~~Hobbs~~ ~~envelopes~~ (regular ~~office~~)
Sally - Please send copies of Response to the following

(1) W. Thomas Kellahin
P.O. Box 2265
SF. NM 87504-2265

Thanks
Lyn

(2) Harold D. Stratton, Jr.
Brian J. Pezzillo
40 First Plaza, Suite 610
Albuquerque, NM 87102

(3) Harold L. Hensley
James M. Hudson
P. O. Box 10
Roswell, NM 88202-0010

Mailed 1/21/00

12-502

Response - may file a resp. w/in 10 days of service of petition or w/in 10 days of the granting of the petition.

Failure to act - if petition not acted upon w/in 30 days after filing, deemed denied

May 22, 00 filed in Sct.

145 P.2d 422 (1943)

Thompson v. Johnson-Kenwitz Drilling Co.

Laches
- ~~Actual notice~~
- ~~Delay~~ in filing claims
- Reliance to detriment

Late 50's

George L. Scott Jr.

p. 152

~~Scott Exploration~~ (His)
Part owner of Strata

(1) ~~Scott Exploration~~ .5
Charles Warren Scott
(2) George L. Scott, III .5
(3) Lori Scott Worrall 1.0
(4) ~~Scott Exploration~~ Inc. 9.0
~~C. W. Scott~~
(5) Wm Dwyer 1.0
~~Susan Scott~~ Murphy
(6) Strata 18.5

THOMPSON et al. v. JOHNSON-KEMNITZ DRILLING CO. et al.

No. 31301.

Supreme Court of Oklahoma.
Oct. 5, 1943.

Rehearing Denied Feb. 8, 1944.

1. Tenancy in common ⇐37

A tenant in common, producing oil and gas from common property, is liable to account to his cotenants for their proportionate shares of market value of such oil and gas, less reasonable and necessary costs of production.

2. Tenancy in common ⇐22

The rights of owners of city lots to participate as tenants in common in proceeds of oil and gas, produced from other lots in vicinity under drilling permit issued by city building superintendent, depend on creation of legal drilling block or area including their lots by city ordinance.

3. Tenancy in common ⇐34, 38(5)

City lot owners, knowing of city building superintendent's issuance of permit to drill oil wells in drilling block including their lots before they acquired interests therein and of drilling operations and production of oil on other lots in such block, but making no demand on producers for participation in production or proceeds thereof for almost ten years, nor any attempt or offer to pay their proportionate part of operation expenses until well proved profitable, were guilty of "laches" and estopped to recover proportionate share of proceeds of all oil produced.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

4. Estoppel ⇐93(1)

Equity will not aid party who, with full knowledge of facts and without risk to himself, stands by for unreasonable time and sees another assume all risks in uncertain venture, wherein such party might have shared, and after success thereof seek to share in benefits therefrom, and such rule applies as between parties entitled to share in production of oil.

Syllabus by the Court.

1. The owners of town lots in an area designated as an oil and gas drilling block pursuant to the ordinances of Oklahoma City are not tenants in common, as def at common law, of the right to pro oil and gas, but their respective rights controlled by and subject to adjustment der the municipal ordinances.

2. Lot owners, who do not join ir oil and gas mining lease covering a munitized drilling block upon which a mit to drill has been granted under th dinances of Oklahoma City, may be topped by laches to assert in equity right, if any they had, to participate i working interest in the drilling opera notwithstanding failure of prescribe tice to them of the application for the mit.

CORN, C. J., and WELCH, J., senting.

Appeal from District Court, Okla County; Sam Hooker, Judge.

Action by T. G. Thompson agains Johnson-Kemnitz Drilling Company, partnership, one Wilmarth, one Rou and others, for determination of plai rights as lot owner to participate wit tain defendants in proceeds of prod of oil and gas from a drilling block in homa City, in which defendants Wil and Routledge joined in plaintiff's p for accounting against other defer From a judgment awarding plainti defendants Wilmarth and Routledge satisfactory amount, they appeal.

Affirmed.

Snyder & Lybrand, Twyford & and Wm. J. Crowe, all of Oklahom for plaintiffs in error.

Paul Brown, of Oklahoma City, f fendant in error Johnson-Kemnitz ing Co.

William H. Zwick, of Ponca City, fendant in error Continental Oil Co.

Simons, McKnight, Simons, Mitc McKnight, of Enid, for defendant ir Eason Oil Co.

Don Emery and Rayburn L. Foste of Bartlesville, and E. G. DePara Wm. J. Zeman, both of Oklahoma C defendant in error Phillips Petroleur

Keaton, Wells & Johnston, of Okl City, for defendant in error Ardie Gas Co.

Embry, Johnson, Crowe & Tolb Oklahoma City, for defendant in Liberty Nat. Bank of Oklahoma Cit

Willingham & Fariss, of Oklahoma City, for defendant in error C. A. Rodesney.

Edward H. Chandler and Ralph W. Garrett, both of Tulsa, and R. M. Williams and Miley, Hoffman, Williams, France & Johnson, all of Oklahoma City, for defendant in error Sinclair Refining Co.

GIBSON, Vice Chief Justice.

By this appeal the plaintiffs in error Thompson, Wilmarth and Routledge question the sufficiency of the sum awarded them by the judgment and decree of the district court in an action for accounting.

Thompson instituted the action, and defendants Wilmarth and Routledge, by separate pleadings, joined in his petition for accounting against the other defendants. Since there is no controversy between said plaintiffs in error, they will be referred to generally as plaintiffs.

The action sought a determination of plaintiffs' rights as lot owners to participate with certain of the defendants in the production of oil and gas, or in the proceeds thereof, from a drilling block or area located within the limits of Oklahoma City and defined in a drilling permit issued to such defendants by the city building superintendent allegedly pursuant to municipal ordinances.

The drilling area as defined in the permit is composed of Blocks 1 and 2, Aungst Addition to Oklahoma City. Each block contains numerous lots of different ownership.

Plaintiffs are the owners of lots 11 and 12, an undivided one-half interest in lot 13, and the east half of lot 14, in said block 2. Their title was acquired by different conveyances and compromised litigation, and, as to a portion, was quieted in the present action. The first interest acquired by them was an undivided one-sixth interest in lots 11 and 12, and was purchased some four months subsequent to the issuance of the drilling permit, and after operations had commenced.

The permit was issued on May 19, 1930, by the building superintendent on the affidavit of one of the defendants stating that it was the owner of an oil and gas mining lease on all the lots within the drilling block. Soon thereafter drilling operations were commenced on property other than that belonging to plaintiffs, and the well completed in due course as a producer.

It developed, however, that the lessee had no valid lease on the property now owned by plaintiffs.

On May 23, 1940, by supplemental petition in the present action, the defendant lessees, drilling contractors, oil purchasing companies, etc., were first brought into this litigation which was commenced in November, 1930, by plaintiffs against other parties to quiet title to lots 11 and 12 aforesaid.

Plaintiffs sought to establish their alleged rights as tenants in common with the lessees to participate in the drilling operations from the beginning by tendering their proportionate part of the cost thereof and receiving their proportionate part of the proceeds.

The judgment of the trial court, based on the referee's report, denied plaintiffs' claim as tenants in common, but permitted recovery for their proportionate part of the one-eighth royalty as reserved to the lessors in the community lease. Their right to so participate in the royalty was not disputed by defendants.

Plaintiffs' lots comprise 5.26 per cent of the total area of the drilling block. The court gave them that percentage of one-eighth of all oil produced, whereas they claimed 5.26 per cent of all the oil produced.

If plaintiffs are correct in their assertion, their claim can be justified only upon tenancy in common with the lessees of the right to produce; and their argument is based on that theory.

[1] Plaintiffs take the position that the permit issued by the building superintendent created a drilling block of which their property was a part, and by reason thereof they became tenants in common with all other lot owners, or their lessees, of the right to produce the oil under said drilling block, and since they had executed no lease or other contract with defendant lessees they were entitled as at common law to all the rights and privileges accruing to tenants in common in such case where one of their number goes upon the premises and produces oil without the consent of the others. Ludey v. Pure Oil Co., 157 Okl. 1, 11 P.2d 102; Moody v. Wagner, 167 Okl. 99, 23 P.2d 633; Earp v. Mid-Continent Petroleum Corp., 167 Okl. 86, 27 P.2d 855, 91 A.L.R. 188. The rule is that a tenant in common producing oil and gas from the common property is liable to account to his cotenants for their proportionate share of

the market value of the oil and gas produced, less the reasonable and necessary costs of production. Moody v. Wagner, supra.

[2] Plaintiffs question the legality of the drilling permit, and at the same time seek to affirm it. They question its validity for failure of the lessees to comply with the city ordinances in obtaining it. They affirm the permit by asserting rights that can arise only in event of the creation of a legal drilling block. In the absence of such a communitized area as provided by ordinance, nothing resembling a tenancy in common in all the area or drilling block could exist among the constituent owners thereof. In the absence of a drilling block within the meaning of the city ordinance, there would be no common interest of any kind among the various lot owners. Amis v. Bryan Petroleum Corp., 185 Okl. 206, 90 P.2d 936, 939.

City Ordinance No. 3865, relating to zoning for oil and gas development, provides, among other things, that before a permit to drill a well shall be issued by the building superintendent the applicant must submit a sworn statement showing that he owns, controls or has under lease all the property within the drilling block where the well is to be put down, and the statement must show the names and addresses of all parties having any right, title or interest in any property within the block. It is further provided that in case the statement shall show that the applicant has not such control of all the property and cannot obtain same, then the board of adjustment, on appeal, shall have authority to grant the permit in event the applicant owns, controls or has under lease at least 51 percent of the total acreage.

Plaintiffs say the statement submitted to the building superintendent showed that the applicant did not own, control or have under lease all the property in the block, and that it was applicant's duty in such case to proceed before the board of adjustment for a permit where all parties are entitled to notice and to have their rights fixed. Amis case, supra.

Plaintiffs contend, in effect, that there now exists a valid permit to produce oil from the drilling block of which their property is a part, but their rights to participate in the drilling operations or in the benefits arising therefrom have never been fixed by contract, or judicially determined.

If plaintiffs are to receive any benefits at all from the production of the well in question, that production must be had under and by virtue of the drilling permit. The well was not drilled on their own premises, and if there is a tenancy in law or equity that will enable them to participate, that tenancy was created by the permit issued pursuant to the ordinance aforesaid. A relationship in the nature of a tenancy in common was authorized by the zoning ordinances which were enacted in the exercise of the city's police powers. Amis v. Bryan Petroleum Corp., supra. In that case we said: "The tenancy owes its existence to those powers and is entirely subject thereto. The parties cannot successfully assert their common law rights as tenants in common, for such a tenancy actually does not exist."

Plaintiffs' alleged right now to elect to participate in the working interest is based upon the failure of notice to their grantors of the application for the drilling permit. Plaintiffs say they have succeeded to all the rights of their grantors in this respect.

The trial court held against plaintiffs on that issue. But, as we view the case, it is unnecessary for us to review that matter.

[3] Defendants' plea of laches was sustained by the trial court, and its judgment on that issue is fully supported by the evidence. That, alone, demands affirmance of the judgment.

The evidence shows that plaintiffs knew of the issuance of the permit before they acquired any interest in the block. They knew all along of the drilling operations and the production. They made no demand upon the defendants, and stood by for almost ten years and witnessed the production and sale of the oil, and all the while spoke only of their "royalty" interest. Plaintiffs made no attempt or offer to pay their proportionate part of the operation expenses until the well proved profitable, knowing at all times for almost ten years that defendants considered their claims as only applying to the one-eighth royalty, which claims for most of the period were tied up in litigation with other parties. Under the facts of this case even if plaintiffs had been entitled to share in the working interest at their election, they waited too long to voice their decision. There was ample evidence to show that plaintiffs knew from the start that the lessees were claiming the entire seven-eighths working interest as

their own. Plaintiffs were under the imperative duty to speak within a reasonable time, and the defendants were mislead by their prolonged silence. The delay constituted laches, and plaintiffs are now estopped.

[4] Equity will not aid a party who, with full knowledge of the facts, and without risk to himself, stands by an unreasonable length of time and sees another assume all the risks in an uncertain venture in which said party might have shared, and, after success of the venture, seeks to share in the benefits thereof. That rule applies as between parties entitled to share in the production of oil. Parker v. Ryan, 143 Okl. 187, 287 P. 1006, 1008. When considering a similar claim the court in the latter case held: "The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

Notwithstanding the recognized judicial power of the board of adjustment to determine the rights of lot owners whose title is not in dispute to participate in the royalties and working interest in cases of this character, defendants do not question the propriety of the present action; and we do not consider the matter.

The judgment is affirmed.

RILEY, OSBORN, BAYLESS, HURST, DAVISON, and ARNOLD, JJ., concur.

CORN, C. J., and WELCH, J., dissent.

PRUSA v. HEJDUK et al.

No. 31006.

Supreme Court of Oklahoma.

Jan. 18, 1944.

Rehearing Denied Feb. 8, 1944.

1. Appeal and error ⇐1024(2)

A judgment for intervener in proceeding in garnishment in aid of execution claiming specific part of, or interest in, funds in garnishee's hands will not be reversed, where uncontradicted evidence shows that particular amount claimed by intervener was derived from sale of property belonging to intervener. 12 O.S.1941 § 863.

2. Appeal and error ⇐1024(2)

In garnishment proceeding in aid of execution on note and chattel mortgage, finding that funds sought to be garnisheed were not proceeds of sale of property covered by the chattel mortgage, but were proceeds of sale of property of chattel mortgagor's wife and sons, in which chattel mortgagor had no interest, was not against weight of evidence. 12 O.S.1941 § 863.

3. Appeal and error ⇐1024(2)

Where, in garnishment in aid of execution, issue was whether funds in hands of garnishee were derived from judgment debtor's personalty or from separate personalty of debtor's wife who intervened, judgment for intervener would not be reversed, where not clearly against weight of evidence. 12 O.S.1941 § 863.

4. Witnesses ⇐148

Party is disqualified from testifying in own behalf regarding transactions or communications with deceased person only where adverse party is executor, administrator, heir at law, next of kin, surviving partner or assignee of deceased person, and where party acquired title to cause of action immediately from deceased. 12 O.S. 1941 § 384.

5. Witnesses ⇐150(2)

Judgment creditor in garnishment proceeding in aid of execution is not an "assignee" of judgment debtor within statute disqualifying party to civil action from testifying in own behalf regarding transactions or communications with deceased person when adverse party is an "* * * assignee of such deceased person." 12 O.S.1941 §§ 384, 863.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignee".

Syllabus by the Court.

1. Where in a proceeding in garnishment in aid of execution a third party is permitted to intervene, claiming a specific part of or interest in the funds in the hands of a garnishee, a judgment in favor of such intervenor will not be reversed where the uncontradicted evidence shows that the particular amount claimed by the

THOMPSON et al. v. JOHNSON-KEMNITZ DRILLING CO. et al.

No. 31301.

Supreme Court of Oklahoma.

Oct. 5, 1943.

Rehearing Denied Feb. 8, 1944.

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The rights of owners of city lots to participate as tenants in common in proceeds of oil and gas, produced from other lots in vicinity under drilling permit issued by city building superintendent, depend on creation of legal drilling block or area including their lots by city ordinance.

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See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

4. Estoppel ⇐93(1)

Equity will not aid party who, with full knowledge of facts and without risk to himself, stands by for unreasonable time and sees another assume all risks in uncertain venture, wherein such party might have shared, and after success thereof seek to share in benefits therefrom, and such rule applies as between parties entitled to share in production of oil.

Syllabus by the Court.

1. The owners of town lots in an area designated as an oil and gas drilling block pursuant to the ordinances of Oklahoma City are not tenants in common, as defined at common law, of the right to produce oil and gas, but their respective rights are controlled by and subject to adjustment under the municipal ordinances.

2. Lot owners, who do not join in the oil and gas mining lease covering a communitized drilling block upon which a permit to drill has been granted under the ordinances of Oklahoma City, may be estopped by laches to assert in equity their right, if any they had, to participate in the working interest in the drilling operations, notwithstanding failure of prescribed notice to them of the application for the permit.

CORN, C. J., and WELCH, J., dissenting.

Appeal from District Court, Oklahoma County; Sam Hooker, Judge.

Action by T. G. Thompson against the Johnson-Kemnitz Drilling Company, a copartnership, one Wilmarth, one Routledge and others, for determination of plaintiff's rights as lot owner to participate with certain defendants in proceeds of production of oil and gas from a drilling block in Oklahoma City, in which defendants Wilmarth and Routledge joined in plaintiff's petition for accounting against other defendants. From a judgment awarding plaintiff and defendants Wilmarth and Routledge an unsatisfactory amount, they appeal.

Affirmed.

Snyder & Lybrand, Twyford & Smith, and Wm. J. Crowe, all of Oklahoma City, for plaintiffs in error.

Paul Brown, of Oklahoma City, for defendant in error Johnson-Kemnitz Drilling Co.

William H. Zwick, of Ponca City, for defendant in error Continental Oil Co.

Simons, McKnight, Simons, Mitchell & McKnight, of Enid, for defendant in error Eason Oil Co.

Don Emery and Rayburn L. Foster, both of Bartlesville, and E. G. DeParade and Wm. J. Zeman, both of Oklahoma City, for defendant in error Phillips Petroleum Co.

Keaton, Wells & Johnston, of Oklahoma City, for defendant in error Ardie Oil & Gas Co.

Embry, Johnson, Crowe & Tolbert, of Oklahoma City, for defendant in error Liberty Nat. Bank of Oklahoma City, Okl.

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GIBSON, Vice Chief Justice.

By this appeal the plaintiffs in error Thompson, Wilmarth and Routledge question the sufficiency of the sum awarded them by the judgment and decree of the district court in an action for accounting.

Thompson instituted the action, and defendants Wilmarth and Routledge, by separate pleadings, joined in his petition for accounting against the other defendants. Since there is no controversy between said plaintiffs in error, they will be referred to generally as plaintiffs.

The action sought a determination of plaintiffs' rights as lot owners to participate with certain of the defendants in the production of oil and gas, or in the proceeds thereof, from a drilling block or area located within the limits of Oklahoma City and defined in a drilling permit issued to such defendants by the city building superintendent allegedly pursuant to municipal ordinances.

The drilling area as defined in the permit is composed of Blocks 1 and 2, Aungst Addition to Oklahoma City. Each block contains numerous lots of different ownership.

Plaintiffs are the owners of lots 11 and 12, an undivided one-half interest in lot 13, and the east half of lot 14, in said block 2. Their title was acquired by different conveyances and compromised litigation, and, as to a portion, was quieted in the present action. The first interest acquired by them was an undivided one-sixth interest in lots 11 and 12, and was purchased some four months subsequent to the issuance of the drilling permit, and after operations had commenced.

The permit was issued on May 19, 1930, by the building superintendent on the affidavit of one of the defendants stating that it was the owner of an oil and gas mining lease on all the lots within the drilling block. Soon thereafter drilling operations were commenced on property other than that belonging to plaintiffs, and the well completed in due course as a producer.

It developed, however, that the lessee had no valid lease on the property now owned by plaintiffs.

On May 23, 1940, by supplemental petition in the present action, the defendant lessees, drilling contractors, oil purchasing companies, etc., were first brought into this litigation which was commenced in November, 1930, by plaintiffs against other parties to quiet title to lots 11 and 12 aforesaid.

Plaintiffs sought to establish their alleged rights as tenants in common with the lessees to participate in the drilling operations from the beginning by tendering their proportionate part of the cost thereof and receiving their proportionate part of the proceeds.

The judgment of the trial court, based on the referee's report, denied plaintiffs' claim as tenants in common, but permitted recovery for their proportionate part of the one-eighth royalty as reserved to the lessors in the community lease. Their right to so participate in the royalty was not disputed by defendants.

Plaintiffs' lots comprise 5.26 per cent of the total area of the drilling block. The court gave them that percentage of one-eighth of all oil produced, whereas they claimed 5.26 per cent of all the oil produced.

If plaintiffs are correct in their assertion, their claim can be justified only upon tenancy in common with the lessees of the right to produce; and their argument is based on that theory.

[1] Plaintiffs take the position that the permit issued by the building superintendent created a drilling block of which their property was a part, and by reason thereof they became tenants in common with all other lot owners, or their lessees, of the right to produce the oil under said drilling block, and since they had executed no lease or other contract with defendant lessees they were entitled as at common law to all the rights and privileges accruing to tenants in common in such case where one of their number goes upon the premises and produces oil without the consent of the others. Ludey v. Pure Oil Co., 157 Okl. 1, 11 P.2d 102; Moody v. Wagner, 167 Okl. 99, 23 P.2d 633; Earp v. Mid-Continent Petroleum Corp., 167 Okl. 86, 27 P.2d 855, 91 A.L.R. 188. The rule is that a tenant in common producing oil and gas from the common property is liable to account to his cotenants for their proportionate share of

the market value of the oil and gas produced, less the reasonable and necessary costs of production. Moody v. Wagner, supra.

[2] Plaintiffs question the legality of the drilling permit, and at the same time seek to affirm it. They question its validity for failure of the lessees to comply with the city ordinances in obtaining it. They affirm the permit by asserting rights that can arise only in event of the creation of a legal drilling block. In the absence of such a communitized area as provided by ordinance, nothing resembling a tenancy in common in all the area or drilling block could exist among the constituent owners thereof. In the absence of a drilling block within the meaning of the city ordinance, there would be no common interest of any kind among the various lot owners. Amis v. Bryan Petroleum Corp., 185 Okl. 206, 90 P.2d 936, 939.

City Ordinance No. 3865, relating to zoning for oil and gas development, provides, among other things, that before a permit to drill a well shall be issued by the building superintendent the applicant must submit a sworn statement showing that he owns, controls or has under lease all the property within the drilling block where the well is to be put down, and the statement must show the names and addresses of all parties having any right, title or interest in any property within the block. It is further provided that in case the statement shall show that the applicant has not such control of all the property and cannot obtain same, then the board of adjustment, on appeal, shall have authority to grant the permit in event the applicant owns, controls or has under lease at least 51 percent of the total acreage.

Plaintiffs say the statement submitted to the building superintendent showed that the applicant did not own, control or have under lease all the property in the block, and that it was applicant's duty in such case to proceed before the board of adjustment for a permit where all parties are entitled to notice and to have their rights fixed. Amis case, supra.

Plaintiffs contend, in effect, that there now exists a valid permit to produce oil from the drilling block of which their property is a part, but their rights to participate in the drilling operations or in the benefits arising therefrom have never been fixed by contract, or judicially determined.

If plaintiffs are to receive any benefits at all from the production of the well in question, that production must be had under and by virtue of the drilling permit. The well was not drilled on their own premises, and if there is a tenancy in law or equity that will enable them to participate, that tenancy was created by the permit issued pursuant to the ordinance aforesaid. A relationship in the nature of a tenancy in common was authorized by the zoning ordinances which were enacted in the exercise of the city's police powers. Amis v. Bryan Petroleum Corp., supra. In that case we said: "The tenancy owes its existence to those powers and is entirely subject thereto. The parties cannot successfully assert their common law rights as tenants in common, for such a tenancy actually does not exist."

Plaintiffs' alleged right now to elect to participate in the working interest is based upon the failure of notice to their grantors of the application for the drilling permit. Plaintiffs say they have succeeded to all the rights of their grantors in this respect.

The trial court held against plaintiffs on that issue. But, as we view the case, it is unnecessary for us to review that matter.

[3] Defendants' plea of laches was sustained by the trial court, and its judgment on that issue is fully supported by the evidence. That, alone, demands affirmance of the judgment.

The evidence shows that plaintiffs knew of the issuance of the permit before they acquired any interest in the block. They knew all along of the drilling operations and the production. They made no demand upon the defendants, and stood by for almost ten years and witnessed the production and sale of the oil, and all the while spoke only of their "royalty" interest. Plaintiffs made no attempt or offer to pay their proportionate part of the operation expenses until the well proved profitable, knowing at all times for almost ten years that defendants considered their claims as only applying to the one-eighth royalty, which claims for most of the period were tied up in litigation with other parties. Under the facts of this case even if plaintiffs had been entitled to share in the working interest at their election, they waited too long to voice their decision. There was ample evidence to show that plaintiffs knew from the start that the lessees were claiming the entire seven-eighths working interest as

their own. Plaintiffs were under the imperative duty to speak within a reasonable time, and the defendants were mislead by their prolonged silence. The delay constituted laches, and plaintiffs are now estopped.

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Notwithstanding the recognized judicial power of the board of adjustment to determine the rights of lot owners whose title is not in dispute to participate in the royalties and working interest in cases of this character, defendants do not question the propriety of the present action; and we do not consider the matter.

The judgment is affirmed.

RILEY, OSBORN, BAYLESS, HURST, DAVISON, and ARNOLD, JJ., concur.

CORN, C. J., and WELCH, J., dissent.

PRUSA v. HEJDUK et al.

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1. Appeal and error ⇐1024(2)

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Party is disqualified from testifying in own behalf regarding transactions or commuincations with deceased person only where adverse party is executor, administrator, heir at law, next of kin, surviving partner or assignee of deceased person, and where party acquired title to cause of action immediately from deceased. 12 O.S. 1941 § 384.

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Judgment creditor in garnishment proceeding in aid of execution is not an "assignee" of judgment debtor within statute disqualifying party to civil action from testifying in own behalf regarding transactions or communications with deceased person when adverse party is an "* * * assignee of such deceased person." 12 O.S.1941 §§ 384, 863.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignee".

Syllabus by the Court.

1. Where in a proceeding in garnishment in aid of execution a third party is permitted to intervene, claiming a specific part of or interest in the funds in the hands of a garnishee, a judgment in favor of such intervenor will not be reversed where the uncontradicted evidence shows that the particular amount claimed by the

...ts not anticipated in the initial esti-...tes of the operator. Here the opera-...r attempted a deeper completion that ...s unsuccessful which doubled costs ...er the shallower completion originally ...ontemplated. After the operators ...roofs of all of these costs the non-oper-...tor showed the Commission on the ba-...is of the testimony of one expert (ver-...us two for operator) that the deeper ...ttempt was not reasonable, but the Commission finding to the contrary is here found adequately supported in terms of substantial evidence review. (Probably a Commission decision the other way in this case would have been equally unassailable.)

Wyo.—In Gilmore v. Oil and Gas Comm'n, 1982, 642 P.2d 773, a compulsory poolwide unitization is upheld in which the participation formula is based on 11 weighted factors. Under somewhat unusual Wyoming procedures the approval levels required were reduced from 80% to 75% to avoid the certain refusal of the United States, holder of 61% of the overall royalty interest, to approve unitization based on any other acreage measure than the 1880 G.L.O. survey, even though concededly less accurate than a current private working interest owner survey. In effect, correlative rights are here somewhat subordinated to prevention of the physical waste of about 5700 barrels per day which would occur each day unitized operations are deferred.

21a. Okl.—In Olansen v. Texaco, Inc., 1978, 587 P.2d 976, a distinction is drawn between voluntary and compulsory unitizations to the effect that in the latter working interest owners supporting the unit may not rely on the ownerships as shown by the owner's lease files, but by reason of 52 O.S.1971, § 287.9 must ascertain from the record subsequent to its lease, the true ownership, then give due process notice to these owners. In consequence of failure so to do royalty owners who had not given notice of their ownership were enabled to claim an accounting in 1972, back to 1961, not barred by laches, by reason of having acted as soon as they learned the situation. Here the claim went against not only the lessee-working interest owner, but the pipeline purchaser, who made no separate defense even if one existed.

§ 975. Sharing in Proceeds and Expenses of Compulsory Poolings

Library References:

C.J.S. Mines and Minerals § 230.
West's Key No. Digests, Mines and Minerals ⇐92.80.

22. U.S.—In Bezzi v. Hocker, C.A.Okl.1966, 370 F.2d 533, there was an Oklahoma compulsory fieldwide unit which provided that no royalties were payable on gas produced but used for conservation purposes. Gas was produced and reinjected to maintain pressures. A term royalty owner, after the end of his term, claimed an interest in gas so produced and reinjected during his royalty term, claiming title was not lost by reinjection. The case holds title was lost, the gas becoming again subject to the law of capture when reinjected.

But see Pan American Petroleum Corp. v. Candelaria, C.A.N.M.1968, 403 F.2d 351, where owners not made parties to compulsory poolings are entitled to accounting on a good faith trespasser basis for past production, but have no further obligations as regards future production. Presumably this means their acreage is excluded for attribution purposes at this point in time.

In re Sierra Trading Corp. v. Winkler, Jr., C.A.Colo.1973, 482 F.2d 333, trustee holds a 200% recovery of funds advanced in behalf of the defaulting party (now the bankrupt) for gas unit operating ex-

the required affidavit with the application (the instrument filed lacking both signatures of the applicant and acknowledgment) appears on the face of the record of the proceedings. This defect was jurisdictional and rendered the order entered at the conclusion of such proceedings subject to collateral attack."[3]

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[3] 150 F. Supp. at 260, 8 *O.&G.R.* at 297.

