THERE IS

NO

ORDER NO. R-11855-A

7.20

Proughton -

surface owner must
give them easement if
zone not productive

Gandy acquired surface
doesn't object
draft order approving

INTERSTATE OIL AND GAS COMPACT COMMISSION

P.O. Box 53127, Oklahoma City, OK 73152-3127
900 N.E. 23rd Street, Oklahoma City, OK 73105
Phone: 405/525-3556 • Fax: 405/525-3592
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STATE OF NEW MEXICO
ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 12905
ORDER NO. R-11855

APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 8:15 a.m. on September 5, 2002, at Santa Fe, New Mexico, before Examiner David R. Catanach.

NOW, on this 28th day of October, 2002, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner,

FINDS THAT:

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

(2) The applicant, Pronghorn Management Corporation ("Pronghorn"), seeks approval to utilize the State "T" Well No. 2 (API No. 30-025-03735) located 4290 feet from the South line and 500 feet from the West line (Unit L, Lot 12) of Section 6, Township 16 South, Range 36 East, NMPM, Lea County, New Mexico, to dispose of produced water into the San Andres and Glorieta formations from a depth of 6,000 feet to 6,400 feet.

(3) DKD, L.L.C., an offset operator, appeared at the hearing in opposition to the application.

(4) The record in this case shows that:

(a) a Division Form C-108 (Application to Inject) for injection into the State "T" Well No. 2 was

originally filed by Pronghorn for administrative approval on April 5, 2002;

(b) on April 30, 2002 the Division issued Administrative Order No. SWD-836, which order authorized Pronghorn to utilize the State "T" Well No. 2 to dispose of produced water into the San Andres and Glorieta formations from a depth of 6,000 feet to 6,200 feet;

(c) subsequently, DKD, L.L.C. contacted and advised the Division that it operates acreage within one-half mile of the State "T" Well No. 2, and that it was not provided notice of the administrative application filed by Pronghorn on April 5, 2002, as required by Form C-108 and Division Rule No. 701.B.;

(d) DKD, L.L.C. further advised the Division that it objected to the application; and

(e) by letter dated July 9, 2002 the Division advised Pronghorn that due to the apparent deficiency in notice to DKD, L.L.C., and the valid objection received by the Division, Order No. SWD-836 would be suspended pending the outcome of a hearing before a Division examiner.

(5) The evidence presented by both parties demonstrates that:

(a) in 1992 or 1993 Pronghorn acquired State of New Mexico Lease No. V-4886, which comprises Lots 11, 12, 13 and 14 of Section 6, Township 16 South, Range 36 East, NMPM. Subsequently, Pronghorn's lease from the State of New Mexico terminated due to lack of production. On June 1, 1996 this land was re-leased by the Commissioner of Public Lands to Chesapeake Operating, Inc. ("Chesapeake");

(b) on May 1, 2002, Chesapeake assigned a portion of Lease No. V-4886, being Lots 13 and 14 of Section 6, to DKD, L.L.C. This document was recorded in

the Lea County, New Mexico County Clerk's office on May 14, 2002;

(c) Chesapeake retained Lots 11 and 12 of Section 6;

(d) prior to termination of its lease, Pronghorn operated several wells within Lots 11, 12, 13 and 14 of Section 6, among them the State "T" Well No. 1 located in Lot 13, the State "T" Well No. 2 located in Lot 12, the State "T" Well No. 3 located in Lot 14, and the State "T" Well No. 4 located in Lot 11. Pronghorn testified that it has plugged, or is currently in the process of plugging, the State "T" Wells No. 1, 3 and 4, although Division records do not reflect that any such plugging has taken place thus far;

(e) Division records show Pronghorn to be the current operator of the State "T" Well No. 2;

(f) the surface land on which the State "T" Well No. 2 is located is owned by Felipe A. Moreno and Adelaida P. Moreno;

(g) Mr. Danny Watson, the owner of DKD, L.L.C., is the surface owner of certain acreage located on Lease No. V-4886. Mr. Watson contends that Pronghorn, in fulfilling its obligation to plug and abandon its wells located on this lease, has not satisfactorily cleaned and restored the surface to its original condition;

(h) DKD, L.L.C. further contends that the San Andres formation in the area of the State "T" Well No. 2 is potentially productive, and that allowing injection into this formation may violate its, or others, correlative rights;

(i) neither Chesapeake, Felipe A. Moreno, nor Adelaida P. Moreno has granted any authority to Pronghorn to inject water for commercial disposal purposes on Lot 12; and

(j) Pronghorn has not applied to, nor received any approval from the Commissioner of Public Lands to commercially inject fluid into the State "T" Well No. 2 within Lot 12.

(6) DKD, L.L.C. did not present any geologic or engineering evidence to support its position that the San Andres formation may be productive in the area of the State "T" Well No. 2 and that approval of the application may violate its correlative rights.

(7) DKD, L.L.C.'s assertion that Pronghorn has not adequately cleaned up the surface on certain acreage it owns on Lease No. V-4886 is not relevant, and should therefore not be a factor in this case.

(8) At the time Pronghorn filed its Form C-108 for administrative approval to inject into the State "T" Well No. 2, the owner of record of Lots 13 and 14 was Chesapeake. The evidence shows that Pronghorn provided notice to Chesapeake in accordance with Division rules.

(9) With regards to Division Order No. SWD-836, it appears that there is no deficiency in notice to DKD, L.L.C., however, it also appears that there is a deficiency in notice to the surface owner, Felipe A. Moreno and Adelaida P. Moreno.

(10) Pronghorn did not provide notice of this case to the surface owners, Felipe A. Moreno and Adelaida P. Moreno.

(11) Pronghorn has not secured from either Chesapeake, the lessee of State Lease No. V-4886, the Commissioner of Public Lands, nor the surface owner, any type of additional authorization that may be necessary in order to utilize the State "T" Well No. 2 for commercial disposal operations.

(12) Due to the notice deficiency described above, Division Order No. SWD-836 should be rescinded.

(13) Due to the notice deficiency in this case, and due to certain outstanding issues related to Pronghorn's right to inject water into this well on State Lease No. V-4886, the application should be denied.

(14) Pronghorn may reapply to the Division to utilize the State "T" Well No. 2 for disposal purposes at such time as the issues described in Finding No. (13) are addressed and resolved.

IT IS THEREFORE ORDERED THAT:

(1) The application of Pronghorn Management Corporation to utilize the State "T" Well No. 2 (API No. 30-025-03735) located 4290 feet from the South line and 500 feet from the West line (Unit L, Lot 12) of Section 6, Township 16 South, Range 36 East, NMPM, Lea County, New Mexico, to dispose of produced water into the San Andres and Glorieta formations from a depth of 6,000 feet to 6,400 feet, is hereby denied.

(2) Division Order No. SWD-836 dated April 30, 2002, is hereby rescinded.

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

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

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

LORI WROTENBERY
Director

SEAL

OCC - 3/20/03
Minutes - adopted —
Rule 711 → 7 15013
David Brooks — for Division
Bob Gallagher - NMOCA

Written comments — from ED

Roger C. Anderson
- waste — o+g except emergency / declared by DRS
- purpose of charge

3 ✓
4 ✓ 7 ✓
5 ✓ need for capacity ? — yes
6 similar wastes — salts from mining;
7 ✓ contaminated soils (cast, spills)
appropriate to accept wastes
9 ✓
what is hazardous waste ? — CFR def. RCRA
11 ✓ not appropriate for hazardous —
12 ✓ no envir. reason not to allow —
13 types of facilities — across board case-by-case

ED — comments ↔ changes —
contaminants — constituents not typically in oil/field waste

OCD / Ex 1 —

TB - conflict w/ surface waste regs —
No —

Bob Gallagher —
returned

Motion JB, RL-2
adopted by all 5
effective on publication
now - 3 months ?

13029 - 1107 - continued
13030 - 1209 - " "
12905

12905 - Pierghon - de novo
App. for salt water disposal

Ernie Padilla - Pierghon
2 wit -

Paul Oser - DKD - 1 wit
wit. sworn

Opening - Pierghon
filed adm. - approved - DKD applied
because no notice
Notice not required because assignment
not filed
Div. hearing - not an issue

- opposition solely on basis of eliminating
competition
- no adverse effect on correlative rts -
interval is watered; no production capability

- Notice - Div. Order -
surface owners - Lacre - now has been
purchased by a Pierghon
- no pty
lease w/ Pierghon

SLO controls minerals — no lease until OCC decides — so can't show lease / chicken + egg

Lori ? —
Will show Pronghorn or partner has acquired lease of surface — no notice (w/in ½ mile of proposed well)

Who owns surface? —
JB — not SLO —
Well is on the purchased acre

SLO approval? —
Chesapeake has O+G lease; but if taking water for somewhere else — need waiver from Chesapeake —

Commercial salt water disposal — if has O+G lease then all rights; but if brings water from off lease need something else

LW/Briefing an issue

Paul Owen — need permission of surface + mineral owner —

Ernie —
Exhibits — Plus — Ex. 7

→ Admin. — decision —
objection — no notice — hearing —
notice problems; ownership; no permission

- surface ownership — Not an issue
- admin. lease — from SLO / on Chesapeake
- possible production — from horizon
- not pressing surface ownership issue

— Who owns mineral + has right to frack

Witness — G. A Baker
Pres. of Pronghorn — Op Manager
tender — practical oil man; officer in corp
obj. — not a petroleum eng

Decision — plugging wells → did not want to plug prematurely —
interest in using as disposal well - SWD856
App — notice —

Ex. 1 — App. to inject. April 5, 2002
C-108 —
p3 - info re injection well — tubing; packer — 4500 San Andres to Glorieta 5000 — inj. formation pool
— O+G formations — not producing

schematic of wellbore after cementing + plugging —
want 4900 — bottom depth —
discussion w/ Will Jones re added depth —
same horizons —

— next schematic —
- Attach. to App —
VII — Proposed Op —
closed system — no open tanks —
pump fluid in — ? —
filter, heater treater, whatever is needed for condensate

no surface facility plan

VIII — 6200 should be 6400

Map of wells in area —
Non in State or Colorado — production
for lease
DKD well = water 16
2000 ft away
- 2 mile area — some productive in State
- table — wells w/in ½ mile + status
none completed in State

Well data — info on wells w/in ½ mile area
cement — nothing indicates packer
OCD — only well to work is
"our" injection well

C-103 — how well was plugged —
nothing indicates a problem SWD

OSE — depth of G.W —
- Lab report on wells — water is potable

Attach to 1st C-103 - 5.
State C - Charles B. Gillespie [#2 or #1]?

freshwater above casing — /

goes through removal to avoid confusion

— schematics from OCD records

- list of wells for which water might come
- VII — geographical tops

list – notices to SLC + offset

Why no notice to DKP –
not operator at time –
became operator –
assignment record May 2002
appr

Notice – published –

~~Take~~ Notice of OOP record –

#2 – C103 –
for State T wells # 1 3 + 4 – P+A

#3 – WD →

#7 Letter agreement re SWD well –

#4 letter from Chesapeake – no problem
SWD
who is Lynda – landman

→
need for addl SWD wells –
Candy does, too

–
more ex. 1 – 4 + 7

3.20

Pronghorn

admin. notice
- SWD file
- Division file

Baker:

"notified" offset operators (no copies) (copies in SWD file)
didn't notify DKB because not an operator at
the time

Dale

Candy purchased "surface" ?
from Morenos —

does Candy object?
no - letter
agreement

(Marks and Garner - 25% wi)

trying to get oil and gas [redacted] assignment — to this tract
thinking may be an issue
doesn't have assignment yet

from
Chesapeake
(land man)

Baber cross

re: assignment from Chesapeake

why? — clear up issues
what issues?

DKD has assignment from Chesapeake

understands that doesn't have to have mineral lease to inject SW

6000-6200
-6400?

hasn't amended notice to operators of intent to discharge to 6400' (original notice used for 6200')

(concerned about Grayburg — production - apparently SWD to be in the Grayburg)

"no one has tested San Andres in vicinity of SWD"

believes injection confined to San Andres at Glorieta

Casing and cement

cleaned up State T No. 1
tank still there - need to move it or use it?

C-103 shows "clean location"

rec'd necessary approval to inject -

- but still pursuing assignment from Chesapeake (why? can't answer)

- u/k how much will have to pay for assignment

6200 vs. 6400

is this an issue?

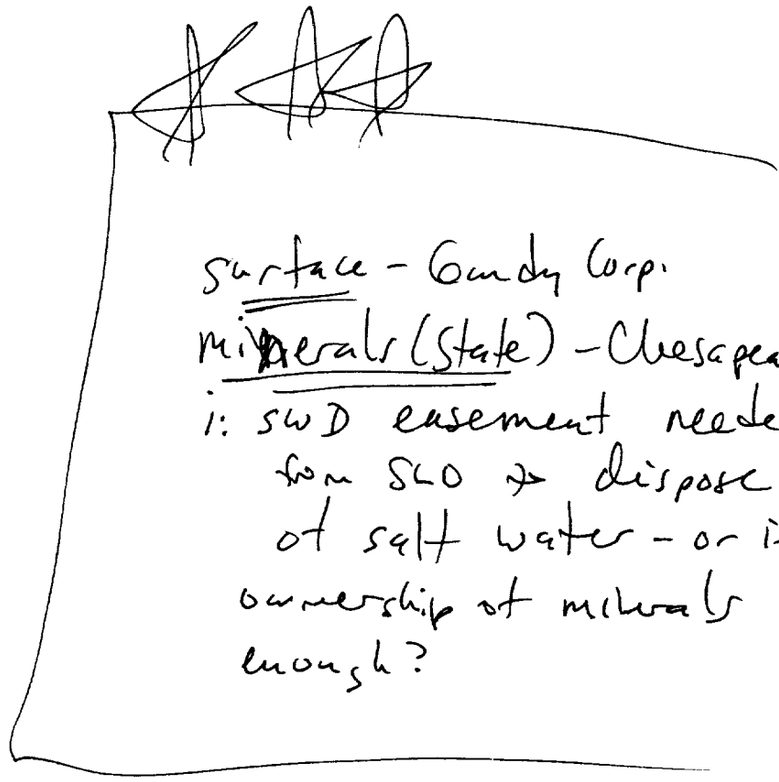
Bailey:

has contacted Land Office
Padilla contacted - they can't grant easement until SUD approved - Land Office requiring an SUD easement

Joseph Lopez - SLO
Said SUD easement required

Lopez understand this is split estate? n/k

assignment from Chesapeake being pursued because some doubt whether need a SWD easement or not?



Gas storage analogy?

Larry Scott

engineer
Consulting pet. engineer

Ex. 5 - summarized testimony

water sat. - the zones are water saturated

Watson 1-16 → water sat. of 57% & 49%

some shows - state T, #2 <this is proposed disposal well>

zone wet

what formations is DKD injecting?? Watson 1-6

— apparently same zone – 20' downdip

Wolfcamp zone

No San Andres or Glorieta production in vicinity –

some about 6 mi. South

Watson 1-6 – direct measurement of porosity

what concern does DKD have about the operations competitor? damage to its operations?

Bailey:

→ unlikely there would be interference – they are "several thousand feet" lower

what is water sweep?

DKD ... Danny Ray Watson

admin. notice?

operator disposal well (SWD-834)

owns surface ad all minerals up hole from injection zone

has considered developing minerals

opposing app. because they don't have State Mineral lease - concerned about affecting productivity -

(production 5 - 6 mi.)

Chesapeake owns minerals - leased from State -

Pronghorn had lease - lost it - Chesapeake leased from State

* Chesapeake has minerals - Linda Townsend @ Chesapeake said No assignment -

* concerned about 35-40% reduction in business from competition from other pub. disposal facility

* has a SWD easement from SLO

also paying royalties

rec'd OCD SWD first - then
a few weeks later had to find
easement from SLO

SUBSTANTIVE LAW CASES

GILL v. McCOLLUM

Illinois Appellate Court
Fifth District
April 17, 1974—No. 74–8
311 N.E. 2d 741
(Rehearing denied May 20, 1974)

Oil and Gas Leases: Injunctions—Provision Authorizing Salt Water Disposition by Injunction Limited to Salt Water from Lease Lands.

Suit to enjoin the lessee from using a well on the lessor's land for disposal of salt water from other leases owned by him, and for damages. The trial court granted a temporary injunction. On appeal, held: Affirmed. The primary purpose of an oil and gas lease is to obtain production, and the lease provision allowing the lessee to inject water into the subsurface strata must be read with this purpose in mind. Since the injection had no relation to that purpose, the temporary injunction was properly granted.

Appeal from the Circuit Court of Clay County, Illinois. Harold Wineland, Judge Presiding.

CREBS, Justice.

Plaintiff field suit in the Circuit Court of Clay County to enjoin defendant from using a well on her land for disposal of salt water from other leases and for damages. After a hearing, the injunction was granted. This case is an interlocutory appeal from an Order entered on December 5, 1973

temporarily enjoining the defendant from injecting disposal salt water from adjoining leases into the oil well in question.

The well in question was drilled in May 1973 to the Aux Vases formation. Defendant claims it is a producing well from that formation, while plaintiff claims it is a dry hole. No oil has been sold from the lease. There are tanks on the lease which contain a mixture of oil and salt water, but defendant was unable to state how much of the fluid was oil. It is undisputed that defendant obtained a permit to convert the well into a combination oil and disposal well; that a packer was inserted above the Aux Vases formation and below the Cypress formation. This permits pumping from the Aux Vases formation and injection of salt water in the Cypress formation. At the time of hearing defendant was injecting salt water pumped from the Aux Vases and salt water from three other leases he owned into the Cypress formation. Since there was no attempt to produce the Cypress formation, it was admitted that it was of no benefit to plaintiff to inject salt water from other leases into the well.

Defendant's position is that the right to use this well for the disposal of salt water from other leases is granted to him by the terms of the lease.

The relevant provisions of the lease are as follows:

" '(1) Lessor, in consideration of ONE DOLLAR ($1.00) in hand paid, receipt of which is hereby acknowledged, and of the royalties herein provided and of the agreements of the Lessee, herein contained, hereby grants, leases and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling, mining and operating for and producing oil, liquid hydrocarbons, all gases and their respective constituent products, injecting gas, waters, other fluids and air into subsurface strata, laying pipe lines, storing oil, building tanks, ponds, power stations, telephone lines, and other structures and things thereon to produce, save, take care of,

treat, manufacture, process, store and transport said oil, liquid, hydrocarbons, gases and their respective constituent products and other products manufactured therefrom together with the rights of ingress and egress thereto or to other land under Lease to Lessee.'. . .

'(2) Subject to the other provision herein contained, this Lease shall remain in force for a term of one year from this date (called 'primary term') and as long thereafter as oil, liquid, hydrocarbons, gas, or their respective constituent products or any of them is produced from said land or land with which said land is pooled, provided, however, that for injection purposes this Lease shall continue in full force and effect only as to the subsurface strata or stratas into which such injections are being made together with such surface privileges as may be necessary or desirable to continue such injections.' "

Since the primary purpose of an oil and gas lease is to obtain production the above provisions must be read with this purpose in mind. The injection must have some relation to the primary purpose of obtaining production. Since in this case there was none, the injunction was properly granted.

Judgment affirmed.

Concur: MORAN, P.J., and CARTER, J.

DISCUSSION NOTES

Oil and Gas Leases: Injunctions—Provision Authorizing Salt Water Disposition by Injection Limited to Salt Water from Lease Lands.

Not discussed.

W. J. F.

56 N.M. 92, 240 P.2d 844 BOLACK V. HEDGES (S. Ct. 1952)

BOLACK

vs.

HEDGES et al.

