section 18 of the New Mexico Constitution and the fourteenth amendment to the United States Constitution. We believe that this argument has a firm basis in New Mexico law, the law of other jurisdictions, and in the rulings of the United States Supreme Court.

[1] [2] **723 *530 {7} First, this was an adjudicatory and not a rulemaking proceeding. Under statewide rules, all gas wells in San Juan County are spaced on 160 acres. *See* N.M. Oil Conservation Rules 104(B)(2)(a) and 104(c)(3)(a). These rules are rules of general application, and are not based upon engineering and geological conditions in a particular reservoir. However, oil and gas interest owners, such as Amoco, can apply to the Commission to increase the spacing required by statewide rules. In this case, this was done by application and hearings where the applicant presented witnesses and evidence regarding the engineering and geological properties of this particular reservoir. After the hearings, the Commission entered an order based upon findings of fact and conclusions of law. This order was not of general application, but rather pertained to a limited area. The persons affected were limited in number and identifiable, and the order had an immediate effect on Uhden. Additionally, a spacing order can only be modified upon substantial evidence showing a change of condition or change in knowledge of conditions, arising since the prior spacing rule was instituted. *See Phillips Petroleum Co. v. Corporation Comm'n,* 461 P.2d 597 (Okla.1969). We find that this determination was adjudicative rather than rulemaking. *See Harry R. Carlisle Trust v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okla.1987).

[3] [4] {8} Second, Uhden clearly has a property right in the oil and gas lease. "In this state a grant or reservation

of the underlying oil and gas, or royalty rights provided for in a mineral lease as commonly used in this state, is a grant or reservation of real property. Mineral royalty retained or reserved in a conveyance of land is itself real property." *Duvall v. Stone,* 54 N.M. 27, 32, 213 P.2d 212, 215 (1949) (citation omitted). The appellees contend that Uhden's property right is somehow diminished by her lessor/lessee relationship with Amoco. They argue that the voluntary pooling clause in her lease, not the state's action in approving the 320 acre spacing pool, caused the reduction of her royalty interest. Pooling is defined as "the bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules." 8 H. Williams and C. Meyers, *Oil and Gas Law* 727 (1987). Without the subject spacing orders, Amoco could never have pooled leases to form 320 acre well units. The Commission's order authorizing 320 acre spacing was a condition precedent to pooling tracts to form a 320 acre well unit. *See Gulfstream Petroleum Corp. v. Layden,* 632 P.2d 376 (Okla.1981) (entry of a spacing order is a jurisdictional prerequisite to pooling). Thus, it was the spacing order, and not the pooling clause, which harmed Uhden. Pooling is therefore immaterial under these circumstances, and the spacing order deprived Uhden of a property interest. Uhden's property right was worthy of constitutional protection, regardless of the fact that she had contractually granted Amoco the right to extract oil and gas from the estate.

{9} In *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the United States Supreme Court stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314, 70 S.Ct. at 657. The Court also said that "[b]ut when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315, 70 S.Ct. at 657. Significantly, the Court refused to sanction notice by publication to those whose identity and whereabouts were ascertainable from sources at hand.

{10} The due process requirements of fairness and reasonableness as stated in *Mullane* are echoed in the case law of this state. Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law. A litigant must be given a full opportunity to be heard with all rights related thereto. The essence of justice is largely procedural. ****724** ***531** Procedural fairness and regularity are of the indispensable essence of liberty. *In re Miller,* 88 N.M. 492, 496, 542 P.2d 1182, 1188 (Ct.App.1975) (citations omitted), *rev'd on other grounds,* 89 N.M. 547, 555 P.2d 142 (1976).

{11} Similarly, it has been held that due process requires the state to provide notice of a tax sale to parties whose interest in property would be affected by the sale, as long as the names and addresses of such parties are "reasonably ascertainable." *Brown v. Greig,* 106 N.M. 202, 206, 740 P.2d 1186, 1190 (Ct.App.), *cert. denied,* 106 N.M. 174, 740 P.2d 1158 (1987). The court of appeals also has held that when the state has reason to know that the owner of real property subject to delinquent tax sale is deceased, then reasonable notice of the proposed tax sale must be given to decedent's personal representative where one has been appointed and where record of that fact is reasonably ascertainable. *Fulton v. Cornelius,* 107 N.M. 362, 366, 758 P.2d 312, 316 (Ct.App.1988).