For another case invalidating a pooling or unitization order by reason of failure to give notice of hearing and/or failure to make mandatory findings of jurisdictional facts, see Brown v. Sutton, 349 So. 2d 898 (La. App. 1977), *rev'd*, 356 So. 2d 965, 60 *O.&G.R.* 29 (La. 1978) (finding actual notice and waiver of irregularity in manner of giving notice and that complainant was not prejudiced by failure to include certain findings in the commission's order).

See also the following:

Cravens v. Corporation Comm'n, 613 P.2d 442, 67 *O.&G.R.* 562 (Okla. 1980), *cert. denied*, 450 U.S. 964 (1981) (vacating a drilling and spacing order for failure to give notice to the owner of a producing eighty-acre lease which was included in a 160-acre unit);

Harry R. Carlile Trust v. Cotton Petroleum Corp., 732 P.2d 438, 91 *O.&G.R.* 294 (Okla. 1986), *cert. denied*, 483 U.S. 1007, 1021 (1987) (concerned with the validity of a compulsory drilling and spacing unit involving nonproducing mineral interests when the only notice given was by publication. The court applied the rule of *Cravens v. Corporation Comm'n, supra*, and held that resort to publication service is constitutionally permissible *only* when all other means of giving notice are unavailable. The court concluded that its new rule should be given purely prospective application to protect the public's reasonable expectations of reliance on prior judicial decisions);

Hair v. Corporation Comm'n, 740 P.2d 134, 96 *O.&G.R.* 333 (Okla. 1987) (following *Cotton Petroleum* in giving prospective effect only to the standards of due process announced in *Cotton Petroleum* and *Cravens);*

Union Texas Petroleum v. Corporation Comm'n, 651 P.2d 652, 75 *O.&G.R.*105 (Okla. 1981), *cert. denied*, 459 U.S. 837 (1982) (sustaining an order modifying a previous drilling and spacing unit order of the Corporation Commission except insofar as Union Oil Co. of California, which was never served with notice by mail of the proceeding, was concerned. The dissenting opinion by V.C.J. Barnes emphasized the "chaotic" effects and consequences of leaving undetermined and uncertain the rights and liabilities of the parties in each 160-acre unit as against Union, whose interest was still fixed on the basis of a 640-acre unit);

Mountain States Natural Gas Corp. v. Petroleum Corp. of Texas,

Under some circumstances failure to comply with the notice and hearing requirements imposed by a compulsory pooling statute or ordinance may be viewed as harmless error.[4] And, in other cases, it has been held that a person who has not received the required notice may waive his right to such notice or be barred by laches from complaining of nonreceipt of notice.[5]

[Required findings by regulatory agency]

Many compulsory pooling and unitization statutes permit the issuance of a compulsory order only if such order is necessary to accomplish specified objectives, *e.g.*, the prevention of waste. The commission should make findings in each case concerning

693 F.2d 1015, 75 *O.&G.R.* 524 (10th Cir. 1982) (sustaining the validity of an order denying a risk penalty to a carrying party who failed to provide required notice to a carried party).

[4] See, *e.g.*, Placid Oil Co. v. North Central Texas Oil Co., 206 La. 693, 19 So. 2d 616 (1944).

Walker v. Cleary Petroleum Corp., 421 So. 2d 85, 76 *O.&G.R.* 433 (Alabama 1982), was concerned with failure to give adequate notice to the owner of one small tract. As this owner was "entitled to receive, and was offered, the entire value of the oil and gas taken from his land, reduced only by actual, reasonable expenses in producing the oil and gas," the court concluded that the owner had not suffered any economic damages; the most he would receive under the facts of this case would be nominal damages. However, the court noted:

> "if the failure to give notice was the result of malice, fraud, wilfulness, or a reckless disregard of Walker's rights, then Appellant [Walker] would be entitled to punitive damages, upon a showing of nominal damages, even though he has suffered no real economic loss."

[5] Thompson v. Johnson-Kemnitz Drilling Co., 193 Okla. 507, 145 P.2d 422 (1943).

Tara Oil Co. v. Kennedy & Mitchell, Inc., 622 P.2d 1076, 70 *O.&G.R.* 323 (Okla. 1981), concerned a lessee who failed to receive proper notice of the Commission hearing to consider the application to pool but who did receive a copy of the pooling order and accepted and cashed the check tendered as bonus for his lease under the terms of the pooling order. The court concluded that by his conduct, the lessee had waived his appeal from the pooling order.

BRANKO

MOUNTAIN STATES NATURAL GAS CORPORATION v. PETROLEUM CORPORATION OF TEXAS

United States Court of Appeals
Tenth Circuit
December 3, 1982—No. 81-2358
693 F. 2d 1015

Oil and Gas Leasing: Pooling Order—Primary Jurisdiction—Due Process—State Action—Notice.

Plaintiff sued to join in the drilling of a well free of the risk penalty, claiming that the defendant failed to provide it with proper notice of well costs, and did not give it an opportunity to elect to pay its share as required by the pooling order issued by the New Mexico Oil Conservation Division. Defendant appeals from a judgment for the plaintiff. Held: Affirmed. A court may exercise primary jurisdiction where both the court and an agency have the legal capacity to decide the issue, but where the exhaustion doctrine does not apply—as when a substantial federal question, such as a denial of due process, is presented. Where plaintiff was not contesting the state order, but rather the actions of a private party seeking compliance with the order, a "state action" was not sufficiently demonstrated so as to support an action for denial of due process. Plaintiff will be permitted to join in the drilling of a well free of risk, although it did not elect to do so prior to the drilling of the well, where defendant failed to give proper notice of the well costs and drilling pursuant to the pooling order of the State's Oil Conservation Division.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

...as (Petco) appeals from ... ...art authorizing Mountain ... Mountain States) to join ... lexico without penalty and ... Mountain States for the ... eld from production.

...ompany organized under ... ...ed to do business in New ... gas interests underlying ... New Mexico, on which it ... ...ier the spacing rules pro... ...d Conservation Division,[1] a ...essary to secure a drilling ... the oil and gas interests ...ous to Petco's property.

... a Petco employee, tele... ...sident of Mountain States, ... farm out its rights in the ... Blair suggested that Ware ...ng. On May 11, Ware sent ...hich provided that Moun... ...est in the well to Petco in ...alty interest.

...rom Blair by June 21. He ...ffice. Ware was informed ...m-out agreement had not ...y of the farm-out agree... June 30, Blair telephoned ... he was not interested in ...

... a letter stating that Petco ...d gas mineral interests on ...ess an agreement could be ...ot respond to the letter.

... Oil Conservation Division Rules ...

On August 29, Petco submitted an application to the New Mexico Oil Conservation Division (Division) seeking to have Mountain States' 40-acre tract forced pooled into a drilling unit.[2] On September 27, the Division conducted a hearing, in which Mountain States did not participate, concerning the mandatory pooling of the oil and gas underlying Mountain States' 40-acre tract. Subsequent to the hearing, the Division issued an order creating a 160 acre oil spacing and proration unit and pooling all the mineral interests, including Mountain States' interests, therein. The order also named Petco as the operator of the well and unit and provided that: "[a]fter the effective date of [the] order and within a minimum of 30 days prior to commencing [the] well, the operator shall furnish . . . each known working interest owner . . . an itemized schedule of estimated well costs." The order further provided that: "[w]ithin 30 days from the date the schedule of estimated well costs is furnished to him, any non-consenting working interest owner shall have the right to pay his share of estimated well costs to the operator in lieu of paying his share of reasonable well costs out of production. . . ." The order also provided that non-consenting owners were required to pay 200 percent of the reasonable well costs as risk charges.

On October 25, Petco sent Mountain States a certified letter containing a copy of the Division's order and a copy of the estimated well costs. On October 31, without having heard from Mountain States, Petco commenced drilling the well. The well was drilled to its maximum depth by November 17 and was completed on January 10, 1979. On December 12 Petco's letter to Mountain States, containing the well costs and Division order was returned marked "unclaimed." The envelope indicated the post office had placed the letter in Mountain States' postoffice box first on November 1 and again on November 11. Despite notifica-

[2] Under NMSA § 70-2-6 the division has jurisdiction and authority over all matters relating to the conservation of oil and gas.

tio... at Mountain States had not been informed of the ... order, Petco made no other attempts to contact M... ain States.

...irst gas sales from the well were made on April 17, 19... Pursuant to the Division's order, Petco withheld ...roduction Mountain States' share of the well costs ... additional 200 percent thereof as a penalty for not co... ting to pay its share of the well costs.

...ter dated June 28, 1979 Petco was informed by Mou...tain States that it had never received notice of the ...ts or had an opportunity to elect to pay its share, ...s was asserting its right to join in the drilling of the we... hout paying a penalty. Petco, nevertheless, contin- ue... withhold Mountain States' costs from production.

...lay 23, 1980, Mountain States filed a complaint in th... rict court seeking an order permitting it to join in the ... l free of risk penalty because Petco had failed to pr... Mountain States with notice of well costs pursuant to ... Division's order. Mountain States alleged that as a resu... f Petco's failure to provide it with notice, Mountain Sta... right to due process of law had been denied. The complaint was amended on December 12, 1980, to include ... r for damages for conversion and for an accounting.

O... February 4, 1981, the district court dismissed the ac... ...out prejudice so that the issues could be initially ... ...red by the Division.[3] Mountain States filed a motion ... reconsideration of the court's dismissal of the suit on ...ruary 6, contending that the Division need not ... the action initially inasmuch as the suit sought equitable relief which the Division could not grant and because the central issue was legal. Mountain States con-

... provides that, "any dispute relative to [the cost of drilling and completing the well], the division shall determine the proper costs after due notice to interested parties and a hearing thereon."

:ended that the doctrine of primary jurisdiction therefore did not apply. The court granted Mountain States' motion on March 9, and set aside its order of dismissal.

The case was tried before the court on September 22, 1981. The court found that the Division's order requiring Petco to furnish estimated well costs to Mountain States contemplated *actual* notice to Mountain States, and that Petco's attempt to notify Mountain States by means of a certified letter did not satisfy the requirements of the [illegible], the court found that Petco's attempted notification on October 25 did not comply with the terms [illegible] Division order inasmuch as notification was not made at least 30 days prior to commencing drilling of the well. Consequently, the court ordered Petco to pay Mountain States the sum it had withheld as a risk penalty from its share of the proceeds of the well, together with interest thereon at 12 percent per annum.

On appeal Petco contends that: (1) the court erred in ruling that the Division did not have primary jurisdiction over the suit; (2) the court erred in its consideration of Mountain States' due process claim; and (3) the court [illegible] Petco had not complied with the 30-day notification requirement inasmuch as that issue was not within the scope of the pleadings.

I.

Petco contends that the court erred in ruling that the Division did not have primary jurisdiction over the suit.

In United States v. Western Pacific R. Co., 352 U.S. 59, 77 S. Ct. 161, 1 L.Ed. 2d 126 (1956), the Supreme Court explained the related doctrines of exhaustion of administrative remedies and primary jurisdiction as follows:

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between

> the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. [Citation omitted].
>
> 352 U.S. at pp. 63–64, 77 S. Ct. at p. 165.

In New Mexico Association For Retarded Citizens, et al. v. State of New Mexico, et al., 678 F. 2d 847 (10th Cir. 1982), we recognized that exhaustion of [administrative] remedies and primary jurisdiction are closely connected doctrines. In that case, it was contended that the district court should have stayed its hand until administrative remedies had been exhausted or invoked the doctrine of primary jurisdiction to permit the administrative agency to first complete its investigation into the charges. We observed, inter alia:

> Exhaustion requires agency determination of claims initially cognizable exclusively at the administrative level prior to court intervention. See United States v. Radio Corp., 358 U.S. 334, 346 n.14, 79 S. Ct. 457, 464 n.14, 3 L.Ed. 2d 354 (1959). Primary jurisdiction mandates similar judicial restraint: disputes properly pressed in either the courts or administrative bodies are to be first decided by an agency specifically equipped with expertise to resolve the regulatory issues raised. Id.
>
> 678 F. 2d at p. 850.

The exhaustion doctrine applies where the agency *alone*

has exclusive jurisdiction over the case (generally premised on the exercise of the agency's expertise), whereas primary jurisdiction applies where *both* a court and an agency have the legal capacity to deal with the issue.

There are two main principles applicable to the rule that every court requires exhaustion of administrative remedies: "(1) a court will not decide a question [within the agency's specialization and when the administrative remedy will provide the wanted relief] not first presented to an agency; and (2) a court will not decide a constitutional question in a case that the agency might have decided on nonconstitutional grounds." Davis, Administrative Law Treatise, 1982 Supp., Ch. 20, § 20.11, p. 281.

However, in McKart v. United States, 395 U.S. 185, 89 S. Ct. 1657, 23 L.Ed. 2d 194 (1969) the Supreme Court observed that while the doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law, it is, like most judicial doctrines, subject to numerous exceptions. Indeed, this court has recognized that "[t]he exhaustion principle is not indiscriminately applied to block judicial action in every circumstance where a litigant has failed to explore his administrative avenues of relief." New Mexico Association For Retarded Citizens, et al. v. State of New Mexico, et al., 678 F. 2d at p. 850. Thus, in Martinez v. Richardson, 472 F. 2d 1121 (10th Cir. 1973) we said:

> It is, of course, axiomatic that a litigant must exhaust his administrative remedies, if such remedies exist, as a prerequisite to invoking the jurisdiction of the federal court. But this requirement of exhaustion is not invariable where, for example, the administrative remedy is wholly inadequate and the federal question is so plain that exhaustion is excused. [Citations and footnotes omitted].

As previously noted, the action which was taken against the plaintiffs here involves violation of rights guaranteed by the

Fifth Amendment to the Constitution of the United States, and it cannot be doubted that the federal question is a substantial one.

472 F. 2d at p. 1125. [Emphasis supplied].

In Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 41 L.Ed. 2d 18 (1976) the question presented was whether a pre-termination hearing was required by due process and whether this issue must, in the first instance, be decided by the agency. The Supreme Court held that the Secretary was not required to consider such a challenge. The converse, of course, is that the challenge may be initially posited with the courts because it involves a constitutional question.

We hold that the court did not err in exercising primary jurisdiction in the case at bar. The crux of Mountain States' claim presented was that Petco violated its federal constitutional right of due process of law. Here, as in Martinez v. Richardson, supra, there was a substantial federal question presented.

II.

Petco's due process contentions are two-fold. First, Mountain States failed to plead or to prove that state action was involved, and thus the issue was improperly before the court. Second, even if due process was properly raised, Petco satisfied its obligations when it sent a letter containing the Division order and well costs to Mountain States.

To maintain an action for denial of due process, a party must demonstrate initially that "state action" is involved.[4]

[4] The Fourteenth Amendment to the United States Constitution provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

No cause of action exists for a dispute between purely private individuals.

In this case, Mountain States alleges that Petco denied it due process because Petco neglected to provide notification of well costs as mandated by the Division order. It is not clear from the record what Mountain States' state action contention is. Apparently, Mountain States is maintaining that because notification was required by order of the Division, which is a state agency, state action was involved. Admittedly, however, Mountain States' complaint is not with the Division's order, which it unquestioningly accepts, but rather with Petco's actions seeking compliance with the order.

In Norton v. Liddel, 620 F. 2d 1375 (10th Cir. 1980) this court, discussing Torres v. First State Bank of Sierra County, 588 F. 2d 1322 (10th Cir. 1978), stated that where a state "does no more than furnish a neutral forum for the resolution of issues and has no interest in the outcome of the lawsuit, the State court's action in issuing an order cannot be imputed to the private party seeking issuance of the order." 620 F. 2d at p. 1380. This rationale must extend also to neutral state agencies which, without having an interest in the outcome of the case, merely provide a forum for the resolution of disputes.

The dispute in the present case is between private parties. No state action is contested. Mountain States' contentions are directed solely to Petco, and Petco's actions cannot be said to rise to the level of state action merely because an uncontested state order is involved.

Without considering the "state action" question, the trial court found that the term "furnish" in the Division order required actual notification to Mountain States, and that Petco failed to comply with due process requirements by simply mailing a letter to Mountain States.

We decline to consider whether the order and due pro-

cess require actual notification or whether Petco's attempt to notify by mail, even though not received by Mountain States, was sufficient notification. We need not reach the issue, inasmuch as the court ruled that Petco's attempt to notify Mountain States on October 25, even if received, failed to comply with the Division order requiring that Mountain States be accorded a minimum of 30 days notice before Petco commenced drilling operations. The record shows that the well was commenced on October 31, only six days following the mailing of notification to drill. Petco argues that the court improperly considered the "actual notification" issue because it was outside the scope of the pleadings. Even if this be true, an appellate court may affirm the order of the trial court on any grounds that find support in the record. Fleming Bldg. Co. v. Northeastern Oklahoma Bldg., 532 F. 2d 162 (10th Cir. 1976); Keyes v. School District, 521 F. 2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Carpenters Dist. Council v. Brady Corp., 513 F. 2d 1 (10th Cir. 1975); Retail Store Employees v. Sav-On Groceries, 508 F. 2d 500 (10th Cir. 1975); Sanchez v. TWA, 499 F. 2d 1107 (10th Cir. 1974); Pound v. Insurance Co. of N. Am., 439 F. 2d 1059 (10th Cir. 1971). Such is the case here.

The Division order provided that Petco was required to furnish notice to Mountain States "within a minimum of 30 days prior to commencing a well." The language of the order is clear. Despite Petco's argument that notification had to be *within* 30 days of drilling, the plain language of the order is that Petco was required to provide Mountain States with at least 30 days notice *before* commencing drilling operations.

We hold that Petco violated the terms of the Division order by failing to furnish Mountain States with notice at least 30 days before commencing the well. Accordingly, Mountain States was not allowed the opportunity accorded by Division's order to elect to pay the costs of drilling.

WE AFFIRM.

DISCUSSION NOTES

Oil and Gas Leasing: Pooling Order—Primary Jurisdiction—Due Process—State Action—Notice.

Not discussed.

P. G. D.

817 P.2d 721

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.

Supreme Court of New Mexico.

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.

1. Administrative Law and Procedure ⇐381

Mines and Minerals ⇐92.32

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. Mines and Minerals ⇐92.33

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.

3. Mines and Minerals ⇐92.32

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.

4. Constitutional Law ⇐277(1)

Mines and Minerals ⇐79.1(1)

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.

5. Mines and Minerals ⇐92.33

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.

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.

OPINION

FRANCHINI, Justice.

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

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.

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.

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.

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.

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. 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.

[1, 2] 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] 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.

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.

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.

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).

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).

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] 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.

IT IS SO ORDERED.

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

MONTGOMERY, J., dissents.

MONTGOMERY, Justice (dissenting).

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

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."

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...."

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).

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.

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.

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.

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

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.

The majority having concluded otherwise, I respectfully dissent.

817 P.2d 726

Maria D. SANCHEZ, Petitioner,

v.

SIEMENS TRANSMISSION SYSTEMS and Zurich-American Insurance Group, Respondents.

No. 19820.

Supreme Court of New Mexico.

Sept. 25, 1991.

In workers' compensation case, worker's compensation administration, John Pope, Workers' Compensation Judge, awarded claimant temporary total disability and other benefits. Employer appealed. The Court of Appeals, 112 N.M. 236, 814 P.2d 104, affirmed in part, reversed in part, and remanded. Certiorari was granted. The Supreme Court, Ransom, J., held that: (1) legal counseling provided to claimant before discontinuation of benefits could be considered by workers' compensation judge in determining attorney fees, and (2) award of fees in amount equivalent to 102% of present value of final award was not per se excessive.

Reversed.

1. Workers' Compensation ⇐1981

Even though recovery of compensation is prerequisite to allowance of attorney fees, legal services rendered prior to termination of benefits may still be compensable. NMSA 1978, §§ 52-1-54, 52-1-54, subds. A-L.

2. Workers' Compensation ⇐1981

Employer is not liable for consultation fees incurred prior to termination of disability benefits only if employer does not wrongly terminate benefits. NMSA 1978, §§ 52-1-54, 52-1-54, subds. A-L.

3. Workers' Compensation ⇐1981

Attorneys are entitled to adequate compensation for work necessarily performed in workers' compensation cases, and, thus, determination of what fees are reasonable and proper lies within sound discretion of workers' compensation judge. NMSA 1978, § 52-1-54, subd. F.

4. Workers' Compensation ⇐1981

Attorney fees are not set at any specific percentage of claimant's recovery in workers' compensation case.

5. Workers' Compensation ⇐1981

Relationship between attorney fee award and actual recovery in workers' compensation case may be considered in determining reasonableness of attorney fees.

6. Workers' Compensation ⇐1983

Award of attorney fees in amount equivalent to 102% of present value of claimant's final workers' compensation award was not per se excessive; issues were seriously contested and complex, and, when reduced to hourly rate, fee did not appear unreasonable.

Jarner & Olona, Mark D. Jarner, Los Lunas, for petitioner.

Ray A. Padilla, Padilla, Riley & Shane, P.A., Albuquerque, for respondents.

OPINION

RANSOM, Justice.

We granted certiorari to review two issues addressed by the court of appeals in

(1) (P) principles & (P) bound by P

(2) Murphy testifying on behalf of (P)s

(3) Cutoff point: Case

Correspondence

Constructive Notice

Note w/interest:

(1) Scott: Testified @ hearing
→ Scott Exploration owner
→ SH in Strata
Q. Other SHs in Strata?
→ Other Scotts (5 in all) Aware 1/93
→ Relation to Murphy

(2) Scally Cavin — Strata protected interests

113 NM 403

(3) Principal & Agent → From Partners
Scope P&A 178 181
148(2) 182
142

(4) Constructive Notice Banks 2587

(5) 2 WI owners didn't join in action
Why?
→ Affidavit from Warren
→ Arrowhead: Nothing
subpoenas

(6)

* ~~Affidavits~~
* Review

Plug Cases

① Old orders
Why never carried out?
② Opinion: Can wells be profitably produced?

Woosley H&W Mercury

Exs. for 5/16 hearing

Outline

① Name
② Residence
③ Position/Duties
④ Familiar w/subj matter
* Offer qualifs. as witness

Yates

BRANKO File

Operator/Current Status
⑤ Brief history of wells
⑥ Efforts to get operator to plug
⑦ Recommended plugging proced.
⑧ Bonds
Info. from Diane R.
⑨ Notice

SWD Noon

Exhibits
① ~~Permit docs.~~ ③ ~~Draft Order~~
② ~~Admin. Order~~

Q. Recommend plugging?
Q. Plugging result in prevention waste, protect correlative rights and protection of freshwater public health and environment?
Q. Does any other?
Q. Does ex hibits ~~kept~~ maintained by OCD in OCB?

Testimony
① Original permit ④ Comps. — Maps.
② What happened
③ Why need to be closed

* [redacted] Move Exs. into Record

Q. ~~Cavin Scaly testifying~~? Atty for Strata

Q. Partnership/partners

~~Q.~~ Correspondence/detailed phone logs re: concept w/ partners re:

Q. Once p.174

Q.

* Q. Well performance?

Q. Notice of well to partners? When?

Q.

Daggett, Inc. ? 5/2/96 case

11510 Branko

WI →
ORRoy →

1989

~~Q.~~ When did Mitchell (2-3 mos. know ?

~~Q.~~ Partners show up for hearing ?

Q. When postg [redacted] applic filed

* Dec. 7 Applic
* Dec. 9 Served Delayed

Jan. 13

Dec. 9 letter: Notice/Represent.
Dec. 30 letter:

Q. Documentation as to rel

→ Checks
→ Assigns. R

11510 Mark Murphy

October 92

December 9 → Ith partners
January 6 →

Daily phone log/convo w/ partners

December 30 →
Q7 Undisclosed Q. What
Q8 Authority

(Btw Dec 9 and 30)
** Prior to Dec. 30th letter discussed w/ undisclosed partners

Fall 89

Dec. 9th → Compulsory pooling

Arrowhead Warren, Inc. / No affidavits

Ex. 23

How many partners?

Salt Lake City, UT
→ All signed by same man
Scotts → All same

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* Dec. 9 conflict w/ Dec. 30

March 16, 1993

* btw Dec. 9 and Dec. 30
Conns. w/partners

Dec. 95

Ex. 77

* Lease ~~Extensions~~

Why not

"leasehold operating rights"
is this the ~~same as~~ "leasehold int"? or "operating int."?

Affidavits

Branco — Nov. 1, 1989 (on or about) Branco pd for: acquired 1.5625% of leasehold op. rights in. fol'g lease for $316.48
B believes B has pd 1.5625% of rentals pd by Strata w respect to lease
(affdt. dated 1/23/96) affidavit: "given in support of Motion to Reopen Case. No. 10656 - for no other purpose."

Brown — 9/22/89 (on or about) B pd for: acqd 5% of leasehold op. rights in, to: under. for $1012.75. "I have pd 5% of the rentals pd by Strata..." ~~Grant~~ by?

Cavin atty — on or about 10/5/89 pd for: acqd 2% for $405.10 (as consideration for the "interest")

Eaton — 9/24/89 pd for: acqd 1.5625% of "leasehold operating rights" for $316.48

Kramer — 3/7/90 pd for: acqd 30% of "leasehold operating rights" for $6076.50

Grant — 9/89 Landmest p/shp (Utah) ~~[illegible]~~ pd for: acqd 1% for $202.55

McClellard — 11/1/89 2.125% $430.42

Grant — 9/25/89 Permian Hunter Corp 4% for $810.20

Scott — 11/1/89 Scott Explstn Inc. .5% overriding royalty interest for $1822.95

Wellborn atty — 11/1/89 2% $405.10

Murphy — 11/1/89 Mesa Investments 1% $202.55

CALL BLM

Worrall 11/1/89 1 ½ "203.55

Hunt 9/15/89 Xion Investments (p/ship) 10½ - "2025.50

Scott "11/1/89 Geo. Scott .5% "I received a .5% ..." in consideration of geological services rendered in connection w/ negotiation & acquisition of lease

Mitchell 11/1/89 rec'd .5% overriding royalty int. for geological services

Scott 11/1/89 Charles Scott Exp. rec'd .5% for geological services

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Murphy Affidavit Branko Ex 17

late 89 Strata (Mr pres.) - S is operator of Gavilon Fed No 1 well - S acquired U.S.O.G. lease NM 82 927 at a fed lease sale "Strata North Gavilon Lease"

In late 1989 S offered this lease to the working int. owners of Strata Gavilon Lease "Some of the ptrs accepted the offer & purchased an interest in the leasehold operating rights in such lease... The remaining int. was sold to new parties or retained by S

#6 Following the sale by S of the int. in the Strata North Gavilon Lease, S retained all the record title interest subject to the beneficial int. of the ptrs in Ex A."

STAMPED ON NOV 8, 1995 BY LEA COUNTY CLERK

[S no stmt re. BLM approval]

Who typed in eff. date? (of 11/1/89

No signature of transfee

Gifis * Cl Black's

BENEFICIAL USE w/ respect to property, such right to its enjoyment as exists where legal title is in one person while right to such use or int. is in another.

131 P.2d 189, 191. A person who has beneficial use does not hold legal title & of prop. Legal title is held in trust by another.

Gifts Law Dict. "beneficial int." the int. of the beneficiary as opposed to the int. of the trustee who holds legal title; the equitable int. in prop. held in trust which the beneficiary may enforce agnst the trustee according to the terms of the trust.
300 U. S. 118, 138

12/30/92 LT from S to Mitchell "S still ex. : deliv an assignment of 100% of the record title in the Subj. Lease"
Ex. 20 Bl. of Undisclosed Owners There are certain undisclosed owners / undivided interest in the Subject Lease whose interest (sic) are not reflected in the county or BLM records. S hereby represents & warrants unto Mitchell that it has the right, power and authority to sell 100% of the Subj. Lease for the benefit of the such undisclosed owners
[this does show that S knew how to make an assignment]

~~1/6/93~~ [I ate later]

1/12/93 Ex ~~22~~ 23 S LT to Mitchell S recalls that a tel. conf. on 11/18/92 "I [S] informed you that... S wld defend itself and it's [sic] partners rights during any proceeding including a force pooling hearing
in which S claims the partnership
...I will provide you w/ a list of the leasehold partners & overriding royalty owners so that you can contact these individuals direct. Since you have had notice that these undisclosed owners exist we would ask that you grant another 2 week continuance & notify these parties of your application."

1/13/93 Ex. 24 LIST "S has or is in the process of making a direct assignment of each partners proportionate ownership."