No. 5454
SUPREME COURT OF NEW MEXICO
56 N.M. 92, 240 P.2d 844
February 08, 1952

Quiet title suit by Tom Bolack against Sarah Myers Hedges and others. The District Court, San Juan County, Luis D. Armijo, J., sustained motion to dismiss, and plaintiff appealed. The Supreme Court, McGhee, J., held that the question whether lessee under "unless" oil and gas lease must first maintain an ejectment suit could only be determined on the filing of an answer.

COUNSEL

Esther S. Crane, Aztec, Seth & Montgomery, Santa Fe, Hoy & Burnham, Farmington, for appellant.
H. A. Daugherty, Charles M. Tansey, Jr., Farmington, for appellee Sarah Myers Hedges.

JUDGES

McGhee, Justice. Sadler, Compton, and Coors, JJ., concur. Lujan, C.J., not participating.
AUTHOR: MCGHEE

OPINION

*{*93}* The appellant filed suit to quiet title to minerals in land in San Juan County claimed under an "unless" oil and gas lease executed by the appellee, a copy of which was attached to the complaint. He followed the statutory form, except he alleged he was the owner of a leasehold interest by virtue of the lease, and stated: "* * * and that said defendant has interfered and threatens to interfere with operations under the oil and gas lease referred to in paragraph 1 hereof from which plaintiff derives his estate in the premises."

He added the following to the statutory prayer: "That the defendant Sarah Myers Hedges (also known as Sarah Meyers Hedges and as Sarah M. Hedges) be estopped and enjoined and restrained from any interference with the operations for the discovery, development and production of gas and/or oil by plaintiff or his assigns under the terms of the lease set forth herein as Exhibit A."

The cash consideration for the execution of the lease on the 320 acres was $400.00, and was for a primary term of six years and as long thereafter as oil or gas should be produced, with the further provision: "If operations for the drilling of a well for oil and gas are not commenced on said land on or before one year from this date, this lease shall terminate as to both parties, unless the lessee shall, on or before one year from this date, pay or tender to the lessor or for the lessor's credit in the Citizens Bank of Aztec * * * the sum of Three Hundred and Twenty Dollars * * * which shall operate as rental and cover the privilege of deferring the commencement of drilling operations for a period of *{*94}* one year. In like manner and upon like payments or tenders, the commencement of drilling operations may be further deferred for like periods successively. * * *"

It also provided for the delivery by the lessee in the pipe line of one-eighth of the oil produced and the payment to lessor of one-eighth of the proceeds of gas produced and sold from wells where gas only is produced; and for a payment of $50 per year for royalty on each gas well where such gas is not sold.

The appellee moved the complaint be dismissed for failure to state a claim against her upon which relief could be granted, and the trial court sustained the motion solely on such ground, without stating wherein the complaint was insufficient.

The appellant appealed and filed a pro forma brief under Supreme Court Rule 15(5), and we directed the appellee to file her brief and therein specify and maintain the insufficiency of the complaint. She attempts to sustain the order of dismissal under the following points:

1. Prior to entry upon land and discovery of oil the lessee under an "unless" oil and gas lease has no interest therein or title thereto which will support an action to quiet title.

2. The option of appellant to terminate the lease at any time deprives appellant of the right to specific performance directly or indirectly.

3. A plaintiff out of possession cannot maintain a quiet title action against a defendant in possession.

4. A quiet title action is not a proper proceeding by a lessee to determine his rights under an oil and gas lease as against his lessor.

Points 1 and 2 will be answered together.

We held in Terry v. Humphreys, 27 N.M. 564, 203 P. 539, that an "unless" oil and gas lease such as we have here Conveyed an interest in the realty, an indeterminable fee, following the Texas cases on the subject. This holding has been followed and approved by this court in Staplin v. Vesely, 41 N.M. 543, 72 P.2d 7; Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434; Duvall v. Stone, 54 N.M. 27, 213 P.2d 212; and Vanzandt v. Heilman, 54 N.M. 97, 214 P.2d 864, 870. In addition, the legislature has provided for the taxation on an ad valorem basis of severed mineral interests. Sec. 76-502 et seq. N.M.S.A., 1941 Comp.

The Vanzandt case, supra, was brought for specific performance of a contract to execute and deliver an "unless" oil and gas lease. The opinion deals principally with the question of mutuality of contract, but it has as its foundation the fact that such a lease conveys an interest in the realty. With this fact in mind the author, then Chief justice Brice, stated: "First as to the lease which defendant contracted to execute. An on lease does not create the *(*95)* ordinary relation of landlord and tenant; it conveys an interest in real property, Staplin v. Vesely, 41 N.M. 543, 72 P.2d 7, and this is now generally held, although the early decisions, with few if any exceptions, held that such interest was personal property."

The appellee cites many cases in support of her argument that our former decisions on the subject are erroneous, and should now be overruled and we should hold these oil and gas leases create only personal property, at least until actual production of oil and gas is obtained. She relies strongly on the case of Gloyd v. Midwest Refining Company, 62 F.2d 483, where the Court of

Appeals of the Tenth Circuit declined to follow Terry v. Humphreys, supra, and held an "unless" oil lease did not convey an interest in realty. In that case the court was struggling to avoid cancelling an oil and gas lease because of a letter transmitted a check for rentals which had been lost in the mails. The opinion was filed five years prior to the decision in Erie v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 92 L. Ed. 1188, 114 A.L.R. 1487, which put a stop to the frequent practice of be practice of the various federal courts in ignoring the decisions of the state courts, even when they overruled a settled rule of property of the states.

The oil industry in New Mexico has adjusted itself to the rule announced in the Terry case and we do not feel we should now change the rule.

We hold that points 1 and 2, supra, do not afford support for the ruling of the trial court.

The next point urged is that a plaintiff out of possession cannot maintain a quiet title action against a defendant in possession.

The complaint does not state either the plaintiff or the defendant Hedges is in possession, but it does allege the plaintiff is the lessee in the oil and gas lease, which makes them co-tenants, with the lessee having the dominant estate and the lessor the servient estate in so much of the leased premises as is necessary to carry on the oil operations provided for in the lease. 31A Tex. Jur., Sec. 117. In addition, it is alleged in paragraph 3 of the complaint: "* * * and that said defendant has interfered and threatens to interfere with operations with operations under the oil and gas lease referred to in paragraph 1 hereof from which plaintiff derives his estate in the premises."

Under this allegation proof would he admissible that drilling operations had been initiated and the defendant had interfered with them.

In this situation we feel the burden is on the defendant to plead she is in fact in the sole possession of the premises under claim of right thereto before she can assert the *{*96}* plaintiff must establish his right to possession in an action in ejectment.

Much of the argument of the defendant in support of her motion to dismiss is based upon her claimed right to a trial by jury. Her argument in this respect is premature. We held in Quintana v. Vigil, 46 N.M. 200, 125 P.2d 711, that a demurrer, of which our motion to dismiss is the equivalent, is not the appropriate means to be employed in calling for a jury. Her right to a jury trial and the query whether the plaintiff must first maintain an ejectment suit can only be determined on the filing of her answer and a timely request for a jury.

Even if the trial court then determines a judgment in ejectment must precede a final decision in the quiet title action, the latter should not be dismissed but abide its time on the docket of the court.

The judgment will be reversed and the cause remanded to the District Court with instructions to vacate the order of dismissal, enter one denying the motion and then proceed in accordance with the views herein expressed.

It is so ordered.

CHAPTER 21
DISPOSAL OF PRODUCED WATER

Marion Yoder

EPA Region VIII
Denver, Colorado
and

Thomas H. Owen, Jr.

Meridian Oil Inc.
Houston, Texas

Synopsis

§ 21.01 Introduction

Conventional geologic theory holds that the source material for oil and gas reservoirs is deposited on the floor of a body of water and over time is converted to petroleum by a combination of pressure and temperature. The production of this petroleum either as oil or gas usually entails the production of some of the water of origin associated with the petroleum in the underground reservoir. Since most of the deposition of this material takes place in the ocean, it is common for produced water to be salty. Produced water also normally contains residual hydrocarbons. It is not potable and can be environmentally damaging.

Surface and subsurface disposal are effective means of dealing with produced water. Proper disposal techniques are of great importance in today's environmentally sensitive climate. The scope of this article will be to discuss the rights, obligations, and potential liabilities of an operator/lessee in disposing of produced water. While many of the principles and cases cited throughout this article will apply to the disposal of produced

water by approved means
and most recognized ma
injection. Therefore, this
specifically related to this

§ 21.02 The Right to Disposal

[1] Oil and Gas Lea

Throughout the oil an
common for mineral righ
estate. Typically, this occu
tion of the minerals from
which produces a severanc
the mineral estate has be
there comes into existenc
each having their own ir
grant or reservation of m
owner any title to the surf
so much of the surface as
the mineral estate.[2] With
reservation would be wh
owner would not have th
the land to explore for a

The disposal of salt wa
held to be a reasonably ne
has been interpreted to in
on the surface by use of
dispose of salt water prod
well located on the surfa

[1] *See, e.g.*, Harris v. Currie, 142
[2] *See* Ball v. Dillard, 602 S.W.2d
Oil and Gas Law § 218.9 (1990)
[3] *See* Harris v. Currie, 142 Te
[4] *See, e.g.*, Brown v. Lundell,
[5] *See* Leger v. Petroleum Engi
1986); *see also* TDC Engineering,
writ ref'd n.r.e.).

water by approved means on the surface of land, the preferred and most recognized manner of water disposal is through injection. Therefore, this article will concentrate on issues specifically related to this area.

§ 21.02 The Right to Use the Surface/Subsurface for Disposal

[1] Oil and Gas Lease from the Mineral Owner

Throughout the oil and gas producing states, it is quite common for mineral rights to be separated from the surface estate. Typically, this occurs as the result of a grant or reservation of the minerals from the surface accomplished by deed which produces a severance of one estate from the other. When the mineral estate has been severed from the surface estate, there comes into existence two separate and distinct estates each having their own incidents and attributes.[1] While the grant or reservation of minerals does not vest in the mineral owner any title to the surface, it carries with it the right to use so much of the surface as may be necessary to exploit or enjoy the mineral estate.[2] Without this right, the mineral grant or reservation would be wholly worthless because the mineral owner would not have the opportunity or right to enter upon the land to explore for and extract the minerals.[3]

The disposal of salt water produced with oil or gas has been held to be a reasonably necessary use of the surface. This right has been interpreted to include the right to dispose of salt water on the surface by use of slush pits,[4] and the right to inject/dispose of salt water produced from the lease into an injection well located on the surface estate.[5] In *TDC Engineering Inc.*

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[1] *See, e.g.,* Harris v. Currie, 142 Tex. 93, 176 S.W.2d 302, 305 (1943).

[2] *See* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980); *See also* 1 Williams & Meyers, *Oil and Gas Law* § 218.9 (1990) [hereinafter cited as Williams & Meyers].

[3] *See* Harris v. Currie, 142 Tex. 93, 176 S.W.2d 302 (Tex. 1943).

[4] *See, e.g.,* Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863, 866-867 (1961).

[5] *See* Leger v. Petroleum Engineers, Inc., 499 So. 2d 953, 955-956 (La. App. 3d Cir. 1986); *see also* TDC Engineering, Inc. v. Dunlap, 686 S.W.2d 346, 349 (Tex. App. 1985, *writ ref'd n.r.e.*).

v. Dunlap,[6] the landowner, Dunlap, sued the operator of an oil and gas lease, TDC, for unnecessary use of the surface estate, injecting salt water into an unproductive oil well on land owned by Dunlap. The facts were somewhat complicated. Bowden originally owned the surface and a fractional mineral interest in 1,143 acres of land which he leased to Taliaferro. Located on this lease were four producing oil wells and one salt water disposal well. Taliaferro also owned the leasehold estate to a 1/16 mineral interest in 700 acres which covered the portion of the Bowden tract where the four oil wells and the salt water disposal well were located. Dunlap purchased all of the surface of the Bowden tract and Bowden's undivided mineral interest. The Bowden lease terminated except for 40 acres around each of the four producing oil wells. Accordingly, it terminated as to the tract upon which the salt water disposal well was located. However, the lease for the 1/16 mineral interest on the 700-acre tract covering both the producing wells and the salt water disposal well was continued in effect. Dunlap filed suit against Taliaferro and TDC maintaining that they had no right to dispose of the salt water by injection into the well on Dunlap's property without his permission.

The court agreed with Dunlap that the Bowden lease did not give the lessee the right to inject salt water into the non-productive well. Since that well was no longer located on a tract covered by the oil and gas lease, the lessee had no right to use it for the benefit of the minerals under the four 40-acre tracts remaining under the lease. However, the lease to the 700 acres covering the 1/16 mineral interest did give Taliaferro and TDC the right to inject salt water into the non-productive well. As a co-tenant in common of an undivided mineral interest, the lessee had the right to produce the oil belonging to the 1/16 mineral interest and to make such reasonable use of the surface related to it as was necessary to produce the oil. Evidence conclusively established that the operator must dispose of the salt water which was produced with the oil in order to produce the oil. The court acknowledged that it was unusual for such a small interest in property to dictate this result, but that the

[6] 686 S.W.2d 346 (Tex. App. 1985, *writ ref'd n.r.e.*).

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[8] *Id.* at 954.

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result was one that must logically follow from the application of well established legal principles. TDC was allowed to dispose of salt water produced from a tract under which it had all of the minerals leased into a tract under which it had only 1/16 of the minerals leased.

The general granting clause of an oil, gas, and mineral lease executed by owners of the mineral estate has been held to grant the lessee the right to dispose of salt water waste obtained during production from wells located on the lease. In *Leger v. Petroleum Engineers, Inc.*,[7] the lessors, Leger, brought suit for damages resulting to their property from their lessee's disposal of waste salt water into a dry hole drilled on the premises. In resolving this dispute, the granting clause of a 1941 lease was brought into question. Sometime after the execution of the lease, two wells were drilled on the leased property which produced oil, as well as waste salt water. In early 1978, a well was drilled on the leased premises which resulted in a dry hole. This well was converted into a salt water disposal well. The defendant, Petroleum Engineers, acquired a working interest in the leased property in late 1978 and continued to use the well for disposal of salt water produced by the other two wells on the leased property. In 1983, Leger brought suit and sought damages for unauthorized disposal of salt water on his property. The issue was whether the 1941 mineral lease between the parties allowed Petroleum Engineers to dispose of salt water produced on the lease into a salt water injection well on the lease. The granting clause provided in part that the lessor leased its property for the purpose of "investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipelines, building tanks, power stations, telephone lines and other structures thereon in order to produce, save, take care of, treat, transport and own said products. . . ."[8] While the granting clause of the lease did not specifically address the question of salt water injection or disposal, it was a broad, general grant of rights and authority. The production of salt water from the producing wells on the

[7] 499 So. 2d 953 (La. App. 3d Cir. 1986).

[8] *Id.* at 954.

leased property was the necessary and unavoidable result of the production of oil from the leased property, and the lessee had to dispose of the waste salt water as a necessary and essential incident of the production of oil. The court concluded that the 1941 lease did grant Petroleum Engineers the right to dispose of salt water waste through injection. Such use of Leger's property caused no damage to the surface or subsurface and was reasonably, if not absolutely, necessary for the accomplishment of the overall purpose of the lease, that is, the production of oil from the leased property.

As these cases reflect, the mineral estate is the dominant estate, and the lessee's right to use the surface estate will be upheld if it is used reasonably for the exploration and production of minerals. The courts construe more strictly any use of the surface or grant of surface rights for disposal of wastes which do not result from the production of oil or gas from the mineral estate. In *Gill v. McCollum*,[9] Gill sued to enjoin her lessee, McCollum, from using a well on her land for disposal of salt water which was produced from other leases owned by McCollum. In the granting clause of her lease, Gill leased her property "for [the] purpose of investigating, exploring, prospecting, drilling, mining and operating for and producing oil, liquid hydrocarbons, all gases and their respective constituent products, injecting gas, waters, other fluids and air into subsurface strata. . . ."[10] McCollum drilled a successful oil well on Gill's property and subsequently obtained a permit to convert the well into a combination oil and disposal well. McCollum injected salt water produced from adjoining leases which he owned into the disposal well. The court found that the oil and gas lease did not entitle the lessee to use the well located on Gill's property in this manner. The court reasoned that since the primary purpose of the oil and gas lease was to obtain production from the leased premises, the grant of the right to inject water into the leased premises had to have some relation to the primary purpose of obtaining production. Inasmuch as the injection of produced water from adjoining leases did not

[9] 19 Ill. App. 3d 402, 311 N.E.2d 741 (1974).

[10] *Id.* at 742.

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[12] *Id.* § 202.2.

[13] 412 F.2d 1319, 1323 (Ct. Cl. 1969

[14] *Id.* at 1323.

[15] *See* Gill v. McCollum, 19 Ill. App.
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have any relation to the production from Gill's lease or benefit Gill in any fashion, McCollum was enjoined from injecting disposal water from his adjoining leases.

[2] Agreement from the Surface Owner

To whomever the soil belongs, he owns also to the sky and to the depths.[11] The rights of the surface owner are not limited to ground level but extend to all depths below the surface, with the exception that the mineral owner has the right to produce the minerals from the subsurface strata. Upon severance of the minerals from the surface estate, the mineral owner typically acquires rights to explore for and produce the minerals,[12] but does not receive the right to use or control the geological structures beneath the surface. In *Emeny v. United States*,[13] a dispute arose between the surface owners and the mineral owner, the United States, over the right to use an underground dome. The United States, through injection wells, was storing helium-gas mixtures beneath the surface owners' property. The surface owners sued, asserting that the defendants had no right to do so, and asked for compensation for the taking of their property. The court held that "[t]he surface of the leased lands and everything in such lands, except the oil and gas deposits covered by the leases, were still the property of the respective landowners. This included the geological structures beneath the surface. . . ."[14] Thus, the surface owner owns the right to inject salt water into subsurface aquifers flowing beneath its property. An operator seeking the right to dispose of salt water on land in which it does not have an oil and gas lease from the mineral owner, or from sources not located on its mineral lease, must obtain permission from the surface owner.[15]

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[11] *See* Williams & Meyers, *supra* note 2, § 202.

[12] *Id.* § 202.2.

[13] 412 F.2d 1319, 1323 (Ct. Cl. 1969).

[14] *Id.* at 1323.

[15] *See* Gill v. McCollum, 19 Ill. App. 3d 402, 311 N.E.2d 741 (1974); *see also* Sunray Oil Co. v. Cortez Oil Co., 188 Okla. 690, 112 P.2d 792, 795 (1941).

not by a zoning ordinance deprive a landowner of the opportunity to recover hydrocarbons beneath his land and then "capture" those hydrocarbons by wells on other premises.[9]

§ 204.5 Consequences of theory held: Injection of fluids into structure

For purposes of cycling, recycling, secondary recovery operations, disposal of salt water produced with oil, or storage of gas near a market, a landowner (or his mineral grantee or lessee) may desire to inject fluids (gas, water or air) into an underground structure. The fluid injected may migrate to a portion of the structure underlying the land of another and in the course of such migration displace valuable substances in such land.

The liability *vel non* of the injector to the adjoining landowner does not appear to turn upon the view held in the state as to the nature of the landowner's interest in oil and gas. In Texas, which adopts the ownership in place theory, it has been held that there is no liability in this instance.[1] On the other hand, liability has

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owners of gas leases on tracts drilled by Amoco were entitled to a lessee's interest in the gas produced by Amoco. As to this gas, Amoco was treated as a good-faith trespasser, allowed to deduct its cost of production of the gas. Insofar as Amoco drilled on lands on which it owned a gas lease, the Rule of Capture was applicable to the gas produced.) Rehearing was granted, the prior opinion was withdrawn, and oral argument was ordered. 53 *Okla. B.J.* 2602 (Okla. 1982). Subsequently, the trial court judgment was affirmed without opinion. 54 *Okla. B.J.* 414 (Okla. 1983). *Eike* is discussed in Grissom, "Brine Recovery: Has *Eike v. Amoco* Ended the Confusion in Oklahoma?," 18 *Tulsa L. J.* 698 (1983).