{12} We are also persuaded by a line of cases from Oklahoma, a fellow oil and gas producing state. The facts of *Cravens v. Corporation Commission,* 613 P.2d 442 (Okla.1980), *cert. denied,* 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981), are similar to those of the case before us. An application was made for an increase in well spacing to the state commission. Although the applicants knew the identity and whereabouts of a well operator whose interests would be affected by a change in spacing, they made no attempt to provide actual notice. The applicant complied with the relevant statute and rule, which prescribed notice by publication of a spacing proceeding. The court held that when the names and addresses of affected parties are known, or are easily ascertainable by the exercise of diligence, notice by publication does not satisfy constitutional due process requirements. *Id.* at 444. Similar results were reached in *Union Texas Petroleum v. Corporation Commission,* 651 P.2d 652 (Okla.1981), *cert. denied,* 459 U.S. 837, 103 S.Ct. 82, 74 L.Ed.2d 78 (1982), and *Louthan v. Amoco Production Co.,* 652 P.2d 308 (Okla.Ct.App.1982).

[5] {13} In all of the foregoing cases, great emphasis is placed on whether the identity and whereabouts of the

person entitled to notice are reasonably ascertainable. In this case, Uhden's identity and whereabouts were known to Amoco, the party who filed the spacing application. On these facts, we hold that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result. Thus, the Commission Order Nos. R–7588 and No. R–7588–A are hereby void as to Uhden. We do find that Uhden eventually had notice and an opportunity to be heard on the issue of spacing. Her Case No. 9129, which requested the Commission to vacate the 320 acre spacing, resulted in Order No. R–8653, dated May 11, 1988. An increase in spacing is effective from the date of such order. *See* NMSA 1978, § 70–2–18(A) (Repl.Pamp.1987). Therefore, we find the 320 acre spacing effective to Uhden as of May 11, 1988. Finally, the principles set forth in this opinion are applicable to Uhden and to the Commission cases filed after the date of the filing of this opinion. The judgment of the district court is reversed and the cause is remanded for proceedings consistent with this opinion.

{14} IT IS SO ORDERED.

SOSA, C.J., and RANSOM and BACA, JJ., concur.

MONTGOMERY, J., dissents.

MONTGOMERY, Justice (dissenting).

{15} There is much in the majority opinion with which I certainly agree. The lofty principles of due process—of a property owner's entitlement to notice and an opportunity to be heard before she can be deprived of her property rights—are of course thoroughly ingrained in our state and federal constitutional jurisprudence. Likewise, the proposition that the royalty ****725** ***532** interest of a lessor under an oil and gas lease is a property right accorded constitutional protection under New Mexico law cannot be questioned. My quarrel with the majority opinion boils down to my flat disagreement with this simple statement: "The result of the hearing had the effect of reducing Uhden's royalty interest from 6.25 percent to 3.125 percent of production."

{16} The purpose of the hearing before the Commission was to determine the appropriate size of a proration unit in the Cedar Hills–Fruitland Basal Coal Gas Pool in northwestern New Mexico, in which Amoco operated several wells and in which Uhden's mineral interests were located. Under NMSA 1978, Section 70–2–17(B) (Repl.Pamp.1987), a "proration unit" is defined as "the area that can be efficiently and economically drained and developed by one well...."

{17} Determining the size of a proration unit has nothing to do with the ownership of property rights in the field in which the unit is located. The area which can be "efficiently and economically drained" by a single well is a function of the physical characteristics of the reservoir into which the well is to be drilled. Prescribing the size of a proration unit is a form of land-use regulation carried out by the Commission that depends entirely on the physical or geologic characteristics of the region and only affects the various property rights within the region in the same way as any other land-use regulation affects property owners within the area regulated. It is, if you will, a form of "rulemaking," performed by the Commission in the discharge of its duties to prevent waste and protect correlative rights. *See id.*; §§ 70–2–11, 70–2–12(B)(10).

{18} When the Commission issued Order No. R–7588–A, Uhden's royalty interest was unaffected. In order to affect her interest, a further step was necessary—namely, the pooling of her interest with a similar interest in the 320–acre tract surrounding the Cahn Well. That further step was taken; but it was Amoco, not the Commission, that took it. Amoco took it because Amoco was authorized by the lease with Uhden to take it. As the majority notes, the lease contained a voluntary pooling clause under which Amoco was authorized to pool Uhden's royalty interest with others to form production units of not more than 640 acres.

{19} It is true that the Commission's order authorizing 320–acre spacing was a condition precedent to Amoco's pooling of Uhden's interest in forming a 320–acre unit. However, the majority's conclusion that "it was the spacing order, and not the pooling clause which harmed Uhden" does not follow. Probably *every* zoning and other land-use regulation is a condition precedent to action taken by one landowner consistent with the regulation that may in some way adversely affect another landowner subject to the same regulation. But that does not mean that

the *regulation* causes the adverse effect; if the adversely affected landowner has authorized the landowner taking the action to do so, the mere fact that the action conforms with an applicable land-use regulation does not make the regulation the cause of the adversely affected owner's harm.

{20} Had Uhden owned the royalty interest on an undivided one-half interest in the entire 320 acres in the new unit, the Commission's spacing order would have had no effect on her cash flow. She would have continued to receive 6.25% of the proceeds from the single well allowed on the new unit. As it was, she had to share her 6.25% interest with the royalty owners of the other mineral interests pooled to form the new unit, but in return she received the right to receive a share of *their* royalty interest in the gas subject to their lease.