(thru atty Cavin)

4/28/93 Ex 25 — S tells TK its w/drawn its applctn for de novo hearing
"As we have maintained from the start, S does not have unfettered auth. to act on behalf of the other int. owners"

5/11/93 — "proper notice" 252 x 81.52 x 1.4 mil. x 200% = $70,000.00

11/6/95 Ex 27 — Transfer of Operating Rgts assigning out the leasehold op. rights

"Prior to & after the force pool hearing, S encouraged M to contact each of you, (leasehold owners) as the beneficial owners of the leasehold operating rights. ... S, on the advice of counsel, believes that you may have a gd claim agnst M
penalty = 7500 per 1% interest

Ex 28 1/19/93 — Certificate signed by TK re notice provisions of Rule 1207
... and faith diligent effort to find the correct addresses of all interest parties entitled to receive notice (re applctn for compulsory pooling)

Ex 29-44 — 2. I first became aware of ... well on Nov. -95

Rule 1-025(C)
Applctn for Rehrg filing Jan 1993; 5 dates for de Novo, but dismissals
Applctn to reopen by non-parties - standing
(so OCD had to determ. what non-parties had standing

Why didn't order just address standing

Order - R-10672 10/2/96 ordered case reopened finding #19 no notice of election rights sent to applicants - case shld be reopened to det. share of costs that shld be apportioned to each int. owner in subj. well as well as determine how future operations shld be conducted for such well

STATUTE of frauds - "interests were unenforceable (real prop int)

BENEFICIAL INTEREST ISSUE

STATUTE REQUIRING RECORDING - not "of record"

" mentioning executed instrument

years after hrng: order

"protected property right"

during. Uhden - U was lessor - entire lease

p8 of Hal's Brief

Wld some of the "interests" have expired on 1/31/94 - since they did not, didn't these "interests" exist at that time that the well was producing - not necessarily Why did they wait til 1/96 (1 yr + 2 months) to seek to reopen case? [illegible]

(Pltfs claim they became aware 11/95)

Did the title op. indicate the possibility or likelihood of unrecorded interests in the pooled prop?

NOT THAT I could find

ISSUE: DE NOVO

Why was the opening limited to issue of other tenants had a protected right?

Branko did not file for a DE NOVO (has to be a party of record)

ISSUE: REOPEN

BLM TK Reply to Motion to Dismiss

- no evid that Sewer filed assign w/ or obtained appvl of BLM

43 CFR § 3106.1(b)

43 CFR 31.06.7-4 'no cognizable

ILLEGIBLE

⇐115.1. —— Necessity.

N.M.App. 1981. Oral agreement sought to be enforced against defense of statute of frauds can be evidenced by a series of writings, but collateral papers must be referred to in the memorandum itself; in such instance all the writings relied upon to evidence existence of the purported contract between the parties must be signed by the party to be charged, or if only one is signed, it must appear that it was signed with reference to the others. NMSA 1978, § 55–1–206.—Balboa Const. Co., Inc. v. Golden, 639 P.2d 586, 97 N.M. 299.

⇐116(5). Necessity that agent's authority in agreements relating to land be in writing.

N.M. 1980. Orally created agency relationship between vendor and its employee could be relied upon in seeking specific performance of land sales contract executed by employee even though land sales contract had to be in writing to comply with statute of frauds.—Vickers v. North American Land Developments, Inc., 607 P.2d 603, 94 N.M. 65.

⇐118(1). In general.

N.M.App. 1985. Essential terms of a contract to make a will may be contained in more than one document and still satisfy statute of frauds; statute governing contracts to make wills only operates to exclude extrinsic oral evidence for proof of essential terms of the contract. NMSA 1978, § 45–2–701.—Matter of Estate of Vincioni, 698 P.2d 446, 102 N.M. 576, certiorari denied 698 P.2d 886, 102 N.M. 613.

⇐118(2). Writings connected by internal reference.

N.M.App. 1985. Purported will or contract to make a will must contain, or by reference to some other document, refer to, all of the essential terms of the contract in order to satisfy statute of frauds. NMSA 1978, § 45–2–701.—Matter of Estate of Vincioni, 698 P.2d 446, 102 N.M. 576, certiorari denied 698 P.2d 886, 102 N.M. 613.

N.M.App. 1981. Oral agreement sought to be enforced against defense of statute of frauds can be evidenced by a series of writings, but collateral papers must be referred to in the memorandum itself; in such instance all the writings relied upon to evidence existence of the purported contract between the parties must be signed by the party to be charged, or if only one is signed, it must appear that it was signed with reference to the others. NMSA 1978, § 55–1–206.—Balboa Const. Co., Inc. v. Golden, 639 P.2d 586, 97 N.M. 299.

⇐118(4). Letters and other documents.

N.M. 1969. Letters from decedent, referring to fact that third person had left $35,000 with decedent for plaintiff and to agreement that plaintiff was to keep the house and decedent was to keep the money and stating that decedent had made will and that plaintiff should pay for curtains put into house (because house was hers or was to become hers), constituted sufficient memoranda of agreement to make will to satisfy statute of frauds.—Aragon v. Boyd, 450 P.2d 614, 80 N.M. 14.

IX. OPERATION AND EFFECT OF STATUTE.

Library references

C.J.S. Frauds, Statute of § 216 et seq.

⇐119(1). In general.

N.M. 1994. Although exclusive real estate listing agreement fell within the statute of frauds, cancellation of agreement was not required to be in writing to be effective and thus, real estate agency, through its actions, effectively consented to cancellation of agreement. NMSA 1978, § 47–1–45.—Dave Zerwas Co. v. James Hamilton Const. Co., Inc., 876 P.2d 653, 117 N.M. 724.

Purpose of statute of frauds is to fix specific terms of agreement between the parties.—Id.

N.M. 1991. Oral trust of land requires reconveyance to the settlor notwithstanding the unenforceability of such trust under statute of frauds. NMSA 1978, § 46–2–13.—Matter of Estate of McKim, 807 P.2d 215, 111 N.M. 517.

N.M.App. 1995. It is not a light matter to refuse to apply the clear rule of the statute of frauds that oral contracts for the conveyance of property are not enforceable.—Nashan v. Nashan, 894 P.2d 402, 119 N.M. 625, certiorari denied Nashen v. Nashen, 891 P.2d 1218, 119 N.M. 464.

N.M.App. 1994. Because statute of frauds required that any conveyance of real property be in writing, oral agreement allowing purchaser of land an indefinite extension to perform under sales contract was not valid and purchaser could not, therefore, rely on oral agreement as basis for its claim to a legal interest in the property at time of the taking so as to be entitled to compensation.—Board of Educ., Gadsden Independent School Dist. No. 16 v. James Hamilton Const. Co., 891 P.2d 556, 119 N.M. 415, certiorari denied 890 P.2d 807, 119 N.M. 354.

N.M.App. 1993. Once property has been conveyed by deed from record owner, person to whom property has been conveyed owns it, and he or she must then reconvey it before law will recognize other person as having acquired title, because common-law statute of frauds requires transfers of real property to be in writing.—Gonzales v. Gonzales, 867 P.2d 1220, 116 N.M. 838.

N.M.App. 1982. Statute of frauds is affirmative defense applicable in action seeking to enforce oral contracts; such defense, however, is not effective in actions grounded in tort.—Sanchez v. Martinez, 653 P.2d 897, 99 N.M. 66.

Statute of frauds did not bar plaintiffs' actions seeking damages for defendant's alleged negligent failure to procure fire insurance, since plaintiffs brought suit under alternative theories of tort and contract, and as ultimately submitted to jury, plaintiffs sought recovery solely upon their claim of tort.—Id.

N.M.App. 1976. The statute of frauds applies only to executory, as distinguished from executed, contracts, and if a contract otherwise within the statute is completely performed, it is thereby taken out of its operation.—Pattison Trust v. Bostian, 559 P.2d 842, 90 N.M. 54, certiorari denied 561 P.2d 1347, 90 N.M. 254.

⇐119(2). Statute as engine of fraud.

C.A.10 (N.M.) 1972. Statute of frauds was not enacted to be used as a vehicle for perpetration of a fraud.—Ortega v. Kimbell Foods, Inc., 462 F.2d 421.

N.M.App. 1995. Equity will regard bar of statute of frauds as removed if plaintiff's performance is such that it would amount to fraud upon plaintiff to use the statute as a defense.—Nashan v. Nashan, 894 P.2d 402, 119 N.M. 625, certiorari denied Nashen v. Nashen, 891 P.2d 1218, 119 N.M. 464.

⇐121. Construction of statute in general.

N.M.App. 1976. Statute of frauds is intended to protect against fraud; it is not intended as an escape route for persons seeking to avoid obligations undertaken by or imposed upon them.—Pattison Trust v. Bostian, 559 P.2d 842, 90 N.M. 54, certiorari denied 561 P.2d 1347, 90 N.M. 254.

⇐127. Writing subsequent to oral agreement.

N.M.App. 1982. Where plaintiff's cause of action is solely in contract based on oral agreement which cannot be performed within one year, and there is no evidence of partial performance or memoranda confirming the agreement, statute of

ases see same Topic and Key Number in Pocket Part

stantial evidence and appeal.
49 P.2d 759, 56 N.M.

ion to cancel mineral st grantee, there was support finding that had been delivered to which was retained by olute title after grant- ineral interest therein tion of cancellation of is an additional sum, fraud or without con-

rtin, 289 P.2d 327, 60

ought action against ed to cancel the same ed had not been pro- not without considera- y the evidence, the deed o in order to determine of the parties.
artin, 289 P.2d 327, 60

ction to cancel convey- est wherein defendants to quiet title as against ff's part, plaintiff's as- f frauds and statutes e of real estate consti- nses that were required

k, 325 P.2d 284, 64 N.M.

CENSES, AND CON- ACTS.

mining leases and s.

d Minerals §§ 164, 165,

Forms ch. 44, Minerals,

for leases.

Minerals § 166.
Law of Oil and Gas §§ et seq.

suit for possession of under option to purchase d for accounting for ore evidence held to support of option peacefully va- claims.
on, 51 P.2d 601, 39 N.M.

Holders of option to purchase and work gold mining claims who peacefully vacated and abandoned claims when tenant in common on whom option to purchase contract was not binding insisted that they cease operations under claim of right as his lessees, had no interest in ore shipped from claims, and were not entitled to accounting from occupying tenant, notwithstanding refusal of occupying tenant to permit holders to work claims, where holders demanded right to work the whole of the claims.

James v. Anderson, 51 P.2d 601, 39 N.M. 535.

Claimant of rights under option to purchase and work gold mining claims, with royalties reserved to lessor, must exercise good faith and diligence.

James v. Anderson, 51 P.2d 601, 39 N.M. 535.

N.M. 1950. A contract to execute an oil and gas lease should be construed as any other contract for sale of an interest in land is construed.

Vanzandt v. Heilman, 214 P.2d 864, 54 N.M. 97, 22 A.L.R.2d 497.

⇦58. Requisites and validity.

Library references

C.J.S. Mines and Minerals §§ 167, 169, 196, 198.
Modern Legal Forms ch. 44, Minerals, Oil and Gas.
Summers, The Law of Oil and Gas §§ 211 et seq., 598, 1121 et seq.

N.M. 1922. An oil and gas lease for a period of five years, or as long thereafter as oil and gas, or either of them, is produced from said land by the lessee, conveys "real property," and under chapter 84, Laws 1915, requires that the husband and wife join in such instrument.

Terry v. Humphreys, 203 P. 539, 27 N.M. 564.

N.M. 1950. Where lessor agreed in writing to execute and deliver an oil lease, terms of which were agreed on, and down payment was to cover not only privilege granted to date when first rental in stated amount was payable, but also lessee's option of extending that period and all other rights conferred, fact that lessor agreed to accept money for options and thus sold to lessee right to terminate lease which he did not reserve for himself would not render lease, if executed, void for lack of mutuality of remedies.

Vanzandt v. Heilman, 214 P.2d 864, 54 N.M. 97, 22 A.L.R.2d 497.

For references to other topics, see Des

N.M. 1951. A lessor may limit depth to which he leases his land for oil, gas or other mineral development.

Thompson v. Greer, 233 P.2d 204, 55 N.M. 335.

⇦59–63. *See Topic Analysis for scope.*

Library references

C.J.S. Mines and Minerals §§ 168 et seq., 179.
Modern Legal Forms ch. 44, Minerals, Oil and Gas.
Summers, The Law of Oil and Gas §§ 195, 1354 et seq.

⇦61. Construction and operation of mining leases.

Library references

C.J.S. Mines and Minerals § 170.

⇦64. —— Assignment or sale of lease or reversion.

Library references

Modern Legal Forms ch. 44, Minerals, Oil and Gas.

N.M. 1944. In ascertaining intent of parties to contract for option to purchase interest in sodium mining leases with respect to ownership of property at time of execution of contract, court may look to circumstances surrounding parties, including object, nature, and subject matter of agreement, and parties' preliminary negotiations.

Logan v. Emro Chemical Corp., 151 P.2d 329, 48 N.M. 368.

Persons contracting to assign their option to purchase interest in sodium mining leases to corporation did not preclude themselves from asserting implied vendor's lien for balance of purchase price by permitting legal title to property to pass directly from optionor to another corporation by assignment to it of all their interest in contract at request of assignee and such other corporation.

Logan v. Emro Chemical Corp., 151 P. 2d 329, 48 N.M. 368.

Persons to whom corporation agreed to issue preferred stock of specified par value without stipulated dividends as consideration for their transfer to corporation of option to purchase interest in sodium mining leases, instead of issuing preferred stock of no par value, with guaranteed dividends, as provided by previous contract, were not precluded from asserting that property passed to corporation subject to vendor's lien in their favor. 1941 Comp. § 54–317.

Logan v. Emro Chemical Corp., 151 P.2d 329, 48 N.M. 368.

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-Id.

logy that appears to create a "non-par-
mineral interest" usually has been con-
create a royalty interest.—Id.

non-participating" as used in deed of
: of mineral rights meant that owner of
'est was not entitled to participate in
leases and was not entitled to participate
n bonuses or delay rentals.—Id.

)f remaining mineral rights and surface
; party to leases and paid delay rentals
to them prior to their assignment to
however, owners of 25% mineral rights
:r parties to leases and, as holders of
pating interest, had no privity of contract
: and, therefore, owners of percentage of
ights could not maintain action against
l.

)68. Under deed whereby grantors con-
undivided one-half interest in described
retained an undivided one-half of all
described land, grantee acquired exclu-
ıg rights and exclusive right to bonus
ıd delay rentals, but grantee could not
)erty so as to deprive grantors of their
Price v. Atlantic Refining Co., 447 P.2d
I.M. 629.

)68. Creation of exploration and devel-
ısements in instrument, such as right of
d egress, is not controlling in determin-
er it conveys minerals in place or trans-
y only.—Atlantic Refining Co. v. Beach,
107, 78 N.M. 634.

y" interest in oil and gas reserved in deed
:d for in oil and gas lease, is share of the
r profits reserved by the owner for per-
ıother to develop his property for oil and
ly without expense to the property owner.

h instrument denominated as mineral
words "in and under" or "thereunder"
tion with conveyance of 1/16 of minerals,
ghout entire intention clause of instru-
granted interest was referred to as royal-
:e in the minerals themselves, together
to any bonus, rentals, or delayed rentals,
ved to grantor, instrument conveyed roy-
st and not mineral interest so that own-
neral rights were entitled to ½ of ⅛ of
ather than 1/16 of ⅛ royalty.—Id.

at reserved to grantor mineral rights
h royalties already conveyed were to be
elieved grantee and his grantees of bur-
ıy part of royalty interest theretofore
—Id.

**Kind, quantity, and location of miner-
als granted or reserved.**

85. Sand and gravel are not included
pe of general mineral reservation con-
ontract of sale or patent.—Roe v. State
e Highway Dept., 710 P.2d 84, 103 N.M.
ari denied Baca v. Roe, 106 S.Ct. 2247,
141, 90 L.Ed.2d 693.

sand and gravel passed with surface
ough original applicant for property did
or title to sand and gravel, as sand and
: not specifically reserved by purchase
d patent; overruling *Burris v. State ex
ighway Commission*, 88 N.M. 146, 538
Id.

2. Sand and gravel were not "miner-
reservation to State of all minerals in
nder contract.—Jensen v. State High-
ission, 642 P.2d 1089, 97 N.M. 630,
enied Armijo v. Jensen, 103 S.Ct. 86,
8, 74 L.Ed.2d 80.

N.M. 1978. Whether sand and gravel are "minerals" as that term is used in a mineral reservation or grant depends upon specific facts of each case after consideration is given to statutes applicable thereto, mineral reservation as expressed, and commonly understood meaning of term. 1953 Comp. §§ 7-9-15, 7-9-17, 7-9-18.—Rickelton v. Universal Constructors, Inc., 576 P.2d 285, 91 N.M. 479.

N.M. 1968. Deed whereby grantors conveyed an undivided one-half interest in described land but retained an undivided one-half of all royalty in described land reserved to grantors an undivided one-half royalty interest in the land described and not merely an undivided one-half royalty in the one-half mineral interest conveyed.—Price v. Atlantic Refining Co., 447 P.2d 509, 79 N.M. 629.

N.M. 1968. Although instrument denominated as mineral deed used words "in and under" or "thereunder" in connection with conveyance of 1/16 of minerals, but throughout entire intention clause of instrument the granted interest was referred to as royalty, and fee in the minerals themselves, together with right to any bonus, rentals, or delayed rentals, was reserved to grantor, instrument conveyed royalty interest and not mineral interest so that owners of mineral rights were entitled to ½ of ⅛ of royalties rather than 1/16 of ⅛ royalty.—Atlantic Refining Co. v. Beach, 436 P.2d 107, 78 N.M. 634.

Where lessor leased land to oil company with provision for royalty of 1/20 of oil produced and saved and conveyed ⅛ of his interest to transferee and lessor's interest was 17/32 of oil and gas mineral fees subject to entire burden of previous conveyance of 15/32, grantees of previously conveyed interest were entitled to 1.5625 per cent of said royalty so that lessor and his transferee were entitled only to remainder in proportions of ⅞ to lessor and ⅛ to transferee.—Id.

⇐55(6). Servitudes granted, retained, or reserved.

C.A.10 (N.M.) 1974. Where the United States reserves the mineral estate, together with the right to prospect for, mine, and remove the same, in a grant of the surface estate, there is a servitude laid on the surface estate for the benefit of the mineral estate.—Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878, certiorari dismissed 95 S.Ct. 691, 419 U.S. 1097, 42 L.Ed.2d 689.

⇐55(8). Remedies.

N.M. 1982. Lessee of remaining mineral rights and surface rights was party to leases and paid delay rentals pursuant to them prior to their assignment to assignee; however, owners of 25% mineral rights were never parties to leases and, as holders of nonparticipating interest, had no privity of contract with lessee and, therefore, owners of percentage of mineral rights could not maintain action against lessee.—HNG Fossil Fuels Co. v. Roach, 656 P.2d 879, 99 N.M. 216, appeal after remand 715 P.2d 66, 103 N.M. 793.

N.M. 1981. Evidence, in garnishment action by bank against purchasers of turquoise mine, including evidence that vendor had made no material misrepresentations with respect to quality or quantity of minerals located in mines or financial conditions of business, supported trial court's findings that rescission was not available to purchasers of mine.—Bank of New Mexico v. Priestley, 624 P.2d 511, 95 N.M. 569.

N.M. 1966. In action to quiet title to fractional interest in oil, gas, minerals and mineral substances on half section of land, evidence supported findings that memory of original grantor of property was unreliable, untrustworthy, and evasive and not susceptible of belief, that grantor had no recollection of the transaction in question whatsoever, and that plaintiff's father did not purchase subject property from grantor.—Gish v. Hart, 411 P.2d 349, 75 N.M. 765.

In action to quiet title to fractional interest in all oil, gas, mineral and mineral substances in and under half section of land, evidence supported finding that grantee in deed was decedent under whose will defendants were sole devisees, and that defendants were sole owners and successors to title and interest of decedent.—Id.

(C) LEASES, LICENSES, AND CONTRACTS.

1. IN GENERAL.

Research Notes

Contracts for, and validity of mineral leases; covenants for title in leases and assignments; drilling, rental and surrender clauses; rents and royalties, see Summers, The Law of Oil and Gas.

Library references

C.J.S. Mines and Minerals § 164 et seq.

⇐56. Nature of mining leases and agreements.

N.M. 1976. Mineral lease is considered to be real property.—Sachs v. Board of Trustees of Town of Cebolleta Land Grant, 557 P.2d 209, 89 N.M. 712, appeal after remand 592 P.2d 961, 92 N.M. 605.

⇐58. Requisites and validity.

C.A.10 (N.M.) 1972. Evidence relative to mineral lessor's claim for cancellation supported findings that no false, fraudulent or deceitful representations were made to lessor's predecessors and that lessor's predecessors were dealt with fairly and lease was made through fair arm's-length negotiations with both sides represented by competent counsel. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.—Kerr-McGee Corp. v. Bokum Corp., F.2d 1067.

⇐59. Modification or rescission.

C.A.10 (N.M.) 1972. Standard force-maj clause in mineral lease providing that breac any covenant due to conditions beyond contr lessee shall not be ground for termination dic give lessor right to terminate lease for brea Kerr-McGee Corp. v. Bokum Corp., 453 F.2d 1

2. CONSTRUCTION AND OPERATION OF MINING LEASES.

⇐64. Assignment or sale of lease or reversion.

C.A.10 (N.M.) 1981. Even if conveyance of lessee's interest in property was considered sublease

tional rights." *Id.* at 7, 644 P.2d at 521. The Court had no occasion to consider what would happen if the plaintiff sued under the Tort Claims Act in one court and under the federal Civil Rights Act in another court and the first judgment was adverse to the plaintiff. The opinion simply does not address the law of judgments. *See Poe,* 695 F.2d at 1103 (plaintiff filed state court lawsuit alleging state law torts while federal suit was pending; once federal suit was decided, the result was res judicata as to state law claims).

III. CONCLUSION

[12] The Department's liability in this case is based solely on vicarious responsibility for the acts of the federal defendants. The federal judgment precluded further suit against the federal defendants for those acts. The claims raised in the state case could have been raised against the federal defendants in the federal case. The federal judgment was not based on a defense unavailable to the Department. Following Restatement Section 51, we therefore hold that the Department is protected by claim preclusion. Accordingly, we reverse the decision of the district court and remand for dismissal of Plaintiff's complaint.

IT IS SO ORDERED.

MINZNER, C.J., and BLACK, J., concur.

891 P.2d 556

BOARD OF EDUCATION, GADSDEN INDEPENDENT SCHOOL DIST. NO. 16, and Gadsden Independent School Dist. No. 16, Petitioner–Appellant,

v.

JAMES HAMILTON CONSTRUCTION CO., Respondent–Appellee.

No. 15267.

Court of Appeals of New Mexico.

Dec. 20, 1994.

The District Court, Dona Ana County, James T. Martin, D.J., entered stipulated partial judgment awarding compensation to vendors with respect to the taking of land pursuant to condemnation action filed by school district and entered judgment, after bench trial, for purchaser, and appeal was taken. The Court of Appeals, Black, J., held that purchaser was not entitled to compensation because mere execution of purchase agreement gave purchaser no legal interest in the property.

Reversed.

1. Appeal and Error ⇐842(8)

Appellate court is not bound by trial court's legal interpretation of a written document, where interpretation rests solely upon wording of the document.

2. Eminent Domain ⇐81.1, 153

Real estate sales agreement was not a binding contract because purchaser made no binding promises and provided no consideration and thus, because agreement provided purchaser no legal interest in the property at the time of the taking, purchaser was not entitled to compensation for the condemned property.

3. Contracts ⇐164

When two documents refer to each other, they are properly construed together.

4. Vendor and Purchaser ⇐18(.5)

An option to purchase is a contract where property owner gives another the privilege of buying property within a specific time on terms and conditions expressed in the option.

5. Contracts ⇐47

Both an executory and an option contract must rest on consideration.

6. Contracts ⇐47

Essence of a valid agreement is consideration.

7. Contracts ⇐56

Promise of one party may be consideration for promise of the other party, but each

promise is in need of consideration to be binding and enforceable.

8. **Contracts ⇐53**

Consideration adequate to support a promise is essential to enforcement of a contract.

9. **Contracts ⇐54(1)**

In order to be binding as sufficient consideration, a promise must be lawful, definite, and possible.

10. **Contracts ⇐1**

Gratuitous statement of intention, even when concurred in by the receiving party, is not sufficient to create a legal contract.

11. **Contracts ⇐75(1)**

Promise to do what party is already obligated to do by law is not sufficient consideration.

12. **Contracts ⇐10(1)**

Valid contract must possess mutuality of obligation and mutuality means both sides must provide consideration.

13. **Contracts ⇐10(1)**

Purported promise that actually promises nothing because it leaves the choice of performance entirely to offeror is illusory and an illusory promise is not sufficient consideration to support a contract.

14. **Frauds, Statute of ⇐55**

Statute of frauds requires that any conveyance of real property be in writing.

15. **Eminent Domain ⇐81.1**
Frauds, Statute of ⇐119(1)

Because statute of frauds required that any conveyance of real property be in writing, oral agreement allowing purchaser of land an indefinite extension to perform under sales contract was not valid and purchaser could not, therefore, rely on oral agreement as basis for its claim to a legal interest in the property at time of the taking so as to be entitled to compensation.

16. **Contracts ⇐238(2)**

Where contract requires that any modification be in writing, oral modifications are ineffectual.

17. **Eminent Domain ⇐81.1**

Even if land purchase agreement and escrow instructions created a valid contract, purchaser was in default under the agreement as of the time of the land's taking, such that he had no legal interest in the condemned land so as to be entitled to compensation.

18. **Eminent Domain ⇐81.1**

When private land is condemned, only the person who owns or occupies land at date of the taking or has some legal interest in the property has claim for damages and for compensation purposes, the "date of the taking" is generally the date the order of permanent entry is filed and condemnee is entitled to actual possession of the condemned property. NMSA 1978, § 42-2-5, subd. B.

See publication Words and Phrases for other judicial constructions and definitions.

19. **Eminent Domain ⇐81.1**

Only those with legal interest in condemned property are entitled to compensation when that property is taken under eminent domain.

Beverly J. Singleman, Hubert & Hernandez, P.A., Las Cruces, for petitioner-appellant.

Jeffrey A. Dahl, Clayton E. Crowley, Lamb, Metzgar, Lines & Dahl, P.A., Albuquerque, for respondent-appellee.

OPINION

BLACK, Judge.

In September 1991, James Hamilton Construction Company (Buyer) hired an experienced land developer to determine the feasibility of constructing a residential housing subdivision in Santa Teresa, New Mexico. On December 20, 1991, Buyer signed a document captioned "Agreement For Sale and Purchase of Land" (the Agreement) with the owners of a twenty-eight-acre parcel in Santa Teresa (the Property), Charles and Phyllis Crowder and William Ikard (Sellers).

On May 26, 1992, Gadsden Independent School District No. 16 (the School District) filed a condemnation action on thirteen of the twenty-eight acres subject to the Agreement. In January 1993, the district court entered a stipulated partial judgment awarding Sellers $130,000 as just compensation for the condemned thirteen acres. After a bench trial, the district court held that the Agreement was a binding executory contract, that Buyer had an interest in the land at the time of the taking, and that Buyer was entitled to $180,350 as compensation for its development costs prior to the taking. We reverse.

I. *FACTS*

The focus of the case is on the Agreement executed by Buyer and Sellers. Under the Agreement, Buyer covenants that it will "comply with all of the laws, rules and regulations of Dona Ana County, New Mexico, pertaining to the subdivision and development of land ... and further to meet the standards and specifications for the installation of water and sewer services of the Santa Teresa Services Company." In addition, Buyer "agrees to provide public street access through the Property to the Sellers' adjoining property." The only other covenant advanced by Buyer is as follows:

> Sellers agree to sell and Buyer agrees to purchase the Property for Ten Thousand and No/100 Dollars ($10,000.00) per acre, for a total price of Two Hundred Eighty Thousand and No/100 Dollars ($280,000.00), for the 28-acre parcel subject to the satisfaction of the terms and conditions as are hereinabove and hereinafter set forth. In the event the certified survey to be made by the Sellers increases or decreases the number of acres in the Property, the total purchase price will then be determined by multiplying the actual acreage or fraction thereof by $10,000.00.

The Agreement also gives Buyer forty days from the date of execution, December 20, 1991, "to complete its due diligence effort and verify to its satisfaction all matters pertaining to the Property and to review and approve or reject all matters pertaining to this transaction." Significantly, the Agreement also made provisions for the establishment of an escrow. The escrow paragraph provided that Buyer and Sellers will "consummate this transaction or Buyer may elect to withdraw from this Agreement as provided for in the Letter of Escrow Instructions hereinabove referred to."