[9] Frost v. Ponca City, 541 P.2d 1321, 53 *O.&G.R.* 370 (Okla. 1975). Applicable zoning ordinances deprived landowners of the opportunity to drill wells to recover refined hydrocarbons (apparently escaped from nearby refineries) found in a shallow sand beneath their land. The city drilled 26 wells in the area and took other steps to produce, transport and sell the hydrocarbons. The court concluded that the landowners' right to capture the hydrocarbons was not destroyed by the zoning regulations, and when the city, in the exercise of the police power, removed them in order to protect public safety the city was merely exercising the landowners' right to capture the hydrocarbons. Under the circumstances the city was required to account for the value of the hydrocarbons removed but it was entitled to reimbursement for expenditures incurred and to be incurred for the purpose of preventing recurrence of the hazardous situation. For a comment on the case see 29 *Okla. L. Rev.* 987 (1976).

Edwards v. Lachman, 534 P.2d 670, 51 *O.&G.R.* 343 (Okla. 974), rejected the argument that in the case of good faith subsurface trespass "the Ownership in Place Rule should be applied as distinguished from the Rule of Capture," *viz.*, that defendants should not be required to account to plaintiffs for oil produced from the well bottomed under plaintiff's land but which had originally been in place beneath defendants' land until drainage occurred as the result of the completion of the trespassing well.

Champlin Exploration, Inc. v. Western Bridge & Steel Co., 597 P.2d 1215, 64 *O.&G.R.* 160 (Okla. 1979), held that refined hydrocarbons which escaped from a refinery continued to belong to the refiner, absent intent to abandon, and hence the Rule of Capture was inapplicable.

§ 204.5

[1] Tidewater Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), *cert. denied,* 331 U.S.

been found to exist in Oklahoma, which adopts the qualified ownership theory.[2] If the theory held in these states were significant in this context, the opposite results would have been expected.[2.1]

[Negative Rule of Capture]

When this portion of the **Treatise** was first published we expressed the following sanguine comments:

> "What may be called a 'negative rule of capture' appears to be developing. Just as under the rule of capture a landowner may capture such oil or gas as will migrate from adjoining premises to a well bottomed on his own land, so also may be inject into a formation substances which may migrate through the structure to the land of others, even if this results in the displacement under such land of

817 (1947) (under a recycling program, dry gas was injected into a producing formation, resulting in the displacement of wet gas underlying the plaintiff's tract with dry gas; plaintiff, despite the ownership in place theory applicable in Texas, was denied the recovery of damages.)

See also Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945), in which it was apparently assumed that when substances were reinjected the rules applicable before original capture became applicable.

[2] West Edmond Salt Water Disposal Ass'n v. Lillard, 265 P.2d 730, 3 *O.&G.R.* 1426 (Okla. 1954) (defendant injected salt water into a formation and the injected substance migrated to the land upon which plaintiff had a lease. Plaintiff alleged first that he was unable to produce oil and gas from the leasehold because the injected salt water penetrated into and across the subsurface of the leased premises and thereby destroyed the productivity of his well; as a second cause of action he sought to recover damages for loss of part of the casing that could not be removed because of the influx of water and for extraordinary expenses incurred in shutting off the flow and recovering the remainder of the casing. A demurrer to the evidence supporting the first cause of action was sustained and plaintiff did not appeal. However plaintiff was permitted to recover damages under the second cause of action on the theory that a trespass had occurred. Discussion Notes, 3 *O.&G.R.* 1430 (1954), observes that the court did not refer to the reasonableness of defendant's conduct or to negligence on its part, and it would appear to follow therefore that the court ruled by implication that these are not material to liability.)

In Kentucky it has been held that under the non-ownership theory followed in that state an overriding royalty owner was not the "owner" of any "oil and gas interest" within the meaning of those terms in the Kentucky pooling statute, and hence consent of the overriding royalty owner to pooling was not required by the statute. Rice Brothers Mineral Corp. v. Talbott, 717 S.W.2d 515, 91 *O.&G.R.* 512 (Ky. 1986), discussed in § 203.1 *supra,* and in § 925.1, *infra.* See Fox, "Pooling Provisions in Oil end Gas Leases," 4 *J. of Mineral L. & Policy* (1988–89).

[2.1] The authority of a state regulatory commission to regulate injection wells is regularly sustained. See *e.g.,* Hanson v. Industrial Comm'n, 466 N.W.2d 587, — *O.&G.R.* — (N.D. 1991), sustaining a Commission order denying an application to dispose of produced salt water by injecting it through another well. The court rejected contentions that the Commission's finding of fact were not supported by substantial evidence, that the order violated the governing statute because it hinders, rather than promotes oil development, that the Commission failed to make the minimum findings of fact necessary to determine the correlative rights of the parties, that the order violated the applicant's correlative rights and resulted in waste, and that the Commission's rules of procedure have not afforded the applicant a fair hearing.

more valuable with less valuable substances (*e.g.*, the displacement of wet gas by dry gas). The law on this subject has not been fully developed, but it seems reasonable to suggest the qualification that such activity will be permitted, free of any claim for damages, only if pursued as part of a reasonable program of development and without injury to producing or potentially producing formations."

Our optimism in this regard was based in large part on an Oklahoma case denying recovery for trespass on a showing of injection of salt water into a stratum which already included salt water and no other substance.[3] The view was taken that when salt water was injected into the formation by defendants, they thereby lost title thereto.[4]

A later Texas case, *Railroad Commission v. Manziel*,[5] was consistent with our position in denying an injunction against water flooding as part of a secondary

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[3] West Edmond Salt Water Disposal Ass'n v. Rosecrans, 1950 OK 196, 204 Okla. 9, 226 P.2d 965, *appeal dismissed*, 340 U.S. 924 (1951).

See also Larkins-Warr Trust v. Watchorn Petroleum Co., 1946 OK 84, 198 Okla. 12, 174 P.2d 589. Plaintiffs here sought recovery for injuries sustained when water entered the structure from defendants' damaged well. Defendants had succeeded in plugging this well by introducing a sealing fluid into it. Plaintiff sought further damages resulting from the introduction of the sealing fluid into the formation. The jury found that defendants' conduct was not negligent and on this ground the court held that defendants were not liable for plaintiffs' injuries.

[4] The case of Hammonds v. Central Kentucky Natural Gas Co., 255 Ky. 687, 75 S.W.2d 204 (1934), was cited for this proposition. This case held that if gas were returned to a depleted formation for storage purposes, another landowner might not recover for trespass or for use and occupancy, but he might produce such gas at his option through a well drilled on his own land. Title to the gas was said to have been lost on its reinjection into the structure.

Hammonds v. Central Kentucky Natural Gas Co. was "limited" in Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co., 736 S.W.2d 25, 99 *O.&G.R.* 258 (Ky. 1987), discussed in § 203 at note 6, *supra.*

For other cases and secondary authorities dealing with "ownership" of gas (or other fluids) injected into an underground structure, see § 222 at note 5, *infra.*

[5] Railroad Commission v. Manziel, 361 S.W.2d 560, 17 *O.&G.R.* 444, 93 A.L.R.2d 432 (Tex. 1962). Plaintiffs sought to set aside a Railroad Commission order permitting water injection into an irregularly spaced well as part of a secondary recovery program. It was alleged that the injection would cause trespass by injected water that would result in the premature destruction of plaintiff's poducing wells. Judgment was rendered dissolving the permanent injunctions granted by the trial court against the Railroad Commission and the injecting operator. The court quoted the discussion in this **Treatise** concerning the "negative rule of capture" [361 S.W.2d at 568, 17 *O.&G.R.* at 453] and commented as follows:

"The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural resources. . . .

"We conclude that if, in the valid exercise of its authority to prevent waste, protect correlative rights, or in the exercise of other powers within its jurisdiction, the Commission authorizes secondary recovery projects, a trespass does not occur when the injected, secondary recovery

recovery operation approved by the Railroad Commission. Quoting the discussion of the "negative rule of capture" found in this **Treatise**, the court concluded that there was no liability for trespass under the facts of the instant case.

Subsequent developments have indicated a reluctance by the courts to permit a regulatory order to insulate from liability an operator who by secondary recovery methods displaces under the land of another more valuable with less valuable substances.[6] Although the power of the regulatory agency to authorize

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forces move across lease lines, and the operations are not subject to an injunction on that basis. The technical rules of trespass have no place in the considerations of the validity of the orders of the Commission." 361 S.W.2d at 568–569, 17 *O.&G.R.* at 454, 93 A.L.R.2d at 444–445.

Left open by *Manziel* was the question whether invasion of plaintiff's land by a sandfracing operation on defendant's premises would be a trespass and, if it were a trespass, whether it could be authorized by a Commission order. See Gregg. v. Delhi-Taylor Oil Corp., 162 Tex. 26, 344 S.W.2d 411, 14 *O.&G.R.* 106 (1961); Gregg v. Delhi-Taylor Oil Corp., 162 Tex. 38, 344 S.W.2d 419, 14 *O.&G.R.* 118 (1961); Delhi-Taylor Oil Corp. v. Holmes, 162 Tex. 39, 344 S.W.2d 420, 14 *O.&G.R.* 103 (1961).

See also Raymond v. Union Texas Petroleum Corp., 697 F. Supp. 270, 101 *O.&G.R.* 267 (E.D. La. 1988) (invasion of salt water under plaintiffs' land was part of a salt water disposal operation authorized by the Commissioner of Conservation, and "[a]s such, it is not unlawful and does not constitute a legally actionable trespass").

Raymond was distinguished in Mongrue v. Monsanto Co., 1999 U.S. Dist. LEXIS 5543 (E.D. La. Apr. 9, 1999) (unpublished opinion), where an injector of wastewater (rather than saltwater) allegedly migrating across property lines was sued for trespass and there was no pooling or unitization. The injector was operating pursuant to a state-issued injection permit, but the court was unwilling to grant summary judgment on the issue of trespass. However, the district court granted the plaintiffs' motion for leave to dismiss with prejudice to their remaining claim of trespass. The plaintiffs then pursued a claim for an unconstitutional taking under the Louisiana Constitution. Mongrue v. Monsanto Co., 249 F.3d 422 (5th Cir. La. 2001). But this was rejected on the ground that the defendant was not a state actor merely because it had a permit from the Commissioner of Conservation. The permits of the Commissioner did not authorize expropriation, and did not reference any right to place wastewater in plaintiffs' subsurface property. The court rejected the federal takings claim on the basis that the plaintiffs had not pleaded the claim. *See also* Nunez v. Wainoco Oil & Gas Co., 488 So. 2d 955, 91 *O.&G.R.* 846 (La. 1985), *cert. denied*, 489 U.S. 925 (1986).

[6] For other discussions of the legal consequences of the injection of fluids into a reservoir see the following:

S. Lansdown, *The Problem of Produced Water—Obtaining the Right to Dispose of It and Avoiding Liability for Such Disposal,* 44 Sw. Legal Fdn. Oil & Gas Inst. 3-1 (1993)

Ragsdale, *Hydraulic Fracturing: The Stealthy Subsurface Trespass,* 28 Tulsa L.J. 311 (1993);

Weaver, "The Legal Significance of Commission Approval of Oil and Gas Operations," 37 *Sw. Legal Fdn. Oil & Gas Inst.* 4-1 (1986);

Aron, "Secondary Recovery of Oil & Gas—The Rule of Positive Dominion," 9 *Land & Water L. Rev.* 457 (1974);

Lynch, "Liability for Secondary Recovery Operations," 22 *Sw. Legal Fdn. Oil & Gas Inst.* 37 (1971);

the operation is regularly sustained,[7] in the absence of unitization binding the owner of the affected premises liability has been imposed upon the operator in

Kennedy, Lowery, Anderson, Palmer, Ostrosser and Palmer, "Tort Liability in Waterflood Operations," 5 *Alberta L. Rev.* 52 (1966);

Golden, "Secondary Recovery Operations—Protection of Correlative Rights," 2 *Land & Water L. Rev.* 129 (1967);

Driscoll, "Secondary Recovery of Oil and Gas: Significance of Agency Approval," 13 *Kan. L. Rev.* 481 (1965);

Cunningham, "Oil and Gas: Rights and Liabilities Incident to Water Flood Operations," 17 *Okla. L. Rev.* 457 (1964);

Methvin, "Secondary Recovery Operations: Right of the Non-Joiner," 42 *Texas L. Rev.* 364 (1964);

Kelly, "Trespass in Secondary Recovery," 17 *Southwestern L.J.* 591 (1963);

Bowen, "Secondary Recovery Operations—Their Values and Their Legal Problems," *13 Sw. Legal Fdn. Oil & Gas Inst.* 331 (1962);

Keeton and Jones, "Tort Liability and the Oil and Gas Industry II," 39 *Texas L. Rev.* 253 at 267 *et seq.* (1961);

Jones, "Tort Liabilities in Secondary Recovery Operations," 6 *Rocky Mt. Min. L. Inst.* 639 (1961);

Huie, "Some Recent Developments in the Law of Oil and Gas," *A.B.A. 1960 Proceedings of Section of Mineral and Natural Resources Law* 148;

Bredin, "Legal Liability for Water Flooding In Petroleum Reservoirs in Alberta," 1 *Alberta L. Rev.* 516 (1960);

McElroy, "Water Flooding of Oil Reservoirs," 7 *Baylor L. Rev.* 18 (1955);

Brown and Myers, "Some Legal Aspects of Water Flooding," 24 *Texas L. Rev.* 456 (1946).

Underground property damage liability insurance may be desirable in secondary recovery operations. *See* Burnett, "Underground Property Damage Liability," 7 *Tulane Tidelands Inst.* 133 (1963).

A related problem is whether the court or the agency has exclusive jurisdiction over the alleged injury. Even if the agency does not have exclusive jurisdiction, the primary jurisdiction doctrine may allow the court to defer hearing the case until the agency has acted. *See generally* B. Kramer & P. Martin, The Law of Pooling and Unitization § 25.04 (3d ed. Matthew Bender). *See, e.g., In re* Apache Corp., 2001 Tex. App. LEXIS 719 (Tex. App.—Amarillo 2001) (Railroad Commission does not have exclusive jurisdiction to hear claims relating to contamination of underground aquifers; primary jurisdiction doctrine not applicable where agency lacks authority to resolve common law claims).

[7] See, *e.g.*, the following:

Reed v. Texas Co., 22 Ill. App. 2d 131, 159 N.E.2d 641, 11 *O.&G.R.* 789 (1959) (denying an injunction against secondary recovery operations which had been approved by the Mining Board);

Jackson v. State Corporation Commission, 186 Kan. 6, 348 P.2d 613, 12 *O.&G.R.* 185 (1960) (affirming Commission's authorization of salt water repressuring of 900-acre lease);

California Co. v. Britt, 247 Miss. 718, 154 So. 2d 144, 19 *O.&G.R.* 36 (1963) (as a result of a unitized pressure maintenance program approved by the state regulatory agency, it was alleged that plaintiffs' nonunitized premises had been damaged by the displacement of oil. The court held that there was no liability; this result was based in part on the fact that plaintiffs had rejected a fair opportunity to join in a fair plan of unitization);

a number of cases. Thus liability has been imposed on the ground of nuisance in Oklahoma[8] and by a federal case arising in Indiana.[9] Trespass has been the basis for relief granted by a federal court in Arkansas.[10] And a Nebraska case,

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Syverson v. North Dakota State Industrial Commission, 111 N.W.2d 128, 15 *O.&G.R.* 478 (N.D. 1961) (rejecting an attempt by an owner, who had declined a fair plan of unitization and who failed to show actual damage, to overturn a commission approved plan of fluid injection);

Arnstad v. North Dakota State Industrial Commission, 122 N.W.2d 857, 18 *O.&G.R.* 995 (N.D. 1963) (sustaining a pressure maintenance order of the commission);

Texas County Irrigation & Water Resources Ass'n v. Dunnett, 1974 OK 118, 527 P.2d 578, 50 *O.&G.R.* 49 (sustaining the validity of a Corporation Commission order permitting injection of saltwater into the Glorietta Sand Formation pursuant to rules set forth by the Commission. The court rejected the contention that the order appropriated the Glorietta Formation from the surface owners for the use of oil and gas companies without due process of law). *Dunnett* was overruled on other grounds in El Paso Natural Gas Co. v. Corporation Comm'n, 1981 OK 150, 640 P.2d 1336, 72 *O.&G.R.* 93.

[8] Greyhound Leasing & Financial Corp. v. Joiner City Unit, 444 F.2d 439, 40 *O.&G.R.* 60 (10th Cir. 1971). The court held that owners of interests in leases and wells injured by water injection as a result of secondary recovery operations on defendant unit could recover damages on the theory of a private nuisance. The fact that the injection had been authorized by the Oklahoma Corporation Commission did not insulate defendant from liability for its conduct. The court noted that cases and texts (citing this section of the **Treatise**):

> "have expressed opinions that the defendant here should be insulated from this type of liability by the administrative approval of the unit. . . . This could be desirable, but we express no opinion on it as it is apparent that the statutory law and the decisions in Oklahoma at the present time lead to a different result." 444 F.2d at 444–445, 40 *O.&G.R.* at 70–71.

Greyhound Leasing was followed in Boyce v. Dundee Healdton Sand Unit, 1975 OK CIV APP 23, 560 P.2d 234, 56 *O.&G.R.* 565 (*cert. denied*).

See also Gulf Oil Corp. v. Hughes, 1962 OK 39, 371 P.2d 81, 16 *O. &G.R.* 1016 (liability imposed upon theory of private nuisance for contamination of plaintiff's fresh water by water flood project on defendants' premises).

Gouin v. Continental Oil Co., 1978 OK CIV APP 57, 590 P.2d 704, 63 *O.&G.R.* 107, applied the two-year statute of limitations to an action to recover for permanent damage resulting from defendant's water-flood operation.

[9] In Mowrer v. Ashland Oil & Refining Co., 518 F.2d 659, 52 *O.&G.R.* 351 (7th Cir. 1975), the court sustained a judgment for damages to plaintiff's domestic water supply caused by a waterflood operation on the ground that the water flood created a private nuisance.

[10] Young v. Ethyl Corp., 521 F.2d 771 at 775, 53 *O.&G.R.* 111 at 118 (8th Cir. 1975). This case involved recycling of salt water for the extraction of valuable minerals such as bromide. On remand, the District Court concluded that the trespass was in good faith and hence the "mild" rule for good faith trespass should be applied. See § 226.2 *infra.* Young v. Ethyl Corp., 444 F. Supp. 207 (W.D. Ark. 1977), *aff'd that taking was in good faith and rev'd on measure of damages,* 581 F.2d 715, 61 *O.&G.R.* 330 (8th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979), *subsequent appeal dism'd,* 635 F.2d 681 (8th Cir. 1980).