{21} I realize that the trade-off just mentioned is small consolation to Uhden and that in a very real sense, at least in terms of her current cash flow, her rights have been reduced significantly. However, that is the result not of the Commission's spacing order, but of Amoco's decision to exercise its right under the lease to effect a voluntary pooling. I believe that the notoriously slippery distinction between rulemaking and adjudication is not particularly ****726** ***533** helpful in this case and that, if the Commission's action *had* reduced Uhden's interest, then the constitutional concerns in the majority opinion would be well taken—whether or not the action constituted "rulemaking" rather than "adjudication." However, I do not think those concerns are implicated when the lessee exercises the right the lessor has given it in the lease to pool the leasehold and the associated royalty with other interests to form a new unit.

{22} The majority having concluded otherwise, I respectfully dissent.

All Citations

112 N.M. 528, 817 P.2d 721, 1991 -NMSC- 089

Footnotes

1 NMSA 1978, § 70–2–7 was amended in 1987 to allow the Commission to prescribe by rule its rules of order or procedure. The current rule, New Mexico Oil Conservation Division Rule 1204, provides for notice by publication.

End of Document

127 N.M. 120
Supreme Court of New Mexico.

Timothy B. JOHNSON, Trustee for Ralph A. Bard, Jr., Trust u/a/d February 12, 1983, et al., Plaintiffs–Appellees,
v.
NEW MEXICO OIL CONSERVATION COMMISSION, Defendant–Appellant.
Timothy B. Johnson, Trustee for Ralph A. Bard, Jr., Trustee u/a/d February 12, 1983, et al., Plaintiffs–Appellees,
v.
Burlington Resources Oil & Gas Company, Defendant–Appellant.

Nos. 25,061, 25,062.
|
April 13, 1999.

Holders of working interests and operating rights appealed Oil Conservation Commission's order amending Commission's rules to increase spacing requirements for deep wildcat gas wells in San Juan Basin. The District Court, San Juan County, W. Byron Caton, D.J., found the order was without effect as to holders. Commission and oil company that sought the order appealed. The Supreme Court, Minzner, C.J., held that the Commission failed to provide "reasonable notice," within meaning of Oil and Gas Act (OGA), and violated Commission's own rules, by failing to provide actual notice to the holders of hearing requested by oil company regarding amendment of Commission's rules to increase spacing requirements for deep wildcat gas wells in San Juan Basin.

District Court's judgment affirmed.

West Headnotes (8)

[1] **Mines and Minerals**
⇐ Judicial review
260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.15 Powers and Proceedings of Commissions and Officers in General
260k92.21 Judicial review
Supreme Court conducts a whole-record review of the Oil Conservation Commission's factual findings.

Cases that cite this headnote

[2] **Mines and Minerals**
⇐ Judicial review
260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.15 Powers and Proceedings of Commissions and Officers in General
260k92.21 Judicial review
On legal questions such as the interpretation of the Oil and Gas Act (OGA) or its implementing regulations, appellate court may afford some deference to the Oil Conservation Commission, particularly if the question at hand implicates agency expertise. NMSA 1978, § 70–2–1 et seq.

2 Cases that cite this headnote

[3] **Constitutional Law**
⇐ Particular Issues and Applications
92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1007 In general
(Formerly 92k48(4.1))
Canon of statutory construction that if a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality applies to the Oil Conservation Commission's procedural rules in the same manner that it applies to a statute.

7 Cases that cite this headnote

[4] **Mines and Minerals**
⇦ Procedure in general

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.15 Powers and Proceedings of Commissions and Officers in General
260k92.17 Procedure in general

The Oil and Gas Act's (OGA) "reasonable notice" mandate for all oil and gas hearings circumscribes whatever Oil Conservation Division rules are promulgated for the purpose of notifying interested persons of hearings. NMSA 1978, §§ 70–2–7, 70–2–23.

1 Cases that cite this headnote

[5] **Mines and Minerals**
⇦ Procedure Before Commissions as to Location

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.32 Procedure Before Commissions as to Location
260k92.32(1) In general

Oil Conservation Commission failed to provide "reasonable notice," within meaning of Oil and Gas Act (OGA), and violated Commission's own rules, by failing to provide actual notice to holders of working interests and operating rights of hearing requested by oil company regarding amendment of Commission's rules to increase spacing requirements for deep wildcat gas wells in San Juan Basin, where oil company intended to affect holders' interests with a subsequent pooling order. NMSA 1978, § 70–2–23.

2 Cases that cite this headnote

[6] **Administrative Law and Procedure**
⇦ Notice and comment, necessity

Administrative Law and Procedure
⇦ Necessity

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak392 Proceedings for Adoption
15Ak394 Notice and comment, necessity
15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak452 Notice
15Ak453 Necessity

Notice requirements for agency action are determined on the basis of the character of the action, rather than its label.