The Letter of Escrow Instructions (Instructions), which is incorporated in the Agreement, is also dated December 20, 1991, and indicates that Sellers are depositing three special warranty deeds naming Buyer as grantee. The Instructions also provide that Buyer is to deposit escrow funds as follows:

> A. On or before forty (40) days of the date hereof, Buyer may deposit with you, as Escrow Agent, the sum of Twenty-eight Thousand and No/100 Dollars ($28,000.00).
>
> B. On or before forty (40) days of the date hereof, Buyer may also deposit with you a Declaration of Covenants and Restrictions, together with a letter executed by Sellers approving this Declaration of Covenants and Restrictions.
>
> C. On or before six (6) months of the date hereof[,] Buyer may deposit with you, as Escrow Agent, an additional Sixty-six Thousand and No/100 Dollars ($66,000.00).
>
> D. On or before nine (9) months of the date hereof [,] Buyer will deposit with you, as Escrow Agent, an additional Ninety-three Thousand and No/100 Dollars ($93,000.00).
>
> E. On or before nineteen (19) months of the date hereof[,] Buyer will deposit with you, as Escrow Agent, an additional Ninety-three Thousand and No/100 Dollars ($93,000.00). This amount may be increased or decreased to reflect the purchase price of $10,000 per acre or fraction thereof for the actual acreage reflected in the final accepted survey of the Property.

The Instructions then direct the escrow agent to do the following:

> In the event, within forty (40) days of the date hereof, Buyer has accepted the terms and conditions of the Agreement identified herein as Item No. 2, and has deposited $28,000.00 with you, as Escrow Agent, you are to maintain this escrow. In the event Buyer fails to deposit the funds or notifies

you that it does not intend to close this transaction, you are to return the documents deposited with you to the parties causing them to be deposited with you and cancel this escrow.

There is no dispute that Buyer did not deposit any funds in escrow within the forty days referenced in the Agreement and Instructions. Indeed it is undisputed that at the time of trial in August 1993, more than eighteen months after the execution of the Agreement and attached Instructions, Buyer had never tendered any money for the Property.

The district court found that Buyer completed its due diligence studies and decided to develop the Property as a residential subdivision. To that end, Hamilton searched the title, performed soil testing, did a traffic impact analysis, and worked with an engineer to determine what governmental approvals would be necessary. The Agreement also required the Crowders, as owners of the Santa Teresa Services Company, to issue a commitment to supply water and sewer to the Property. However, Santa Teresa Services was unable to provide water and sewer due to the refusal of the New Mexico Environmental Improvement Division to issue a permit for liquid waste discharge for the subdivision. The testimony was that Charles Crowder therefore suggested that Buyer not deposit any money into escrow until the sewage issue was "cleared up."

Despite the failure to make any payments into escrow, Buyer proceeded to file its application for subdivision approval with Dona Ana County in April 1992. Buyer, however, stopped all work on the subdivision upon being served with the petition for condemnation in June 1992. Buyer then had the Property replatted, minus the thirteen acres condemned by the School District, and decided that the development costs per lot on the remaining land would be too high for the type of subdivision Buyer had envisioned.

The district court found that "[i]f property at the development stage of Hamilton's project were to be marketed, land, hard costs, and soft costs (development costs) and a profit would be recoverable." The district court further found that, at the time the condemnation was filed, Buyer had "direct project costs expended (excluding the land) of approximately One Hundred Sixty-Two Thousand, Four Hundred Sixteen Dollars ($162,416.00)." After adding interest, the district court entered a judgment in favor of Buyer in the amount of $180,350.00.

II. *STANDARD OF REVIEW*

[1] The parties argue over what interest Buyer had in the Property, if any, under the terms of the Agreement and Instructions at the time of the condemnation taking. "[W]hen the issue to be determined rests upon the interpretation of documentary evidence, this Court is in as good a position as the trial court to determine the facts and draw its own conclusions...." *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 103, 678 P.2d 1170, 1178 (1984). Therefore, "an appellate court is not bound by a trial court's [legal] interpretation of a written document, where the interpretation rests solely upon the wording of the document." *Ortiz v. Lane*, 92 N.M. 513, 518, 590 P.2d 1168, 1173 (Ct.App.1979) (Hernandez, J., specially concurring); *see also Schueller v. Schueller*, 117 N.M. 197, 199, 870 P.2d 159, 161 (Ct.App.1994) (stating that district court interpretation is not binding on appellate court).

III. *WHEN THE AGREEMENT IS READ TOGETHER WITH THE ESCROW INSTRUCTIONS, HAMILTON MAKES NO BINDING PROMISES AND PROVIDES NO CONSIDERATION.*

[2] The School District argues that the Agreement was not a binding contract because Buyer failed to make any payment into escrow. Under the terms of the Agreement as it incorporates the Instructions, we agree.

[3] The Agreement refers to "the Letter of Escrow Instructions, a copy of which is attached hereto and made a part hereof." In addition to the fact that the Agreement expressly incorporates the Instructions, when two such documents refer to each other, they are properly construed together. *Master Builders, Inc. v. Cabbell*, 95 N.M. 371, 373-

74, 622 P.2d 276, 278–79 (Ct.App.1980), *cert. denied*, 95 N.M. 426, 622 P.2d 1046 (1981). When these two documents are read together, it is clear that Buyer did not provide any consideration under the Agreement and was not legally obligated to perform under its terms. The Agreement thus provided Buyer no legal interest in the Property at the time of the taking.

[4, 5] Buyer argues that the Agreement is an executory contract. The School District maintains that the Agreement, when read with the incorporated Instructions, is no more than an option. "Executory contracts are those contracts on which performance remains due to some extent on both sides." *In re Priestley*, 93 B.R. 253, 258 (Bankr. D.N.M.1988). An option to purchase is a contract where the property owner gives another the privilege of buying property within a specific time on terms and conditions expressed in the option. *Hueschen v. Stalie*, 98 N.M. 696, 698, 652 P.2d 246, 248 (1982). However, both an executory and an option contract must rest on consideration. *Compare* 1 Richard A. Lord, *Williston on Contracts* § 5:16, at 722 (4th ed. 1992) (noting consideration requirement for option contract) *with* 3 *id.* § 7:1, at 7 (discussing contract consideration requirement at common law).

[6–9] It is elemental "that the essence of a valid agreement is consideration." *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 88 N.M. 472, 474, 542 P.2d 52, 54 (Ct.App.1975), *rev'd on other grounds sub nom. Fortuna Corp. v. Sierra Blanca Sales Co.*, 89 N.M. 187, 548 P.2d 865 (1976); *cf. Knoebel v. Chief Pontiac, Inc.*, 61 N.M. 53, 57, 294 P.2d 625, 628 (1956) (holding that conditional sales contract without consideration is unenforceable). A promise of one party may be consideration for the promise of the other party, but "[e]ach promise is in need of consideration to be binding and enforceable." *Acme Cigarette Servs., Inc. v. Gallegos*, 91 N.M. 577, 581, 577 P.2d 885, 889 (Ct.App.1978). Consideration adequate to support a promise is, therefore, essential to the enforcement of a contract. *Romero v. Earl*, 111 N.M. 789, 791, 810 P.2d 808, 810 (1991). In order to be binding as sufficient consideration, a promise must be "lawful, definite and possible." *Sanders v. Freeland*, 64 N.M. 149, 152, 325 P.2d 923, 925 (1958). Under the terms of the Agreement and Instructions, Buyer gave no financial consideration and made no "definite" promise. *See generally Friedman v. Tappan Dev. Corp.*, 22 N.J. 523, 126 A.2d 646, 650–51 (1956) (discussing requirement that contract promise be definite).

[10, 11] The Agreement says that "Sellers wish to sell and Buyer wishes to purchase the Property." A gratuitous statement of intention, even when concurred in by the receiving party, is not sufficient to create a legal contract. *Beverage Distribs., Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 29 (9th Cir.), *cert. denied*, 403 U.S. 906, 91 S.Ct. 2209, 29 L.Ed.2d 682 (1971). Thereafter, Buyer warrants that it will "comply with all of the laws, rules and regulations of Dona Ana County." A promise to do what a party is already obligated to do by law is not sufficient consideration. *Hurley v. Hurley*, 94 N.M. 641, 645, 615 P.2d 256, 260 (1980), *overruled on other grounds by Ellsworth v. Ellsworth*, 97 N.M. 133, 135, 637 P.2d 564, 566 (1981). The only other promise by Buyer contained in the Agreement is for Buyer "to provide public street access through the Property to the Sellers' adjoining property." This would be consideration only if Buyer had promised to make payment and assume possession of the Property so that Sellers' property would become "adjoining."

The Instructions also create no definite obligation. On the critical issue of payment, the Instructions state:

> A. On or before forty (40) days of the date hereof, Buyer *may* deposit with you, as Escrow Agent, the sum of Twenty-eight Thousand and No/100 Dollars ($28,000).

(Emphasis added). These terms leave it entirely to the discretion of Buyer whether to deposit any payment for the Property, and that was clearly understood by both parties as the consideration. Indeed, as counsel for Buyer argues, "the Purchase Agreement could not have been an option because the *quid pro quo* is land in exchange for money, not the sale of a continuing offer in exchange for money." At the time of the taking Buyer

had not paid any money and did not possess any land. More importantly, it had no obligation to do so.

The testimony of the parties at trial also supports the conclusion that Buyer had no duty to make any payments and could walk away from the Agreement without legal consequence. On cross-examination, Buyer's president, Charles Hamilton, admitted that his understanding under the Agreement and Instructions was that "we were not obligated to deposit the money." On cross-examination he testified:

> Q. And has James Hamilton Construction Company complied with any of the requirements in the escrow instructions that are in Paragraph 3?
>
> A. We have not made any deposits up to this time.
>
> Q. And there's nothing under this agreement that required you to do so?
>
> A. Not really, no.

Charles Crowder also testified on cross-examination that his understanding of the Agreement and Instructions was that Buyer had no duty to perform:

> Q. And had they—if they never exercised the option and they never put the money down on the agreement for reasons of due-diligence, or if they just never put the money down, you didn't have any particular remedy against them at that point, did you?
>
> A. No, nor I didn't seek any.
>
> Q. Well, I mean, legally you couldn't have held them to the agreement at that point, could you?
>
> A. They did not have the duty.

Thus, the parties' understanding and intent are consistent with what we view as the plain meaning of the language; Buyer was not obligated by the Agreement or Instructions to do anything.

[12, 13] A valid contract must possess mutuality of obligation. *Williams v. Waller*, 51 N.M. 180, 184, 181 P.2d 798, 800 (1947). Mutuality means both sides must provide consideration. *See Vanzandt v. Heilman*, 54 N.M. 97, 107, 214 P.2d 864, 870 (1950); *see also* 3 Lord, *supra*, § 7:14, at 287–90 (discussing consideration requirement). "It is also elementary that a contract, which leaves it entirely optional with one of the parties to perform, is not founded on mutual promises." *Acme*, 91 N.M. at 581, 577 P.2d at 889; *see also Berry v. Walton*, 366 S.W.2d 173, 173–74 (Ky.Ct.App.1963) (stating that contract placing no obligation on mineral lessee except payment of royalties on minerals actually removed lacked mutuality). A purported promise that actually promises nothing because it leaves the choice of performance entirely to the offeror is illusory, and an illusory promise is not sufficient consideration to support a contract. *See Interchange Assocs. v. Interchange, Inc.*, 16 Wash.App. 359, 557 P.2d 357, 358 (1976); *see generally* 3 Lord, *supra*, § 7:7, at 88–89 (stating that illusory promise cannot serve as consideration). As we have indicated, because Buyer's promise to perform under the Agreement and Instructions was entirely at its discretion, any consideration contained in such a promise would be illusory. *See Andreoli v. Brown*, 35 Ohio App.2d 53, 299 N.E.2d 905, 906 (1972); *cf. Commercial Movie Rental, Inc. v. Larry Eagle, Inc.*, 738 F.Supp. 227, 230–31 (W.D.Mich.1989) (finding promise to be illusory where offeror could never be held liable for failure to perform).

Nor could any of Buyer's actions prior to the taking be interpreted as providing consideration. Buyer's only actions were toward evaluation of the Property and preparation for obtaining the necessary subdivision approvals so that these development barriers could be hurdled if, and when, Buyer chose to bind itself under the Agreement. Time and money spent by an optionee to increase the value of his option cannot be construed as consideration for the agreement itself. *See Berryman v. Kmoch*, 221 Kan. 304, 559 P.2d 790, 795 (1977). Moreover, by their own admission, the parties had not complied with the terms of the Agreement as of August 1993. As Mr. Hamilton testified:

> Q. Now, have you—when I say, "you"—has James Hamilton Construction Company made any payments for the purchase of the land in question at this point in time?
>
> A. No, we have not.
>
> Q. And why is that, Mr. Hamilton?

A. As the—as we did our work on the property and did our preparation to apply to the County for a subdivision, it became apparent that the sewer people there at Santa Teresa Sanitation Services had a problem with the Environmental Department, and they couldn't—and the County was not willing to accept our subdivision until that problem was resolved with the sewer people; and in our—*we felt that as long as we withheld our payment of these funds, that that would keep Mr. Crowder more willing to be sure that that sewer problem was resolved, and then knowing that as soon as it was resolved, we were willing to go ahead to complete our contract.*

(Emphasis added).

IV. *BUYER WAS IN DEFAULT UNDER THE AGREEMENT.*

Whether the "contract" is classified as an executory agreement or an option, the parties had failed to comply with its terms at the time of the condemnation taking. Paragraph six of the Agreement provided:

6. Buyer shall have forty (40) days from the date hereof to complete its due diligence effort and verify to its satisfaction all matters pertaining to the Property and to review and approve or reject all matters pertaining to this transaction including, but not limited to, the survey and the binder for the policy of title insurance.

This dovetailed into the Instructions which require:

In the event, within forty (40) days of the date hereof, Buyer has accepted the terms and conditions of the Agreement identified herein as Item No. 2, and has deposited $28,000.00 with you, as Escrow Agent, you are to maintain this escrow. *In the event Buyer fails to deposit the funds* or notifies you that it does not intend to close this transaction, *you are to return the documents deposited with you* to the parties causing them to be deposited with you *and cancel this escrow.*

(Emphasis added).

There is no dispute over the fact that Buyer failed to deposit the $28,000. Nonetheless, the escrow agent did not return the documents or cancel the escrow. By its terms, the Agreement required performance within a specified time. That time expired without the specified performance. Rather, the parties testified that they orally agreed Buyer did not have to perform until the Crowders' Santa Teresa Services Company resolved its problems with the Environmental Improvement Division. This oral agreement gave Buyer an indefinite extension. By the date of trial in August 1993, however, Buyer still had not tendered any money into escrow and therefore had acquired no interest in the land.

[14, 15] As the School District correctly points out, the modification which would allow Buyer an indefinite extension was not in writing and was therefore not valid. The Agreement and Instructions were obviously intended to convey real estate. *See Hobbs Mun. Sch. Dist. No. 16 v. Knowles Dev. Co.*, 94 N.M. 3, 5, 606 P.2d 541, 543 (1980) (stating that interest acquired under an executory contract for sale of land is real estate). The statute of frauds requires that any conveyance of real property be in writing. *Mercury Gas & Oil Corp. v. Rincon Oil & Gas Corp.*, 79 N.M. 537, 539, 445 P.2d 958, 960 (1968); *see Ritter-Walker Co. v. Bell*, 46 N.M. 125, 128, 123 P.2d 381, 382 (1942). The alleged oral extension does not meet this requirement. "An expired contract within the statute [of frauds] cannot be revived and extended by parol agreement, nor can a contract in writing be modified or varied by a subsequent oral agreement." *Gonzales v. United Southwest Nat'l Bank*, 93 N.M. 522, 524, 602 P.2d 619, 621 (1979) (citations omitted); *see also Dave Zerwas Co. v. James Hamilton Constr. Co.*, 117 N.M. 724, 725, 876 P.2d 653, 655 (1994) (stating that modification to agreement within the statute of frauds must itself be in writing). Buyer cannot, therefore, rely on the oral agreement as the basis for its claim to a legal interest in the Property.

[16] Moreover, the Agreement itself provided that "no addition to or modification of any term or provision shall be effective unless set forth in writing and signed by both Sellers and Buyer." Where the contract requires that any modification be in writing,

oral modifications are ineffectual. *United States ex rel. McDonald v. Barney Wilkerson Constr. Co.*, 321 F.Supp. 1294, 1295 (D.N.M.1971); *see also Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 645, 777 P.2d 371, 373 (1989) (oral modifications could not create enforceable contractual obligations in light of contract provision that modifications must be in writing).

[17] Even if the December 1991 Agreement and Instructions did create a valid contract, Buyer was still in default as of the time of the taking and had forfeited whatever right to an interest in the Property it could have acquired. Because Buyer did not comply with the Agreement and Instructions, any property interest that these documents created in Buyer was lost prior to the time of the taking and Buyer's right to obtain any interest in the Property could not be extended by oral agreement.

[18] When private land is condemned, only the person who owns or occupies the land at the date of the taking or has some legal interest in the property has a claim for damages. *See* NMSA 1978, § 42–2–5(B) (Orig. Pamp.); *see also Mesich v. Board of County Comm'rs*, 46 N.M. 412, 416, 129 P.2d 974, 976 (1942) (discussing such person's right to damages where private land is taken for public use). The "date of taking" for compensation purposes is generally the date the order of permanent entry is filed and the condemnee is entitled to actual possession of the condemned property. *See State ex rel. State Highway Dep't v. Yurcic*, 85 N.M. 220, 222, 511 P.2d 546, 548 (1973); *see also County of Dona Ana v. Bennett*, 116 N.M. 778, 782–83, 867 P.2d 1160, 1164–65 (1994) (recognizing that taking may also occur in Special Alternative Condemnation Procedure when preliminary order has been entered and acted upon). The documents in this case indicate that this event occurred on January 7, 1993. The only owners of record on that date were Sellers. On January 15, 1993, the district court entered a Stipulated Partial Judgment, which awarded Sellers $130,000.00 for the thirteen acres condemned. (The $10,000 per acre contained in the Stipulated Partial Judgment is the per acre purchase price contained in the Agreement and Instructions.) However, Buyer had not purchased so much as an acre, so it did not participate in the award under the stipulated judgment.

V. *CONCLUSION*

[19] Only those with a legal interest in condemned property are entitled to compensation when that property is taken under eminent domain. The mere execution of the Agreement and Instructions gave Buyer no legal interest in the Property. While Buyer could have obtained a legal interest in the thirteen acres condemned by the School District, it had not done so at the time of the taking. Buyer is therefore not entitled to compensation, and the judgment of the district court is reversed.

IT IS SO ORDERED.

APODACA, C.J., and FLORES, J., concur.

891 P.2d 563

Cynthia HOUGHLAND, Individually and as Personal Representative for the Estate of Rhonda Shirel a/k/a Rhonda Corley, Plaintiff–Appellant,

v.

Kenneth GRANT, M.D., Frank Gallegos, M.D., and Northeastern Regional Hospital, Defendants–Appellees.

No. 15307.

Court of Appeals of New Mexico.

Jan. 18, 1995.

Medical malpractice action was brought against hospital, alleging that it was vicariously liable for alleged malpractice committed in its emergency room by physician who was provided by contractor. The District Court, Bernalillo County, Gerard W. Thomson, D.J., granted summary judgment for hospital. Plaintiffs appealed. The Court of Appeals, Pickard, J., held that genuine issue

To protect the lessee against assignments of the lessor's interest of which he may have constructive notice by the recording of the instruments of assignment, leases usually provide that the lessee is not bound by transfers of interest unless he has actual notice of such transfer given by furnishing to him such instrument of assignment, or a copy thereof.[46] Where an assignee of the lessor

not served with a certified copy of the recorded instrument conveying a share of the lessor's mineral interest and royalties, it was held that it could have continued to pay delay rentals to the lessor as provided in the lease without regard to the advice in an opinion on the title indicating that a portion of the delay rentals should be paid to the grantee in the recorded instrument without suffering the loss of the lease.

Mont.—Thomas v. Standard Development Co., 1924, 224 P. 870, 70 Mont. 156 (payment to lessor without notice to lessee of assignments of his interest binding upon assignee).

N.D.—Burbridge v. Noe, 1955, 69 N. W.2d 286, —— N.D. —— (failure of assignee of lessor to give notice or provide a copy of deed of transfer).

46. The following is a fairly typical change of ownership provision of a modern oil and gas lease: "No change in the ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of lessee or require separate measuring or installation of separate tanks by lessee. Notwithstanding any actual or constructive knowledge of or notice to lessee, no change in the ownership of said land or of the right to receive rentals or royalties hereunder, or of any interest therein, whether by reason of death, conveyance or any other matter, shall be binding on lessee (except at lessee's option in any particular case) until 90 days after lessee has been furnished written notice thereof, and the supporting information hereinafter referred to, by the party claiming as a result of such change in ownership or interest. Such notice shall be supported by original or certified copies of all documents and other instruments or proceedings necessary in lessee's opinion to establish the ownership of the claiming party."

U.S.—In Brunson v. Carter Oil Co., D.C.Okl.1919, 259 F. 656, appeal dismissed, C.C.A.Okl., 268 F. 1020, where the lessee had received proper notice of a part assignment of the lessor's interest but through an error paid all of the delay rental to the lessor the lease was not cancelled because the court thought the lessee was entitled to equitable relief.

In Phillips Petroleum Co. v. Curtis, C. A.Okl.1950, 182 F.2d 122, affirming, D.C., 85 F.Supp. 399, the equitable relief theory of the court in the Brunson case was repudiated.

Ky.—In Union Gas & Oil Co. v. Wright, 1923, 255 S.W. 697, 200 Ky. 791, where a lessee was given proper notice of the assignment of the lessor of a lease containing a drill or pay development clause, it was held that a failure of the lessee to pay the assignee gave the latter the power to forfeit the lease or sue for the delay rentals.

payments the modern contract law rule allowing payment in any manner currently used in the ordinary course of business. The court held that delivery of a check was "payment" of delay rentals under an oil and gas lease that did not specifically permit payment by check because an oil and gas lease "is a contract and must be interpreted as a contract."

§ 346. Day Upon Which Rentals Are Due—Sundays—Holidays

24. Okl.—Winn v. Nilsen, 1983, 670 P.2d 588, follows the usual rule of contract law that the recited commencement date of a lease is excluded in making the calculation of the due date.

§ 347. Who May Pay Delay Rentals—Partial Assignees

31. Miss.—In Wagner v. Mounger, 1965, 175 So.2d 145, 253 Miss. 83, X leased a 1/16 mineral interest to A, who assigned 1/2 of the leasehold to B. B made the first delay rental payment. Thereafter C, a stranger to the lease, made the second and third, which were accepted by the depository bank and the bank paid lessor A who did not know who had paid. C paid the fourth payment but the bank refused to give its check to A unless A would guarantee C's check. A refused. C's check cleared. The court held delay rental payments by a stranger are not effective to keep the lease alive. There was no basis for estoppel as A had not known the source of the previous payments.

33. Ky.—In S. W. Bardill, Inc. v. Bird, 1961, 346 S.W.2d 25, it was held that the lessees under an oil and gas lease covering a 124-acre tract were under no duty to keep the lease alive by the payment of delay rentals for the benefit of the assignees of an 80-acre portion of the leasehold, and when the lease expired the assignee's interest was terminated and they had no interest under a new lease obtained by the lessees on the entire 124-acre tract.

§ 348. To Whom Delay Rentals Are Payable

40. Okl.—Superior Oil Co. v. Jackson, 1952, 250 P.2d 23, 207 Okl. 437 (deposit of delay rentals in bank to joint credit of joint lessors held sufficient payment).

45. Kan.—In Brubaker v. Branine, 1985, 701 P.2d 929, 237 Kan. 488, defendant landowners granted an oil and gas lease reserving a 1/8th royalty on an 80 acre tract in which they owned all interests, the lease containing an entirety clause. In 1976 they conveyed to plaintiffs 65% of the surface subject to the lease. (The court must mean 65% of surface *and* minerals, for were their interest surface only, they should have no concern with the entirety clause.) Plaintiffs are here upheld in their right to a proportionate share of the royalties wherever in the lease produced by virtue of the lease entirety clause, but are denied any basis for claim against the lessee inasmuch as the lease's change of ownership notice had not been given the lessee.

La.—In Garelick v. Southwest Gas Producing Co., App.1961, 129 So.2d 520, purchaser of a one-sixteenth mineral interest was held not to be entitled to cancellation of the lease or attorney's fees for nonpayment of delay rentals to him where he had not given the lessee notice of his purchase of the mineral interest.

46.1 Tex.—In Andretta v. West, Civ. App.1958, 318 S.W.2d 768, writ of error ref. n.r.e., a purchaser of a fractional royalty interest from an oil and gas lessor could not recover the royalty payments from the lessee because he had not satisfied the requirements of the lease respecting notice to the lessee of his assignment and the furnishing of a certified copy of the transfer to the lessee.

48.1 Tex.—In Ploeger v. Humble Oil & Refining Co., Civ.App.1967, 416

VIRGINIA P. UHDEN, Plaintiff-Appellant,
vs.
THE NEW MEXICO OIL CONSERVATION COMMISSION and AMOCO PRODUCTION COMPANY, Defendants-Appellees, and MERIDIAN OIL, INC., Intervenor-Appellee.

No. 19,281
SUPREME COURT OF NEW MEXICO
817 P.2d 721, 112 N.M. 528, 30 N.M. St. B. Bull. 939
September 24, 1991, FILED

Appeal from the District Court of San Juam County. Benjamin S. Eastburn, District Judge

COUNSEL

Hinkle, Cox, Eaton, Coffield & Hensley, James Bruce, Albuquerque, for Appellant.
Robert G. Stovall, Santa Fe, for Appellee Oil Commission.
Campbell & Black, William F. Carr, Santa Fe, for Appellee Amoco Production.
W. Thomas Kellahin, Santa Fe, for Appellee Meridian Oil.

JUDGES

FRANCHINI, SOSA, RANSOM, BACA, MONTGOMERY
AUTHOR: FRANCHINI

OPINION

FRANCHINI, Justice.

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

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.

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 bean to remit royalty payments pursuant to the division order.

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.

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.

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.

*{*530}* 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).

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 Gulf Stream 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.

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 "an 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 "but 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. Significantly, the Court refused to sanction notice by publication to those whose identity and whereabouts were ascertainable from sources at hand.

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. *{*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).

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).

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 644. 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).

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.

IT IS SO ORDERED.

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

DISSENT

MONTGOMERY, Justice (Dissenting).

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 *{*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."

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. . . ."

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 legion and only affects the various property rights within the region in the same way as any other land-use relation 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).

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.

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.

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.

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 *{*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.

The majority having concluded otherwise, I respectfully dissent.

OPINION 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.

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818 P.2d 401, 112 N.M. 623 CARISTO V. SULLIVAN (S. Ct. 1991) 30 N.M. St. B. Bull. 962

PHILIP CARISTO, Petitioner,

817 P.2d 721, 112 N.M. 528 UHDEN V. THE N.M. OIL CONSERVATION COMM'N (S. Ct. 1991) 30 N.M. St. B. Bull. 939

Gallimore, met with Fitzhugh. She notified Fitzhugh that she was disruptive to working relationships in the office and that if she did not improve she may be subject to disciplinary action.

{6} Fitzhugh, at the recommendation of Dr. Lovette, took off from work from Tuesday, October 20 through Friday October 23, 1992. The following Monday, October 26, 1992, Fitzhugh returned to the office. However, she left early, suffering from stomach pains, a headache, and a "dazed" feeling. Fitzhugh called in sick the next four days, Tuesday, October 27 through Friday, October 30, 1992.

{7} At some point between October 26 and 30, Fitzhugh informed her immediate supervisor, Judy Morris, of the extended nature of her illness. She asked Morris for assistance in applying for workers' compensation benefits. This claim was ultimately denied.

{8} At the same time, Fitzhugh asked Morris to provide the application forms for a short-term disability program offered by Prudential. Employees who are absent from work for more than four days are required to apply for this program. These disability claims are processed by a special office—or "unit"—located in New Jersey. For the sake of confidentiality, the unit that evaluates disability claims is kept isolated from other units in the Prudential company. For this reason, the Human Resources unit, which handles other personnel matters such as termination of employment, is separately located in California.

{9} When Fitzhugh called in sick on Friday, October 30, 1992, the fourth day after her ill-fated attempt to return to work, Morris warned Fitzhugh concerning her excessive absenteeism. She informed Fitzhugh that she may be placed on "final warning" status if she were absent even a few more days. This was apparently an allusion to a formal system of discipline established by Prudential to address employee problems, in which a "final warning" was one step in a series that ended with the employee's discharge. Fitzhugh told Morris she did not know when she would be returning to work. This conversation was the last time Fitzhugh had any direct contact with her Albuquerque supervisors.