See also Snyder Ranches, Inc. v. Oil Conservation Comm'n of New Mexico, 110 N.M. 637, 798 P.2d 587, 112 *O.&G.R.* 296 (1990) (sustaining order of Commission granting permission to inject salt water into underground formation, there being substantial evidence supporting

while rejecting the theories of trespass or conversion as the basis for relief, has held (one Justice dissenting) that a landowner who had rejected the opportunity to join in a unitized water flood operation was entitled to recover "what he can prove by a preponderance of the evidence he could have obtained through his own efforts if he had drilled, developed, and operated his property outside the unitization project; that is, as if no unitization had occurred."[11] And in Kansas, after the state court sustained the validity of an order of the state corporation commission authorizing a salt water repressuring operation,[12] a federal court found that the operator was liable for compensatory damages to the owner of rights in adjoining premises which suffered flooding of producing wells.[13]

In California, liability for unauthorized injection of wastewater fluids produced from other premises has been imposed in one case on the theory of trespass for

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commission conclusion that injection of salt water would not trespass on plaintiff landowner's property; the court observed, however:

> "in order to avoid future error, we take this opportunity to answer Snyder Ranches's assertion that the granting of Mobil's application to inject salt water into the disposal well authorizes a trespass against Snyder Ranches's property. We do not agree.
>
> "The State of New Mexico may be said to have licensed the injection of salt water into the disposal well; however, such license does not authorize trespass. The issuance of a license by the State does not authorize trespass or other tortious conduct by the licensee, nor does such license immunize the licensee from liability for negligence or nuisance which flows from the licensed activity.
>
> "In the event that an actual trespass occurs, neither the Commission's decision, the district court's decision, nor this opinion would in any way prevent Snyder Ranches from seeking redress for such trespass."

[11] Baumgartner v. Gulf Oil Co., 184 Neb. 384, 168 N.W.2d 510, 34 *O.&G.R.* 235 (1969), *cert. denied,* 397 U.S. 913 (1970).

[12] Jackson v. State Corporation Commission, 186 Kan. 6, 348 P.2d 613, 12 *O.&G.R.* 185 (1960).

[13] Jackson v. Tidewater Oil Co., 17 *O.&G.R.* 282 (D. Kan. 1960) (holding defendant liable to plaintiff for actual and punitive damages), *affirmed as to compensatory but reversed (one judge dissenting) as to punitive damages,* Tidewater Oil Co. v. Jackson, 320 F.2d 157, 18 *O.&G.R.* 982 (10th Cir. 1963), *cert. denied,* 375 U.S. 942, 19 *O.&G.R.* 329 (1963).

The *Jackson* holding that punitive damages are not available for a legalized trespass or nuisance was followed in Morsey v. Chevron, USA, Inc., 94 F.3d 1470, 1477 (10th Cir. 1996) and Fransen v. Conoco, Inc., 64 F.3d 1481, 1492–1493 (10th Cir. 1995), *cert. denied,* 116 S. Ct. 1060 (1996).

See also Phillips Petroleum Co., 105 IBLA 345, GFS (O&G) 1989–1989 (Nov. 17, 1988) (declaring that an operator would be liable to the United States as mineral owner should the operator's salt water injection activities—authorized by the surface but not by the mineral owner—adversely affect the mineral interest). Sanders v. Gary, 657 So. 2d 1085 (La. Ct. App.), *writ denied,* 658 So. 2d 1258 (La. 1995) (trial court has jurisdiction to issue preliminary injunction prohibiting further use of injection well because there was either a breach of contract or nuisance allegation even though injection wells were regulated by the Commissioner of Conservation and the Department of Environmental Quality).

See also § 222 *infra.*

interfering with and damaging the mineral estate.[13.1] Finding plaintiff proved that defendant's "lengthy injection of wastewater resulted in widespread damage throughout a large oil, gas and mineral field,"[13.2] the court turned to the appropriate measure of damages. Since the defendant's activities rendered "it difficult, if not impossible, to trace completely the injuries it caused, [the court stated that] resort to more traditional measures of damages such as cost of replacement, cost of restoration, diminution in value or fair rental value cannot be readily used. But the difficulty in determining damages does not bar recovery."[13.3] Under such circumstances, the court sustained the trial court's award of "a reasonable quasi-contractual measure of damages—the fair market cost to dispose of the injected wastewater at available sites in the area during the pertinent period. This is the amount of money [defendant] would have had to pay to others to dispose of the excess water, and therefore the amount of [defendant's] unjust enrichment."[13.4]

In 1980, the Arkansas Supreme Court held that reasonable and necessary secondary recovery processes of pools of transient materials should be permitted. However, the court conditioned this rule by concluding that owners of land depleted by secondary recovery may recover damages for minerals extracted in excess of natural depletion.[14] The court remanded the case for determination of an appropriate measure of damages, commenting as follows on the problem of balancing the public interest and the interests of affected parties:

> "The underlying reason for adoption of the rule of capture by Arkansas and other states was the acknowledged impracticality of tracing ownership of a

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[13.1] Cassinos v. Union Oil Co. of Cal., 14 Cal. App. 4th 1770, 18 Cal. Rptr. 2d 574, 577–578, 125 *O.&G.R* 472 (1993). Defendant held an oil and gas lease—to which plaintiff was the successor lessor—on the premises used for the injection well. The wastewater injected came from other leaseholds held by the defendant.

> "Because Union intended to inject its off-site wastewater into A-16 for a non-lease purpose, thereby causing the water to interfere with and adversely affect the mineral rights owned by the [successor lessor], [defendant. . .] committed trespass . . . "In particular, causing subsurface migration of fluids into a mineral estate without consent constitutes a trespass. . . ."

[13.2] 18 Cal. Rptr. 2d at 584.

[13.3] 18 Cal. Rptr. 2d at 584.

[13.4] 18 Cal. Rptr. 2d at 584.

[14] Jameson v. Ethyl Corp., 271 Ark. 621, 609 S.W.2d 346, 69 *O.&G.R.* 19, 19 A.L.R.4th 1174 (1980).

Richardson v. Phillips Petroleum Co., 791 F.2d 641, 89 *O.&G.R.* 44, *reh'g en banc denied with opinion,* 799 F.2d 426 (8th Cir. 1986), *cert. denied,* 479 U.S. 1055 (1987), concluded that findings of Arkansas Oil and Gas Commission in an order denying injunctive relief against secondary recovery operations alleged to cause damage to offset wells on other premises did not bar a tort action for money damages by the owners of the offset wells. The collateral estoppel doctrine was held not to bar the suit for damages.

transient substance which migrated from lands of one owner to lands of someone else. However, as noted in *Oil and Gas Law, Williams and Meyers,* Volume I § 204.5, there have been varying reactions of the courts of different states to the question of whether the rule of capture should be applied without qualification to secondary recovery processes. In some of the cases orders from state regulatory agencies have been involved and in some of the cases unleased owners have been offered participation.

". . .

"While Arkansas" unitization laws are not, as previously noted, involved in this case, we do believe that the underlying rationale for the adoption of such laws, i.e., to avoid waste and provide for maximizing recovery of mineral resources, may be interpreted as expressing a public policy of this State which is pertinent to the rule of law of this case. Inherent in such laws is the realization that transient minerals such as oil, gas and brine will be wasted if a single landowner is able to thwart secondary recovery processes, while conversely acknowledging a need to protect each landowner's rights to some equitable portion of pools of such minerals. A determination that a trespass or nuisance occurs through secondary recovery processes within a recovery area would tend to promote waste of such natural resources and extend unwarranted bargaining power to minority landowners. On the other hand, a determination that the rule of capture should be expanded to cover the present situation could unnecessarily extend the license of mineral extraction companies to appropriate minerals which might be induced to be moved from other properties through such processes and, in any event, further extend the bargaining power of such entities to reduce royalty payments to landowners who are financially unable to 'go and do likewise' as suggested by Ethyl.

"The laws of trespass and nuisance and the rule of capture each evolved out of circumstances designed to balance the relative rights and responsibilities of the parties and the interests of society in general. As noted in the *Young* case, *supra,* a great deal of technology and geological understanding has developed since the 1912 *Osborn* decision. As envisioned in the *Young* case, which we consider to be persuasive, we are unwilling to extend the rule of capture further. By adopting an interpretation that the rule of capture should not be extended insofar as operations relate to lands lying within the peripheral area affected, we, however, are holding that reasonable and necessary secondary recovery processes of pools of transient materials should be permitted, when such operations are carried out in good faith for the purpose of maximizing recovery from a common pool. The permitting of this good faith recovery process is conditioned, however, by imposing an obligation on the extracting party to compensate the owner of the depleted lands for the minerals extracted in excess of natural depletion, if any, at the time of taking and for any special damages which may have been caused to the depleted property. By this holding we believe that the interests of the owners and the public are properly protected and served."

In New Mexico, an absolute ownership state, the court in *Hartman v. Texaco, Inc.*,[15] found that a unit operator committed a common law trespass when injected water escaped the boundaries of the unit and caused an adjacent lessee's well to blow-out. The injured party sought double damages based on a New Mexico statute which allows for the doubling of damages in trespass cases.[16] After reviewing the legislative history of the statute, however, the court found that it only applies to surface trespass actions and reversed that part of the trial court's verdict doubling the damage award.

The Supreme Court of Ohio, in a matter involving the deepwell injection of refining byproducts with no extraction processes related thereto, rejected the application of a "negative rule of capture" in *Chance v. BP Chemicals.*[17] The injecting company had state and federal permits, and there were no regulatory violations at issue. Quoting this section of this **Treatise**, the Ohio Supreme Court ruled that the situation before them was "not analogous to those present in the oil and gas cases, around which a special body of law has arisen . . . ."[18] Nevertheless, the court ruled that for the plaintiffs to recover on a theory of trespass, they would have to demonstrate some type of physical damages or interference with use; their subsurface rights were not absolute, and migration alone was insufficient to establish an unlawful entry.

It is hazardous, therefore, to engage in a secondary recovery program in the absence of unitization (voluntary or compulsory) of all premises which may be adversely affected by injection of fluids.

§ 204.6 Consequences of theory held: Waste and the doctrine of correlative rights

Some early cases, particularly in states adopting the nonownership theory, took the position that a landowner might produce as much oil or gas as he was able, even though the rate of production was excessive, caused damage to the producing formation, and would reduce ultimate recovery. The same position was taken where no economic use was made of the oil

[Next page is 60.11]

[15] Hartman v. Texaco, Inc., 937 P.2d 979 (N.M. App. 1997, *cert. denied*). *See also* Snyder Ranches, Inc. v. Oil Conservation Commission, *supra* note 10.

[16] N.M. Stat. Ann. § 30-14-1.1(D).

[17] Chance v. BP Chemicals, 77 Ohio St. 3d 17, 670 N.E.2d 985 (1996).

[18] 670 N.E.2d at 991.

Pronghorn

Can defective notice be cured by subsequent notice

what property interest is required to ~~own~~ run a disposal well

Pronghorn: Centurion → one of DKD's partners purchased property to surface owner on [illegible] issue

surface: State + Moreno property; well is on that property

→ claims notice to DKD not required because Chesapeake was the offset operator of record — assignment filed subsequent to the application

→ DKD's opposition is ~~essentially~~, based on ~~[illegible]~~ competition that an additional facility - all not on permissible factors (what are those?)

correlative rights - formation water not produced ever

→ Pronghorn may dispose of ~~saltw~~ produced water if it has a saltwater easement from State (surface) and a waiver from the mineral owner (Chesapeake) which it has —

DKD:

produced water disposal requires permission of both the surface owner and a mineral lease owner (a mineral saltwater disposal easement), because impairing the mineral estate by injecting fluids into estate, whether or not it is produced

Pronghorn does not own surface mineral rights

now not an issue [didn't provide notice to surface mineral rights owner

[illegible] property

1. (RE DKT) - who owns the minerals & what right does Pronghorn have to use them?

Pronghorn case:
Guy A. Baber III

applied for SWD well
SW-836 issued

p. 19

5000' 6500'

injecting into San Andres to Glorieta
abandon Wolfcamp w/ cast iron bridge plug - w/ cement
Grayburg & Paddock - id as oil & gas zones (non productive)

neither productive in area

no wells w/in 2 miles productive in either San Andres or Glorieta

injection interval → 6000 - 6400 feet

injection: 1500 bbl/day
500 lbs ave. pressure
1000 psi max. pressure

water wells: minimum 40' ave. depth 56'
maximum 65'

offsetting wells
Charles Gillespie State "C" No. 2
13 3/8" casing set at 364
cement (250 sacks) circulated to surface
State "B" No. 3 -
13 3/8 set at 365'

p. 32

31 - 16
31 - 17

Steve Hynes - Geologist
no operating Navajo Nation federal Mineral
2 State wells

p. 35 - surface cleaned up
State T No. 1
State T No. 3
State T No. 4

except for one tank (48) to be utilized in SWD operations

p. 37, Chesapeake has no prod.
Ex. 4

p. 37, ~~Read~~ Pronghorn trying to obtain an

Is there a notice issue re: 6200 vs. 6400?

44-45 Owen seems to be arguing that there is Gray Burg production "in the area" because of the statement that water will be accepted from that pool

47 injection will be confined to the San Andres & Glorieta

48 ok whether it will go up

59 Larry R. Scott
engineer
petroleum engineering

61 No production from any of 14 wells in §6
" " " " " 19 " " §1
in either San Andres or
Glorieta

61 all 35 wells penetrated both formations
all were producing from Wolfcamp or
Pennsylvania-Strawn

62 used
production data
scout ticket data

63 No DST
production test data 6000-6400
wireline
other tests

63 electric log data
formation water .165 ohm - San Andres
.086 ohm - Glorieta
64 basal San Andres & upper Glorieta are wet
water saturations > 94 percent

Watson 1-6 in zones of best permeability -
57% , 49%

zones are wet - won't commercially produce

800-521-6380

64 State T No. 2 slight show -

65 Texas Pacific Oil Co. tested zone
cl concluded that the 5- to. 10% dead oil stain was not commercially productive

65 Water saturation calculations in the 2 primary zones of permeability -
water saturations around 98% in the upper interval
" " 62% in the lower interval

66 perf. test would produce water

66 log results from Watson 1-6 (DKD's well)
shows very high water saturation

66 and Watson 1-6 structurally downdip

69 no San Andres or Glorieta production in the immediate area

closest is west Lovington-San Andres field 6 miles south

69 5 million barrels and nine years of operation @ 1500 bbl/day to sweep water to a wellbore 1320 feet south

44 S.W. Legal Foundation Oil and Gas Inst. 3-1

Also: 32-4-1 1993

28 Tulsa L.J. 311

9 Land & Water Rev. 457

17 Southwestern Law Review 591

50 O+GR 49 overruled 72 O+GR 53

V. 2

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

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

CASE NO. 12905

THE APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

ORDER NO. R-11855-B

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (hereinafter referred to as "the Commission") for evidentiary hearing on March 20, 2003 at Santa Fe, New Mexico on application of Pronghorn Management Corporation (hereinafter referred to as "Pronghorn"), *de novo*, opposed by DKD, L.L.C. (hereinafter referred to as "DKD"), and the Commission, having carefully considered the evidence, the pleadings and other materials submitted by the parties hereto, now, on this 17th day of April, 2003,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties and the subject matter herein.

2. This matter is before the Commission on application of Pronghorn for review *de novo*.

3. In this matter, Pronghorn seeks a permit pursuant to Rule 701 of the Rules and Regulations of the Oil Conservation Division, 19.15.9.701 NMAC (11-02-2000), to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose. Disposal is to be accomplished through 2 7/8 inch plastic-lined tubing set in a packer located at approximately 5,590 feet. DKD opposes the application on various grounds.

4. Before moving to the merits of the dispute, the subject of notice should be addressed. Notice was raised as an issue in the Oil Conservation Division's orders and

the parties hereto presented evidence and testimony on the subject during the Division's proceeding (but not during the hearing *de novo*).

5. The rules and regulations of the Oil Conservation Division (hereinafter referred to as "the Division") require that an operator desiring to inject produced water apply for a permit and serve a copy of the application on the "owner of the surface of the land upon which each injection or disposal well is to be located" and "each leasehold operator within one-half mile of the well" proposed for discharge. *See* 19.15.9.701(A) and (B) NMAC.

6. Pronghorn filed an application for administrative approval of the operation described paragraph 3 on April 5, 2002. On April 30, 2002 the Oil Conservation Division (hereinafter referred to as "the Division") issued ~~an~~ Administrative Order No. SWD-836~~, and~~ granted the application. Such applications may be approved administratively unless an objection to the Order is filed within fifteen days of issuance. *See* 19.15.9.701(C) NMAC. DKD objected to the application within that time period and advised the Division that it operates a well within one-half mile of the State "T" Well No. 2. DKD also advised the Division that it had not been provided notice of the administrative application as required by Form C-108 and Rule 701, 19.15.9.701(B)(2) NMAC. The Division advised Pronghorn by letter of July 9, 2002 that Order No. SWD-836 would be suspended pending the outcome of a hearing before a Division examiner. On September 5, 2002, the Division conducted a hearing on the matter. The failure to provide notice to DKD apparently formed the basis for the Division's suspension of Order No. SWD-836.

7. As noted, neither party raised the issue during the hearing *de novo* and it further appears that circumstances have changed substantially ~~and notice is not now an issue.~~ For example, as a basis for its protest of Order No. SWD-836, DKD claimed it had not received notice of the application. During the hearing *de novo* it became apparent that although DKD was not in fact notified of the initial application, it was not a record "leasehold operator within one-half mile of the [proposed disposal] well" pursuant to Rule 701, 19.15.9.701(B)(2). When Pronghorn filed its application, it notified the State Land Office, Chesapeake Operating Inc. (hereinafter referred to as "Chesapeake"), Charles B. Gillespie Jr., Pronghorn Management and Energen Resources. In addition, notice of the application was published on March 26, 2002 in the Lovington Daily Leader. Almost six weeks after the application was filed, an assignment from Chesapeake to DKD was recorded (May 14, 2002) but as the assignment does not bear the approval of the State Land Office, its validity is in doubt. *See* NMSA 1978, § 19-1-13 (Repl. 1994). Moreover, the fact that the document was unrecorded at the time the application was filed strongly suggests that notice to Pronghorn's predecessor-in-interest was appropriate. *See* NMSA 1978, § 70-1-2 (Repl. 1995)(effect of failure to record). Nevertheless, after being notified of the potential notice issue, the Division set the matter

for hearing. The subsequent hearing before the Division in which DKD actively participated (as well as the hearing on the application for review *de novo)* cured any defect in ~~initial~~ the application.

8. Another notice issue addressed by the Division concerned notice to surface owners Felipe A. Moreno and Adelaida P. Moreno. It seems to be undisputed that these persons, owners of record of surface rights at the proposed injection site, were not notified of the application in this matter. However, subsequent to the hearing before the Division and prior to the hearing of this matter, those individuals conveyed their interest to Gandy Corporation. Through a letter agreement, Gandy Corporation and Pronghorn have become partners in the proposed disposal operation (along with Marks & Garner) and Gandy Corporation has agreed to the use of the property for purposes of saltwater disposal. It seems this transaction has cured any notice issue with respect to the surface owners as ~~Gandy Corporation has consented to the operation and is a party in interest along with the applicant.~~

9. A final notice issue was obliquely raised by DKD concerning the extent of the perforations through which injection would be accomplished. Initially, notice was provided that injection would be accomplished through perforations located between 6,000 and 6,200 feet. Later, Pronghorn, after a conversation with a Division engineer, requested that it be permitted to inject from 6,000 to 6,400. It does not appear that this defect is material or that DKD was prejudiced by the change ~~and DKD did not present any evidence tending to indicate that it was prejudiced by the change or that the interval between 6,200 feet and 6,400 was productive of oil or gas.~~

10. Thus, it appears that notice is not an issue in this matter and we can consider the merits of the application.

11. As noted, Pronghorn proposes to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose.

12. Rules 701 through 708 (19.15.9.701 through 19.15.9.708 NMAC) govern the injection of produced water into any formation. Injection wells must be equipped, operated, monitored and maintained in such a way as to assure mechanical integrity and prevent leaks and fluid movement adjacent to the well bore. *See* 19.15.9.703(A) NMAC. Furthermore, injection wells must be operated and maintained in such a way as to confine the injected fluids into the interval approved and prevent surface damage or pollution. *See* 19.15.9.703(B) NMAC. In no event, will injection operations be permitted to endanger underground sources of drinking water (19.15.9.703(C) NMAC) and such wells must undergo rigorous testing to serve these goals (19.15.9.704 NMAC). Order No.