Cases that cite this headnote

[7] **Mines and Minerals**
⇦ Procedure in general

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.15 Powers and Proceedings of Commissions and Officers in General
260k92.17 Procedure in general

Neither the Oil and Gas Act's (OGA) "reasonable notice" mandate for all oil and gas hearings, nor the Oil Conservation Division's rule requiring actual notice to individuals or entities if an application may affect a property interest of the individuals or entities, distinguish between adjudicatory and rulemaking proceedings. NMSA 1978, § 70–2–23.

1 Cases that cite this headnote

[8] **Mines and Minerals**
⇦ Procedure Before Commissions as to Location

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.32 Procedure Before Commissions as to Location
260k92.32(1) In general

Oil Conservation Commission did not substantially comply with requirement under Oil and Gas Act (OGA) and Commission's own rules of providing actual notice to working interest holders of hearing requested by oil company regarding amendment of Commission's rules to increase spacing requirements for deep wildcat gas wells in San Juan Basin, where oil company had actual knowledge of holders' interests, their identities, and their whereabouts, and actual notice of the hearing was provided to other persons with potentially affected property interests but not to the holders. NMSA 1978, § 70–2–23.

Cases that cite this headnote

Attorneys and Law Firms

**328 Marilyn S. Hebert, Special Assistant Attorney General, Santa Fe, Kellahin & Kellahin, W. Thomas Kellahin, Santa Fe, for Appellants.

Gallegos Law Firm, P.C., J.E. Gallegos, Jason E. Doughty, Santa Fe, for Appellee.

*121 OPINION

MINZNER, Chief Justice.

{1} This is an appeal from the district court's review of an order by the New Mexico Oil Conservation Commission, which increased the spacing requirements for deep wildcat gas wells in certain areas of the state. Specifically, the Commission and the real party in interest, Burlington Resources Oil & Gas Co., appeal the district court's ruling that the order is without effect as to Timothy P. Johnson and other individual holders (Holders) of working interests and operating rights affected by the order.

{2} After the Commission issued its order, Holders timely filed with the Commission an application for rehearing, but the Commission failed to act upon the application within ten days. Holders then appealed to the district court, naming the Commission and Burlington as defendants. The district court found in favor of Holders, ruling that the order, as against them, was without effect. The Commission and Burlington now appeal to this Court.

{3} The question we address in this appeal is whether the Commission violated the New Mexico Oil and Gas Act (OGA), NMSA 1978, §§ 70–2–1 to –38 (1935, as amended through 1996, prior to 1998 amendment), and its implementing regulations by issuing its order without first providing Holders with actual notice of the Commission's proceedings on Burlington's application for an increase in gas-well spacing requirements. We conclude that the Commission's order is invalid with respect to Holders, because Holders were not afforded reasonable notice of the proceedings as required by the OGA and its implementing regulations. Our conclusion that the Commission's order is invalid with respect to Holders makes it unnecessary for us to reach the question whether the Commission's order should be vacated on other grounds. We affirm the district court's judgment.

I.

{4} The parties involved in this dispute include Holders, Burlington, and the Commission. In all, Holders control over an eighty-percent working interest in the east half and southwest quarter of Section 9, Township 31 North, Range 10 West, San Juan County, New Mexico (Section 9). Burlington is also a working-interest owner in Section 9. The Commission is a creature of the OGA. *See* § 70–2–4. Pursuant to the OGA, the Commission regulates certain aspects of oil and gas operations throughout the state.

{5} The Oil Conservation Division, which is not a party to this suit, also is a creature of the OGA. *See* § 70–2–5. The Division has

> jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of [the OGA] or any other law of this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations.

Section 70–2–6(A). The Commission has "concurrent jurisdiction and authority with the [D]ivision to the extent necessary for the *122 **329 [C]ommission to perform its duties as required by law." Section 70–2–6(B).

{6} This case concerns the Commission's modification of Oil and Gas Rule 104, which addresses the spacing of wildcat gas wells. From 1950 until the time of this suit, Rule 104 had required all wildcat gas wells in the San Juan Basin to be located on drilling tracts consisting of 160 contiguous surface acres. *See* Well Spacing; Acreage Requirements for Drilling Tracts, N.M. Oil Conservation Comm'n, Rule 104(c) (Jan. 1, 1950); Well Spacing; Acreage Requirements for Drilling Tracts, N.M. Oil Conservation Comm'n, Rule 104(b) (Feb. 1, 1951); Well Spacing: Acreage Requirements for Drilling Tracts, Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't, 19 NMAC 15.C.104.B(2)(a) (May 25, 1964, as amended through Feb. 1, 1996, prior to June 30, 1997 amendment).