{10} Gallimore and Morris both testified that Prudential requires an employee who must be absent from work to notify his or her supervisor of the absence on a daily basis. They claimed that this rule applies even if the employee is absent pending action on a disability or workers' compensation application. They asserted that this rule is waived only if the employee provides a note from a physician indicating the length of absence. Fitzhugh testified that she had no knowledge of this policy. Morris testified that she never warned Fitzhugh about this policy but that it could be found in the company's employee guide.

{11} On November 9, 1992, Fitzhugh apparently received a phone call from Ginny Ordesch, who worked for Prudential's Human Resources unit in California. That unit was in charge of hiring and firing employees for the Albuquerque office. Additionally, though Human Resources did not process disability claims, it did set the deadlines for their submission. Ordesch told Fitzhugh that her short-term disability application must be submitted to the New Jersey unit by November 24.

{12} The short-term disability application required the submission of an "Attending Physician's Statement." Dr. Lovette completed and returned this statement to Fitzhugh on November 12, 1992. In the statement Lovette indicated that Fitzhugh would be unable to work for an "uncertain" period of time, noting that "she will need to have job transfer or some assurance from employer that things will change."

{13} Sometime around November 14, 1992, Fitzhugh mailed the completed short-term disability claim to New Jersey. A return mail receipt showed that the New Jersey unit received the claim by the November 24 deadline.

{14} Fitzhugh claims she made a telephone call to Ordesch at Prudential's California office on December 1, 1992, more than one month after she last spoke to the Albuquerque office. Apparently Ordesch said she was in the process of preparing a letter terminating Fitzhugh's employment, in part because Fitzhugh had not worked for more than a month. Fitzhugh claims she offered to return to work immediately to preserve her employment but Ordesch refused.

{15} Fitzhugh received the letter of termination on December 7, 1992. The letter stated:

> Since you have not reported to work since October 26, 1992 . . . we interpret this as resignation of your employment and are terminating your services accordingly. This is effective October 26, 1992, the last day you worked. . . . Should you have any additional evidence to support your absence, please let us know.

{16} The following day, December 8, 1992, Fitzhugh received a letter from the New Jersey office notifying her of the denial of her short-term disability claim. In contradiction to the letter from California, this letter from New Jersey stated, "We have advised Human Resources of our decision and you should make arrangements to return to work."

{17} On December 11, 1992, Fitzhugh filed a claim for unemployment compensation. On December 29, 1992, the unemployment pre-hearing claims examiner disqualified Fitzhugh from receiving benefits. The examiner determined that Fitzhugh voluntarily quit her job because she thought the work was detrimental to her health, and that such leaving did "not constitute good cause connected with the work." The absence of good cause rendered Fitzhugh ineligible for unemployment compensation.

{18} Fitzhugh filed an appeal to this determination. On February 16, 1993, an administrative hearing on Fitzhugh's claim was held before the Appeals Bureau of the Department. The Appeals Bureau affirmed the denial of Fitzhugh's unemployment benefits, concluding that Fitzhugh voluntarily abandoned her job. The hearing examiner found that

> the claimant, shortly after receiving the termination letter, received a letter denying her claim for disability payments and telling her, "We have advised Human Resources of our decision and you should make arrangements to return to work." . . . At that point, the claimant

> abandoned the job by failing to respond to this invitation in any way, either by reporting to work, requesting leave of absence, or following up on her pending request for transfer.

Fitzhugh appealed this decision to the Secretary of Labor where it was once again affirmed.

{19} Fitzhugh filed a Petition for Writ of Certiorari seeking judicial review in district court of the administrative decision. In its March 1, 1994 decision, the district court rejected the Department's conclusion that Fitzhugh had voluntarily quit her job. The court found instead that Fitzhugh failed to comply with Prudential's "company policy requiring daily or other communication during a long-term absence." The court concluded that Prudential justifiably terminated Fitzhugh for misconduct.

{20} Fitzhugh filed an appeal with this Court. We disagree with the decisions of both the Department and the district court. We reverse and direct that unemployment benefits be awarded to Fitzhugh.

II. STANDARD OF REVIEW

{21} The district court limited its review of the administrative determination to evidence that was presented to the Appeals Bureau. Similarly, the evidentiary record before us consists entirely of information accumulated at the hearing before the Appeals Bureau. "When reviewing administrative agency decisions courts will begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise." *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 120 N.M. 579, 582, 904 P.2d 28, 31 (1995).

{22} If an agency decision is based upon the interpretation of a particular statute, the court will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise. However, the court may always substitute its interpretation of the law for that of the agency's "because it is the function of the courts to interpret the law." *Id.* at 583, 904 P.2d at 32. If the court is addressing a question of fact, the court will accord greater deference to the agency's determination, "especially if the factual issues concern matters in which the agency has specialized expertise." *Id.*

{23} When reviewing findings of fact made by an administrative agency we apply a whole record standard of review. *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). This means that we look not only at the evidence that is favorable, but also evidence that is unfavorable to the agency's determination. *Trujillo v. Employment Sec. Dep't*, 105 N.M. 467, 470, 734 P.2d 245, 248 (Ct. App. 1987). We may not exclusively rely upon a selected portion of the evidence, and disregard other convincing evidence, if it would be unreasonable to do so. *National Council on Compensation Ins. v. New Mexico State Corp. Comm'n*, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988).

{24} The decision of the agency will be affirmed if it is supported by the applicable law and by substantial evidence in the record as a whole. *Kramer v. New Mexico Employment Sec. Div.*, 114 N.M. 714, 716, 845 P.2d 808, 810 (1992). "Substantial evidence" is evidence that a reasonable mind would regard as adequate to support a conclusion. *Wolfley v. Real Estate Comm'n*, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983). If the agency's factual findings are not supported by substantial evidence, the court may adopt its own findings and conclusions based upon the information in the agency's record. *Sanchez v. New Mexico Dep't of Labor*, 109 N.M. 447, 449, 786 P.2d 674, 676 (1990).

{25} The party challenging an agency decision bears the burden on appeal of showing "that agency action falls within one of the oft-mentioned grounds for reversal including whether the decision is arbitrary and capricious; whether it is supported by substantial evidence; and whether it represents an abuse of the agency's discretion by being outside the scope of the agency's authority, clear error, or violative of due process." *Morningstar*, 120 N.M. at 582, 904 P.2d at 31.

{26} The record in this case is inadequate, a problem that greatly complicated and delayed our evaluation of the issues. However, a careful review of the whole record has yielded enough evidence to justify our decision upon rehearing.

III. STATUTE IN QUESTION

{27} The only issue in this case is whether Fitzhugh is entitled to receive unemployment compensation. The answer to this question is determined by the portion of the Unemployment Compensation Law, NMSA 1978, §§ 51-1-1 to -58 (Repl. Pamp. 1993 & Cum. Supp. 1994), that establishes the circumstances under which a person may be denied unemployment benefits:

> An individual shall be disqualified for, and shall not be eligible to receive, benefits:
>
> A. if it is determined by the division that he left his employment voluntarily without good cause in connection with his employment; . . .
>
> B. if it is determined by the division that he has been discharged for misconduct connected with his employment.

Section 51-1-7. We conclude that Fitzhugh did not abandon her employment under Section 51-1-7(A), nor was she discharged for misconduct under Section 51-1-7(B). She should therefore be awarded unemployment compensation benefits.

IV. FITZHUGH DID NOT ABANDON HER EMPLOYMENT WITH PRUDENTIAL

{28} Section 51-1-7(A) suggests a two-part analysis. First, whether Fitzhugh left her employment voluntarily. Second, if we conclude that she quit, whether she did so for good cause in connection with her employment. Since we conclude that she was fired rather than quit, we need only discuss the first part of this analysis. Whether an employee quit or was fired constitutes a question of law. *TBA Supply Co. v. Commonwealth*, 463 A.2d 1223, 1224 (Pa. Commw. Ct. 1983). This means there is a legal standard by which this question is answered. It is for the court to determine whether the conduct of the

parties falls within the parameters of this standard. While we accept the facts established in the fact-finding process, we need not be bound by the conclusions drawn from those facts at the administrative hearing or the trial level. In determining whether a claimant voluntarily left his or her job, we will look at the conduct of individuals involved as well as other circumstances surrounding the separation.

{29} Both the Department and Prudential describe as a "directive" the comment in the December 8, 1992 letter from the disability unit that Fitzhugh "should make arrangements to return to work." They argue that, by failing to pursue this "directive" she voluntarily quit her job. Under the facts of this case, this argument is untenable.

{30} Among the most important considerations in resolving whether an employee quit or was fired is an examination of the subjective intentions and understandings of that employee. *County Mkt. v. Dahlen*, 396 N.W.2d 81, 83 (Minn. Ct. App. 1986) ("[W]hat is important is the employee's perception of the situation and his or her response thereto."). A finding of voluntary termination usually requires that the claimant had a conscious intention to leave his or her employment. *See Roberts v. Commonwealth*, 432 A.2d 646, 648 (Pa. Commw. Ct. 1981). Our review of the record indicates that Fitzhugh had no conscious intention to leave her employment with Prudential. Additionally, she believed in good faith that she had been fired. *See TBA*, 463 A.2d at 1224 (where claimant testified she had not quit, court found claimant was involuntarily terminated).

{31} Fitzhugh testified she could not afford to lose her job because she was a single parent supporting two young daughters. She made efforts to preserve her job despite her debilitating illness. On two or three occasions she submitted requests for transfers to Prudential's Atlanta offices, she applied for workers' compensation benefits, and she sought to participate in Prudential's short-term disability program. All of these activities indicate that, though her health prevented her from reporting to work, she still viewed herself as an employee of Prudential. She never expressed any desire to leave her job with the Prudential corporation, rather she sought release from the stresses of the Albuquerque office. *See Maines v. Commonwealth*, 532 A.2d 1248, 1251 (Pa. Commw. Ct. 1987) (court found claimant had not voluntarily left employment because claimant expressed no desire to leave employment).

{32} The language of the letter from the California Human Resources unit, dated December 1, 1992, shows that it was reasonable for Fitzhugh to conclude that she had been released from employment with Prudential. *County Mkt.*, 396 N.W.2d at 83 (concluding employee "believed in good faith he was fired"). Pennsylvania courts have adopted a useful standard for evaluating the language of an employer's termination notice: "In order for an employer's language to be interpreted as a discharge it must possess the *immediacy* and *finality* of a firing." *Maines*, 532 A.2d at 1250 (emphasis added); *see also Sweigart v. Commonwealth*, 408 A.2d 561, 564 (Pa. Commw. Ct. 1979) (same statement).

{33} The "immediacy" element of the December 1 letter is found in the language "[t]his is effective October 26, 1992, the last day you worked." It is hard to imagine a more "immediate" termination than one that takes effect retroactively. The "finality" element is satisfied by the statement, "[We] are terminating your services." This finality is underscored by Fitzhugh's offer to return immediately to work when, on December 1, she spoke to Ordesch. Ordesch flatly refused this offer.

{34} We reject the notion that Fitzhugh had a "duty" to contact Prudential and resolve the two conflicting letters. When Ordesch refused the offer to return to work, Fitzhugh could reasonably presume any further efforts to contact Prudential would be futile. *McBrearity v. Maine Unemployment Ins. Comm'n*, 529 A.2d 326, 327 (Me. 1987) (finding claimant was discharged and was not required to approach management about other employment, when supervisor, despite lack of authority to fire employees, told claimant he was fired).

{35} Any argument that the letter from the New Jersey disability unit could somehow reverse the California letter of termination is unsupported by the record. There is no dispute that the two units were deliberately kept separate—physically and bureaucratically—in order to assure confidentiality in the processing of disability claims. Also, the New Jersey unit did not have the authority to hire and fire employees. The "directive" from New Jersey to return to work "was not that type of request which would lead an employee, recently fired, to believe that the job position was once more available." *Unemployment Compensation Bd. of Review v. DiMarco*, 355 A.2d 594, 595 (Pa. Commw. Ct. 1976).

{36} Prudential and the Department suggest that Fitzhugh abandoned her job by failing to call Prudential every day of her absence as required by company policy. This concept is called "constructive quitting" or the "doctrine of provoked discharge." *See James v. Levine*, 315 N.E.2d 471, 472 (N.Y. 1974). The concept refers to an employee who, through some willful action or omission, provokes their own discharge. *Id.* We are reluctant to adopt such a rule in this case. Unless the rule were narrowly defined, almost any termination action could be deemed a "constructive quit." In these cases, we are still inclined to look to the subjective intentions of the employee. When an employee does nothing at all to preserve their employment, this may, under a subjective standard, indicate the employee's indifference to continued employment. Then it may fairly be said they voluntarily quit. Fitzhugh was not indifferent. She had taken steps to remain employed by applying for transfers, workers' compensation, and disability.

{37} We hold as a matter of law that Fitzhugh did not abandon her employment with Prudential.

V. FITZHUGH WAS NOT TERMINATED FOR MISCONDUCT

{38} Once it is determined that an employee did not abandon his or her job, it is presumed that he or she was terminated. We now turn to the question of why Fitzhugh was terminated. Under Section 51-1-7(B), an employee may be denied unemployment benefits if "dis-

charged for misconduct connected with his [or her] employment." Prudential and the Department argue that if we conclude Fitzhugh was fired, the record shows that she was fired for misconduct. They claim that she violated the company policy that required her to notify her supervisor on a daily basis of her absence from work. They state that this call-in policy applied even during the pendency of an application for disability and was waived only if the employee provided a note from a physician. This misconduct, they allege, is sufficient to warrant a denial of unemployment benefits. We disagree.

{39} An employee's conduct may justify his or her discharge from employment. *Rodman v. New Mexico Employment Sec. Dep't*, 107 N.M. 758, 761, 764 P.2d 1316, 1319 (1988). However, that same conduct may not rise to the level of "misconduct" so as to justify the denial of unemployment benefits. *Id.* To constitute misconduct sufficient to deny benefits, the employee's violation must be evaluated in light of the purposes of the Unemployment Compensation Law, which include easing the burden of involuntary unemployment "which now so often falls with crushing force upon the unemployed worker and his family." Section 51-1-3. In Fitzhugh's case, absenteeism may explain her discharge from Prudential, but standing alone it is not necessarily the kind of misconduct that would render her ineligible for unemployment compensation. *See Atlantic Richfield Co. v. Commonwealth*, 441 A.2d 516, 517 (Pa. Commw. Ct. 1982). The employer must demonstrate more than the simple fact that the discharge was justifiable in reference to business interests. *Butler v. District of Columbia Dep't of Employment Servs.*, 598 A.2d 733, 734-35 (D.C. 1991).

{40} The term "misconduct" is nowhere defined in the Employment Compensation Law. We addressed this omission in *Mitchell v. Lovington Good Samaritan Center, Inc.*, by borrowing a definition from the Wisconsin Supreme Court:

> '[M]isconduct' . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

See Mitchell v. Lovington Good Samaritan Ctr., Inc., 89 N.M. 575, 577, 555 P.2d 696, 698 (1976) (quoting *Boynton Cab Co. v. Neubeck*, 296 N.W. 636, 640 (Wis. 1941)).

{41} In reevaluating this matter upon rehearing, we note that subsequent to *Mitchell*, we further explained the meaning of "misconduct." Most notably, in *Rodman v. New Mexico Employment Security Department* we limited "misconduct" to more egregious behavior than might first be presumed from the *Mitchell* definition. We pointed out that the statutory bar of Section 51-1-7(B) served to deny "benefits to those who bring about their own unemployment by conducting themselves with such callousness, and deliberate or wanton misbehavior that they have given up any reasonable expectation of receiving unemployment benefits." *Rodman*, 107 N.M. at 761, 764 P.2d at 1319. *Rodman* also describes "two components to the concept of misconduct sufficient to justify denial of benefits." *Id.* The first is "the notion that the employee has acted with willful or wanton disregard for the employer's interests. The second "is that this act significantly infringed on legitimate employer expectations." *Id.* (referring to *Alonzo v. New Mexico Employment Sec. Dep't*, 101 N.M. 770, 772, 689 P.2d 286, 288 (1984) and *Trujillo*, 105 N.M. at 472, 734 P.2d at 250).

{42} In order to preclude any further confusion regarding the meaning of "misconduct," we propose a modified definition that incorporates the various elements listed above. The wording of *Rodman* is more definitional, while the language in *Mitchell* exemplifies the type of conduct that warrants denial of unemployment benefits: "Misconduct" is limited to conduct in which employees bring about their own unemployment by such callousness, and deliberate or wanton misbehavior that they have given up any reasonable expectation of receiving unemployment benefits. The employee's actions may evince a wilful or wanton disregard of an employer's interests as is exemplified by deliberate violations of or indifference to the employer's reasonable expectations regarding standards of behavior. The employee's misconduct may demonstrate carelessness or negligence of such degree or recurrence so as to suggest equal culpability, wrongful intent, or evil design, or so as to reveal an intentional and substantial disregard of the employer's interests, or of the employee's duties and obligations to his employer. *See Mitchell*, 89 N.M. at 577, 555 P.2d at 698; *Rodman*, 107 N.M. at 761, 764 P.2d at 1319.

{43} In evaluating whether the employee has given up any reasonable expectation of receiving unemployment benefits through conduct that evinces callousness, and deliberate or wanton misbehavior toward the employer's interests and expectations, we look to the "totality of circumstances" of the case. *See Rodman*, 107 N.M. at 762, 764 P.2d at 1320. Relevant "circumstances" can include the employee's past conduct, previous reprimands by the employer, the worker's knowledge of the employer's expectations, the reasonableness of those expectations, and the presence of any mitigating factors. *Id.*

{44} The employer bears the burden of proving that the employee was discharged for willful misconduct. *TBA*, 403 A.2d at 1224. Accordingly, Prudential bears the burden of showing that, under the totality of the circumstances of this case, the violation of a company rule constitutes "misconduct" sufficient to disqualify Fitzhugh from

unemployment compensation benefits. *See Chavez v. Employment Sec. Comm'n*, 98 N.M. 462, 463, 649 P.2d 1375, 1376 (1982) ("Whether excessive absenteeism, amounts to misconduct . . . depends upon the particular facts in each case."). Moreover, we construe the Unemployment Compensation Law as favoring the granting of unemployment benefits. "Given the remedial purpose of the Unemployment Compensation Law, New Mexico courts, like most jurisdictions, interpret the provisions of the law liberally, to provide sustenance to those who are unemployed through no fault of their own, and who are willing to work if given the opportunity." *Rodman*, 107 N.M. at 761, 764 P.2d at 1319.

{45} Thus, on rehearing, we are applying a modified legal standard. In order to determine if this modified rule of law sheds new light on the facts of this case we have reexamined the whole record. We have also looked to see if any facts that previously seemed irrelevant, now, under a different legal standard, support the arguments of either party.

{46} The record in administrative cases can be characterized by procedural informality and inadequate documentation that would not be acceptable in a trial setting. This case is no exception. The existence of the company's daily call-in policy is established exclusively by the testimony of Morris and Gallimore. We do not have the advantage of examining the written language of this policy. However, the testimony describing this policy is consistent, and Fitzhugh never suggests that its provisions were different from the description offered by Morris and Gallimore. The issue at hand is, despite the fact that Prudential may have been justified in firing Fitzhugh for violating the policy, whether this violation rises to a sufficient level of misconduct to warrant denying unemployment benefits. *See, e.g., Sanchez*, 109 N.M. at 451, 786 P.2d at 678 (stating employee's actions were willful and wanton violation of a reasonable and known rule); *Unemployment Compensation Bd. of Review v. Kells*, 349 A.2d 511, 513 (Pa. Commw. Ct. 1975) ("[F]ailure to report an illness in the proper manner under company policy does constitute willful misconduct justifying discharge and precluding the recovery of benefits.").

{47} When evaluating a company policy, the abstract reasonableness of the policy is less significant than the unreasonableness of the employee who breaches the rule. *Milwaukee Transformer Co. v. Industrial Comm'n*, 126 N.W.2d 6, 12 (Wis. 1964). Prudential argues that Fitzhugh's violation of the rule does fall within the meaning of "misconduct" in Section 51-1-7(B). The company suggests that Fitzhugh's failure to report her absence each day was a great disservice to the company's interests. They point out that Fitzhugh never spoke to her Albuquerque supervisors, Morris and Gallimore, after October 30, 1992. Thus, more than an entire month passed before she was terminated by a letter dated December 1, 1992. Prudential claims that from its perspective, Fitzhugh simply disappeared from her place of employment. *See Watkins v. Employment Sec. Admin.*, 292 A.2d 653, 655 (Md. 1972) (excessive absenteeism is a willful disregard of appropriate behavior); *Shepherd v. District of Columbia Dep't of Employment Servs.*, 514 A.2d 1184, 1186 (D.C. 1986) (stating that "[a]ttendance at work is an obligation which every employee owes to his or her employer").

{48} In *Chavez v. Employment Security Commission* we set forth a rule, borrowed from an A.L.R. annotation, for determining whether employee absenteeism amounted to misconduct: "[P]ersistent or chronic absenteeism, at least where the absences are without notice or excuse, and are continued in the face of warnings by the employer, constitutes wilful misconduct within [Section 51-1-7(B)]." *Chavez*, 98 N.M. at 463, 649 P.2d at 1376 (quoting C. C. Marvel, *Discharge for Absenteeism as Affecting Right to Unemployment Compensation*, Annotation, 41 A.L.R.2d 1160, § 3 (1955)). This rule will help us determine if Fitzhugh's absenteeism and her violation of the call-in policy qualify as "misconduct" under Section 51-1-7(B). It is true that Fitzhugh's absenteeism could be characterized as persistent and chronic. But the *Chavez* rule mentions two further factors that we must resolve in evaluating Fitzhugh's conduct: whether her absence was without notice or excuse, and whether she had been adequately warned by Prudential.

{49} Prudential implies that the only notice it would accept from Fitzhugh was daily notice in accordance with the company policy. The company argues that when an employee simply disappears for more than a month, it is not reasonable to expect the employer to be aware of the employee's intentions simply because workers' compensation and disability applications are pending. While these arguments may justify terminating Fitzhugh, they do not necessarily justify denying her benefits.

{50} Fitzhugh responds that Morris and Gallimore should have been aware of the reasons for her extended absence because they were helping her apply for workers' compensation and short-term disability. We agree. When an employee asks for worker's compensation, the employer should be aware that the employee is most likely not suffering from a brief illness. Fitzhugh's statement that she did not know when she would be returning to work was express notice to the Albuquerque office of an extended absence. The request for help in filing a short-term disability claim was further notice that it was unreasonable to expect her to return to work any time soon. Fitzhugh reasonably presumed that Morris and Gallimore knew of the extended nature of her illness.

{51} Additionally, even though she did not directly speak to the Albuquerque office, Fitzhugh did pursue activities that demonstrated her belief that she was employed and that she desired to remain so. The record shows that she spoke to Ordesch regarding her short-term disability application on November 9, 1992. She obtained the necessary physician's statement from Dr. Lovette a few days later, and she mailed the completed application around November 14. She knew from the return mail receipt that the short-term disability application had been timely received by the New Jersey office. Thus, under the *Chavez* rule, we do not conclude that Fitzhugh's absences were "without notice or excuse" *Chavez*, 98 N.M. at 463, 649 P.2d at 1376.

{52} Regarding the second factor from *Chavez*, Prudential notes that Fitzhugh had been warned that her absences from work were excessive. In her last conversation with the Albuquerque office, on October 30, 1992, Fitzhugh was warned by Morris that she was in danger of exceeding the number of absences acceptable under company rules. Morris indicated that Fitzhugh would be placed on "final warning" status if her absences continued. Apparently Prudential maintained a progressive discipline system for addressing problems with employees. As with the other corporate policies whose existence is alleged by Prudential, the record is totally inadequate. We have been offered no company document that demonstrates how this disciplinary system works. Fitzhugh testified that according to her recollection, the system progressed from "counseling to a warning to a final warning and then termination." This suggests that Prudential had a system in which the employee is formally and repeatedly warned before being terminated. If Fitzhugh's testimony conveys a sense of how the system should work, the record suggests it was not followed by Prudential. There is nothing in the record to show that Fitzhugh was ever actually placed on "final warning" status. She was only warned that this might happen.

{53} Furthermore, it cannot be decisively claimed that Fitzhugh was notified that her violation of the call-in rule would result in her termination. Morris admitted that she did not directly inform Fitzhugh of the daily call-in rule though she did state that Fitzhugh could find this rule "in her employee guide." Fitzhugh testified that she was unaware of the rule but did not deny its existence:

> I didn't know that I would have to call in every single day. That was the furthest thing from my mind at the time because of my illness, just take it one day at a time. But I thought that they understood that I, you know, because of my illness, that I would not be able to come in to work.

Morris pointed out that Fitzhugh had correctly followed this policy the previous year when she provided a physician's note indicating she would be absent for surgery for a specific number of days, thus waiving the need to call in daily. This latter fact does not necessarily logically demonstrate Fitzhugh's understanding of the policy. She may have been totally unaware that the physician's note obviated her need to call in daily.

{54} Fitzhugh may have been sufficiently warned of the call-in rule to justify her termination from Prudential. But for the purposes of the Unemployment Compensation Law, the record shows that Fitzhugh believed her efforts to obtain worker's compensation and short-term disability would excuse her failure to report to work despite Morris's warnings. Though her absences may have "continued in the face of warnings by the employer," we cannot say that Fitzhugh demonstrated the kind of bad faith implicated by the rule propounded in *Chavez*. 98 N.M. at 463, 649 P.2d at 1376.

{55} Before we reexamined the legal standard applicable to this misconduct issue, we concluded that the violation of Prudential's daily call-in policy is an example of "disregard of standards of behavior which the employer has the right to expect of his employee." *Mitchell*, 89 N.M. at 577, 555 P.2d at 698. We now conclude this is no longer an appropriate standard. Fitzhugh's absences did not conform to the conduct proscribed by *Chavez*. Moreover, we conclude that her conduct was not "misconduct" under the revised definition set forth above: We cannot say that Fitzhugh's conduct demonstrated callousness, and deliberate or wanton disregard for Prudential's interests and expectations. She may have disappointed those interests and expectations, but her conduct was not wilful, wanton, deliberate, indifferent, extremely or recurrently careless or negligent, or suggestive of culpability, wrongful intent, or evil design. It is important that the trial court made no findings that brought Fitzhugh's conduct within this new legal standard. Fitzhugh engaged in conduct that sufficiently conformed with the company rules as she understood them. She acted as if she wanted to remain employed and believed she was still employed. She did not act as if she had given up any reasonable expectation of receiving unemployment benefits.

VI. CONCLUSION

{56} For the foregoing reasons we conclude Fitzhugh neither abandoned her employment with Prudential under Section 51-1-7(A) nor was she terminated from her position for misconduct under Section 51-1-7(B). We reverse the decision of the trial court and direct that Fitzhugh be awarded unemployment compensation benefits.

{57} IT IS SO ORDERED.

GENE E. FRANCHINI, Justice

WE CONCUR:
JOSEPH F. BACA, Chief Justice
RICHARD E. RANSOM, Justice
PAMELA B. MINZNER, Justice

Joseph F. Baca, Justice Richard E. Ransom, Justice Gene E. Franchini, Justice Pamela B. Minzner, and Justice Dan A. McKinnon, III, concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 10-201, 10-202, 10-203, 10-204, 10-223 and Forms 10-405 and 10-406 of the Children's Court Rules and Forms be and the same hereby are approved;

IT IS FURTHER ORDERED that the amendments of the above-referenced rules and forms of the Children's Court Rules shall be effective for cases filed in the Children's Court on and after October 1, 1996;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of existing rules and adoption of new Children's Court Rules and Forms by publishing the same in the *Bar Bulletin* and SCRA 1986.

DONE at Santa Fe, New Mexico, this 12th day of August, 1996.

Chief Justice Joseph F. Baca
Justice Richard E. Ransom
Justice Gene E. Franchini
Justice Pamela B. Minzner
Justice Dan A. McKinnon, III

10-201. Preliminary inquiry; time limits.

[WITHDRAWN]

[Withdrawn, effective October 1, 1996.]

10-202. Notice of preliminary inquiry.

[WITHDRAWN]

[Withdrawn, effective October 1, 1996.]

10-203. Authorization of petition; request for attorney.

[WITHDRAWN]

[Withdrawn, effective October 1, 1996.]

10-204. Preliminary inquiry; filing of petition.

A. **Preliminary inquiry.** Prior to the filing of a petition alleging delinquency, probation services shall complete a preliminary inquiry in accordance with the Children's Code.

B. **Petitions; form.** Petitions shall be substantially in the form approved by the Supreme Court. The petition shall be signed by the children's court attorney or a staff attorney as permitted by the Children's Code.