SWD-836 appears to have addressed each of these points, and the parties have not raised any issue with respect to the conditions for injection set out in SWD-836.

13. Although not stated explicitly in the rules, injection operations must not cause waste or threaten correlative rights. Apparently to address this issue the parties focused their presentations during the hearing of this matter on the potential productivity of the San Andres and Glorieta formations.

14. Pronghorn presented the testimony of a petroleum engineer who testified that he had studied production data, scout ticket data, production test data, log data and other data to reach conclusions concerning the proposed well. He testified that no oil and well in the immediate vicinity of the proposed injection well produced oil or gas from either the San Andres or Glorieta formations in either Section 16 or Section 1. All 35 wells in those sections had penetrated both formations but produced oil and gas only from lower formations such as the Wolfcamp or the Pennsylvania-Strawn. Pronghorn's witness testified that data from electric logs indicated that the resistivity of formation water in the San Andres was 0.165 ohm and 0.86 ohm in the Glorieta; this data demonstrates that the water saturation of the basal San Andres and the upper Glorieta in the vicinity of the proposed injection well exceeds 94 percent. In the two primary zones of permeability, water saturations exceed 98% in the upper interval and 62% in the lower interval. Both zones are therefore wet and will not produce commercial quantities of oil or gas. Pronghorn's expert testified that even though some hydrocarbons are likely present in the reservoir (a "show" of hydrocarbons was seen in the State "T" Well No. 2), the relative permeability of the rock and the water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered. The witness further testified that the nearest production from either the San Andres or the Glorieta formations was six miles south of the proposed injection well.

15. DKD's witness testified it was his intent to drill a well to produce hydrocarbons from "shallow zones" but failed to identify any specific objective and failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas. The witness also testified concerning the potential harm that the proposed injection could cause to DKD's injection well, some 2,000 feet away, but Pronghorn's witness testified that the DKD well was utilizing a zone for disposal that was several thousand feet below the proposed zone. As such, DKD's well is unlikely to be affected by the proposed injection. Furthermore, Pronghorn's expert testified even after nine years of operation at 1,500 barrels per day, water would be swept from the well bore at most 1,320 feet south. Therefore, it is apparent that the proposed well does not pose a danger to DKD's operations or other operations in the vicinity.

16. It thus appears that the Glorieta and San Andres are not productive in the vicinity of the proposed injection well of Pronghorn, that the proposed operation does not

pose a physical threat to DKD's operations, and, since water will be swept at most 1,320 feet from the well in nine years, that the proposed operation poses no hazard to other oil and gas operations in the vicinity.

17. Finally, DKD claims that Pronghorn's application threatens its existing operations and substantial investment in those operations, and could result ultimately in a loss of approximately 35 to 40 percent of its total revenue. This claim cannot be addressed here; the Commission has no authority to regulate competition among commercial disposal operations.

18. DKD also objects to the application of Pronghorn on legal grounds. This is without question the knottiest issue presented in this matter. DKD argues that since Pronghorn only holds surface rights only at the site of the proposed injection and not the mineral rights, Pronghorn does not have authority to inject ~~as it proposes to do~~. DKD argues that Pronghorn must hold a mineral right to inject produced water. DKD argues that since Chesapeake holds the mineral interest, Chesapeake's letter stating it had no objection to the application or the issuance of an injection permit ~~was~~ irrelevant.[1]

19. Pronghorn, citing Snyder Ranches Inc. v. Oil Conservation Commission et al., 110 N.M. 637, 798 P.2d 587 (S.Ct. 1990), seems to argue that subsurface trespass is a matter for the courts, not this body, and that the potential for subsurface trespass is essentially irrelevant in this proceeding.

20. It appears to be undisputed that Pronghorn controls a one-acre parcel at the site of the proposed disposal well. It also appears to be undisputed that Pronghorn does not own the relevant mineral lease underlying the one-acre disposal site; that is owned by Chesapeake, who holds a mineral lease ~~on the tract~~ granted by the State Land Office. It also seems to be undisputed that Chesapeake has acquiesced to the disposal operation proposed by Pronghorn.

21. It would not be responsible for the Commission to grant a salt water disposal permit knowing that the operator has no ~~recognizable~~ interest in the proposed disposal site, as apparently suggested by Pronghorn. While Snyder Ranches seems to suggest that the Commission may have no liability for such acts, it does not seem to us to be a responsible regulatory action. If, for example, an applicant for a salt-water disposal well

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[1] It is ironic that the wrong DKD accuses Pronghorn of committing --- injecting without having a mineral lease --- also appears to have been committed by DKD, ~~because~~ the assignment from Chesapeake to DKD appears not to be valid since it was not approved by the Commissioner of Public Lands pursuant to NMSA 1978, § 19-10-13. *See* paragraph 7, above.

has no good faith claim to title and lacks a good faith belief that it is authorized to use the property on which injection is to occur, this Commission should not blindly issue a permit anyway. *See e.g. In re: the Application of TMBR/Sharp Drilling, Inc. for an Order Staying David H. Arrington Oil & Gas, Inc. from Commencing Operations, Lea County, New Mexico,* Case No.12731, consolidated with *In re: application of TMBR/Sharp Drilling, Inc. Appealing the Hobbs District Supervisor's Decision Denying Approval of Two Applications for Permit to Drill filed by TMBR/Sharp Drilling, Inc., Lea County, New Mexico*, Case No. 12744, Order No. R-11700-B (the New Mexico Oil Conservation Commission).

22. The right to dispose of water produced in connection with oil and gas exploration and production is usually considered to be inherent in the mineral lessee as a part of the lessee's right use so much of the land as is necessary to explore for and remove the oil and gas. But Pronghorn is not the operator of the lease in question, and proposes to operate a commercial facility that will dispose of water from other leases.[2] There appears to be no inherent right to dispose of water on the lease that is produced from another lease, transported to the lease, and proposed for disposal, as is proposed here. *See e.g.* Gill v. McCollum, 19 Ill.App.3d 402, 311 N.E.2d 741 (1974).

23. However, these principles appear to be of doubtful application here, because Pronghorn proposes dispose of produced water in strata that are not productive of oil or gas. These strata may not be subject to the lease Chesapeake holds because the *lessor* may retain rights to use the subsurface not encumbered by an oil and gas or mineral lease. *See e.g.* Jones-Noland Drilling Co. v. Bixby, 34 N.M. 413, 417, 292 P. 382 (S. Ct. 1929):

> While an oil and gas lease, with the right of ingress and egress to explore for, discover, develop, and remove the oil and gas, conveys an interest in real estate, it does not convey an greater interest in the soil, except the oil and gas, than to enable the owner of the lease to use the soil in carrying out and availing the leases of the above-named rights. The fee in the soil, remains in the lessor unencumbered with those rights of the lessee. The lessee ... at most, is the owner of the oil and gas, in place, and merely has the right to use the solid portion so far as necessary to bore for, discover, and bring to the surface the oil and gas.

See also 1 Williams & Myers, Oil and Gas Law § 202 (2001); Yoder & Owen, "Disposal of Produced Water," 37 Rocky Mountain Mineral Law Institute, § 21.02[2].

[2] It is conceivable that during its commercial operations, Pronghorn may be asked to accept produced water from the lease by its operator, Chesapeake.

24. Thus, it appears that mineral lessors (sometimes referred to in these proceedings as the "surface owners") may have some say whether Pronghorn may inject into the non-productive zones underlying their property. Pronghorn is of course the owner of the one-acre parcel immediately adjoining the property, but it is virtual certainty that produced water will be swept farther than this during the course of injection. Pronghorn's witness appeared to testify that water might be swept as far as 1,320 feet during a nine-year period; this encompasses an area greater than one-acre in size. No party has provided information about who owns the remainder of the surface likely to be impacted by the disposal well.

25. Nevertheless, the parties have not addressed this issue, and ~~the parties~~ seem to agree that a salt-water disposal easement must be obtained from the State Land Office before injection operations proposed by Pronghorn can commence. DKD testified that it has obtained such a permit for its disposal well, and Pronghorn appears to be willing to obtain one as well.

26. The parties disagree on the effect of the salt-water disposal easement ~~through the State Land Office.~~ DKD seems to argue that a salt-water disposal easement is authorized under the State Land Office's rules when it is ancillary to oil and gas operations on an existing lease; DKD ~~maintains~~ that an oil or gas lease must be obtained before a salt-water easement will become effective. This is the same problem discussed earlier, and the regulations of the State Land Office ~~are~~ seem consistent with the discussion above. *See* 19.2.11.1 NMAC *et seq.* The regulations expressly state that "... an oil and gas lessee is entitled to use so much of the land as is necessary to explore for and remove the oil and gas, he does not need additional permission of the commissioner to dispose of the salt water upon or under the leased land so long as the water being disposed of is produced exclusively from wells upon the state trust land ..." 19.2.11.8 NMAC. However, where produced water comes from another lease (e.g. a commercial facility like DKD's and the one proposed by Pronghorn), the rules clearly specify that a separate, disposal site easement must be obtained. *Id.* The operator, depending on the circumstances, may also be required to obtain a right of way easement for any needed pipelines, roads or other conveyances. *Id.*

27. Obviously, this body is not qualified to interpret these regulations on behalf of the State Land Office, and this order should therefore be conditioned appropriately. Similarly, this order should be conditioned to address the possibility that consent of the appropriate mineral lessors (surface owners) may be required as well; this should be accomplished by requiring that Pronghorn satisfy itself that parties affected by the proposed discharge have consented and any discharges without such consent are at its own risk.

28. Administrative notice is taken of Order No. SWD-836 and the accompanying file.

IT IS THEREFORE ORDERED THAT:

1. The application of Pronghorn is granted and reinstated The suspension ordered by the Division of Order No. SWD-836 (granting Pronghorn Management Corporation a permit to utilize the State "T" Well No. 2 (API No. 30-025-03735) for injection of produced water) shall be and hereby is lifted. Any discharge made in connection with SWD-836 shall be made consistent with the conditions and limitations imposed in SWD-836.

2. If deemed necessary by the State Land Office, Pronghorn shall secure a salt-water disposal site easement pursuant to 19.2.11.1 NMAC *et seq.* and this order shall be expressly conditioned upon issuance of such a permit if the State Land Office deems it necessary.

3. Pronghorn shall satisfy itself that all parties affected by the proposed discharge (such as mineral lessors or surface owners) have consented to the discharge. Any discharges that Pronghorn makes without such consent shall be made at its own risk.

4. Jurisdiction of this matter is retained for the entry of such further orders as the Commission may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

LORI WROTENBERY, CHAIR

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

S E A L

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 2 STATE TRUST LANDS
PART 11 RELATING TO SALT WATER DISPOSAL SITE EASEMENTS

19.2.11.1 ISSUING AGENCY: Commissioner of Public Lands, New Mexico State Land Office, 310 Old Santa Fe Trail, P. O. Box 1148, Santa Fe, New Mexico 87501, Phone: (505)827-5713
[12/31/99; 19.2.11.1 NMAC – Rn, 19 NMAC 3. SLO 11.1, 09/30/02]

19.2.11.2 SCOPE: This Rule pertains to all salt water disposal site easements on those lands held in trust by the commissioner of public lands under the terms of the Enabling Act and subsequent legislation (trust lands). This Rule governs the grantees of all salt water disposal site easements on such trust lands entered into subsequent to the date of this Rule.
[12/31/99; 19.2.11.2 NMAC – Rn, 19 NMAC 3. SLO 11.2, 09/30/02]

19.2.11.3 STATUTORY AUTHORITY: The commissioner's authority to manage the trust lands is found in N.M. Const., Art. XIII, and in Section 19-1-1 NMSA 1978. The authority to promulgate this Rule is found in Section 19-1-2 NMSA 1978.
[12/31/99; 19.2.11.3 NMAC – Rn, 19 NMAC 3. SLO 11.3, 09/30/02]

19.2.11.4 DURATION: Permanent.
[12/31/99; 19.2.11.4 NMAC – Rn, 19 NMAC 3. SLO 11.4, 09/30/02]

19.2.11.5 EFFECTIVE DATE: January 20, 1984, unless a later date is cited at the end of a section or paragraph. Reformatted in NMAC format effective December 31, 1999.
[12/31/99; 19.2.11.5 NMAC – Rn, 19 NMAC 3. SLO 11.5, 09/30/02]

19.2.11.6 OBJECTIVE: The objective of 19.2.11 NMAC is to provide for the orderly and lawful administration, and the appropriate use and development of salt water disposal site easements on trust lands.
[12/31/99; 19.2.11.6 NMAC – Rn, 19 NMAC 3. SLO 11.6, 09/30/02]

19.2.11.7 DEFINITIONS: [Reserved]
[12/31/99; 19.2.11.7 NMAC – Rn, 19 NMAC 3. SLO 11.7, 09/30/02]

19.2.11.8 APPLICABILITY OF RULES: The following rules govern the issuance of easements upon state trust lands for sites for the underground disposal of salt water produced in connection with oil and gas operations. Because an oil and gas lessee is entitled to use so much of the land as is necessary to explore for and remove the oil and gas, he does not need additional permission of the commissioner to dispose of the salt water upon or under the leased land so long as the water being disposed of is produced exclusively from wells upon the state trust land and so long as it is reasonable under the circumstances to do so. Conversely, if *any* of the salt water to be injected is produced from land not under the applicant's state oil and gas lease, then the applicant, in addition to a disposal site easement, will be required to secure a regular right of way and easement for a pipeline, roadway, or other means of conveyance under the rules pertaining to right of way and easements generally. (See 19.2.10 NMAC "Rules Relating to Easements, and Rights of Way".) Permission to dispose of produced salt water in natural salt lakes, or other surface facilities located upon state trust lands and approved by the New Mexico oil conservation commission, shall be given at the discretion of the commissioner by means of issuance of a "business lease." (See 19.2.9 NMAC " Business Leasing".)
[12/31/99; 19.2.11.8 NMAC – Rn, 19 NMAC 3. SLO 11.8, 09/30/02]

19.2.11.9 LANDS AVAILABLE FOR DISPOSAL SITE EASEMENTS:

A. Subject to the commissioner's right to exercise his discretion, all lands listed as state owned on New Mexico state land office tract books are subject to application for salt water disposal easement sites; however, reference must be had to New Mexico state land office records in each case to determine which prior rights, if any, have been conveyed to or contracted for by third (3rd) parties which would limit or prohibit the commissioner from issuing a salt water disposal site easement. In any case, such easements are issued subject to prior rights.

B. The commissioner reserves the right to refuse to grant an easement when to do so would be detrimental to the trust. The following are some of the factors which may have bearing on the commissioner's decision:

(1) That an abandoned oil or gas well may have greater value for foreseeable future oil or gas production from a different zone.

(2) That the salt water storage space proposed to be used may be needed for disposal of salt water produced from wells on state trust lands in the foreseeable future.

(3) That disposal of salt water in the particular zone may interfere with development and production of oil and gas or other minerals owned by the state of New Mexico in trust.

C. Although applications will be accepted for filing on disposal sites prior to the approval of the disposal

facility or operation by the New Mexico oil conservation division, the commissioner may withhold or deny issuance of the salt water disposal easement pending approval or disapproval by the New Mexico oil conservation division.
[12/31/99; 19.2.11.9 NMAC – Rn, 19 NMAC 3. SLO 11.9, 09/30/02]

19.2.11.10 APPLICATION: Each application for a salt water disposal easement shall be made in ink or typewritten upon forms prescribed and furnished by the commissioner, under oath, and accompanied by the following:

A. a filing fee of thirty dollars ($30.00);

B. a plat showing disposal well and wells from which produced salt water is to be disposed together with pipelines and haul roads;

C. if the land is under an oil and gas lease, the written consent of the record owner that the easement may be issued, or in the event of his refusal to consent, then a statement of the reasons, if any, given for the refusal;

D. statement as to the estimated number of barrels of salt water to be disposed; and

E. a written appraisal of the land made under oath by some disinterested and credible person familiar with the land. All easements, except as to the true value of the land, must be based upon personal knowledge and not upon information and belief.

[12/31/99; 19.2.11.10 NMAC – Rn, 19 NMAC 3. SLO 11.10, 09/30/02]

19.2.11.11 TERM AND CONDITIONS: Salt water disposal site easements shall be issued for five (5) years or less with a preference right of renewal, subject to the commissioner's decision not to continue the easement. The easement shall normally cover not more than two and one half (2 1/2) acres surrounding the proposed injection site. Applicant shall also file an appraisal of the land with regard to the value for water easement purposes made under oath by some disinterested party who is familiar with the land. Such appraisal shall take into account the extent and nature of the use that the application indicates will be made of the surface.
[12/31/99; 19.2.11.11 NMAC – Rn, 19 NMAC 3. SLO 11.11, 09/30/02]

19.2.11.12 CONSIDERATION: Payment for such water disposal easement sites shall be at a negotiated rate but not less than two hundred fifty dollars ($250.00) annual rental.
[12/31/99; 19.2.11.12 NMAC – Rn, 19 NMAC 3. SLO 11.12, 09/30/02]

19.2.11.13 BOND: Before any disposal site easement is issued, the applicant shall post with the commissioner a sufficient bond or undertaking in an amount to be fixed by the commissioner, in favor of the owner of improvements lawfully located upon the land, to secure payment of damage, if any, done to such improvements by reason of the operations of the applicant. Upon written notice to the holder of a salt water disposal site easement, the commissioner may require such holder to fence the site for the protection of the surface user's livestock.
[12/31/99; 19.2.11.13 NMAC – Rn, 19 NMAC 3. SLO 11.13, 09/30/02]

19.2.11.14 ASSIGNMENT - RELINQUISHMENT - CANCELLATION: A disposal site easement may, with the prior written approval of the commissioner, upon such terms and conditions as he may require, and payment of a thirty dollar ($30.00) fee, be assigned to third (3rd) parties or relinquished to the state and the commissioner may cancel such easement for breach or violation of the terms and conditions thereof after thirty (30) days registered notice is given as required by law.
[12/31/99; 19.2.11.14 NMAC – Rn, 19 NMAC 3. SLO 11.14, 09/30/02]

HISTORY OF 19.2.11 NMAC:
Pre-NMAC History: The material in this Part was derived from that previously filed with the State Records Center and Archives under:
CPL 69-5, Rules and Regulations Concerning The Sale, Lease, and Other Disposition of State Trust Lands, filed 09/02/69;
CPL 71-2, filed 12/16/71;
CPL 77-1, filed 01/07/77;
Rule 11, Relating to Salt Water Disposal Site Easements, filed 03/11/81;
SLO Rule 11, filed 01/20/84.

History of Repealed Material: [Reserved]

Charles Mobus Big Bend

cited by Pringhorn:

Cassinos v. Union Oil
18 Cal. Rptr. 2d 574 (subsurface trespass)

Gill v. McCollum.
311 N.E. 2d 741

TDC Engineers v. Dunlap
686 S.W. 2d 346

Farragut v. Massey
612 So. 325

→ DKO salt water easement? p. 5
* don't have one

Feds - W/2
Fee - rest except for Gandy

→ Joe Lopez - not state surface - no easement

7-5756 Bruce Frederick

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

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

CASE NO. 12905

THE APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

ORDER NO. R-11855-B

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (hereinafter referred to as "the Commission") for evidentiary hearing on March 20, 2003 at Santa Fe, New Mexico on application of Pronghorn Management Corporation (hereinafter referred to as "Pronghorn"), *de novo*, opposed by DKD, L.L.C. (hereinafter referred to as "DKD"), and the Commission, having carefully considered the evidence, the pleadings and other materials submitted by the parties hereto, now, on this 17th day of April, 2003,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties and the subject matter herein.