{7} Rule 104 defines "wildcat well." Since 1996, the rule has provided the following definition for a "wildcat well" in the San Juan Basin:

> Any well which is to be drilled the spacing unit of which is a distance of 2 miles or more from:
>
> (i) the outer boundary of any defined pool which has produced oil or gas from the formation to which the well is projected; and
>
> (ii) any other well which has produced oil or gas from the formation to which the proposed well is projected....

19 NMAC 15.C.104.A(1)(a) (Feb. 1, 1996).

{8} Beginning in June 1996, Burlington sent correspondence to Holders, seeking either to purchase or to farm-out Holders' acreage in Section 9, among other areas. Specifically, Burlington sought to drill high-risk deep wildcat gas wells in these areas. Burlington also planned to file an application with the Commission for the purpose of changing the Rule 104 spacing requirement from 160 to 640 acres for deep wildcat gas wells in the San Juan Basin. On February 27, 1997, Burlington filed its application, which was docketed as Commission Case No. 11745.

{9} Pursuant to Burlington's application in Case No. 11745, the Commission held a public hearing on March 19, 1997. At this hearing, Burlington's counsel informed the Commission that, by certified mail, Burlington had provided personal notice of the application and the hearing to nearly 200 operators in the San Juan Basin. For its part, the Commission provided notice by publication and afforded personal notice to 267 parties on its own mailing list. Apparently none of the Holders were on the Commission's mailing list, for none of them received personal notice from the Commission.

{10} Burlington did not provide personal notice to any of the Holders on either the application or the hearing, even though Burlington had actual knowledge of all of the Holders' names, addresses, and Section 9 interests long before it had filed its application. In fact, at the time of its filing, Burlington had been remitting overriding royalty payments to each of the Holders on a monthly basis, and Burlington had been engaged in litigation against Holders since 1992. In addition, Burlington not only had been seeking to purchase or to farm-out Holders' acreage in Section 9, the company had also selected Section 9 as the location for one of its initial deep-drilling test wells and had prepared a detailed Authority for Expenditure for this well. Further, Burlington had maintained a computerized database of the names and addresses of Holders and could have given them actual notice of its application and the proceedings thereon. Despite Burlington's actual knowledge of and involvement with Holders and their respective Section 9 working interests, Burlington's counsel, during the Commission hearing, testified that, "to the best of [Burlington's] knowledge and belief[,] there [was] no opposition to having the Commission change [Rule 104] and allow deep gas to be developed on 640–acre spacing."

{11} During the Commission proceedings, only one party, Amoco Production Co., voiced some opposition to Burlington's application. Nonetheless, Amoco did not object to 640–acre spacing outright. Rather, believing it to be premature to establish a deep wildcat gas-well spacing order for the entire San **330 *123 Juan Basin, Amoco merely suggested "use of an Exploratory spacing order which would space a drillsite on 640 acres to be revisited after data was accumulated." Amoco is not a party to the suit before us.

{12} At the Commission hearing, Burlington's senior staff landman testified that Burlington had notified approximately 198 out of 315 operators in the San Juan Basin. The landman also testified that, apart from Amoco's suggestion, he was not aware of any other suggestions on Burlington's application. In fact, the landman explained, "We have received support."

{13} On June 5, 1997, the Commission entered its Order No. R–10815, which concluded, among other things, that Division Rule 104 should be amended on a permanent basis to increase the spacing requirements for deep wildcat gas wells in the San Juan Basin to 640 acres. *In re Burlington Resources Oil & Gas Co.*, N.M. Oil Conservation Comm'n Case No. 11745 (June 5, 1997) (Order No. R–10815). On June 11, 1997—six days after the Commission issued its order—Burlington filed an application with the Division, seeking to impose a compulsory pooling of Holders' interests in the east half and southwest quarter of Section 9 for a deep wildcat gas well proposed by Burlington. Obtaining Commission Order R–10815 was a condition precedent to Burlington's initiation of compulsory pooling proceedings against Holders, for under Rule 104 as extant prior to June 5, 1997, Burlington could not have petitioned the Division to impose a compulsory pooling order for 640 acres. *See* 19 NMAC 15.C.104.B(2)(a) (Feb. 1, 1996, prior to June 30, 1997 amendment) (requiring all wildcat gas wells drilled in the San Juan Basin to be located on drilling tracts of 160 contiguous surface acres).

{14} On June 24, 1997, Holders timely filed with the Commission an Application for Rehearing of Order No. R–10815. When the Commission failed to act upon the application within ten days, the application was deemed denied. *See* § 70–2–25(A). Holders then properly appealed to the district court, naming the Commission and Burlington as defendants. Holders also moved for a stay of Order No. R–10815 for the duration of the appeal, and the district court granted the motion as to Holders only. Rule 104 was finally amended on June 30, 1997. *See* 19 NMAC 15.C.104.B(2)(b) (June 30, 1997) (requiring deep wildcat gas wells drilled in the San Juan Basin to be located on drilling tracts of 640 contiguous surface acres).