C. **Time limit.** If the child is in detention a petition shall be filed within two (2) days from the date of detention.

D. **Notice of filing of petitions in delinquency proceedings.** If the parents, guardians or custodians of a child alleged to be a delinquent child are not joined as parties in the delinquency proceeding, they shall be given notice of the filing of the petition in the manner provided by Rule 10-105 of these rules.

[As amended, effective October 1, 1996.]

10-223. Transfer hearing; time limits.

[WITHDRAWN]

[Withdrawn, effective October 1, 1996.]

10-405

[Rule 10-202]

[WITHDRAWN]

NOTICE OF PRELIMINARY INQUIRY

[Withdrawn, effective October 1, 1996.]

10-406

[Rule 10-204]

STATE OF NEW MEXICO
COUNTY OF _____
IN THE DISTRICT COURT
CHILDREN'S COURT DIVISION
In the Matter of
_____, a child
No._____

PETITION

The undersigned states that _____ *(name of child)* is a delinquent child.
The child's birth date is: _____
The child's address is: _____
_____
The child's parents, guardian, custodian or spouse address is as follows:
_____
Name
_____
Address
_____
Relationship
_____
Name
_____
Address
_____
Relationship

(If the child has no parents, guardian, custodian or spouse residing in this state, set forth the adult with whom the child resides or the known adult relative residing nearest to the court.)[1]

The above-named child did: _____ *(set forth essential facts)* contrary to Section(s) _____ *(citation to criminal statute or other law or ordinance[2] allegedly violated).* The acts alleged were committed within _____ county. *(complete applicable alternatives)*

The child is:

[ ] not in detention.

[ ] being detained at _____ *(address)* _____, New Mexico. The child has been in detention since _____ 19____ at _____ __.m.

Probation services has completed a preliminary inquiry in this matter and the children's court attorney, after consultation with probation services, has determined that the filing of a petition is in the best interest of the public and the child.

_____
Children's Court Attorney
_____
Address
_____
Telephone number

USE NOTE

[1] If any information concerning the child's birth date, address, family or guardian is not known, please state "not known".

[2] If the delinquent act is a violation of a traffic ordinance, Section 35-15-2 NMSA 1978 requires that the section or subsection defining the offense and the title of the ordinance be set forth.

[As amended, effective October 1, 1996.]

Branch-guest. of law

ADVANCE OPINIONS

FROM THE NEW MEXICO SUPREME COURT & COURT OF APPEALS

TOPIC INDEX

Administrative Law
Administrative Appeal; General; Evidence; Judicial Review; Record; Standard of Review; and Sufficiency of Evidence

Appeal and Error
Record on Appeal; and Substantial or Sufficient Evidence

Civil Procedure
Burden of Proof; and Standard of Proof

Employment Law
Disability; Disciplinary Action; Employer-Employee Relationship; Employment Security Benefits; Termination of Employment; Unemployment Compensation; and Voluntary Leaving

Evidence
Substantial or Sufficient Evidence; and Uncontradicted Evidence

Statutes
Interpretation

FROM THE NEW MEXICO SUPREME COURT

CHRISTINE R. FITZHUGH,
Petitioner-Appellant,
versus
NEW MEXICO DEPARTMENT OF LABOR, EMPLOYMENT SECURITY DIVISION, and PRUDENTIAL INSURANCE COMPANY,
Respondents-Appellees.

No. 22,172 (filed July 18, 1996)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
GERARD W. THOMSON, District Judge

JANE YEE
Legal Aid Society of Albuquerque, Inc.
Albuquerque, New Mexico
for Appellant

DOUGLAS H. MCKINNON
Albuquerque, New Mexico

MARGARET R. MCNETT
HINKLE, COX, EATON, COFFIELD & HENSLEY
Albuquerque, New Mexico
for Appellees

OPINION
GENE E. FRANCHINI
Justice

{1} Christine R. Fitzhugh applied for, and was denied, unemployment compensation. She appealed to the Appeals Bureau of the Department of Labor, Employment Security Division (Department). The Department affirmed the denial of benefits, concluding Fitzhugh voluntarily abandoned her job. She then filed a Petition for Writ of Certiorari seeking judicial review of the administrative decision in district court. The court affirmed the denial of Fitzhugh's unemployment benefits. However, the court rejected the Department's conclusion that Fitzhugh had voluntarily quit her job, and concluded instead that she was justifiably terminated for misconduct. We originally affirmed the trial court's determination. However, upon Fitzhugh's motion for rehearing, we have concluded that the findings of both the Department and the trial court are not supported by law or by substantial evidence. We therefore reverse and direct that Fitzhugh be awarded unemployment benefits.

I. FACTS

{2} In October 1990, Fitzhugh began working at the Albuquerque office of the Prudential Insurance Company, having transferred from Prudential's San Diego office. Her excellence as an employee resulted in several promotions. However, within less than a year of her transfer, Fitzhugh was incapacitated by a severe emotional breakdown.

{3} Among the first outward indications of Fitzhugh's unhappiness was a written formal complaint against a co-worker filed with the management of the Albuquerque office. In August 1992, Fitzhugh submitted the first of several requests that she be transferred to Prudential's Atlanta office. It was also in August 1992 that the physical symptoms of Fitzhugh's distress became apparent. She experienced headaches, gastrointestinal pain, anxiety, sleep disorders, and depression. On the job, her work began to backlog, she was unresponsive when spoken to, and she exhibited open hostility toward co-workers and supervisors.

{4} Fitzhugh first sought medical help on October 7, 1992, from Dr. Joy Lovette. In medical reports and in her testimony Dr. Lovette noted Fitzhugh's feelings of depression, victimization, isolation, and hopelessness.

{5} On October 19, 1992, the Albuquerque office manager, Janice

PC w/ Hal Stratton

Land - Seely
We really must decide to reopen
& incredulous
order doesn't

don't agree on what Land meant in talking

they & K agree on it

Land has asked for cancelled checks from 80's

70-2-13 ... in connection w/ hrngs or other proceedings before the division
... to conduct hrngs w/ respect to matters properly coming before the division
...
When any matter or proceeding is referred to a Commissioner & a decision is rendered thereon, any party of record adversely affected shall have the right to have the matter heard de novo before the comm. upon application filed w/ Division

70-2-8 next day I called Hall to clear up prod procedural confusion - I told him OCD was not a party to appeal, but that OCC certainly cld ask quest. & OCD staff if it wanted to.

there's a memo (re Reading & Yates) last yr.

Analogy to other admin. actions that affect prop int:

zoning ordinances
School boundaries

Ind. notice not given by body adopting ordinance or rule - but rule or ord. is of public record.

Actual notice — actual notice is an issue when you have a bona fide purchaser for value. That is not the situation here

Here:

1. notice given to owners of record at time applctn filed

2. some int. conveyed after notice given (didn't successors in int. have duty to check pending applctns or orders entered before or by OCD? - Isn't that one of reasons OCD keeps such extensive files?)

Rule 1207 — Add'l Notice Requirements

What if Strata had refused to disclose interest owners' identity

What if after applctn filed, int owner of record dies leaving int → ex. apptd. (but OCD unaware)

Marques: Strata "partners" didn't obtain protected prop int until on or after 11/7/95 when Strata recorded its assignments to these partners

[illegible]

The English Statute of Frauds (29 Charles II, c. 3) in force in New Mexico, as part of the common law, provides:

"No action shall be brought on any contract or sale of tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person therewith by him lawfully authorized."

Childers v. Talbott, 4 N.M. Gild. 336, 16 P. 275, and Section 21-3-3, N.M.S.A., 1953 Comp.

Casebeer v. Marshall's Trust
64 N.M. 170, 326 P.2d 368
(1958)

11/7/95

Sect. 70-1-1 NMSA 1978 "...all assignments & other instruments of transfer of royalties... shll be recorded. " No assignment ... affecting title ... shll affect title or rgts of any purchaser or transferee in good faith w/o knowledge of the existence of such unrecorded instrument

Mineral Lands Leasing Act, 30 U.S.C. Sect. 181
BLM required to approve assignments of oil & gas leases, 30 U.S.C. Sect. 187

Problems for Branko:

Was there a protectable property interest?
Statute of Frauds
Oil & Gas Act recording requirements
BLM approval - no signatures of acceptance by Branko group - fed regs
Murphy's affidavit in '95 (or '96) that he was retaining legal title & conveying out "beneficial interests" - trust analogy
Murphy's testimony at '93 & '96 hearing

Gary Younger - Denver atty

Stat. navigation

is overriding royalty owner entitled to notice

I told him we could give legal advice to private ptys but that I believe conservation division did to give notice to any real prop at owner

Jan 21, 1993
April 29, 1993
May 2, 1996

BRANKO

History

S1/2 of the SW1/4

Case 10656 - testimony & exhibits from hearing on **Jan. 21, 1993** resulted in **Order R-9845** dated **Feb. 15, 1993.**

Case 10656 *DeNovo* - Strata filed application for *denovo* hearing, but withdrew it.

Jan. 31, 1996 Branko et al. filed application for reopening of Case 10656 or in the alternative an application for hearing de novo. Transcript & exhibits from hearing held **May 2, 1996** resulted in issuance of **Order 10672** on **Oct. 2, 1996**

*(Should OCD have reopened case on Branko's request? Branko was not a party to the Mitchell case [Case 10656], so how did Branko have standing? - cld the Branko group be considered as "...any **party of record** adversely affected shall have the right to have the matter heard de novo before the commission within thirty days from the time any such decision is rendered." Section 70-2-13 NMSA 1978)*

(Does U.S. get any notice of transfers of interests in federal leases?)

Both Branko filed application for ***de novo*** hearing in Case 11510 which was heard on **Jan. 16, 1997** (4years after the pooling hearing)-

What is before OCC in this de novo hearing?

1) Is it just notice to Branko group of hearing?
2) Is is notice to Branko group of hearing & notice to B group of election? Did TK's de novo request include this? Does transcript from Jan '97 indicate that the election notice was an issue to be included? Yes, TK's prehearing statement ask that the div. Order be changed re the election notice.
3) It does not seem that any technical issues are before the OCC, but ck both Branko's and TK's de novo requests.

Affidavits submitted by Branko (but Mitchell does not agree that interest was "acquired" or "owned" prior to **Nov. 7, 1995.)**

What "interests" are entitled to due process as property interests?

Statute & Rules

Sect. 70-2-13 "The div shll promulgate rules & regs w/ re to hearings to be conducted before examiners,...."

*****

"When **any party of record** adversely affected shall have the right to have the matter heard de novo before the commission upon application filed w/ the div w/in 30 days from

the time any such decision is rendered.

Sect. 70-2-25

A. "W/in 20 days after entry of any order or decision of the commission, **any party of record adversely affected thereby** may file w/ the commission an application for rehearing...."

*****

B. **Any party of record to such a rehearing...**may appeal to district court."

(Sect 70-2-26 is Sec "may" hold a public hearing to detrmine whtr an order of commission contravenes the public interest.)

Rules

1203 - Method of Initiating a Hearing

A. The Div upon its own motion, the AG on behalf of the State, and any operator or producer, **or any other person having a property interest** may institute proceedings for a hearing.

1220 - <u>De Novo</u> Hearing before Commission

"When any order has been entered by the Div pursuant to any hearing held by an Examiner, **any party of record adversely affected by such order shall have th right to have such matter or proceeding heard <u>de novo</u> before the Commission."**

Legal Research

Uhden - what about J. Montgomery's dissent?

Team Bank v. Meridian Oil, 118 NM 147 (1994)

"In <u>Fullerton</u> the Ps claimed ownership of a royalty int in an oil & gas well, thus the trial ct correctly hled that the suit was for an int in realty such that the Statute of Frauds applied to the K."

Oil & Gas Nutshell

"Leasehold interest" = what lessee of oil & gas lease has; also called the "working interest" & sometimes the "operating interest"

An "overriding royalty" is a royalty int carved out of the lessee's leasehold int (ends when the lease from which it is carved terminates)

"Non-participating royalty" is a royalty carved out of the mineral int, entitling its holder to a stated share of prod w/o re to the terms of any lease tho it is frequently measured by a leasehold royalty.

"Royalty" - no rgt to actually produce; it's a rgt to share of production. Not profit-sharing or cost-bearing

Strata held a fed oil & gas lease w/ record title & operating rights

Case 11510

1/16/97

Applctn of Branko } (isn't it too late to reopen)

Hal Stratton - Branko
Tom Kellahin - Mitchell
Rand Carroll - OCD

ptres have agreed: stip to testimony
1/23/96 hrng transcript
Strat ex 1-7

5/2/96 - M to Reopen hrng } Ex 1-16 affdvts re interests
Strata - 44 exhibits
Mitchell ex 1 & entire transcript
+ ex 45 LT (ptres have stipulated to)
(ex 2 ↑ ?)
hrng ofcr asked for add'l info & Stratton has provided

'93 forced pooling transcript also incld

Mitchell ex 2 to case 11510

Branko — up 16 int, not given notice of pooling applctn, hrng, or order filed Applctn to Reopen on due process grounds
10/26/92 - Smith landman called M Murphy
Strata had 25% of working int; MM told Smith there were other people to talk to.
12/9/92 -
w/in M know or shld of known of these owners
ex. 19, 20, 21, 23 all ref. other ownshp
Appltn for Pooling filed
in Jan

ex 24 — on 13th MM faxed to Smith list of owners
hrg on applctn was 1/21 - it was held
2/15 order entered, but never sent to owners

requisite notice ~~to be~~ heard

Whaley v OCC A 531 | personal service

recording not issue

Stratton 12/62 Mitchell case on notice of existence & interests
applicant has duty to give notice (not Stratton)
kind of notice - personal service (not mail; not publication) - no notice, except maybe publication
w/ well acquired in '89 - 14 working int owners
2 overriding int.

SHLD OCD HAVE RE-OPENED HRNG? Stratton asked OCD to reopen hrng; it did

1/2 hrng cld have been delayed - well was'nt drilled until May

Briefs in the Division matter

Kellahin

a/l's

2/93 - forced pooling order

5/96 - OCD's denial to reopen

11/95 - this was when p's interest occurred - assignment

When do E's undisclosed partners have a prop. int to be protected

How is M to know of assignments that aren't recorded for yrs (11/95)

M

after p'ty is served, p'ty then discloses a list - Does M have to do anything else?

cut off date for notification

Warden - int. in the spacing unit - two of Amoco's payees
Amoco did'nt notify Warden

O/A - set serv. date as cut off date & also set a diff. time for to fix persons get orders & get elected after the order

3 months - waited

W & L's argument was re: was notice

* ~~K~~ wants ~~OCS~~ order modified

~~Strata~~ failed to make election → must do NOD in '93, but Strata rescinded decision request

OCS wants notice by cert. mail not personal service
wants "int. pty" to be "of record & or" an executed instrument

Stratton as rep. Strata - rep. the 16 owners
known interest - due diligence
Ex. 24 LT ~ Simon & Mitchell → this is the "knowledge"

OCS Strata rep & did sell the lease on behalf of undisclosed principals

Stratton affidavits - last to exhibits
when he became aware of well

What precipitated the assignments in '95
16 - working int. other overriding

Did your 16 clients have their working int. owners or ownership?

Rule 1207 states "actual notice" purchased in '89 & '90 - but no written instruments
but they had a protected property int.

Scott Experts can actual notice substitute for service of process
Stratton: "extraordinary" is not a substit. for due process
process must be formal

Cld OCC decide this on a prel. issue? Like too long to wait to reopen the pooling case.

Initial forced pooling in '93
then can you move to reopen forever? Cld

- When is an interest entitled to protection?
For purposes of notice, at what point is a protectable interest established?
  1. At time of filing applctn?
  2. Anytime btwn filing & order?
  3. after order?

- "known" interest
  recorded interest
  actual knowledge

- "actual" notice

Uhden SC found U "clearly has a prop right in oil & gas lease"
real prop interest
it was spacing order, not pooling clause,
which harmed Uhden - pooling

Uhden found that notice by publication does not satisfy constitutional due process req - but what about certified mail
what did it mean by "personal service"

DISSENT - WAS SAME SIT. PRESENT IN BRANCO?
WLD PRESENT SUP. CT AGREE W/ J. Montgomery's dissent

generally applicable so as to make its burden less onerous on the handicapped individual." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1502 (10th Cir.1995) (quoting *Oxford House, Inc. v. Township of Cherry Hill*, 799 F.Supp. 450, 462 n. 25 (D.N.J.1992)). The facts in this case show that the defendants repeatedly changed the guidelines on use of motorized cart to accommodate Mrs. Anderson. Indeed, there is no evidence that they ever refused to accommodate her.

The guidelines are not an outright ban on the use of motorized carts but restrict their use in selected common areas at meal times. Reasonable exceptions have been made by escorting Mrs. Anderson through the lobby and by driving her into the dining room via the parlor for meals. There is no restriction at any time on her use of the motorized cart in residents' rooms, hallways, upper floor assembly room, or wing elevators. Thus, she has meaningful access to the Crosslands as a whole, as evidenced by her testimony that she can do what she wants and participate in all the activities of her choice.

Finally, the court believes the purpose of the Fair Housing Act would not be served by invalidating guidelines which were established for the safety of elderly persons living in a retirement community—many of whom are feeble and handicapped in vision, hearing, or balance—in order to allow those few persons who drive motorized carts to do so without any restrictions on the time, place, or manner of their operation.

III. Order

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment is granted. The plaintiff's claims are dismissed.

RIVER GAS CORPORATION & Texaco Exploration And Production, Inc., Plaintiffs,

v.

Karen PULLMAN, F-L Energy, Corp., Defendants.

Civil No. 2:96-CV-0209 B.

United States District Court, D. Utah, Central Division.

Feb. 28, 1997.

Gas and exploration companies brought action against individual and energy company to quiet title to certain interests in federal oil and gas lease and in existing well located on lands covered by lease. Plaintiffs moved for partial summary judgment. The District Court, Benson, J., held that assignment of lease to individual, which was denied approval of Bureau of Land Management (BLM), could not be perfected once later assignment to gas company was approved.

Motion granted.

Mines and Minerals ⇐5.1(6)

Assignment of federal oil and gas lease that was denied approval of Bureau of Land Management (BLM) could not be perfected once later assignment to different party was approved. 30 U.S.C.A. § 187a.

Frederick M. MacDonald, John F. Waldo, Pruitt, Gushee & Bachtell, Salt Lake City, UT, for Plaintiffs.

Steven E. Clyde, Amanda Seeger, Clyde, Snow & Swenson, Ronald C. Barker, Salt Lake City, UT, Stanley M. Davis, Watertown, S.D., for Defendants.

MEMORANDUM OPINION AND ORDER

BENSON, District Judge.

Plaintiffs River Gas Corporation ("RGC") and Texaco Exploration and Production, Inc.

GAS CORPORATION & Texaco
oration And Production, Inc.,
Plaintiffs,

v.

en PULLMAN, F-L Energy,
Corp., Defendants.

Civil No. 2:96-CV-0209 B.

United States District Court,
D. Utah,
Central Division.

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aintiffs.

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Swenson, Ronald C. Barker, Salt
, UT, Stanley M. Davis, Water-
for Defendants.

EMORANDUM OPINION
AND ORDER

N, District Judge.

s River Gas Corporation ("RGC")
o Exploration and Production, Inc.
("TEXEP") (collectively "Plaintiffs") initiated this action against the defendants Karen Pullman ("Pullman") and F-L Energy, Corporation ("F-L") (collectively "Defendants") to quiet title to certain interests in a Federal oil and gas lease and an existing well located on the lands covered by the lease more specifically defined and identified as the "Subject Property." Currently before the court is Plaintiffs' motion for summary judgment claiming that their assignment is valid and binding because they received Bureau of Land Management ("BLM") approval while the defendants were previously denied approval on their assignment of the same gas lease.

A hearing on this motion was held before the Honorable Dee V. Benson on January 9, 1997. Frederick M. MacDonald represented the plaintiffs and Mitchell R. Barker represented the defendants. Having reviewed the memoranda submitted by the parties and having considered the oral arguments from counsel, being fully apprised, and for good cause appearing, the court makes the following findings and enters the following Memorandum Opinion and Order.

BACKGROUND

The Subject Property in this case was originally leased to Harold L. Anderson by the United States on September 1, 1971. By Assignment of Record Title effective October 1, 1971, and later approved by the BLM, Harold Anderson assigned the lease to Webb Resources, Inc. On December 11, 1979 Webb Resources Inc. merged into Sohio Petroleum Company ("Sohio") and the BLM approved the merger on June 5, 1980. Sohio changed its name to BP Exploration, Inc. and subsequently to Tex/Con Oil and Gas Company ("Tex/Con") on March 15, 1989. The BLM approved the corporate restructuring and succession on June 22, 1990. On April 14, 1992 the BLM issued its approval of Tex/Con's merger into PG & E Resources Company ("PG & E"). On August 9, 1990 Tex/Con purported to assign 100% of the record title in the lease to Karen Pullman, but the BLM did not approve the assignment and Defendants did not make any effort to resubmit the assignment for approval. Subsequently, PG & E reassigned 100% of the record title in the lease to River Gas of Utah, Inc. ("RGU"). This assignment along with the transfer of operating rights was approved by the BLM on July 1, 1994. RGU merged into plaintiff RGC effective January 1, 1995 and the BLM gave its approval on March 3, 1995. On July 1, 1995 the BLM approved the assignment by RGC to plaintiff TEXEP of 50% of its record title in the lease along with 50% of its operating rights.

DISCUSSION

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When considering a motion for summary judgment, the court must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The issue before the court is whether disapproval of an assignment by the BLM and the subsequent approval of the same assignment to a different party will control in an action to quiet title between private parties. Plaintiffs argue that they are entitled to judgment because the BLM approved its assignment of the gas lease after the defendants' assignment was disapproved and that an assignment is not valid without BLM approval. Plaintiffs correctly assert that the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 187a (1994), governs this type of assignment because the lease in question was originally granted to a private party by the United States government and is thus a government lease subject to the MLA. In pertinent part, § 187a reads, "[A]ny oil or gas lease issued under the authority of this chapter may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary." Thus, Plaintiffs argue that according to the statute's § 187a "approval requirement," there

can be no assignment of the rights to a lease unless the BLM gives its approval.

Defendants contend that they should still be allowed time to perfect their assignment regardless of the passage of time and the subsequent perfection of an assignment to another party. They cite *Norbeck v. Crawford*, 254 Mont. 256, 836 P.2d 1231 (1992), for this proposition based on its holding that parties are permitted to resubmit their assignment for BLM approval after the initial denial, *id.* 836 P.2d at 1233–34,[1] but Defendants assume too much. Thus, while Defendants correctly assert that an assignment that was denied BLM approval could still be perfected where no further assignment had subsequently been approved, *id.* at 1234, they wrongly conclude that the assignment can be perfected after an assignment has been made to another party and approved by the BLM. It simply does not follow that an invalid assignment takes precedence over a valid assignment when the latter received the required government approval. Because the interests in the lease remain with the assignor until BLM approval is obtained, Pullman never had an interest in the government lease. Therefore a valid assignment was made to Plaintiffs' predecessors free and clear of the invalid assignment. *See id.* at 1234 (obligation remains with the assignor).[2]

It is well established that a party must receive the approval of the Secretary of the Interior in order for an assignment of a government lease to be valid, 30 U.S.C. § 187a; *see also Oasis Oil Co. v. Bell Oil & Gas Co.*, 106 F.Supp. 954 (W.D.Okla.1952) (holding that the assignee did not have a right to monies attributable to a well, because after the BLM disapproved his assignment the well remained the assignor's property),[3] and that an assignment does not actually occur until approval is granted. *Norbeck*, 836 P.2d at 1234. Significantly, Congress expressed its view on the necessity of BLM approval when it codified the language of the Oasis holding. 30 U.S.C. § 187a (1994) (confirming the concept that responsibility remains with the assignor, as if no assignment existed, until an assignment is approved). Since the original assignment to Pullman was disapproved by the BLM, it was never a valid assignment and the lease interest remained with the assignor.[4]

Defendants also refer to *Recovery Oil Co. v. Van Acker et al.*, 79 Cal.App.2d 639, 180 P.2d 436 (1947), in arguing that the statutes and administrative regulations like those in the MLA are for government use and not individual parties. *Id.* 180 P.2d at 437. While *Van Acker* may appear on its surface to substantiate the defense's argument, Defendants have erred in its application. The law to which the *Van Acker* case refers was established in *Isaacs v. De Hon et al.*, 11 F.2d 943 (9th Cir.1926). There, De Hon brought suit against the defendant, Isaacs, to obtain interests in an oil claim. On appeal, Isaacs argued that De Hon was not qualified to hold an oil claim or prospecting claim

1. Although allowing the assignee the right to procure approval from the BLM after fifty-seven years, *Norbeck* recognized that the property had remained with the assignor the entire time, the assignee had never paid rentals on the property, and the original attempt to perfect the assignee's interest was rejected by the BLM. *Norbeck*, 836 P.2d at 1233–34. Accordingly, the assignee was not entitled to any past profits achieved by use of the property because there was never a valid assignment and therefore no change of title.

2. Defendants further point out that in the *Norbeck* case, the court made reference to the fact that the assignee never paid the rentals, but Pullman did in this case. *Id.* at 1234. While this fact may raise another issue for which the defendants are entitled to relief, the fact that the plaintiffs have allowed Pullman to stay on the land and pay rentals up until this point does not affect the issue of whether the BLM's denial of one assignment is dispositive in a quiet title action over a government lease when the BLM validated an assignment to a subsequent party.

3. The *Oasis* court did not have to consider whether the assignee could assert his rights to future profits from the well under the assignment if he could obtain BLM approval because the assignee disclaimed all interests in the property. *Oasis*, 106 F.Supp. at 957.

4. Defendants point out that the disapproval by the BLM was based on an insufficient bond. They claim that the amount of the bond was proper and that the BLM made a mistake. However, the Defendants never appealed that decision. Moreover, the motives behind the BLM disapproval are not at issue before the court and it is sufficient that the assignment was denied.

106 F.Supp. 954 (W.D.Okla.1952)
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because he was not a citizen of the United States and therefore not a qualified person under section 12½ of the Regulations of the General Land Office (1920) (regulation similar to the pertinent language in § 187a). *Id.* at 944. Apposite to the instant case, the Court of Appeals stated that

> Appellant is in no position to take advantage of this regulation. It may be that plaintiffs will lose the fruits of this litigation by the refusal of the Secretary to approve the assignment of interests in the permit. But appellant is nevertheless held in a court of equity to the obligations he assumed in his grubstake contract.

Id. The court did not even consider the issue of whether BLM approval could be used as proof of a valid assignment. The court merely held that an individual may not use the regulation as a defense to the validity of an assignment based on lack of citizenship. Moreover, the court's holding that there can be no valid assignment or transfer of interests without BLM approval concurs with *Isaacs* dicta referring to the "fruits of litigation" being lost if the plaintiffs did not receive the Secretary's approval. *Id.*

The key element drawn from these cases is the need for BLM approval in order to have a valid assignment. *See* 30 U.S.C.A. § 187a; *see also Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 70, 86 S.Ct. 1301, 1305, 16 L.Ed.2d 369 (1966) ("The Secretary, who must approve all assignments before the lease obligations or record titles are shifted finally, is entirely free to disapprove assignees however valid their assignments may otherwise be."). Applying this reasoning to the instant case, it is as if the original assignment of the lease rights to Pullman never happened once the BLM rejected her application for approval. Nevertheless, Defendants may have had the opportunity to renew their application provided that the property stayed with the original assignor and had not already been assigned to another party to whom approval was granted. However, the assignor did assign the property in question to another assignee (RGC) and RGC received the BLM's approval. Accordingly, Plaintiffs' motion for partial summary judgment is granted and a quiet title decree shall be entered in their favor. Still remaining is Defendants' breach of contract counterclaim.[5]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for partial summary judgment is granted and a quiet title decree is entered in their favor.

IT IS HEREBY ORDERED.

5. This alleged contract purportedly allowed Defendants time to correct any defects provided they conformed with the terms of the agreement. Defendants contend that they continued to pay rent, continued to operate the lease, and complied with all other obligations of the lease. It remains to be determined whether RGC was aware of such an arrangement between PG & E and Defendants and took their assignment subject to this agreement.

Gail Renee WHETSTONE, Plaintiff,

v.

UNITOG, INC., Defendant.

Civil Action No. 97-AR-0538-S.

United States District Court,
N.D. Alabama,
Eastern Division.

March 31, 1997.

Claimant brought action against employer in state court seeking workers' compensation benefits and damages based on claim that she was retaliated against for pursuing workers' compensation benefits. Employer removed action and claimant moved to remand. The District Court, Acker, J., held that: (1) employer was not entitled to stay of plaintiff's motion to remand action to state court; (2) employer's motion to remove claimant's action was untimely; and (3) court did not have jurisdiction over claimant's action seeking benefits and damages.