2. This matter is before the Commission on application of Pronghorn for review *de novo*.

3. In this matter, Pronghorn seeks a permit pursuant to Rule 701 of the Rules and Regulations of the Oil Conservation Division, 19.15.9.701 NMAC (11-02-2000), to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose. Disposal is to be accomplished through 2 7/8 inch plastic-lined tubing set in a packer located at approximately 5,590 feet. DKD opposes the application on various grounds.

4. Before moving to the merits of the dispute, the subject of notice should be addressed. Notice was raised as an issue in the Oil Conservation Division's orders and

the parties hereto presented evidence and testimony on the subject during the Division's proceeding (but not during the hearing *de novo*).

5. The rules and regulations of the Oil Conservation Division (hereinafter referred to as "the Division") require that an operator desiring to inject produced water apply for a permit and serve a copy of the application on the "owner of the surface of the land upon which each injection or disposal well is to be located" and "each leasehold operator within one-half mile of the well" proposed for discharge. *See* 19.15.9.701(A) and (B) NMAC.

6. Pronghorn filed an application for administrative approval of the operation described paragraph 3 on April 5, 2002. On April 30, 2002 the Oil Conservation Division (hereinafter referred to as "the Division") issued an Administrative Order, No. SWD-836, and granted the application. Such applications may be approved administratively unless an objection to the Order is filed within fifteen days of issuance. *See* 19.15.9.701(C) NMAC. DKD objected to the application within that time period and advised the Division that it operates a well within one-half mile of the State "T" Well No. 2. DKD also advised the Division that it had not been provided notice of the administrative application as required by Form C-108 and Rule 701, 19.15.9.701(B)(2) NMAC. The Division advised Pronghorn by letter of July 9, 2002 that Order No. SWD-836 would be suspended pending the outcome of a hearing before a Division examiner. On September 5, 2002, the Division conducted a hearing on the matter. The failure to provide notice to DKD apparently formed the basis for the Division's suspension of Order No. SWD-836.

7. As noted, neither party raised the issue during the hearing *de novo* and it further appears that circumstances have changed substantially and notice is not now an issue. For example, as a basis for its protest of Order No. SWD-836, DKD claimed it had not received notice of the application. During the hearing *de novo* it became apparent that although DKD was not in fact notified of the initial application, it was not a record "leasehold operator within one-half mile of the [proposed disposal] well" pursuant to Rule 701, 19.15.9.701(B)(2). When Pronghorn filed its application, it notified the State Land Office, Chesapeake Operating Inc. (hereinafter referred to as "Chesapeake"), Charles B. Gillespie Jr., Pronghorn Management and Energen Resources. In addition, notice of the application was published on March 26, 2002 in the Lovington Daily Leader. Almost six weeks after the application was filed, an assignment from Chesapeake to DKD was recorded (May 14, 2002) but as the assignment does not bear the approval of the State Land Office, its validity is in doubt. *See* NMSA 1978, § 19-1-13 (Repl. 1994). Moreover, the fact that the document was unrecorded at the time the application was filed strongly suggests that notice to Pronghorn's predecessor-in-interest was appropriate. *See* NMSA 1978, § 70-1-2 (Repl. 1995)(effect of failure to record). Nevertheless, after being notified of the potential notice issue, the Division set the matter

for hearing. The subsequent hearing before the Division in which DKD actively participated (as well as the hearing on the application for review *de novo)* cured any defect in initial the application.

8. Another notice issue addressed by the Division concerned notice to surface owners Felipe A. Moreno and Adelaida P. Moreno. It seems to be undisputed that these persons, owners of record of surface rights at the proposed injection site, were not notified of the application in this matter. However, subsequent to the hearing before the Division and prior to the hearing of this matter, those individuals conveyed their interest to Gandy Corporation. Through a letter agreement, Gandy Corporation and Pronghorn have become partners in the proposed disposal operation (along with Marks & Garner) and Gandy Corporation has agreed to the use of the property for purposes of saltwater disposal. It seems this transaction has cured any notice issue with respect to the surface owners as Gandy Corporation has consented to the operation and is a party-in-interest along with the applicant.

9. A final notice issue was obliquely raised by DKD concerning the extent of the perforations through which injection would be accomplished. Initially, notice was provided that injection would be accomplished through perforations located between 6,000 and 6,200 feet. Later, Pronghorn, after a conversation with a Division engineer, requested that it be permitted to inject from 6,000 to 6,400. It does not appear that this defect is material or that DKD was prejudiced by the change, and DKD did not present any evidence tending to indicate that it was prejudiced by the change or that the interval between 6,200 feet and 6,400 was productive of oil or gas.

10. Thus, it appears that notice is not an issue in this matter and we can consider the merits of the application.

11. As noted, Pronghorn proposes to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose.

12. Rules 701 through 708 (19.15.9.701 through 19.15.9.708 NMAC) govern the injection of produced water into any formation. Injection wells must be equipped, operated, monitored and maintained in such a way as to assure mechanical integrity and prevent leaks and fluid movement adjacent to the well bore. *See* 19.15.9.703(A) NMAC. Furthermore, injection wells must be operated and maintained in such a way as to confine the injected fluids into the interval approved and prevent surface damage or pollution. *See* 19.15.9.703(B) NMAC. In no event, will injection operations be permitted to endanger underground sources of drinking water (19.15.9.703(C) NMAC) and such wells must undergo rigorous testing to serve these goals (19.15.9.704 NMAC). Order No.

SWD-836 appears to have addressed each of these points, and the parties have not raised any issue with respect to the conditions for injection set out in SWD-836.

13. Although not stated explicitly in the rules, injection operations must not cause waste or threaten correlative rights. Apparently to address this issue the parties focused their presentations during the hearing of this matter on the potential productivity of the San Andres and Glorieta formations.

14. Pronghorn presented the testimony of a petroleum engineer who testified that he had studied production data, scout ticket data, production test data, log data and other data to reach conclusions concerning the proposed well. He testified that no oil and well in the immediate vicinity of the proposed injection well produced oil or gas from either the San Andres or Glorieta formations in either Section 16 or Section 1. All 35 wells in those sections had penetrated both formations but produced oil and gas only from lower formations such as the Wolfcamp or the Pennsylvania-Strawn. Pronghorn's witness testified that data from electric logs indicated that the resistivity of formation water in the San Andres was 0.165 ohm and 0.86 ohm in the Glorieta; this data demonstrates that the water saturation of the basal San Andres and the upper Glorieta in the vicinity of the proposed injection well exceeds 94 percent. In the two primary zones of permeability, water saturations exceed 98% in the upper interval and 62% in the lower interval. Both zones are therefore wet and will not produce commercial quantities of oil or gas. Pronghorn's expert testified that even though some hydrocarbons are likely present in the reservoir (a "show" of hydrocarbons was seen in the State "T" Well No. 2), the relative permeability of the rock and the water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered. The witness further testified that the nearest production from either the San Andres or the Glorieta formations was six miles south of the proposed injection well.

15. DKD's witness testified it was his intent to drill a well to produce hydrocarbons from "shallow zones" but failed to identify any specific objective and failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas. The witness also testified concerning the potential harm that the proposed injection could cause to DKD's injection well, some 2,000 feet away, but Pronghorn's witness testified that the DKD well was utilizing a zone for disposal that was several thousand feet below the proposed zone. As such, DKD's well is unlikely to be affected by the proposed injection. Furthermore, Pronghorn's expert testified even after nine years of operation at 1,500 barrels per day, water would be swept from the well bore at most 1,320 feet south. Therefore, it is apparent that the proposed well does not pose a danger to DKD's operations or other operations in the vicinity.

16. It thus appears that the Glorieta and San Andres are not productive in the vicinity of the proposed injection well of Pronghorn, that the proposed operation does not

pose a physical threat to DKD's operations, and, since water will be swept at most 1,320 feet from the well in nine years, that the proposed operation poses no hazard to other oil and gas operations in the vicinity.

17. Finally, DKD claims that Pronghorn's application threatens its existing operations and substantial investment in those operations, and could result ultimately in a loss of approximately 35 to 40 percent of its total revenue. This claim cannot be addressed here; the Commission has no authority to regulate competition among commercial disposal operations.

18. DKD also objects to the application of Pronghorn on legal grounds. This is without question the knottiest issue presented in this matter. DKD argues that since Pronghorn only holds surface rights only at the site of the proposed injection and not the mineral rights, Pronghorn does not have authority to inject as it proposes to do. DKD argues that Pronghorn must hold a mineral right to inject produced water. DKD argues that since Chesapeake holds the mineral interest Chesapeake's letter stating it had no objection to the application or the issuance of an injection permit was irrelevant.[1]

19. Pronghorn, citing Snyder Ranches Inc. v. Oil Conservation Commission et al., 110 N.M. 637, 798 P.2d 587 (S.Ct. 1990), seems to argue that subsurface trespass is a matter for the courts, not this body, and that the potential for subsurface trespass is essentially irrelevant in this proceeding.

20. It appears to be undisputed that Pronghorn controls a one-acre parcel at the site of the proposed disposal well. It also appears to be undisputed that Pronghorn does not own the relevant mineral lease underlying the one-acre disposal site; that is owned by Chesapeake, who holds a lease on the tract granted by the State Land Office. It also seems to be undisputed that Chesapeake has acquiesced to the disposal operation proposed by Pronghorn.

21. It would not be responsible for the Commission to grant a salt water disposal permit knowing that the operator has no recognizable interest in the proposed disposal site, as apparently suggested by Pronghorn. While Snyder Ranches seems to suggest that the Commission may have no liability for such acts, it does not seem to us to be a responsible regulatory action. If, for example, an applicant for a salt-water disposal well

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has no good faith claim to title and lacks a good faith belief that it is authorized to use the property on which injection is to occur, this Commission should not blindly issue a permit anyway. *See e.g. In re: the Application of TMBR/Sharp Drilling, Inc. for an Order Staying David H. Arrington Oil & Gas, Inc. from Commencing Operations, Lea County, New Mexico,* Case No.12731, consolidated with *In re: application of TMBR/Sharp Drilling, Inc. Appealing the Hobbs District Supervisor's Decision Denying Approval of Two Applications for Permit to Drill filed by TMBR/Sharp Drilling, Inc., Lea County, New Mexico*, Case No. 12744, Order No. R-11700-B (the New Mexico Oil Conservation Commission).

22. The right to dispose of water produced in connection with oil and gas exploration and production is usually considered to be inherent in the mineral lessee as a part of the lessee's right use so much of the land as is necessary to explore for and remove the oil and gas. But Pronghorn is not the operator of the lease in question, and proposes to operate a commercial facility that will dispose of water from other leases.[2] There appears to be no inherent right to dispose of water on the lease that is produced from another lease, transported to the lease, and proposed for disposal, as is proposed here. *See e.g.* Gill v. McCollum, 19 Ill.App.3d 402, 311 N.E.2d 741 (1974).

23. However, these principles appear to be of doubtful application here, because Pronghorn proposes dispose of produced water in strata that are not productive of oil or gas. These strata may not be subject to the lease Chesapeake holds because it appears that the *lessor* retains rights to use the subsurface not encumbered by an oil and gas or mineral lease. *See e.g.* Jones-Noland Drilling Co. v. Bixby, 34 N.M. 413, 417, 292 P. 382 (S. Ct. 1929):

> While an oil and gas lease, with the right of ingress and egress to explore for, discover, develop, and remove the oil and gas, conveys an interest in real estate, it does not convey an greater interest in the soil, except the oil and gas, than to enable the owner of the lease to use the soil in carrying out and availing the leases of the above-named rights. The fee in the soil, remains in the lessor unencumbered with those rights of the lessee. The lessee ... at most, is the owner of the oil and gas, in place, and merely has the right to use the solid portion so far as necessary to bore for, discover, and bring to the surface the oil and gas.

See also 1 Williams & Myers, Oil and Gas Law § 202 (2001); Yoder & Owen, "Disposal of Produced Water," 37 Rocky Mountain Mineral Law Institute, § 21.02[2].

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[2] It is conceivable that during its commercial operations, Pronghorn may be asked to accept produced water from the lease by its operator, Chesapeake.

24. Thus, it appears that the surface owners in the vicinity may have the sole discretion to grant Pronghorn authority to inject into the non-productive zones under their property. Pronghorn is of course the owner of the one-acre parcel immediately adjoining the property, but it is virtual certainty that produced water will be swept farther than this during the course of injection. Pronghorn's witness appeared to testify that water might be swept as far as 1,320 feet during a nine-year period; this encompasses an area greater than one-acre in size. No party has provided information about who owns the remainder of the surface likely to be impacted by the disposal well.

25. Nevertheless, the parties seem to agree that a salt-water disposal easement must be obtained from the State Land Office before injection operations proposed by Pronghorn can commence on State minerals. DKD testified that it has obtained such a permit, and Pronghorn appears to be willing to obtain one as well.

26. The parties disagree on the effect of the salt-water disposal easement through the State Land Office. DKD seems to argue that a salt-water disposal easement is authorized under the State Land Office's rules when it is ancillary to oil and gas operations on an existing lease; DKD maintains that an oil or gas lease must be obtained before a salt-water easement will become effective. This is the same problem discussed earlier, and the regulations of the State Land Office are consistent with the discussion above. *See* 19.2.11.1 NMAC *et seq.* The regulations expressly state that "... an oil and gas lessee is entitled to use so much of the land as is necessary to explore for and remove the oil and gas, he does not need additional permission of the commissioner to dispose of the salt water upon or under the leased land so long as the water being disposed of is produced exclusively from wells upon the state trust land ..." 19.2.11.8 NMAC. However, where produced water comes from another lease (e.g. a commercial facility like DKD's and the one proposed by Pronghorn), the rules clearly specify that a separate, disposal site easement must be obtained. *Id.* The operator, depending on the circumstances, may also be required to obtain a right of way easement for any needed pipelines, roads or other conveyances. *Id.*

27. In considering whether to issue a "disposal site easement," the State Land Office considers such factors as the value of the well for production of oil and gas from a different zone, whether the formation may be needed for storage of salt water from the State lease instead of commercial storage and whether disposal of salt water will interfere with development of oil and gas from State trust land. *See* 19.2.11.9 NMAC. Easements are issued for five years, and are generally limited in size to two and one-half acres. *See* 19.2.11.11 NMAC. Annual rental is required (19.2.11.12) and financial assurance must be deposited (19.2.11.13 NMAC). The rules recognize that approval of the Division is required before injection operations may begin, and provide that approval of a disposal site easement may be conditioned upon approval of the Division. *See* 19.2.11.9 NMAC.

28. Obviously, this body is not qualified to interpret these regulations on behalf of the State Land Office, and this order should therefore be conditioned appropriately. Similarly, this order should be conditioned to address the possibility that consent of the appropriate mineral lessors may be required as well and that Pronghorn satisfy itself that parties affected by the proposed discharge have consented and any discharges without such consent are at its own risk.

29. Administrative notice is taken of Order No. SWD-836 and the accompanying file.

IT IS THEREFORE ORDERED THAT:

1. The application of Pronghorn is granted. The suspension ordered by the Division of Order No. SWD-836 (granting Pronghorn Management Corporation a permit to utilize the State "T" Well No. 2 (API No. 30-025-03735) for injection of produced water) shall be and hereby is lifted. Any discharge made in connection with SWD-836 shall be made consistent with the conditions and limitations imposed in SWD-836.

2. If deemed necessary by the State Land Office, Pronghorn shall secure a salt-water disposal site easement pursuant to 19.2.11.1 NMAC *et seq.* and this order shall be expressly conditioned upon issuance of such a permit if the State Land Office deems it necessary.

3. Pronghorn shall satisfy itself that all parties affected by the proposed discharge (such as mineral lessors or surface owners) have consented to the discharge. Any discharges that Pronghorn makes without such consent shall be made at its own risk.

4. Jurisdiction of this matter is retained for the entry of such further orders as the Commission may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

LORI WROTENBERY, CHAIR

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

S E A L

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

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

CASE NO. 12905

THE APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

ORDER NO. R-11855-B

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (hereinafter referred to as "the Commission") for evidentiary hearing on March 20, 2003 at Santa Fe, New Mexico on application of Pronghorn Management Corporation (hereinafter referred to as "Pronghorn"), *de novo*, opposed by DKD, L.L.C. (hereinafter referred to as "DKD"), and the Commission, having carefully considered the evidence, the pleadings and other materials submitted by the parties hereto, now, on this 17th day of April, 2003,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties and the subject matter herein.

2. This matter is before the Commission on application of Pronghorn for review *de novo*.

3. In this matter, Pronghorn seeks a permit pursuant to Rule 701 of the Rules and Regulations of the Oil Conservation Division, 19.15.9.701 NMAC (11-02-2000), to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose. Disposal is to be accomplished through 2 7/8 inch plastic-lined tubing set in a packer located at approximately 5,590 feet. DKD opposes the application on various grounds.

4. Before moving to the merits of the dispute, the subject of notice should be addressed. Notice was raised as an issue in the Oil Conservation Division's orders and

the parties hereto presented evidence and testimony on the subject during the Division's proceeding (but not during the hearing *de novo*).

5. The rules and regulations of the Oil Conservation Division (hereinafter referred to as "the Division") require that an operator desiring to inject produced water apply for a permit and serve a copy of the application on the "owner of the surface of the land upon which each injection or disposal well is to be located" and "each leasehold operator within one-half mile of the well" proposed for discharge. *See* 19.15.9.701(A) and (B) NMAC.

6. Pronghorn filed an application for administrative approval of the operation described paragraph 3 on April 5, 2002. On April 30, 2002 the Oil Conservation Division (hereinafter referred to as "the Division") issued an Administrative Order, No. SWD-836, and granted the application. Such applications may be approved administratively unless an objection to the Order is filed within fifteen days of issuance. *See* 19.15.9.701(C) NMAC. DKD objected to the application within that time period and advised the Division that it operates a well within one-half mile of the State "T" Well No. 2. DKD also advised the Division that it had not been provided notice of the administrative application as required by Form C-108 and Rule 701, 19.15.9.701(B)(2) NMAC. The Division advised Pronghorn by letter of July 9, 2002 that Order No. SWD-836 would be suspended pending the outcome of a hearing before a Division examiner. On September 5, 2002, the Division conducted a hearing on the matter. The failure to provide notice to DKD apparently formed the basis for the Division's suspension of Order No. SWD-836.

7. As noted, neither party raised the issue during the hearing *de novo* and it further appears that circumstances have changed substantially and notice is not now an issue. For example, as a basis for its protest of Order No. SWD-836, DKD claimed it had not received notice of the application. During the hearing *de novo* it became apparent that although DKD was not in fact notified of the initial application, it was not a record "leasehold operator within one-half mile of the [proposed disposal] well" pursuant to Rule 701, 19.15.9.701(B)(2). When Pronghorn filed its application, it notified the State Land Office, Chesapeake Operating Inc. (hereinafter referred to as "Chesapeake"), Charles B. Gillespie Jr., Pronghorn Management and Energen Resources. In addition, notice of the application was published on March 26, 2002 in the Lovington Daily Leader. Almost six weeks after the application was filed, an assignment from Chesapeake to DKD was recorded (May 14, 2002) but as the assignment was on a form not approved by the State Land Office and does not bear the approval of the State Land Office, its validity is in doubt. *See* NMSA 1978, § 19-1-13 (Repl. 1994). Moreover, the fact that the document was unrecorded at the time the application was filed strongly suggests that notice to Pronghorn's predecessor-in-interest was appropriate. *See* NMSA 1978, § 70-1-2 (Repl. 1995)(effect of failure to record). Nevertheless, after being

notified of the potential notice issue, the Division set the matter for hearing. The subsequent hearing before the Division in which DKD actively participated (as well as the hearing on the application for review *de novo)* cured any defect in initial the application.