{15} In its Opinion and Final Judgment, the district court found in favor of Holders, ruling that, "[k]nowing of its plan to pool the interests of [Holders] for a wildcat well on 640–acre spacing and knowing the identities and whereabouts of [Holders], Burlington's failure to provide personal notice to them of the spacing case proceeding ... deprived [Holders] of their property without due process of law." Accordingly, the district court ruled that the order, as against Holders, was without effect. The Commission and Burlington now appeal to this Court, which has jurisdiction under Section 70–2–25(B). [1]

II.

[1] [2] {16} This Court conducts a whole-record review of the Commission's factual findings. *See Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992). On legal questions such as the interpretation of the OGA or its implementing regulations, we may afford some deference to the Commission, particularly if the question at hand implicates agency expertise. *See generally Regents of Univ. of N.M. v. New Mexico Fed'n of Teachers*, 1998–NMSC–020, ¶ 17, 125 N.M. 401, 962 P.2d 1236. "However, the [C]ourt may always substitute its interpretation of the law for that of the [Commission] 'because it is the function of courts to interpret the law.' " *Fitzhugh v. New Mexico Dep't of Labor*, 1996–NMSC–044, ¶ 22, 122 N.M. 173, 922 P.2d 555 (quoting *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)).

****331 [3]** {17} ***124** At the outset, we note that the district court held that Holders were denied due process of law under the United States and New Mexico Constitutions because they were not given personal notice of the Commission's proceedings on Burlington's application for increased spacing requirements. We agree with the district court that the failure to provide Holders with actual notice of the proceedings on Burlington's application for increased spacing requirements is dispositive. We do not agree, however, that it is necessary to reach the question whether this failure amounts to a violation of Holders' constitutional rights to due process. "Courts will not decide constitutional questions unless necessary to a disposition of the case." *Huey v. Lente*, 85 N.M. 597, 598, 514 P.2d 1093, 1094 (1973); *cf. Garcia v. Las Vegas Med. Ctr.*, 112 N.M. 441, 444, 816 P.2d 510, 513 (Ct.App.1991) ("There would be no need to decide what federal procedural due process required if the plaintiffs could obtain the desired relief from an [order requiring] compliance with state law.").

As we explain below, our disposition in this case only requires interpretation of the OGA and the Commission's procedural rules. Nevertheless, we are guided by the canon of statutory construction that "if a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality." *Huey*, 85 N.M. at 598, 514 P.2d at 1094. We apply this canon to the Commission's procedural rules in the same manner that we apply it to a statute. *See Wineman v. Kelly's Restaurant*, 113 N.M. 184, 185, 824 P.2d 324, 325 (Ct.App.1991) (applying a canon of construction used to interpret statutes to an interpretation of a rule adopted by the Workers' Compensation Administration). In applying this canon, we are also mindful of the holding in *Uhden v. New Mexico Oil Conservation Comm'n*, 112 N.M. 528, 817 P.2d 721 (1991), which relied on principles of due process to conclude that notice had been constitutionally deficient.

{18} In reaching its holding, the *Uhden* court noted that "[t]he essence of justice is largely procedural." *Id.* at 530, 817 P.2d at 723. We reaffirm this principle today. In this case, however, we do not rely on the *Uhden* court's constitutional rationale. *Cf. State ex rel. Hughes v. City of Albuquerque*, 113 N.M. 209, 210, 824 P.2d 349, 350 (Ct.App.1991) ("[The] violation of a state law requiring specific procedures does not necessarily constitute a violation of constitutional due process."); *see also* Bernard Schwartz, *Administrative Law* § 5.2, at 204 (2d ed.1984). Instead, we conclude that Holders are entitled to relief because the notice procedures required by the OGA and the Oil and Gas rules were not followed. *See* Additional Notice Requirements (Rule 1207), Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't, 19 NMAC 15.N.1207.D (Feb. 1, 1996) ("Evidence of failure to provide notice as provided in this rule may, upon a proper showing be considered cause for reopening the case."); *cf. Hughes*, 113 N.M. at 210, 824 P.2d at 350 (concluding that a party "may be entitled to relief if the procedures mandated by city ordinance were not followed"); *Atlixco Coalition v. Maggiore*, 1998–NMCA–134, ¶ 15, 125 N.M. 786, 965 P.2d 370 (concluding that an administrative agency "is required to act in accordance with its own regulations"). Accordingly, we reject the Commission's contention that it provided the requisite notice for a hearing on a rule amendment, as well as Burlington's contention that Holders were not entitled to actual notice of the proceedings under the OGA.