Motion granted.

CHAPTER 70

Oil and Gas

Art.

ARTICLE 1

Assignments and Leases

Sec.

70-1-1. [Production of oil, gas or other minerals; assignments of royalties to be recorded.]

That all assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands in this state, including lands operated under lease or contract from the United States and from the state of New Mexico, shall be recorded in the office of the county clerk of the county where the lands are situated.

History: Laws 1927, ch. 76, § 1; C.S. 1929, § 97-501; 1941 Comp., § 69-101; 1953 Comp., § 65-2-1.

Cross references. — For recording deeds, see 14-9-1 NMSA 1978. For recording contracts relating to oil and gas rights in state lands, see 19-10-33 NMSA 1978.

Constructive notice of prior assignment of federal leases. — Plaintiff was an innocent purchaser for value, under 14-9-1 to 14-9-3 NMSA 1978, of oil and gas lease interests since the records at federal land office did not constitute constructive notice to purchaser of a prior assignment; rather, to constitute such notice, this section requires assignments of interests and royalties in federal oil and gas leases to be recorded in the appropriate county clerk's office. Bolack v. Underwood, 340 F.2d 816 (10th Cir. 1965).

Severance of mineral estate from surface property. — A grant or reservation of underlying oil and gas, or royalty rights therein, is a grant or reservation of real property that may be severed from the surface. Such severance may be effected by a conveyance of mineral estate, or by a reservation or exception of the mineral estate, or by a conveyance, reservation or exception of the surface estate, or it may be accomplished by judgment. Johnson v. Gray, 75 N.M. 726, 410 P.2d 948 (1966).

A conveyance or reservation of a fractional interest in the minerals by the owner of a fee simple estate will only effect a severance of the fractional interest so conveyed or reserved. Johnson v. Gray, 75 N.M. 726, 410 P.2d 948 (1966).

Recording of assignment of oil or gas lease is necessary under New Mexico law in order to be effective against subsequent assignees or purchasers. 1980 Op. Att'y Gen. No. 80-12.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gas and Oil § 19; 54 Am. Jur. 2d Mines and Minerals § 106.

What constitutes oil or gas "royalty" or "royalties" within language of conveyance, exception, reservation, device or assignment, 4 A.L.R.2d 492.

Necessity that mortgage covering oil and gas lease be recorded as real estate mortgage, and/or filed or recorded as chattel mortgage, 34 A.L.R.2d 902.

Production on one tract as extending term on other tract, where one mineral deed conveys oil or

gas in separate tracts for as long as oil or gas is produced, 9 A.L.R.4th 1121.

Meaning of, and proper method for determining, market value or market price in oil and gas lease requiring royalty to be paid on standard measured by such terms, 10 A.L.R.4th 732.

Oil and gas royalty as real or personal property, 56 A.L.R.4th 539.

58 C.J.S. Mines and Minerals §§ 193, 221.

70-1-2. [Effect of recording or failure to record.]

Such records shall be notice to all persons of the existence and contents of such assignments and other instruments so recorded from the time of filing the same for record, and no assignment or other instrument of transfer affecting the title to such royalties not recorded as herein provided shall affect the title or right to such royalties of any purchaser or transferee in good faith, without knowledge of the existence of such unrecorded instrument.

History: Laws 1927, ch. 76, § 2; C.S. 1929, § 97-502; 1941 Comp., § 69-102; 1953 Comp., § 65-2-2.

Constructive notice of prior assignment of federal leases. — Plaintiff was an innocent purchaser for value, under 14-9-1 to 14-9-3 NMSA 1978, of oil and gas lease interests since the records at federal land office did not constitute constructive notice to purchaser of a prior assignment; rather, to constitute such notice, 70-1-1 NMSA 1978 et seq., requires assignments of interests and royalties in federal oil and gas leases to be recorded in the appropriate county clerk's office. Bolack v. Underwood, 340 F.2d 816 (10th Cir. 1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gas and Oil § 20.

70-1-3. [Forfeiture of oil, gas or mineral lease; release from record.]

Whenever any oil, gas or other mineral lease heretofore or hereafter executed shall become forfeited, it shall be the duty of the lessee, his, or its heirs, executors, administrators, successors or assigns, within thirty days from the date this act [70-1-3 to 70-1-5 NMSA 1978] shall take effect, if the forfeiture occurred prior thereto, and within thirty days from the date of the forfeiture of any and all other leases, to have such lease released from record in the county where the leased land is situated, without cost to the owner thereof.

History: Laws 1925, ch. 118, § 1; C.S. 1929, § 97-301; 1941 Comp., § 69-103; 1953 Comp., § 65-2-3.

Proof of substantial damage from undrilled tract. — Irrespective of standard of duty which should be imposed upon lessee of two oil and gas leaseholds when he has drilled one leasehold, or which remedies are available to the lessor, there must first be proof of substantial drainage from undrilled tract, and where there was substantial evidence to support trial court's finding that little or no drainage had occurred, that finding would not be overturned on appeal. Cone v. Amoco Prod. Co., 87 N.M. 294, 532 P.2d 590 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gas and Oil § 212; 54 Am. Jur. 2d Mines and Minerals § 141.

Surrender clause as affecting validity of oil or gas lease, 3 A.L.R. 378.

Commencement of development within fixed term as extending term of oil and gas lease, 67 A.L.R. 526.

Acceptance of rents or royalties under oil and gas lease as waiver of forfeiture for breach of covenant or condition regarding drilling of wells, 80 A.L.R. 461.

Lessor's acceptance of royalty under gas and oil lease after lease has expired as precluding him from insisting upon expiration, 113 A.L.R. 396.

Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil and gas lease for failure to complete well or commence drilling, 5 A.L.R.2d 993.

Relief against forfeiture of lease for nonpayment of rent, 31 A.L.R.2d 321.

Rights of parties to oil and gas lease or royalty deed after expiration of fixed term where production temporarily ceases, 100 A.L.R.2d 885.

Gas and oil lease force majeure provisions: construction and effect, 46 A.L.R.4th 976.

58 C.J.S. Mines and Minerals §§ 173, 184, 205.

70-1-4. [Failure to execute release; action to obtain release; damages; attachment.]

Should the owner of such lease neglect or refuse to execute a release as provided by this act [70-1-3 to 70-1-5 NMSA 1978], then the owner of the leased premises may sue in any court of competent jurisdiction to obtain such release, and he may also recover in such action of the lessee, his, or its heirs, executors, administrators, successors or assigns, the sum of one hundred dollars ($100.00) as damages, and all costs, together with a reasonable attorney's fee for preparing and prosecuting the suit, and he may also recover any additional

damages that the evidence in the case will warrant. In all such actions, writs of attachment may issue as in other cases.

History: Laws 1925, ch. 118, § 2; C.S. 1929, § 97-302; 1941 Comp., § 69-104; 1953 Comp., § 65-2-4.

Cross references. — For attachment, see 42-9-1 NMSA 1978.

70-1-5. [Demand for release must precede action.]

At least twenty days before bringing the action provided for in this act [70-1-3 to 70-1-5 NMSA 1978], the owner of the leased land, either by himself or by his agent or attorney, shall demand of the holder of the lease (if such demand by ordinary diligence can be made in this state) that said lease be released of record. Such demand may be either written or oral. When written, a letterpress or carbon or written copy thereof, when shown to be such, may be used as evidence in any court with the same force and effect as the original.

History: Laws 1925, ch. 118, § 3; C.S. 1929, § 97-303; 1941 Comp., § 69-105; 1953 Comp., § 65-2-5.

ARTICLE 2

Oil Conservation Commission; Division; Regulation of Wells

Sec.

340 F.2d 816 BOLACK V. UNDERWOOD (10th Cir. 1965)

Tom BOLACK and wife, Alice Bolack, Appellants,
vs.
Rip C. UNDERWOOD, Appellee. Tom BOLACK and wife, Alice Bolack, Appellants, v. H. K. RIDDLE and Dena Riddle, Appellees.

Nos. 7578, 7612
UNITED STATES COURT OF APPEALS TENTH CIRCUIT
340 F.2d 816
January 18, 1965

AUTHOR: LEWIS

OPINION

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

These consolidated appeals follow the entry of judgments in the District Court for the District of New Mexico in actions involving title to a portion of a federal oil and gas lease on lands located in San Juan County, New Mexico. The action was initiated by the appellee Underwood as a suit to quiet title to the lease interest as against appellants who in turn counterclaimed by claim of title in themselves and also filed a third party claim against the appellees Riddle. The trial court summarily entered judgment quieting title to the disputed interests in favor of appellee Underwood and against appellants, and, after trial, entered a money judgment upon the cross-complaint in favor of appellants and against the Riddles. The appeal from the latter judgment, No. 7612, is taken as a protective procedural measure only and appellees Riddle do not appear in this court[1]. Our primary concern is therefore directed to a consideration of appellants' claim that the trial court erred in No. 7578, its judgment quieting title to the subject lease interests in Underwood.

On July 8, 1948, the Riddles, then the undisputed owners of the subject lease, assigned their interests therein to the Bolacks by an instrument containing the language "subject to the approval of the Director of the Bureau of Land Management." The Bolacks filed the assignment with the Bureau for approval on October 28, 1948, subsequent to the ninety-day period allowed for filing. Thereafter, on April 30, 1952, the Bureau notified the Bolacks that the assignment could not be approved because they had not submitted a consent of the surety under the Riddles' bond to the transfer, and the Bolacks were given thirty days to supply this deficiency or ninety days to appeal from this decision by the Bureau. The Bolacks, however, did nothing: they paid no bond premiums on the lease, paid no delay rentals, and in no way asserted ownership over the disputed leasehold until the complaint in the instant action was filed on March 11, 1961[2]. During this period of nearly nine years Riddle continued to furnish and post all bonds required by the Bureau in connection with the lease.

On July 28, 1960, the Riddles assigned the entire lease to one E. R. Richardson, a broker, so that Richardson could sell the lease for them, which Richardson failed to do. Mr. Riddle, desperately in need of money, then called upon plaintiff Underwood, whom he had known for years, and asked him to buy the lease for $4,000. Since title to the lease was still in Richardson, Underwood and Riddle went to his office where Underwood gave Richardson a check for

$4,000, which Richardson immediately endorsed to Riddle, in return for Richardson's assigning the lease to Underwood. The affidavits and depositions relied upon by the trial court are uncontradicted to the effect that Underwood knew nothing of the prior assignment to the Bolacks. Underwood could have learned of the assignment had he examined the records of the Federal Land Office, which he admittedly did not do, but there was no recording in the state office provided for by New Mexico law.

On the basis of the above undisputed facts the trial court granted Underwood's motion for summary judgment, finding that the New Mexico recording acts governed and had not been complied with and that Underwood had knowledge neither of the Bolack assignment nor of circumstances that would lead an ordinarily prudent man to the facts. The trial court thereupon concluded that the records of the office of the Bureau of Land Management did not constitute constructive notice to Underwood and that Underwood therefore was an innocent purchaser for value.

As we have earlier indicated, after the entry of the summary judgment against the Bolacks, they proceeded to judgment upon their cross-complaint against the Riddles, and this procedure premises a preliminary contention by Underwood that this appeal should be dismissed. The basis of the motion is that the Bolacks, by obtaining judgment on their third party complaint against the Riddles, have waived their right to appeal and that that judgment constitutes an acceptance by the Bolacks of the summary judgment in favor of Underwood. While the general rule is that the right to appeal may be waived by an inconsistent act by the losing party, e.g., Hinton v. Hotchkiss, 65 Ariz. 110, 174 P.2d 749, that situation is not here presented, as the Bolacks did not attempt to execute their judgment and were merely protecting themselves in the event the adverse judgment was allowed to stand. To dismiss would detract from the benefits of third party practice and would be inconsistent with the inherent policy of Rule 14(a), Fed.R.Civ.P. See, e.g., Luther v. United States, 10 Cir., 225 F.2d 495; Moss v. Smith, Ky., 361 S.W.2d 511; Aetna Cas. & Sur. Co. v. Smith, 127 A.2d 556 (D.C.Mun.App.); cf. Flag Oil Corp. of Delaware v. Triplett, 180 Okl. 154, 68 P.2d 108. The motion to dismiss the appeal is accordingly denied.

The Bolacks contend that the trial court erred in granting Underwood's motion of summary judgment for the reason that there remained material facts in dispute. Although summary judgment is appropriate only where the case is so free of doubt as to render a formal trial useless, Singer v. Rehm, 10 Cir., 334 F.2d 240, and all inferences must be viewed in the light most favorable to the party opposing the motion, United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176, the motion should be granted in situations where the factual issues are all either irrelevant or spurious; such is the import of the language of Rule 56(c), Fed.R.Civ.P., "no genuine issue as to any material fact." The trial court may not make a factual finding by reference to deposition or affidavit wherein the disputed issue of fact appears but may explore whether or not such disputed issue does exist by reference to deposition and affidavit. Here, testimony by deposition unequivocally shows that Underwood had no knowledge of the assignment to Bolack and nothing was offered by appellants in opposition to the motion for summary judgment to indicate their intention or ability to prove otherwise. In such case, the trial court may accept the deposition as negativing the existence of a disputed fact and accept the record as showing no issue regarding a "material fact 'dispositive of right or duty [remaining] in the case'." In this situation summary judgment is proper. Bushman Construction Co. v. Air Force Academy Housing, Inc., 10 Cir., 327 F.2d 481.

Two principal issues remain to be decided; first, whether the 1948 assignment was effective to pass title to the Bolacks in view of the lack of Bureau of Land Management approval of the assignment, and second, whether, assuming title did pass, Underwood was an innocent purchaser

for value with rights superior to those of the Bolacks. In view of our disposition of the second issue we need not here consider whether the 1948 assignment passed title to the Bolacks.

The answer to the question of whether Underwood may be considered an innocent purchaser for value is dependent upon whether the records at the Federal Land Office constitute constructive notice to a purchaser of a federal lease. New Mexico law is to the effect that the federal land office records do not constitute such notice, as sections 65-2-1 et seq.[3], N.M.S.A., require that assignments of interests and royalties in federal oil and gas leases be recorded in the appropriate county clerk's office, and sections 71-2-1 et seq.[4] provide that an instrument that is not recorded cannot affect the title or right to real estate of any purchaser in good faith. New Mexico law also provides that an interest in an oil and gas lease constitutes an interest in real property, e.g., Rock Island Oil & Refining Co. v. Simmons, 73 N.M. 142, 386 P.2d 239. There is no federal statute governing disputes between private individuals regarding rights to federal oil and gas leases, and in such instance, where no right of the federal government is involved, state law governs. See Bank of America Nat. Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93; United States v. Union Livestock Sales Co., 4 Cir., 298 F.2d 755, 96 A.L.R.2d 199.

Viewed in this posture, the problem at hand is reduced to the simple issue of whether under New Mexico law Underwood is chargeable with notice of the prior assignment to the Bolacks. And section 71-2-3, N.M.S.A., clearly states that absent recording in the office of the county clerk the prior assignment will not affect the title of a subsequent purchaser, in this case Underwood. Since it is undisputed that Underwood did not have notice of the prior assignment and that it was not recorded in the county clerk's office, the judgment for Underwood was correct. The Bolacks' other two contentions, that the trial court erred in refusing to rule upon whether they were entitled to inspect a letter written by Underwood's counsel, and that Underwood was not entitled to relief in equity, are without merit. The judgment in number 7578 is affirmed. It follows that the judgment in number 7612 is also affirmed.

OPINION FOOTNOTES

1. The money judgment against the Riddles is based upon a tortious divesting of title and is dependent upon the correctness of the court's finding that appellants have no present interest in the leasehold. If, as appellants contend, such finding is incorrect the basis of the money judgment must fail; otherwise, there is no claim of error regarding No. 7612.

2. On May 10, 1961, Mr. Bolack filed a protest with the land office against the approval of the assignments by the Riddles and Richardson. The land office dismissed the protest, stating that it would recognize the judicial decision in the instant case as correctly determining the rights of the parties.

3. "65-2-1. Production of oil, gas or other minerals - Assignments of royalties to be recorded. - All assignments and other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands in this state, including lands operated under lease or contract from the United States and from the state of New Mexico, shall be recorded in the office of the county clerk of the county where the lands are situated."

"65-2-2. Effect of recording or failure to record. - Such records shall be notice to all persons of the existence and contents of such assignments and other instruments so recorded from the time of filing the same for record, and no assignment or other instrument of transfer affecting the title to such royalties not recorded as herein provided shall affect the title or right to such

royalties of any purchaser or transferee in good faith, without knowledge of the existence of such unrecorded instrument."

4. "71-2-1. Recording deeds, mortgages and patents.- All deeds, mortgages, United States patents and other writings affecting the title to real estate, shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated."

"71-2-2. Constructive notice of contents. - Such records shall be notice to all the world of the existence and contents of the instruments so recorded from the time of recording."

"71-2-3. Unrecorded instruments - Effect. - No deed, mortgage or other instrument in writing, not recorded in accordance with section 4786 [71-2-1], shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith, or judgment lien creditor, without knowledge of the existence of such unrecorded instruments."

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339 F.2d 435 DOWNING V. STATE SUP. CT. (10th Cir. 1964)

Everett R. DOWNING, Appellant,
vs.
The NEW MEXICO STATE SUPREME COURT, the First Judicial District Court, Santa Fe, New Mexico, and Warden Harold A. Cox, Penitentiary of New Mexico, Appellees.

No. 7841
UNITED STATES COURT OF APPEALS TENTH CIRCUIT
339 F.2d 435
December 16, 1964

OPINION

Before LEWIS, BREITENSTEIN and HILL, Circuit Judges.

PER CURIAM.

Appellant is a prisoner in the New Mexico State Penitentiary under a state sentence imposed after his plea of guilty to a felony charge. The trial court dismissed his self-prepared petition without a hearing. In this court he is represented by appointed counsel.

The record shows that appellant sought habeas corpus relief in state court and this was denied after a hearing at which appellant was present and represented by counsel. He sought a review of such action by the New Mexico State Supreme Court and this was denied because of his failure to follow established procedure. Appellant then brought this action in federal court. We are unable to classify this action. If the proceeding is an appeal from the action of the New Mexico Supreme Court, it fails because no appeal lies from a state supreme court to a federal district court. If it seeks to enjoin the individuals composing the named New Mexico courts and the warden, the allegations are insufficient to entitle appellant to any relief.

With reco

561 F.2d 207 O'KANE V. WALKER (10th Cir. 1977)

JAMES V. O'KANE and F. KENNETH MILLHOLLEN, Plaintiffs - Appellants,
vs.
BROWN WALKER and D. L. HANNIFIN Defendants - Appellees.

No. 76-2169
UNITED STATES COURT OF APPEALS TENTH CIRCUIT
561 F.2d 207
September 6, 1977

Appeal from the United States District Court for the District of New Mexico (Civil No. 75-284)

COUNSEL

Alan M. May (Charles A. Pharris, on the brief) for Appellants.
Robert H. Strand for Appellee (Hannifin).

JUDGES

Before McWILLIAMS, DOYLE and MARKEY.*
AUTHOR: MARKEY

OPINION

MARKEY, Chief Judge.

Appeal by plaintiffs James V. O'Kane and F. Kenneth Millhollen (collectively, O'Kane) from a judgment[1] declaring defendant D. L. Hannifin (Hannifin) the owner of record title interest in U.S. Department of Interior Oil and Gas Lease No. NM 3620, by virtue of an assignment to Hannifin from defendant Brown Walker (Walker) dated June 18, 1974. We affirm.

The Facts

The district court's findings of fact are not challenged. The following chart will aid in understanding the involved chain of title ("BLM" means "Bureau of Land Management," U.S. Department of Interior):

Conveyances of Record Title Interest For Oil and Gas Lease No. NM-3620

United States

(1) Oil & Gas Lease Issued - 11/1/67

Franklin Eisenzoph

(2) Assignment: Executed - 10/21/67 Approved Effective by BLM - 1/1/68

Ivan S. Osborn

(3) Assignment: Executed - 7/1/71 Approved Effective by BLM - 8/1/71

Doreen Smith

(4) Assignment: Executed - 11/17/70 Approved Effective by BLM - 8/1/71

Brown Walker

(5) Assignment: Executed - 12/13/71 Filed with BLM - 7/16/74 Approval by BLM denied - 7/31/74

Doreen Smith

(6) Assignment: Executed - 12/4/71 Filed with BLM - 12/10/71 Approved Effective by BLM - 2/1/72 Approval declared null and void by written decision of BLM - 2/15/74

Plaintiffs-Appellants O'Kane and Millhollen

Defendant-Appellee D. L. Hannifin

(7) Assignment: Executed - 6/18/74 Filed with BLM - 6/27/74

On October 20, 1967, BLM issued the involved lease to Franklin C. Eisenzoph, pursuant to the Mineral Lands Leasing Act, 30 U.S.C. § 181 et seq., covering 519.91 acres in Eddy County, New Mexico at an annual rental of $260. The lease had an effective date of November 1, 1967, was for ten years, and bears serial number NM 3620.

Conveyance (2) took place on October 21, 1967, when Eisenzoph assigned his interest to Ivan S. Osborn. This assignment was approved by BLM, as required by 30 U.S.C. § 187, with an effective date of January 1, 1968.

Conveyance (3) occurred on July 1, 1971, when Osborn assigned to Doreen Smith. BLM approved this assignment, with an effective date of August 1, 1971.

Conveyance (4) effectively took place on July 1, 1971, when title passed, under the doctrine of after acquired title, from Doreen Smith to Walker, by virtue of an assignment executed on November 17, 1970, prior to the time Smith actually acquired title. This assignment was approved by BLM with an effective date of August 1, 1971.

Conveyance (5) occurred on December 13, 1971, when Walker executed an assignment to Doreen Smith. This assignment was not filed with BLM until July 16, 1974. BLM denied approval of this assignment on July 31, 1974.

Purported conveyance (6) would have occurred on December 13, 1971, when title would have passed from Doreen Smith to O'Kane under the doctrine of after acquired title by virtue of an assignment executed on December 4, 1971. This assignment was filed at BLM on December 10, 1971 and initially approved by BLM with an effective date of February 1, 1972. On February 15, 1974, BLM filed its written decision declaring null and void its approval of this assignment. The BLM decision ordered refund of the rental fees paid by O'Kane for the years 1972 and 1973, and ordered Walker to remit them. O'Kane accepted the remitted fees from BLM. The decision recognized Walker as owner of record title interest in the lease, and allowed O'Kane thirty days within which to perfect an administrative appeal of the decision. O'Kane perfected no appeal and filed no notice with BLM of any claim to any interest in NM 3620 as of June 18, 1974, the date of purchase by Hannifin.

On June 18, 1974, Walker telephoned Hannifin and offered to sell the record title interest in lease NM 3620 for the sum of $7,800 ($15 per acre for the remaining three year term). Walker

said he needed the money in a hurry and that the conveyance would be without warranty of title.

Hannifin said he would have to check the title first, but would contact Walker thereafter. Hannifin, an independent petroleum land man with twenty years in the oil and gas business, normally checked title to all assignments of federal oil and gas leases which he purchased. His procedure was to request an abstractor specializing in federal oil and gas records to examine the BLM records and to provide an oral summary thereof. The district court found that such a title examination procedure was commonly utilized to check title to federal oil and gas leases prior to purchase.

Hannifin telephoned Joe B. Schutz, owner of Schutz Abstract Company, Santa Fe, New Mexico and an abstractor specializing in federal oil and gas records, and requested him to check the BLM records pertaining to NM 3620 and to report back by telephone.

On the same day (June 18, 1974), Schutz called Hannifin and relayed the following: (1) That BLM records indicated that record title interest was owned by Walker by virtue of conveyance (4) from Doreen Smith; (2) That conveyance (6) from Doreen Smith to O'Kane had been filed and approved by BLM with an effective date of February 1, 1972, but that there was nothing on file conveying title from Walker back to Doreen Smith; (3) That on February 15, 1974, BLM had revoked its approval of conveyance (6), declaring it null and void, declaring Walker owner of record title interest, allowing O'Kane the right of appeal warning O'Kane of the consequence of failure to comply with regulations relating to administrative appeals; (4) That O'Kane had failed to appeal, and had filed no other notice or instrument with BLM indicating any claim to NM 3620, subsequent to the BLM decision of February 15, 1974.

Reviewing maps and other data, Hannifin determined that $15 per acre was a good price. He hoped to resell the lease for $40 to $50 per acre. Expert testimony determined the fair market value of NM 3620, as of June 18, 1974, to be from $15 to $50 per acre.

Hannifin accepted Walker's offer and Walker effected conveyance (7) mailing an executed assignment to Hannifin. The assignment to Hannifin was on a standard BLM form commonly used for such assignments in New Mexico, and which does not contain an express warranty of title.[2] Expert testimony established that there is no custom or practice requiring that assignments of federal oil and gas leases be made with warranty of title.

Upon receipt of the executed assignment on June 26, 1974, Hannifin mailed a cashier's check for $7,800 to Walker, Hannifin submitted the assignment to BLM for its approval on the next day.

On July 16, 1974, O'Kane filed conveyance (5), the assignment from Walker to Doreen Smith of December 13, 1971, with BLM for its approval, and simultaneously filed protest against approval of the assignment from Walker to Hannifin. By written decision on July 31, 1974, BLM denied O'Kane's request for approval of conveyance (5) and dismissed the protest.

O'Kane appealed the BLM decision of July 31, 1974, to the Board of Land Appeals in the Department of Interior. On March 18, 1975, the Board set aside the BLM decision of July 31, 1974,[3] directed the parties to institute litigation or otherwise resolve the dispute, and directed BLM to approve an assignment in accordance with rights so established. O'Kane then filed the instant declaratory judgment action.

The District Court's Conclusions of Law

Those material on this appeal are:

3. As of June 18, 1974, the defendant Brown Walker was the owner of record title interest in and to federal oil and gas lease NM 3620.

4. The purchase price of $7,800 or approximately $15 per acre paid by the defendant Hannifin to the defendant Brown Walker for assignment of NM 3620 was an adequate and reasonable consideration for purchase of said oil and gas lease, and therefore said purchase price was not so low as to put the defendant D. L. Hannifin on inquiry as to any defects in the title to NM 3620, or other claims to said lease.

5. The lack of any express warranty of title in the assignment of federal oil and gas lease NM 3620 from the defendant Brown Walker to the defendant D. L. Hannifin was not sufficient cause to place the defendant D. L. Hannifin on any inquiry as to defects in the title to NM 3620, or other claims to said lease.

6.The information contained in the instruments on record with the Bureau of Land Management as of June 18, 1974, was insufficient to place the defendant D. L. Hannifin on any inquiry as to defects in title to federal oil and gas lease NM 3620 and was insufficient to give him notice that the plaintiffs O'Kane and Millhollen claimed any interest in said lease as of that date.

7. The defendant D. L. Hannifin exercised the ordinary care that a reasonable and prudent person in the oil and gas business would exercise in checking the title to a federal oil and gas lease prior to purchase.

8. The defendant D. L. Hannifin on June 18, 1974, was a good faith bona fide purchaser of federal oil and gas lease NM 3620, and was without notice, either actual or constructive, of any facts which would have put him on inquiry as to any other claims against said federal oil and gas lease.

9. The title of the defendant D. L. Hannifin to said oil and gas lease should be declared superior to any claim to said lease asserted by the plaintiffs O'Kane and Millhollen.

10. The defendant D. L. Hannifin should be declared the owner of record title interest in and to federal oil and gas lease NM 3620.

11. The Secretary of the Interior of the United States by and through the New Mexico State Office of the Bureau of Land Management should be directed to approve the assignment to D. L. Hannifin from the defendant Brown Walker dated June 18, 1974.

Issue

O'Kane challenges conclusion No. 8, i.e., that Hannifin "was a good faith bona fide purchaser * * * without notice, either actual or constructive, of any facts which would have put him on inquiry * * *."

New Mexico law is controlling in this diversity jurisdiction case. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).The absence of federal statute governing this type of private dispute regarding rights to federal oil and gas leases further requires that state law shall govern. Bolack v. Underwood, 340 F.2d 816, 820 (10th Cir. 1966).

Under New Mexico law, an oil and gas lease is an interest in real property. Bolack v.

Underwood, supra; Rock Island Oil & Refining Co. v. Simmons, 73 N.M. 142, 386 P.2d 239 (1963).

Sec. 71-2-3 of the New Mexico Statutes Annotated (1953) provides:

71-2-3. Unrecorded instruments -- Effect.-- No deed, mortgage or other instrument in writing, not recorded in accordance with section 4786 [71-2-1], shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith, or judgment lien creditor, without knowledge of the existence of such unrecorded instruments.