8. Another notice issue addressed by the Division concerned notice to surface owners Felipe A. Moreno and Adelaida P. Moreno. It seems to be undisputed that these persons, owners of record of surface rights at the proposed injection site, were not notified of the application in this matter. However, subsequent to the hearing before the Division and prior to the hearing of this matter, those individuals conveyed their interest to Gandy Corporation. Through a letter agreement, Gandy Corporation and Pronghorn have become partners in the proposed disposal operation (along with Marks & Garner) and Gandy Corporation has agreed to the use of the property for purposes of saltwater disposal. It seems this transaction has cured any notice issue with respect to the surface owners as Gandy Corporation has consented to the operation and is a party-in-interest along with the applicant.

9. A final notice issue was obliquely raised by DKD concerning the extent of the perforations through which injection would be accomplished. Initially, notice was provided that injection would be accomplished through perforations located between 6,000 and 6,200 feet. Later, Pronghorn, after a conversation with a Division engineer, requested that it be permitted to inject from 6,000 to 6,400. It does not appear that this defect is material or that DKD was prejudiced by the change, and DKD did not present any evidence tending to indicate that it was prejudiced by the change or that the interval between 6,200 feet and 6,400 was productive of oil or gas.

10. Thus, it appears that notice is not an issue in this matter and we can consider the merits of the application.

11. As noted, Pronghorn proposes to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose.

12. Rules 701 through 708 (19.15.9.701 through 19.15.9.708 NMAC) govern the injection of produced water into any formation. Injection wells must be equipped, operated, monitored and maintained in such a way as to assure mechanical integrity and prevent leaks and fluid movement adjacent to the well bore. *See* 19.15.9.703(A) NMAC. Furthermore, injection wells must be operated and maintained in such a way as to confine the injected fluids into the interval approved and prevent surface damage or pollution. *See* 19.15.9.703(B) NMAC. In no event, will injection operations be permitted to endanger underground sources of drinking water (19.15.9.703(C) NMAC) and such wells must undergo rigorous testing to serve these goals (19.15.9.704 NMAC). SWD-836

appears to have addressed each of these points, and the parties have not raised any issue with respect to the conditions for injection set out in SWD-836.

13. Although not stated explicitly in the rules, injection operations must not cause waste or threaten correlative rights. Apparently to address this issue the parties focused their presentations during the hearing of this matter on the potential productivity of the San Andres and Glorieta formations.

14. Pronghorn presented the testimony of a petroleum engineer who testified that he had studied production data, scout ticket data, production test data, log data and other data to reach conclusions concerning the proposed well. He testified that no oil and well in the immediate vicinity of the proposed injection well produced oil or gas from either the San Andres or Glorieta formations in either Section 16 or Section 1. All 35 wells in those sections had penetrated both formations but produced oil and gas only from lower formations such as the Wolfcamp or the Pennsylvania-Strawn. Pronghorn's witness testified that data from electric logs indicated that the resistivity of formation water in the San Andres was 0.165 ohm and 0.86 ohm in the Glorieta; this data demonstrates that the water saturation of the basal San Andres and the upper Glorieta in the vicinity of the proposed injection well exceeds 94 percent. In the two primary zones of permeability, water saturations exceed 98% in the upper interval and 62% in the lower interval. Both zones are therefore wet and will not produce commercial quantities of oil or gas. Pronghorn's expert testified that even though some hydrocarbons are likely present in the reservoir (a "show" of hydrocarbons was seen in the State "T" Well No. 2), the relative permeability of the rock and the water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered. The witness further testified that the nearest production from either the San Andres or the Glorieta formations was six miles south of the proposed injection well.

15. DKD's witness testified it was his intent to drill a well to produce hydrocarbons from "shallow zones" but failed to identify any specific objective and failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas. The witness also testified concerning the potential harm that the proposed injection could cause to DKD's injection well, some 2,000 feet away, but Pronghorn's witness testified that the DKD well was utilizing a zone for disposal that was several thousand feet below the proposed zone. As such, DKD's well is unlikely to be affected by the proposed injection. Furthermore, Pronghorn's expert testified even after nine years of operation at 1,500 barrels per day, water would be swept from the well bore at most 1,320 feet south. Therefore, it is apparent that the proposed well does not pose a danger to DKD's operations or other operations in the vicinity.

16. It thus appears that the Glorieta and San Andres are not productive in the vicinity of the proposed injection well of Pronghorn, that the proposed operation does not

pose a physical threat to DKD's operations, and, since water will be swept at most 1,320 feet from the well in nine years, that the proposed operation poses no hazard to other oil and gas operations in the vicinity.

17. Finally, DKD claims that Pronghorn's application threatens its existing operations and substantial investment in those operations, and could result ultimately in a loss of approximately 35 to 40 percent of its total revenue. But this claim cannot be addressed here; the Commission has no authority to regulate competition among commercial disposal operations.

20. DKD also objects to the application of Pronghorn on legal grounds. This is without question the knottiest issue presented in this matter. DKD argues that since Pronghorn only holds surface rights only at the site of the proposed injection and not the mineral rights, Pronghorn does not have authority to inject as it proposes to do. DKD argues that Pronghorn must hold a mineral right to inject produced water. DKD argues that Chesapeake holds the mineral interests, and therefore even Chesapeake's letter stating it had no objection to the injection proposed was relevant.[1]

21. Pronghorn, citing Snyder Ranches Inc. v. Oil Conservation Commission et al., 110 N.M. 637, 798 P.2d 587 (S.Ct. 1990), seems to argue that subsurface trespass is a matter for the courts, not this body, and that the potential for subsurface trespass is essentially irrelevant in this proceeding.

22. It appears to be undisputed that Pronghorn controls a one-acre parcel at the site of the proposed disposal well. It also appears to be undisputed that Pronghorn does not own the relevant mineral lease underlying the one-acre disposal site; that is owned by Chesapeake, who owns a lease on the tract granted by the State Land Office. It also seems to be undisputed that Chesapeake has acquiesced to the disposal operation proposed by Pronghorn. However, the parties provided no information about the surface ownership outside the one-acre disposal site.

23. It would not be responsible for the Commission to grant a salt water disposal permit knowing that the operator has no recognizable interest in the proposed disposal site, as apparently suggested by Pronghorn. While Snyder Ranches seems to suggest that

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[1] It is ironic that the wrong DKD accuses Pronghorn of committing --- injecting without having a mineral lease --- also appears to have been committed by DKD because the assignment from Chesapeake to DKD appears not to be since it appears on the face of the assignment that it was not properly approved by the Commissioner of Public Lands pursuant to NMSA 1978, § 19-10-13. *See* paragraph <>, above.

the Commission may have no liability for such acts, it does not seem to us to be a responsible regulatory action. If, for example, an applicant for a salt-water disposal well has no good faith claim to title and lacks a good faith belief that it is authorized to use the well applied for, this Commission should not blindly issue a permit anyway. *See e.g. In re: the Application of TMBR/Sharp Drilling, Inc. for an Order Staying David H. Arrington Oil & Gas, Inc. from Commencing Operations, Lea County, New Mexico,* Case No.12731, consolidated with *In re: application of TMBR/Sharp Drilling, Inc. Appealing the Hobbs District Supervisor's Decision Denying Approval of Two Applications for Permit to Drill filed by TMBR/Sharp Drilling, Inc., Lea County, New Mexico*, Case No. 12744, Order No. R-11700-B (the New Mexico Oil Conservation Commission).

24. The right to dispose of water produced in connection with oil and gas exploration and production is inherent in the mineral lessee as a part of the lessee's right use so much of the land as is necessary to explore for and remove the oil and gas. But Pronghorn is the operator of the lease in question, and seems to propose to operate a commercial facility that will dispose of water from other leases.[2] There is no inherent right to dispose of water on the lease that is produced from another lease, transported to the lease, and proposed for disposal, as is proposed here. *See e.g.* Gill v. McCollum, 19 Ill.App.3d 402, 311 N.E.2d 741 (1974).

25. The problem here is that Pronghorn proposes to operate a disposal operation in strata that are not productive of oil or gas. These strata may not be subject to the lease Chesapeake holds, because the *lessor* retains rights to use the subsurface not encumbered by an oil and gas or mineral lease. *See e.g.* Jones-Noland Drilling Co. v. Bixby, 34 N.M. 413, 417, 292 P. 382 (S. Ct. 1929):

> While an oil and gas lease, with the right of ingress and egress to explore for, discover, develop, and remove the oil and gas, conveys an interest in real estate, it does not convey an greater interest in the soil, except the oil and gas, than to enable the owner of the lease to use the soil in carrying out and availing the leases of the above-named rights. The fee in the soil, remains in the lessor unencumbered with those rights of the lessee. The lessee ... at most, is the owner of the oil and gas, in place, and merely has the right to use the solid portion so far as necessary to bore for, discover, and bring to the surface the oil and gas.

See also 1 Williams & Myers, Oil and Gas Law § 202 (2001); Yoder & Owen, "Disposal of Produced Water," 37 Rocky Mountain Mineral Law Institute, § 21.02[2].

[2] It is conceivable that during its commercial operations, Pronghorn may be asked to accept produced water from the lease by its operator, Chesapeake.

26. Thus, it appears that the surface owners in the vicinity may have the sole discretion to grant Pronghorn authority to inject into the non-productive zones under their property. Pronghorn is of course the owner of the one-acre parcel immediately adjoining the property, but it is virtual certainty that produced water will be swept farther than this during the course of injection. Pronghorn's witness appeared to testify that water might be swept as far as 1,320 feet during a nine-year period; this encompasses an area greater than one-acre in size. No party has provided information about who owns the remainder of the surface likely to be impacted by the disposal well.

27. It appears, from a review of Division data residing on the Division's computer systems, that the State Land Office does *not* have an interest in the surface in the vicinity of the proposed disposal well; instead it appears that a split estate is present. Therefore, it does not appear that obtaining a salt-water easement from the State Land Office will provide Pronghorn with the necessary authority to operate its disposal well.

30. Nevertheless, the parties seem to agree that a salt-water disposal easement must be obtained from the State Land Office before injection operations proposed by Pronghorn can commence on State minerals. As this appears to be an area where a split estate exists, such a permit may be of limited utility, especially absent a similar easement from the owner of the surface estate. As the parties do not seem to be in disagreement on this issue, we will not elaborate further on this issue.

31. The parties disagree on the effect of the salt-water disposal easement through the State Land Office. DKD seems to argue that a salt-water disposal easement is authorized under the State Land Office's rules when it is ancillary to oil and gas operations on an existing lease; DKD consistently maintains that an oil or gas lease must be obtained before a salt-water easement will become effective. This is the same problem discussed earlier, and the regulations of the State Land Office are consistent with the discussion in pargraphs <> through <>, above. *See* 19.2.11.1 NMAC *et seq*. The regulations expressly state that "... an oil and gas lessee is entitled to use so much of the land as is necessary to explore for and remove the oil and gas, he does not need additional permission of the commissioner to dispose of the salt water upon or under the leased land so long as the water being disposed of is produced exclusively from wells upon the state trust land ..." 19.2.11.8 NMAC. However, where produced water comes from another lease (e.g. a commercial facility like DKD's and the one proposed by Pronghorn), the rules clearly specify that a separate, disposal site easement must be obtained. *Id.* The operator, depending on the circumstances, may also be required to obtain a right of way easement for any needed pipelines, roads or other conveyances. *Id.*

32. In considering whether to issue a "disposal site easement," the State Land Office considers such factors as the value of the well for production of oil and gas from a different zone, whether the formation may be needed for storage of salt water from the

State lease instead of commercial storage and whether disposal of salt water will interfere with development of oil and gas from State trust land. *See* 19.2.11.9 NMAC. Easements are issued for five years, and are generally limited in size to two and one-half acres. *See* 19.2.11.11 NMAC. Annual rental is required (19.2.11.12) and financial assurance must be deposited (19.2.11.13 NMAC). The rules recognize that approval of the Division is required before injection operations may begin, and provide that approval of a disposal site easement may be conditioned upon approval of the Division. *See* 19.2.11.9 NMAC.

33. As Pronghorn does not now possess a salt-water disposal easement but , as described above, permit may not need such a permit to operate as proposed, it would be improper of this body to speculate on whether Pronghorn will be found to meet the criteria specified above and be granted a permit by the State Land Office.

34. One possibility for dealing with this situation is to have the parties return and litigate before this body the subject of the expected area encompassed by the proposed injection operation, and then requiring Pronghorn to obtain consent form each surface owner impacted thereby. However, that would be wasteful of time and resources of the parties and this body. Instead, this order should be conditioned upon Pronghorn satisfying itself that parties affected by the proposed discharge have consented, and that any discharges without such consent are at its own risk.

34. Administrative notice is taken of Order No. SWD-836 and the accompanying file.

IT IS THEREFORE ORDERED THAT:

1. The suspension of Order No. SWD-836, granting Pronghorn Management Corporation a permit to utilize the State "T" Well No. 2 (API No. 30-025-03735) for injection of produced water shall be and hereby is lifted. Any discharge made in connection with SWD-836 shall be made consistent with the conditions and limitations imposed in SWD-836.

2. If deemed necessary by the State Land Office, Pronghorn shall secure a salt-water disposal site easement pursuant to 19.2.11.1 *et seq.* and this order shall be expressly conditioned upon issuance of such a permit if the State Land Office deems it necessary.

3. Pronghorn shall satisfy itself that all parties affected by the proposed discharge have consented to the discharge. Any discharges that Pronghorn makes without such consent shall be made at its own risk.

4. Jurisdiction of this matter is retained for the entry of such further orders as the

Commission may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

LORI WROTENBERY, CHAIR

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

S E A L

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

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

CASE NO. 12905

THE APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

ORDER NO. R-11855-B

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (hereinafter referred to as "the Commission") for evidentiary hearing on March 20, 2003 at Santa Fe, New Mexico on application of Pronghorn Management Corporation (hereinafter referred to as "Pronghorn"), *de novo*, opposed by DKD, L.L.C. (hereinafter referred to as "DKD"), and the Commission, having carefully considered the evidence, the pleadings and other materials submitted by the parties hereto, now, on this 17th day of April, 2003,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties and the subject matter herein.

usual de novo paragraph

2. In this matter, Pronghorn seeks a permit pursuant to Rule 701 of the Rules and Regulations of the Oil Conservation Division, 19.15.9.701 NMAC (11-02-2000), to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose. Disposal is to be accomplished through 2 7/8 inch plastic-lined tubing set in a packer located at approximately 5,590 feet. DKD opposes the application on various grounds.

3. Before moving to the merits of the dispute, the subject of notice should be addressed. Notice was raised as an issue in the Oil Conservation Division's orders and the parties hereto presented evidence and testimony on the subject during the Division's proceeding (but not during the hearing *de novo*).

4. The rules and regulations of the Oil Conservation Division (hereinafter referred to as "the Division") require that an operator desiring to inject produced water apply for a permit and serve a copy of the application on the "owner of the surface of the land upon which each injection or disposal well is to be located" and "each leasehold operator within one-half mile of the well" proposed for discharge. *See* 19.15.9.701(A) and (B) NMAC.

5. ~~This matter first arose on~~ April 5, 2002 ~~when~~ Pronghorn filed ~~its~~ application for administrative approval of the operation described in ~~the previous~~ paragraph. On April 30, 2002 the Oil Conservation Division (hereinafter referred to as "the Division") issued an Administrative Order, No. SWD-836, and granted the application. Such applications may be approved administratively unless an objection to the Order is filed within fifteen days of issuance. *See* 19.15.9.701(C) NMAC. DKD objected to the application within that time period and advised the Division that it operates a well within one-half mile of the State "T" Well No. 2. DKD also advised the Division that it had not been provided notice of the administrative application as required by Form C-108 and Rule 701, 19.15.9.701(B)(2) NMAC. The Division advised Pronghorn by letter of July 9, 2002 that Order No. SWD-836 would be suspended pending the outcome of a hearing before a Division examiner. On September 5, 2002, the Division conducted a hearing on the matter, ~~and on October 28, 2002 the Division issued Order No. R-11855 denying the application. Pronghorn filed for review *de novo* of that decision.~~

6. Notice to DKD apparently formed the basis for the Division's suspension of Order No. SWD-836. ~~As noted, neither party raised the notice issue during the hearing *de novo* and it further appears that circumstances have changed substantially and notice is not now an issue.~~

7. For example, as a basis for its protest of Order No. SWD-836, DKD claimed it had not received notice of the application. During the hearing *de novo* it became apparent that although DKD was not in fact notified of the initial application, it was not a record "leasehold operator within one-half mile of the [proposed disposal] well" pursuant to Rule 701, 19.15.9.701(B)(2). When Pronghorn filed its application, it notified the State Land Office, Chesapeake Operating Inc. (hereinafter referred to as "Chesapeake"), Charles B. Gillespie Jr., Pronghorn Management and Energen Resources. In addition, notice of the application was published on March 26, 2002 in the Lovington Daily Leader. Almost six weeks after the application was filed, an assignment from Chesapeake to DKD was recorded (May 14, 2002) but as the assignment was on a form not approved by the State Land Office and does not bear the approval of the State Land Office, its validity is in doubt. *See* NMSA 1978, § 19-1-13 (Repl. 1994). Moreover, the fact that the document was unrecorded at the time the application was filed strongly suggests that notice to Pronghorn's predecessor-in-interest was appropriate. *See* NMSA 1978, § 70-1-2 (Repl. 1995)(effect of failure to record). Nevertheless, after being

notified of the potential notice issue, the Division set the matter for hearing. The subsequent hearing before the Division in which DKD actively participated (as well as the hearing on the application for review *de novo)* cured any defect in initial the application.

8. Another notice issue addressed by the Division concerned notice to surface owners Felipe A. Moreno and Adelaida P. Moreno. It seems to be undisputed that these persons, owners of record of surface rights at the proposed injection site, were not notified of the application in this matter. However, subsequent to the hearing before the Division and prior to the hearing of this matter, those individuals conveyed their interest to Gandy Corporation. Through a letter agreement, Gandy Corporation and Pronghorn have become partners in the proposed disposal operation (along with Marks & Garner) and Gandy Corporation has agreed to the use of the property for purposes of saltwater disposal. It seems this transaction has cured any notice issue with respect to the surface owners as Gandy Corporation has consented to the operation and is a party-in-interest along with the applicant.

9. A final notice issue was obliquely raised by DKD concerning the extent of the perforations through which injection would be accomplished. Initially, notice was provided that injection would be accomplished through perforations located between 6,000 and 6,200 feet. Later, Pronghorn, after a conversation with a Division engineer, requested that it be permitted to inject from 6,000 to 6,400. It does not appear that this defect is material or that DKD was prejudiced by the change and DKD did not present any evidence tending to indicate that ~~it was prejudiced by the change or that~~ the interval between 6,200 feet and 6,400 was productive of oil or gas. ~~It does not seem to be~~ a ~~material change which might affect our jurisdiction to hear the matter~~.