{19} The relevant statutory notice provisions in the OGA are contained in Sections 70–2–23 and 70–2–7. Section 70–2–23 imposes a "reasonable notice" requirement for all oil and gas hearings. This section provides, in pertinent part:

> Except as provided for herein [i.e., exceptions for emergencies], before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the [D]ivision. The [D]ivision shall first give *reasonable notice* of such hearing (in no case less than ten days, except in an emergency) and at any such hearing any person having an interest in the subject ****332 *125** matter of the hearing shall be entitled to be heard.

(Emphasis added).

{20} Section 70–2–7 provides: "The [Division] shall prescribe by rule its rules of order or procedure in hearings or other proceedings before it under the [OGA]." Although the text of Section 70–2–7 does not expressly mention the word "notice," the Division, pursuant to the authority in this section, has adopted rules establishing notice requirements for oil and gas hearings.

{21} In terms of publication notice for an oil and gas hearing, the Division has adopted the following rule:

> Notice of each hearing before the Commission and before a Division Examiner shall be by publication once in accordance with the requirements of Chapter 14, Article 11, N.M.S.A.1978, in a newspaper of general circulation in the county, or each of the counties if there be more than one, in which any land, oil, gas, or other property which is affected may be situated.

Publication of Notice of Hearing, Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't,

19 NMAC 15.N.1204 (Feb. 1, 1996). The referenced statutory provision mandates the following:

> Any notice or other written matter whatsoever required to be published in a newspaper by any law of this state, or by the order of any court of record of this state, shall be deemed and held to be a legal notice or advertisement within the meaning of [14–11–1 to 14–11–4, 14–11–7, 14–11–8 NMSA 1978].

NMSA 1978, § 14–11–1 (1937) (bracketed material in original).

{22} The Division has also adopted additional notice rules for specific situations. *See* 19 NMAC 15.N.1207. One such situation involves applications that may affect a property interest of other individuals or entities: "In cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities: (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested)." 19 NMAC 15.N.1207.A(11).

[4] {23} Pursuant to the rules promulgated under Section 70–2–7, Burlington and the Commission provided notice by publication. Although the notice by publication satisfied a necessary component of the statutory notice requirements, it was by no means sufficient. Section 7–2–23 of the OGA requires "reasonable notice" as a condition precedent to a hearing. This "reasonable notice" mandate should circumscribe whatever Division rules are promulgated for the purpose of notifying interested persons.

[5] {24} In terms of the rules, we note that, at the time of its filing, the application, if approved, would have affected Holders' interests in Section 9. Specifically, we note that the increased spacing requirements would have expanded the scope of Holders' production-cost liability to include proportional allocations for wildcat gas wells drilled anywhere in a 640–acre area, rather than in a mere 160–acre area, and that Holders would have been able to avoid these unforeseen allocations only if they limited their rights to obtain production royalty payments in the future. *See* § 70–2–17(C). Furthermore, if the Commission increased the spacing requirements, a subsequent pooling order—if granted—would have precluded the owners from drilling deep wildcat gas wells anywhere else on Section 9. *See* 19 NMAC 15.C.104.B(2)(b) (June 30, 1997).

{25} If Burlington succeeded in pooling Holders' Section 9 property interests, and if Holders intended to enjoy the privileges of development and ensure receipt of full royalties in the future, they would have been compelled to contribute to the drilling costs associated with Burlington's high-risk wildcat well. In fact, as Holders maintain, they would have had to bear a higher percentage of the costs in aggregate than even Burlington would have had to bear. Although Burlington was well aware of these facts, it refused to provide Holders with actual notice of the proceedings on its application for increased spacing. Given that Burlington intended to affect Holders' Section 9 property interests with a subsequent pooling order, under Rule 1207.A(11) Holders were entitled to actual notice of the spacing application. ****333 *126** Because neither Burlington nor the Commission provided Holders with actual notice of the proceedings on the spacing application, Holders were denied the reasonable notice that the OGA and its implementing regulations required.

[6] [7] {26} Burlington asserts that Rule 1207.A(11) only applies to "adjudicatory" proceedings and has no application in this case because the proceedings in this case concern a rule amendment rather than an adjudication. To support the assertion that actual notice was not required for a rule amendment, Burlington and the Commission expend much effort in distinguishing *Uhden*, 112 N.M. at 530, 817 P.2d at 723, on the ground that the order in that case "was not of general application, but rather pertained to a limited area ... [and][t]he persons affected were limited in number." Upon analysis, however, it becomes clear that this distinction is not at all dispositive. It is well established that notice requirements are determined on the basis of " 'the character of the action, rather than its label.' " *Miles v. Board of County Comm'rs*, 1998–NMCA–118, ¶ 9, 125 N.M. 608, 964 P.2d 169 (quoting *Harris v.. County of Riverside*, 904 F.2d 497, 501–02 (9th Cir.1990)), *cert. denied*, No. 25,292, 126 N.M. 107, 967 P.2d 447 (1998). As one commentator explains:

> [N]o test can draw anything like a mathematical line between rulemaking and adjudication.... [A]n adjudication may be based upon a new rule of law that is announced for the first time by the deciding

> tribunal. Conversely, a rule may have an effect on particular rights comparable to a decision in an adjudicatory proceeding involving the given parties.