And § 71-2-1, N.M.S.A. (1953), provides:

71-2-1. Recording deeds, mortgages and patents.-- All deeds, mortgages, United States patents and other writings affecting the title to real estate, shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated.

In the instant case, none of the instruments in the chain of title for lease NM 3620 had been recorded in the office of the county clerk on June 18, 1974, the day Hannifin acquired title. Therefore, the question is whether, under § 71-2-3, N.M.S.A. (1950), Hannifin was a "purchaser * * * in good faith * * * without knowledge of the existence of such unrecorded instruments." The "unrecorded instrument" in this case is conveyance (5), the assignment from Walker to Doreen Smith of December 13, 1971, of which Hannifin had no actual knowledge on June 18, 1974, and which was not filed at BLM until July 16, 1974.

With respect to the meaning of "knowledge" in this context, Gore v. Cone, 60 N.M. 29, 287 P.2d 229 (1955) refers to the earlier case of Sawyer v. Barton, 55 N.M. 479, 236 P.2d 77 (1951) and then states:

The quoted holding is that where facts are brought to the knowledge of the purchaser of such nature that in the exercise of ordinary care he ought to inquire but does not, his failure so to do amounts to gross or culpable negligence, and he is charged with knowledge of all facts which the inquiry, pursued with reasonable diligence, would have revealed. [60 N.M. at 34, 287 P.2d 229, 234.]

Thus, the issue is whether Hannifin had implied knowledge and the test is whether he exercised the ordinary care of a purchaser of a federal oil and gas lease. The burden was on O'Kane, under New Mexico law, to show that Hannifin had "knowledge" within the meaning of § 71-2-3, N.M.S.A. In Archuleta v. Landers, 67 N.M. 422, 427, 356 P.2d 443, 448 (1960), an action to quiet title for land, the Supreme Court of New Mexico stated: "The rule is so well established as to need no citation of authority, that there is a presumption that consideration was paid and that the purchaser acted in good faith."

O'Kane makes four arguments: (1) the price paid was "so unreasonably low" that it created a "duty of further inquiry;" (2) Hannifin did not "give value;" (3) the BLM records were sufficient to create a "duty of inquiry;" and, (4) Walker's statement that the assignment would be without warranty was sufficient to create a "duty of further inquiry." We find no merit in O'Kane's arguments.

Arguments (1) and (2) must fail, in view of the record evidence supporting the district court's finding that the fair market value of lease NM 3620 on June 18, 1974 (with only 3 1/2 years remaining in the lease term) was within a range of $15 to $50 per acre. Thus, the price of $15 per acre was simply at the low end of the range. The fact that a range exists merely reflects the

speculative nature of investments in oil and gas leases, such as NM 3620.[4] The district court's conclusion is not rendered erroneous by the price paid or value given by Hannifin.

O'Kane's argument (3), that the BLM records were sufficient to charge Hannifin with a duty of inquiry, is an argument that Hannifin's "duty" was not just to inquire into the BLM records as they stood, but to inquire further into matters not of record at the BLM. Whether, under some circumstances, the condition of the BLM record could raise such a duty of "further inquiry," we need not decide. It is clear that no such further duty was created in the present case.

Having engaged abstractor Schutz and having found record title in Walker, Hannifin's duty of inquiry in this case came to an end. As this court noted in Southwestern Petroleum Corp. v. Udall, 361 F.2d 650 (10th Cir. 1966), "[the] use of the Land Office [BLM] records for title search must be recognized" for "[otherwise] a premium would be on negligence and studied ignorance." (Id. at 657.)

O'Kane was necessarily aware of his rights, of the state of the BLM records, of his having accepted the remitted rental fees, of his right to appeal, of his failure to do so, and of his failure to enter any claim in the BLM records whatever. Moreover, O'Kane took conveyance (6), the assignment from Doreen Smith, when the BLM records showed title in Walker, not Smith, for at that time conveyance (5), the assignment from Walker to Smith had not been filed at BLM. Thus, a judgment in favor of O'Kane in the present case would place "a premium * * * on negligence and studied ignorance."

Hannifin testified on cross-examination that he relied on the unappealed (and thus, at that time, final) BLM decision of February 15, 1974, which had declared null and void the approval of conveyance (6), the assignment to O'Kane, because "Their decision was on record" and "I had no reason to [discuss it with Walker]." We find nothing in the BLM records to indicate error in the district court's conclusion that Hannifin exercised ordinary care and thus fully met his duty to inquire in the present case.

O'Kane's argument (4), regarding the absence of warranty of title, is unsound under the facts of this case. The record fully supports the district court's findings that there was no custom or practice in the New Mexico oil and gas industry which required a warranty of title, that the standard BLM assignment form involved here was commonly used to make assignments of federal oil and gas leases in New Mexico, and that it contained no warranty of title. Thus, under these circumstances, Walker's oral statement of no warranty was not unusual; it was, in fact, the expected course of conduct. Hence, the district court's conclusion that Hannifin, in the exercise of ordinary care, would not have been put on notice thereby, is free of error.

In summary, we conclude that Hannifin exercised the ordinary care expected of a purchaser of a federal oil and gas lease. His careful investigation of the BLM records showed record title in Walker, the offeror. Walker's price was low, but not unreasonably so, in view of the short remaining lease term and the highly speculative nature of the investment. Thus, we agree with the district court's conclusion that Hannifin was a bona fide purchaser, without actual or implied knowledge of any facts which would have put him on notice of conveyance (5), the unrecorded assignment to Doreen Smith, or which would have created a further duty to inquire thereinto.

Accordingly, the judgment below is affirmed.

JUDGES FOOTNOTES

* Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

OPINION FOOTNOTES

1 The district court's decision in this diversity action is unreported. The court held a one-day nonjury trial, rendered its decision from the bench, and subsequently entered the detailed written findings and conclusions of record here.

2 All of the assignments here involved were made on standard BLM forms.

3 19 IBLA 171.

4 Lease NM 3620 was for land "not within a known geologic structure" of a producing oil or gas field, as determined by the U.S. Geological Survey at the time of lease issuance in 1967.

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562 F.2d 1192 UNITED STATES V. MCMAHON (10th Cir. 1977)

UNITED STATES OF AMERICA, Plaintiff-Appellee,
vs.
HAROLD McMAHON, Defendant-Appellant.

No. 76-1604
UNITED STATES COURT OF APPEALS TENTH CIRCUIT
562 F.2d 1192

Reduced

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64 NM 170, 326 P.2d 368 (1958)
rev'd on other grounds, 67 NM 405,
356 P.2d 117 (1960)

72 NM 336 (1963)

155 F.2d 673 (9th Cir. 1946)

21-3-3

38-1-5

cordance with the statute providing for such a transfer. Kent v. United States, supra, holds that the statute providing for transfer must be read in the context of the constitutional principle of due process. The answer to the majority statement is that due process concepts applied to § 13–8–27 requires that he be afforded benefits not accorded to an adult.

For the above reasons, I dissent.

OPINION ON MOTION FOR REHEARING

MOISE, Justice.

By motion for rehearing petitioner complains that the opinion filed in this case fails to specifically discuss and dispose of his arguments that he was entitled to relief from the sentence which he is serving because of the juvenile court's failure to advise (1) of his right not to incriminate himself; (2) of the powers of the court, including the right to set aside the natural guardianship right of a parent as provided in § 13–8–50, N.M.S.A.1953; and (3) of the right to cross examine witnesses against him. In addition, he complains that we did not note or rule on his argument that there had been no proper transfer because the proceedings held did not occur after a full investigation as required by § 13–8–27, N.M.S.A.1953.

[7] A reading of the opinion filed will disclose that we did not overlook the points here reargued. In our view of the situation the question of entitlement to counsel was decisive. Having determined that upon arraignment in district court, after having had counsel appointed and after having had an opportunity to consult with him, it was incumbent on petitioner to promptly assert prior deprivation of counsel in the juvenile court transfer investigation or waive the right thereto, we were of the opinion that these additional arguments concerning shortcomings in the proceedings were thereby answered. However, we did not specifically say so. We do so now. In our view petitioner just as effectively waived the shortcomings in the transfer proceedings, if they were shortcomings, as he waived his right to counsel, when he did not assert the rights in the district court upon arraignment after counsel had been appointed and they had had an opportunity to consult. The motion for rehearing is denied.

NOBLE, COMPTON and CARMODY, JJ., concur.

WOOD, Judge, Court of Appeals, dissents.

445 P.2d 958

MERCURY GAS AND OIL CORPORATION and Bloomfield Gas Company, Plaintiffs-Appellants,

v.

RINCON OIL AND GAS CORPORATION and Chemical Bank New York Trust Company, as Trustee for certain Employee Benefit Funds, Defendants-Appellees.

No. 8542.

Supreme Court of New Mexico.

Aug. 19, 1968.

Rehearing Denied Oct. 24, 1968.

Purchasers of oil and gas properties sought reformation of contract and, after reformation, specific performance or in the alternative damages for breach of contract. The District Court, Rio Arriba County, James M. Scarborough, D. J., granted summary judgment in favor of vendor, and purchasers appealed. The Supreme Court, Compton, J., held that issues as to whether agency relationship existed between those alleged to have extended time for performance of payment of consideration for purchase of oil and gas property and the corporate vendor and

whether alleged oral and written extensions sufficiently raised waiver or estoppel were material issues of fact precluding summary judgment in favor of vendor on the basis that time was of the essence of the contract and purchaser failed to make payment of consideration on date specified in contract.

Judgment reversed, and case remanded with instructions.

1. Mines and Minerals ⇐54(2)

Time was of the essence of contract for purchase of oil and gas properties, and even if it were not extension of time for payment of consideration from original date of January 31 to February 28 in return for unconditional commitment to purchase production payments made time of the essence.

2. Frauds, Statute of ⇐72(1)

Contracts involving purchase and sale of oil and gas properties are governed by statute of frauds and must be in writing.

3. Mines and Minerals ⇐54(2)

Where subject matter is of speculative and fluctuating nature, such as mineral properties, time is of the essence though not expressed in contract.

4. Vendor and Purchaser ⇐170

Where time is of the essence it is necessary that purchaser make tender of agreed price according to terms of contract.

5. Vendor and Purchaser ⇐170

Failure of purchaser to make tender can not benefit vendor if by conduct he waives performance within time specified.

6. Frauds, Statute of ⇐144

Parol modification of contract to purchase property relied on by one party may give rise to estoppel.

7. Contracts ⇐238(2)

Parol cannot revive or extend a contract if it has expired prior to alleged extension.

8. Judgment ⇐181(29)

Issues as to whether agency relationship existed between those alleged to have extended time for performance of payment of consideration for purchase of oil and gas property and the corporate vendor and whether alleged oral and written extensions sufficiently raised waiver or estoppel were material issues of fact precluding summary judgment in favor of vendor on the basis that time was of the essence of the contract and purchaser failed to make payment of consideration on date specified in contract. Rules of Civil Procedure, rule 56(c).

9. Judgment ⇐181(2)

Where genuine issue of material fact is present, summary judgment should be denied. Rules of Civil Procedure, rule 56(c).

10. Judgment ⇐185(2)

An opposing party cannot remain silent or defeat a motion for summary judgment by a bare contention that an issue exists. Rules of Civil Procedure, rule 56(c).

11. Judgment ⇐185.3(18)

Where memoranda which allegedly constituted waiver of date for payment of consideration for purchase of oil and gas properties were before court, purchaser had not remained silent on vendor's motion for summary judgment and granting summary judgment on the basis that time was of the essence of contract was not proper. Rules of Civil Procedure, rule 56(c).

12. Judgment ⇐570(4)

Where purchasers of oil and gas properties who had brought action for reformation of contract and, after reformation, specific performance did not seek affirmative relief against bank, they were barred from further action against it.

Nordhaus & Moses, Albuquerque, for appellants.

Hinkle, Bondurant & Christy, Harold L. Hensley, Jr., Roswell, for appellee Rincon Oil and Gas Corp.

Iden & Johnson, J. J. Monroe, Albuquerque, for appellee Chemical Bank New York Trust Co.

OPINION

COMPTON, Justice.

This appeal is from a summary judgment. The action was brought by Mercury Oil and Gas Corporation and Bloomfield Gas Company seeking reformation and, after reformation, specific performance of a contract with Rincon Oil and Gas Company, or, in the alternative, damages for breach of the contract.

The contract, dated December 29, 1965, involved the purchase and sale of certain oil and gas properties owned by Rincon Oil and Gas Company, hereinafter referred to as Rincon, for a consideration of $530,000.00, one-half to be paid by Mercury Gas and Oil Company, hereinafter referred to as Mercury, and one-half to be paid by Bloomfield Gas Company, hereinafter referred to as Bloomfield. The conveyance of the properties was to be made subject to the reservation by Rincon of production payment in amount of $1,515,000.00 payable out of 95% of the gross income from the properties.

The contract expressly stipulated that it should be closed on or before January 31, 1966, and that at that time Mercury and Bloomfield should pay the cash consideration of $530,000.00, less the amount of $5,000.00 paid as earnest money. On the closing date, Mercury and Bloomfield were unable to tender the funds as stipulated and requested an extension. The extension was granted by Rincon to "on or before February 28, 1966." Consideration therefor was appellants' obtaining an unconditional commitment to purchase the production payments. As of February 28, 1966, Mercury and Bloomfield were still unable to comply with the contract.

[1–4] The trial court concluded that since time was of the essence of the contract, there was no genuine issue of fact to be determined and granted summary judgment. With regard to time being of the essence, we agree with the ruling of the court. We think time was made the essence of the contract, but if not, the extension made time of the essence. Rudy v. Newman, 54 N.M. 230, 220 P.2d 489. Contracts involving the purchase and sale of oil and gas properties are governed by the Statute of Frauds and must be in writing, Fullerton v. Kaune, 72 N.M. 201, 382 P.2d 529; Terry v. Humphreys, 27 N.M. 564, 203 P. 539, and where the subject matter is of speculative and fluctuating nature, such as mineral properties, time is of the essence though not expressed in the contract. See Campbell v. Barber, 272 S.W.2d 750 (Tex.Civ.App.); Upham v. Banister, 44 S.W.2d 1014 (Tex.Civ.App.); Langford v. Bivins, 225 S.W. 867 (Tex.Civ. App.). See, also, 55 Am.Jur., Vendor and Purchaser, § 112; 1 Williams & Meyer, Oil and Gas Law, § 320 (1964); 6 Williston on Contracts, § 854 (3d ed. 1962). Where time is of the essence it is necessary that the purchaser make tender of the agreed price according to the terms of the contract. The rule is supported by the cases.

[5, 6] The failure of the vendee to make tender cannot benefit the vendor if by conduct he waived performance within the time specified. See Grider v. Turnbow, 162 Or. 622, 94 P.2d 285. Further, parol modification relied on by one of the parties may give rise to estoppel. Vaughan v. Jackson, 27 N.M. 293, 200 P. 425 (1921); Kingston, et al. v. Walters, 16 N.M. 59, 113 P. 594 (1911).

[7–9] Appellants argued before the trial court and contend here that the performance of the contract had been extended by memoranda, or in the alternative, by parol. We think that it is obvious from the colloquy between the trial judge and counsel that summary judgment was granted solely on the theory that since time was of the essence of the contract it terminated by its own terms as a matter of law, regardless of the effect of the memoranda or of parol.

We recognize that *parol* cannot revive or extend a contract if it has expired *prior to* the alleged extension. Compare, Pitek v. McGuire, 51 N.M. 364, 184 P.2d 647, 1 A.L.R.2d 830 with Vaughan v. Jackson, supra. Whether the memoranda were sufficient to constitute a waiver or whether estoppel existed—these are questions upon which we express no opinion. However, there are material issues of fact present precluding summary judgment. First, there is the question of an agency relationship between those alleged to have extended the time for performance and the corporation. Second, if such relationship is found to exist, a determination must then be made as to the sufficiency of the alleged oral or written extensions to raise waiver or estoppel. Where a genuine issue of material fact is present, summary judgment should be denied. Section 21-1-1 (56) (c), N.M.S.A.1953; Worley v. United States Borax & Chemical Corp., 78 N.M. 112, 428 P.2d 651.

[10, 11] Appellees supported their motion for summary judgment by various affidavits and now claim that the affidavits are not controverted. While we recognize that an opposing party cannot remain silent or defeat a motion for summary judgment by a bare contention that an issue exists, Baca v. Britt, 73 N.M. 1, 385 P.2d 61, we do not find that situation present. The memoranda, whatever their effect may be, were before the court for consideration.

[12] While Chemical Bank was a proper party to the action, no affirmative relief was sought against the bank, and appellants are now barred from further action against it.

The judgment is reversed, and the case remanded to the district court with instructions to vacate its judgment and proceed in a manner not inconsistent with this opinion.

It is so ordered.

CHAVEZ, C. J., and CARMODY, J., concur.

445 P.2d 961

Joe H. GALVAN, Guardian ad litem for Carolyn Wright Garner, a minor, Appellant,

v.

Ira B. MILLER, Iva Lucille Miller, Executrix of the Last Will and Testament of Yule N. Miller, Deceased, Ulric F. Miller, Elger E. Miller, and Joetyne M. Wright, Appellees.

Joetyne M. WRIGHT, Appellant,

v.

Ira B. MILLER, Iva Lucille Miller, Executrix of the Last Will and Testament of Yule N. Miller, Deceased, Ulric F. Miller, Elger E. Miller and Joe H. Galvan, Guardian ad litem for Carolyn Wright Garner, a minor, Appellees.

E. E. MILLER, Appellant,

v.

Ira B. MILLER, Ulric F. Miller, and Iva Lucille Miller, Executrix of the Last Will and Testament of Yule N. Miller, Deceased, Appellees.

Iva Lucille MILLER, Executrix of the Last Will and Testament of Yule N. Miller, Deceased, Cross-Appellant,

v.

Elger E. MILLER, Joetyne M. Wright, Carolyn Wright Garner, Joe H. Galvan, Guardian ad litem for Carolyn Wright Garner, a minor, and Ulric F. Miller, Cross-Appellees.

No. 8307.

Supreme Court of New Mexico.

Aug. 26, 1968.

Rehearing Denied Oct. 29, 1968.

Will contest. The District Court, Lincoln County, George L. Reese, Jr., D. J., entered judgment setting aside judgment of probate court which had admitted 1952 will to probate and admitting instead 1946 will, and legatees of 1952 will appealed and representative of legatee of 1938 will cross-appealed. The Supreme Court, Chavez, C. J., held that evidence that major beneficiary under will was dominant party in confidential and fiduciary relationship with testator was sufficient to raise presumption of undue influence, and testimony of attorney who

BIND EA SET OF EXHIBITS

1993

Stratton's list

Stratton - 7 exhibits.
#8 - Notice of staking - [diff from #7]
#9 - OCD from well location + acreage dedication plat

1996

46 - no indication it was in evidence
1997 TR p 5 "44 exhibits from that thing"
as well as one add'l letter - Ex 45.

47 brief - part of pleadings

48 reply - " " "

Where are M's Ex 1, 3, 4, 5; 6 + 21

TK

1997 Stratton - Ex. "2" - we have - letter from TK to Sealy Cavin

but what is Ex. "1" - referred to on p. 8?

↓ "In the hearing on May 2, 1996 there was a package of correspondence was marked exhibit 1. We want that entire transcript + exhibits before you

new 91 5 [redacted] natural gas industry

OCD order · 1993

OCC " ~~filed 11-19~~ March 19, 1997

Petitions April 25, 1997

39-3-1.1. eff. 1998

Dist. Ct. decision — 11/99

~~Petrozuppk State~~ early '70s

Bruce recalls Hartz saying the determinative date will be the date of the district court decision

Pat Wallace - 4925 - clerk, Ct of Appeals

39-3-1.1 eff. 1998

What this case is: this is an collateral attack of an administrative order made by the Plaintiffs two years after the order. The Plaintiffs challenge an 1993 pooling order of the Oil Conservation Division that was made after notice and hearing. In 1996, almost 3 years after entry of the order, the Plaintiffs came to the OCD claiming the OCD order was invalid as to them because they were entitled to notice of the pooling application and the hearing. The OCD considered the Plaintiffs challenge and determined that the Plaintiffs had no property interest that entitled them to notice. The Plaintiffs then appealed that decision to the Oil Conservation Commission that held a hearing taking evidence and oral argument. The Commission also determined that the Plaintiffs had no cognizable property interest at the time of the compulsory pooling application or the hearing that entitled the Plaintiffs to hearing under the OCD rules, the Oil & Gas Act, the state or federal constitutions.
The Plaintiffs then appealed the Commission's order to this district court.

What this case is not: The Plaintiffs base their argument almost totally on certain language from the *Uhden* case. This is not the *Uhden* case. In fact, there is a recent case heard by this court that has more applicability to the facts of the matter before the court. *Strata Production Co. v. Mercury Exploration Co.*, 121 NM 622, a case that the Supreme Court affirmed the decision of this court. In the *Strata* case, as in this case, Strata Production Co. had investors in a drilling venture. The Plaintiffs here were also investors in a drilling venture of Strata Production Co. Mercury argued that the award to Strata Production Co. should have proportionately reduced by the percentage interest owned by ~~the~~ the Strata investors. This court correctly determined, and the Supreme Court agreed stating: "Mercury has not shown that Strata **assigned any of its interest in the Mercury farmout agreement to its investors....Accordingly, the investors are not in contractual**

He retrieved his pliers and pulled with great force. Susan thought the thing would never come out. When it finally did, it was over three inches long.

"No wonder she hobbled," the smithy said.

"I've not seen one this long before. Have you?"

"Nope."

"What sort of plant could produce such a dagger as this?" Susan asked.

"Must be from some kind a' cactus. I guess."

"Will the wound heal?"

"I'll put something on it to keep it from getting infected. Now that thing's out it shouldn't bother him long."

Susan was still wearing her trail clothes when she heard a knock on the pole at the door to her tent. She opened the flap to find George Barber standing there.

"Mr. Barber. You've come to see the books, I presume."

"And you, you beautiful woman," Barber said to himself.

"Precisely."

"Come in then. They are against the back wall. I've just returned from my property. I have things to do, but take your time looking. I think you will find them quite current. As current as things get here in New Mexico."

"Thank you. I will."

Susan busied herself with minor tasks while Barber methodically studied Alex's volumes. On the one hand she wished he would hurry. She was anxious to take a bath and get into more lady-like

privity with Mercury.... The Court continued saying that any claim the investors had would have to be against Strata Production Co.

The Court has in this record documents that clearly show that Strata Production Co. was the legal owner of 100% interest in the federal lease in question. There is the testimony of Mark Murphy, president of Strata, at the time of the 1993 OCD hearing stating unequivocably that Strata had 100% interest in the lease. (The Court can find that testimony on pages 141 and 142 of the 1993 hearing transcript.)

The Court will see in the documentary evidence that the Plaintiffs had no protected property right that entitled them to notice I 1992 or 1993.

1) There is the affidavit of Mark Murphy dated January 17, 1996. (This is The Plaintiffs' Exhibit 17) in which Murphy stated: "Strata retained all of the record title interest subject to the beneficial interest of the parties (some of whom are the Plaintiffs, not all the investors joined with these Plaintiffs.) This statement is in Paragraph 6 of the Affidavit. This statement could not be more clear that Strata owned the lease and the Plaintiffs did not have ownership interests in the lease that entitled them to notice.

2) Exhibit B to the Murphy Affidavit is a federal BLM form "Transfer of Operating Rights (Sublease). This was executed by Murphy for Strata on November 7, 1995. It is the transfer of overriding royalty interest. At the bottom of the first page of this form marked with an asterisk is the statement typed in: "Strata owns 100% of the record title interest and leasehold operating rights." It continues: "Strata is retaining 100% of the record title interest and 100% of the leasehold operating rights, subject to the

She looked at this breathtaking scene a long time, but finally took a deep breath and turned to focus on the stakes and string lines that formed the outline of the large house she and Alex had planned. It was one of the last things Alex had done - lay the outline of their house - before being gunned down in cold blood, she thought.

She closed her eyes. Faintly she could hear the tinkling of silver and crystal, mixed with the laughter and gaiety of a party in the background. She opened her eyes and turned her head to look where he had planned the porch to be. Again she closed her eyes and she could hear the squeaking of a swing and the buzzing of bees in the springtime air.

A dim vision materialized in front of her eyes. For an instant she saw Alex and herself rocking in the porch swing of their completed house. No matter how hard she tried, she couldn't receive the same vision with Chisum there instead of Alex.

A single large, perfectly formed, tear rolled down Susan's cheek. She reached up and wiped it away. Cold determination showed in its place, molding her face.

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On the way back from Three Rivers, one of her horses had developed a limp. Susan took a long time at the livery stable with the blacksmith trying to figure out what was wrong. Finally he had found the head of a thorn sticking in the soft middle of its hoof.

> 1.5% overriding royalty interest which is hereby conveyed. That statement was made on this form almost three years after the pooling application was filed and the hearing was held. That statement could not be more clear. If Strata owned 100% of the lease at that time, obviously the Plaintiffs did not have an ownership interest in the lease in 1993. There are the attempted assignments of the lease from Strata to the Plaintiffs that were not even attempted until 1995.

In the *Uhden* case, there was no question that the Plaintiff, Mrs. Uhden, had a protected property interest. Mrs. Uhden leased the mineral rights to Amoco; she was the lessor. The issue in *Uhden* was **what was the type of notice to which Mrs. Uhden was entitled.** If the Commission was engaged in rulemaking, then Mrs. Uhden was entitled only to public notice. If the Commission was engaged in adjudicating property rights, Mrs. Uhden was entitled to personal notice.

In this case before the Court, the type of notice is not this issue. The issue is whether the Plaintiffs had any protected property interest that entitled them to notice. The evidence in the case showed clearly that the Plaintiffs did not have such an interest so that the 1993 pooling order was effective as to the Plaintiffs. In 1993 the Plaintiffs had to look to Strata Production Co. as owner of the lease to protect whatever investment interests they had in the drilling enterprise.

The Court knows that it would be an impossible situation if administrative bodies could have their decisions overturned years later by anyone who challenges an order based on some beneficial interest. Challengers must be able to show a real interest to have standing with administrative bodies as they must to file challenges in the courts. This is an extremely important case for the

3.

Susan had lain in bed sleeplessly until well after midnight, considering her options. She finally slept fitfully, dreaming of Alex with erotic clarity. She left the next morning while Chisum was with his men. She spent the night in Lincoln and the next morning drove her buggy to Three Rivers. Now she sat in lush grass, leaning against a tree, almost in a trance. Next to it, her team, still hooked to the buggy, cropped grass. She gazed over a staggering view. In the foreground were layers of foothills and valleys. The hills were dotted with large yucca plants interspersed with Pinon and Juniper trees. Occasional cacti bloomed with little yellow blossoms. The valleys slid toward the distant desert as Indian Creek meandered through lush live oak groves and gave life to tall, deep grass lands shaded by shimmering cottonwoods.

She was distracted by a Golden Eagle which circled high in a thermal. Apparently satisfied with the height it had obtained, it suddenly shot off to the West. Susan's eyes followed until it disappeared, but she remained focused on the western horizon. In a pinkish haze, two days travel away, the grey, green and dark Oscura Mountains rose above a sheen of white sand.

Commission. It makes decisions that involve a major industry in this state. The parties have to be able to depend on the decisions that are made pursuant to the rule, statutes and constitutions. Unsupported claims of property ownership cannot be allowed to nullify administrative orders that companies depend upon to make substantial investments in high risk situations.

The Commission knows that constitutional rights must be respected and protected, but as much as the Plaintiffs want to wrap themselves in the constitution, they have been unable to prove the protected property right they claim. These Plaintiffs are in the situation as the other investors in Strata Production Co. in the *Strata v. Mercury* case - they invested in an enterprise much as investors invest in shares of stock of corporation. Each individual investors is not entitled to notice of legal proceedings affecting real property owned by the corporation. The notice goes to the corporation that is charged with protecting the interests of the investors. That is the case here.
The Commission asks that the Court affirm its decision that the OCD order is valid as to the Plaintiffs.

Chisum chuckled at the now openly astonished look on her face and retook his seat.

"Yes, I'd want my son to be my legal heir."

Susan jumped up and Chisum did the same. They stood looking at each other on opposite sides of the table, ramrod straight, for at least a full minute.

"That's more than I had in mind. You are attempting to drive too hard a bargain, John."

She walked for the door, but she had to pass by Chisum to get there. He took her hands in his.

"This is mighty awkward. Look, Susan, this ain't horse tradin'. I'm good at that."

"It's a lot to think about."

"It was for me too."

"Good. Then you'll understand if I take a few weeks to think about it."

"People don't generally put me off."

"I'm sorry. I was thinking of something a little less ... confining than matrimony. Good night, John. I must return to Lincoln in the morning.

She walked out and closed the door behind her. Chisum chuckled and began to eat.