Schwartz, *supra,* § 4.15, at 190 (footnote omitted); *accord* 2 Am.Jur.2d *Administrative Law* § 155, at 176 (1994); 4 Jacob A. Stein et al., *Administrative Law* § 33.01[1], at 33–3 n. 2 (1998); *cf. Ulden,* 112 N.M. at 532–33, 817 P.2d at 725–26 (Montgomery, J., dissenting) (asserting that "the notoriously slippery distinction between rulemaking and adjudication is not particularly helpful in this case"). On the facts presented here, we cannot conclude that the Commission's order is accurately characterized as simply a rule amendment as it applies to Holders. Moreover, neither the "reasonable notice" requirement in Section 70–2–23 of the OGA nor the notice requirements in Rule 1207.A are expressly limited to adjudications.

{27} In *High Ridge Hinkle Joint Venture v. City of Albuquerque,* 1998–NMSC–050, ¶ 5, 126 N.M. 413, 970 P.2d 599, we observed the following rules of statutory interpretation:

> The first rule is that the "plain language of a statute is the primary indicator of legislative intent." *General Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). Courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent ." *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). The court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." [*Burroughs v. Board of County Comm'rs,* 88 N.M. 303, 306, 540 P.2d 233, 236 (1975)].

These canons of statutory construction apply to regulatory and rule interpretation as well. *See Wineman,* 113 N.M. at 185, 824 P.2d at 325.

{28} The language of Section 70–2–23 of the OGA plainly states that, except for emergencies, the requirement of "reasonable notice" applies to hearings regarding "any rule, regulation or order, including revocation, change, renewal or extension thereof." In addition, Rule 1207.A expressly provides that "[e]ach applicant for hearing before the Division or Commission shall give additional notice as set forth below." The rule makes no mention of "adjudication" or "rulemaking," or other words of similar import. The plain language of Rule 1207.A(11) applies to "cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities." The only limitations on the phrase "cases of applications" are the modifying phrases "not listed above" and "the outcome of which may affect a property interest of other individuals or entities." Because an application for increased spacing requirements is not listed earlier in the rule, and because the spacing order in this case ****334 *127** clearly would affect Holders' Section 9 property interests, this case is governed by the plain language of Rule 1207.A(11).

[8] {29} After careful review of the administrative record, we are not convinced that Burlington or the Commission have substantially complied with the "reasonable notice" requirements of the OGA or the specific notice requirements of Rule 1207.A(11) in this case. *See* 19 NMAC 15.N.1207.C ("At each hearing, the applicant shall cause to be made a record ... that the notice provisions of this Rule 1207 have been complied with...."). Our conclusion that substantial compliance is lacking makes it unnecessary for us to reach the issue whether strict compliance is required in this instance. *Cf. Green Valley Mobile Home Park v. Mulvaney,* 1996–NMSC–037, ¶¶ 10–11, 121 N.M. 817, 918 P.2d 1317 (discussing circumstances in which strict compliance with mandatory notice provisions of a statute is required).

{30} The record shows that (1) Burlington had actual knowledge of Holders' interests in Section 9, (2) Burlington targeted Holders' interests long before it applied for increased well-spacing requirements, (3) Burlington intended to affect Holders' interests with a subsequent pooling order, (4) Burlington had actual knowledge of Holders' identities and whereabouts, and (5) Burlington had regular contacts with Holders. Under these circumstances, neither Burlington nor the Commission have shown that sending actual notice to Holders would have been more difficult than sending actual notice to the other persons with potentially affected property interests whom the company chose to notify in this case. Indeed, Burlington's prior dealings with Holders would appear to have made it easier to notify Holders than to notify others. Because Holders were not provided with actual notice under these circumstances, we conclude that Burlington and the Commission did not comply with the notice requirements of the OGA and

its implementing regulations, and this failure to comply renders the Commission's order void with respect to Holders. Thus, we need not reach the issue whether the Commission's order should be voided on other grounds.

III.

{31} Because Burlington and the Commission did not comply with the notice requirements of the OGA and its implementing regulations, we conclude that the Commission's Order No. R–10815 concerning the spacing requirements for deep wildcat gas wells in the San Juan Basin is void with respect to Holders. Accordingly, we affirm the district court's final judgment in this matter.

{32} **IT IS SO ORDERED.**

BACA, FRANCHINI and SERNA, JJ., concur.

All Citations

127 N.M. 120, 978 P.2d 327, 146 Oil & Gas Rep. 168, Util. L. Rep. P 26,699, 1999 -NMSC- 021

Footnotes

1 We do not consider the effect, if any, of the changes brought about by the 1998 amendment to Section 70–2–25(B) because this appeal was taken well before the effective date of that amendment.

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