10. Thus, it appears that notice and jurisdiction of the Commission to hear this matter is present.

11. As noted, Pronghorn proposes to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose.

12. Rules 701 through 708 (19.15.9.701 through 19.15.9.708 NMAC) govern the injection of produced water into any formation for the purpose of water disposal. Applications, as noted, may be administratively approved or a public hearing may be required. Injection wells must be equipped, operated, monitored and maintained in such a way as to assure mechanical integrity and prevent leaks and fluid movement adjacent to the well bore. *See* 19.15.9.703(A) NMAC. Furthermore, injection wells must be operated and maintained in such a way as to confine the injected fluids into the interval approved and prevent surface damage or pollution. *See* 19.15.9.703(B) NMAC. In no

event, will injection operations be permitted to endanger underground sources of drinking water (19.15.9.703(C) NMAC) and such wells must undergo rigorous testing to serve these goals (19.15.9.704 NMAC).

13. And, although not stated explicitly in the rules, injection operations must not cause waste or threaten correlative rights. To address this very important subject, the parties focused their presentations during the hearing of this matter on the potential productivity of the San Andres and Glorieta formations ~~for producing oil or gas in the vicinity of the proposed injection well~~.

14. Pronghorn presented the testimony of a petroleum engineer who testified that he had studied production data, scout ticket data, production test data, log data and other data to reach conclusions concerning the proposed well. He testified that no oil and well in the immediate vicinity of the proposed injection well produced oil or gas from either the San Andres or Glorieta formations in either Section 16 or Section 1. All 35 wells in those sections had penetrated both formations but ~~had~~ produced oil and gas only from lower formations such as the Wolfcamp or the Pennsylvania-Strawn. Pronghorn's witness testified that data from electric logs indicated that the resistivity of formation water in the San Andres was 0.165 ohm and 0.86 ohm in the Glorieta; this data demonstrates that the water saturation of the basal San Andres and the upper Glorieta in the vicinity of the proposed injection well exceeds 94 percent. In the two primary zones of permeability, water saturations exceed 98% in the upper interval and 62% in the lower interval. Both zones are therefore wet and will not produce commercial quantities of oil or gas. Pronghorn's expert testified that even though some hydrocarbons are likely present in the reservoir (a "show" of hydrocarbons ~~is present~~ was seen on the log of the State "T" Well No. 2), the relative permeability of the rock and the water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered. The witness further testified that the nearest production from either the San Andres or the Glorieta formations was six miles south of the proposed injection well.

15. DKD's witness testified it was his intent to drill a well to produce hydrocarbons from "shallow zones" but failed to identify any specific objective and failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas. The witness also testified concerning the potential harm that the proposed injection could cause to DKD's injection well, some 2,000 feet away, but Pronghorn's witness testified that the DKD well was utilizing a zone for disposal that was several thousand feet below the proposed zone. As such, DKD's well is unlikely to be affected by the proposed injection. Furthermore, Pronghorn's expert testified even after nine years of operation at 1,500 barrels per day, water would be swept from the well bore at most 1,320 feet south. Therefore, it is apparent that the proposed well does not pose a danger to DKD's operations or other operations in the vicinity.

16. It thus appears that the Glorieta and San Andres are not productive in the vicinity of the proposed injection well of Pronghorn, that the proposed operation does not pose a physical threat to DKD's operations, and ~~that~~ since water will be swept at most 1,320 feet from the well in nine years, that the proposed operation ~~s~~ poses no hazard to other oil and gas operations in the vicinity. ~~It further appears that the precautions identified by the Division in SWD-836 are adequate to protect fresh water in the area from the injection operations.~~

17. Finally, DKD claims that Pronghorn's application threatens its existing operations and substantial investment in those operations, and could result ultimately in a loss of approximately 35 to 40 percent of its total revenue. But this claim cannot be addressed here; the Commission has no authority to regulate competition among commercial disposal operations.

20. DKD also objects to the application of Pronghorn on legal grounds. This is without question the knottiest issue presented in this matter. DKD argues that since Pronghorn only holds surface rights only at the site of the proposed injection and not the mineral rights, Pronghorn does not have authority to inject as it proposes to do. DKD argues that Pronghorn must hold a mineral right to inject produced water. DKD argues that Chesapeake holds the mineral interests, and therefore even Chesapeake's letter stating it had no objection to the injection proposed was relevant.[1]

21. Pronghorn, citing Snyder Ranches Inc. v. Oil Conservation Commission et al., 110 N.M. 637, 798 P.2d 587 (S.Ct. 1990), seems to argue that subsurface trespass is a matter for the courts, not this body, and that the potential for subsurface trespass is essentially irrelevant in this proceeding.

22. It appears to be undisputed that Pronghorn controls a one-acre parcel at the site of the proposed disposal well. It also appears to be undisputed that Pronghorn does not own the relevant mineral lease underlying the one-acre disposal site; that is owned by Chesapeake, who owns a lease on the tract granted by the State Land Office. It also seems to be undisputed that Chesapeake has acquiesced to the disposal operation proposed by Pronghorn. However, the parties provided no information about the surface ownership outside the one-acre disposal site, or whether other surface owners had consented to the proposed operation.

[1] It is ~~also worth observing~~ ironic that the wrong DKD accuses Pronghorn of committing --- injecting without having a mineral lease --- also appears to have been committed by DKD ~~in its injection operations~~ because the assignment ~~of mineral rights~~ from Chesapeake to DKD ~~may~~ appears not be valid since it appears the assignment was not properly approved by the Commissioner of Public Lands pursuant to NMSA 1978, § 19-10-13. *See* paragraph <>, above.

23. It would be nonsensical for the Commission to grant a salt water disposal permit knowing that the operator has no recognizable interest in the proposed disposal site, as apparently suggested by Pronghorn. While Snyder Ranches seems to suggest that the Commission may have no liability for such acts, it does not seem to us to be a responsible regulatory action. If, for example, an applicant for a salt water disposal well has no good faith claim to title and lacks a good faith belief that it is authorized to use the well applied for, this Commission should not blindly issue a permit anyway. *See e.g. In re: the Application of TMBR/Sharp Drilling, Inc. for an Order Staying David H. Arrington Oil & Gas, Inc. from Commencing Operations, Lea County, New Mexico,* Case No.12731, consolidated with *In re: application of TMBR/Sharp Drilling, Inc. Appealing the Hobbs District Supervisor's Decision Denying Approval of Two Applications for Permit to Drill filed by TMBR/Sharp Drilling, Inc., Lea County, New Mexico*, Case No. 12744, Order No. R-11700-B (the New Mexico Oil Conservation Commission):

> 27. When an application for permit to drill is filed, the Division does not determine whether an applicant can validly claim a real property interest in the property subject to the application, and therefore whether the applicant is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." The Division has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico. The Division so concluded in its Order in this matter. See Order No. R-11700 (December 13, 2001).
>
> 28. It is the responsibility of the operator filing an application for a permit to drill to do so under a good faith claim to title and a good faith belief that it is authorized to drill the well applied for. It appears to this body that Arrington had such a good faith belief when it filed its application, but subsequently the District Court found otherwise. It is not within the purview of this body to question that decision and it should not do so in this case.

24. The right to disposal of salt water is inherent in the mineral lessee as a part of the lessee's right use so much of the land as is necessary to explore for and remove the oil and gas ~~or, as appropriate,~~ the lessor who has retained an interest in the property separate from and apart from the lease of the oil and gas or minerals. *See e.g.* Jones-Noland Drilling Co. v. Bixby, 34 N.M. 413, 417, 292 P. 382 (S. Ct. 1929):

> While an oil and gas lease, with the right of ingress and egress to explore for, discover, develop, and remove the oil and gas, conveys an interest in

> real estate, it does not convey an greater interest in the soil, except the oil and gas, than to enable the owner of the lease to use the soil in carrying out and availing the leases of the above-named rights. The fee in the soil, remains in the lessor unencumbered with those rights of the lessee. The lessee ... at most, is the owner of the oil and gas, in place, and merely has the right to use the solid portion so far as necessary to bore for, discover, and bring to the surface the oil and gas.

See also 1 Williams & Myers, Oil and Gas Law § 202 (2001); Yoder & Owen, "Disposal of Produced Water," 37 Rocky Mountain Mineral Law Institute, § 21.02[2].

25. Of course, the general granting clause of an oil, gas or mineral lease generally grants a lessee the authority to dispose of produced water obtained during production on the lease, but that principle has not been extended to produced water produced from another lease, transported to the lease, and proposed for disposal, as is proposed here. *See e.g.* Gill v. McCollum, 19 Ill.App.3d 402, 311 N.E.2d 741 (1974). The lessor retains rights to use the subsurface not encumbered by an oil and gas or mineral lease for his or her own purposes, including for disposal of produced water.

26. Thus, it appears that the surface owners in the vicinity may have the sole discretion to grant Pronghorn authority to inject into the non-productive zones under their property. But Pronghorn has not presented evidence on this issue, and we do not even have information about who those persons or entities are, excepting the one-acre parcel at the disposal site.

27. It appears, from a review of Division data residing on the Division's computer systems, that the State Land Office does *not* have an interest in the surface in the vicinity of the proposed disposal well; instead it appears that a split estate is present. Therefore, it does not appear that obtaining a salt water easement from the State Land Office will provide Pronghorn with the necessary authority to operate its disposal well.

29. Pronghorn owns a one-acre parcel at the injection well, but it is virtual certainty that produced water will be swept farther than this during the course of injection. Pronghorn's witness appeared to testify that water might be swept as far as 1,320 feet during a nine-year period; this encompasses an area greater than one-acre in size.

30. Nevertheless, the parties seem to agree that a salt-water disposal easement must be obtained from the State Land Office before injection operations proposed by Pronghorn can commence on State minerals. As this appears to be an area where a split estate exists, such a permit may be of limited utility, especially absent a similar easement

from the owner of the surface estate. As the parties do not seem to be in disagreement on this issue, we will not elaborate further on this issue.

31. The parties do disagree on the effect of the salt-water disposal easement through the State Land Office. DKD seems to argue that a salt-water disposal easement is authorized under the State Land Office's rules when it is ancillary to oil and gas operations on an existing lease; DKD consistently maintains that an oil or gas lease must be obtained before a salt water easement will become effective. The regulations of the State Land Office, however, seem to indicate to the contrary. *See* 19.2.11.1 NMAC *et seq*. The expressly state that "... an oil and gas lessee is entitled to use so much of the land as is necessary to explore for and remove the oil and gas, he does not need additional permission of the commissioner to dispose of the salt water upon or under the leased land so long as the water being disposed of is produced exclusively from wells upon the state trust land ..." 19.2.11.8 NMAC. However, where produced water comes from another lease (e.g. a commercial facility like DKD's and the one proposed by Pronghorn), the rules clearly specify that a separate, disposal site easement must be obtained. *Id.* The operator, depending on the circumstances, may also be required to obtain a right of way easement for any needed pipelines, roads or other conveyances. *Id.*

32. In considering whether to issue a "disposal site easement," the State Land Office considers such factors as the value of the well for production of oil and gas from a different zone, whether the formation may be needed for storage of salt water from the State lease instead of commercial storage and whether disposal of salt water will interfere with development of oil and gas from State trust land. *See* 19.2.11.9 NMAC. Easements are issued for five years, and are generally limited in size to two and one-half acres. *See* 19.2.11.11 NMAC. Annual rental is required (19.2.11.12) and financial assurance must be deposited (19.2.11.13 NMAC). The rules recognize that approval of the Division is required before injection operations may begin, and provide that approval of a disposal site easement may be conditioned upon approval of the Division. *See* 19.2.11.9 NMAC.

33. As Pronghorn does not now possess a salt-water disposal easement and it would be improper of this body to speculate on whether Pronghorn will be found to meet the criteria specified above, this order should be conditioned on Pronghorn successfully obtaining a permit. The order should also revoke the suspension of Order No. SWD-836, granting Pronghorn a permit to dispose of produced water in the State "T" No. 2, but conditioned as specified in Order No. SWD-836.

34. Administrative notice is taken of Order No. SWD-836 and the accompanying file.

IT IS THEREFORE ORDERED THAT:

1. The suspension of Order No. SWD-836, granting Pronghorn Management Corporation a permit to utilize the State "T" Well No. 2 (API No. 30-025-03735) for injection of produced water shall be and hereby is lifted, so long as Pronghorn secures form the New Mexico State Land Office a salt water disposal site easement pursuant to 19.2.11.1 *et seq.*

2. Jurisdiction of this matter is retained for the entry of such further orders as the Commission may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

LORI WROTENBERY, CHAIR

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

S E A L

Ross, Stephen

From: Bailey, Jami
Sent: Wednesday, April 16, 2003 3:39 PM
To: Ross, Stephen
Subject: RE: Application of Pronghorn Management

Bruce Frederick looked over the draft, and he has no problem with it. I found some typo's:

Finding paragraph 7 "Moreover, the fact that the document was unrecorded at the time the application was filed strongly suggests that notice to ~~Pronghorn's~~ DKD's predecessor-in-interest...."

Finding paragraph 14 Delete the word "and" in the sentence "He testified that no oil ~~and~~ well in the immediate vicinity...."

Finding paragraph 22 Insert "to" in "...part of the lessee's right to use so much of the land...."

Finding paragraph 23 Insert "to" in "...Pronghorn proposes to dispose of produced water...."
Indented paragraph, delete "an" in "...real estate, it does no convey ~~an~~ greater interest in the soil...."

Finding paragraph 24 When you equate "mineral lessors" and "surface owners" in this section and in paragraphs 27 and order #3, real confusion takes hold because in this section the mineral lessor (the SLO) is NOT the surface owner! Could you eliminate the parenthetical info in #24, make it "mineral lessors and surface owners" in #27and #3?

By the way, DKD is in trespass with us since they do not have a SWD easement, and the SLO is going after them.

-----Original Message-----
From: Ross, Stephen
Sent: Wednesday, April 16, 2003 10:24 AM
To: Wrotenbery, Lori; Bailey, Jami; 'lee@nmt.edu'
Subject: Application of Pronghorn Management
Importance: High

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Commissioners,

After doing quite a bit of legal research, discussing this matter with Jami, Bruce Frederick and briefly with Lori, I offer the following draft. This is a very difficult case, and as far as I can tell, the parties don't even understand how difficult it is. The research I have done strongly suggests that the surface owner retains rights to govern the use of nonproductive formations; the parties have not even addressed this issue, except that Pronghorn purchased the one acre parcel at the wellhead (I believe they did this to correct a notice problem). We don't have any information on who controls the surface from the parties.

The parties appear to be focused on obtaining a salt water easement from the SLO, but this is an area of split estate where the SLO does not control the surface, so I'm not sure that getting a salt water easement helps. I have spoken to Bruce Frederick, and he said the SLO would be willing to consider issuing them a permit as a precaution against a trespass action.

The parties are so off-base that it's difficult to know how to proceed. The order I've drafted is conditioned upon Pronghorn obtaining a salt water easement from SLO (if they deem it necessary or advisable). It's also conditioned upon Pronghorn getting permission from surface owners "if necessary." I added language informing Pronghorn that if they don't get permission from surface owners, they would be injecting at their "own risk."

Another approach (and I have a draft ready on this as well) is to make them come back and address the surface issue

Stephen C. Ross
Assistant General Counsel
Energy, Minerals and Natural Resources Department
Oil Conservation Commission
1220 S. St. Francis Dr.
Santa Fe, New Mexico 87505
(505) 476-3451

directly --- but this means another hearing, and I'm not sure we want to engraft another requirement on the SWD permit in cases where a split estate exists that would make an applicant prove how far the water will be swept and that they have obtained approval of each surface owner affected. This is a policy decision that is yours to make.

Let me know what you think.

Steve

<< File: Order-No-R-11855-B-4-7-03-v2.doc >>

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451

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4.16
11 am

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

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

CASE NO. 12905

THE APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

ORDER NO. R-11855-B

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (hereinafter referred to as "the Commission") for evidentiary hearing on March 20, 2003 at Santa Fe, New Mexico on application of Pronghorn Management Corporation (hereinafter referred to as "Pronghorn"), *de novo*, opposed by DKD, L.L.C. (hereinafter referred to as "DKD"), and the Commission, having carefully considered the evidence, the pleadings and other materials submitted by the parties hereto, now, on this 17th day of April, 2003,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties and the subject matter herein.

2. This matter is before the Commission on application of Pronghorn for review *de novo*.

3. In this matter, Pronghorn seeks a permit pursuant to Rule 701 of the Rules and Regulations of the Oil Conservation Division, 19.15.9.701 NMAC (11-02-2000) to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose. Disposal is to be accomplished through 2 7/8 inch plastic-lined tubing set in a packer located at approximately 5,590 feet. DKD opposes the application on various grounds.

4. Before moving to the merits of the dispute, the subject of notice should be addressed. Notice was raised as an issue in the Oil Conservation Division's orders and

the parties hereto presented evidence and testimony on the subject during the Division's proceeding (but not during the hearing *de novo*).

5. The rules and regulations of the Oil Conservation Division (hereinafter referred to as "the Division") require that an operator desiring to inject produced water apply for a permit and serve a copy of the application on the "owner of the surface of the land upon which each injection or disposal well is to be located" and "each leasehold operator within one-half mile of the well" proposed for discharge. *See* 19.15.9.701(A) and (B) NMAC.

6. Pronghorn filed an application for administrative approval of the operation described paragraph 3 on April 5, 2002. On April 30, 2002 the Oil Conservation Division (hereinafter referred to as "the Division") issued Administrative Order No. SWD-836 granting the application. Such applications may be approved administratively unless an objection to the Order is filed within fifteen days of issuance. *See* 19.15.9.701(C) NMAC. DKD objected to the application within that time period and advised the Division that it operates a well within one-half mile of the State "T" Well No. 2. DKD also advised the Division that it had not been provided notice of the administrative application as required by Form C-108 and Rule 701, 19.15.9.701(B)(2) NMAC. The Division advised Pronghorn by letter of July 9, 2002 that Order No. SWD-836 would be suspended pending the outcome of a hearing before a Division examiner. On September 5, 2002, the Division conducted a hearing on the matter. The failure to provide notice to DKD apparently formed the basis for the Division's suspension of Order No. SWD-836.

7. ~~As noted, neither party raised the issue during the hearing *de novo* and~~ It further appears that circumstances have changed substantially. For example, as a basis for its protest of Order No. SWD-836, DKD claimed it had not received notice of the application. During the hearing *de novo* it became apparent that although DKD was not in fact notified of the initial application, it was not a record "leasehold operator within one-half mile of the [proposed disposal] well" pursuant to Rule 701, 19.15.9.701(B)(2). When Pronghorn filed its application, it notified the State Land Office, Chesapeake Operating Inc. (hereinafter referred to as "Chesapeake"), Charles B. Gillespie Jr., Pronghorn Management and Energen Resources. In addition, notice of the application was published on March 26, 2002 in the Lovington Daily Leader. Almost six weeks after the application was filed, an assignment from Chesapeake to DKD was recorded (May 14, 2002) but as the assignment does not bear the approval of the State Land Office, its validity is in doubt. *See* NMSA 1978, § 19-1-13 (Repl. 1994). Moreover, the fact that the document was unrecorded at the time the application was filed strongly suggests that notice to Pronghorn's predecessor-in-interest was appropriate. *See* NMSA 1978, § 70-1-2 (Repl. 1995)(effect of failure to record). Nevertheless, after being notified of the potential notice issue, the Division set the matter for hearing. The subsequent hearing

before the Division in which DKD actively participated (as well as during the hearing on the application for review *de novo)* cured any defect in the application.

8. Another notice issue addressed by the Division concerned notice to surface owners Felipe A. Moreno and Adelaida P. Moreno. It seems to be undisputed that these persons, owners of record of surface rights at the proposed injection site, were not notified of the application in this matter. However, subsequent to the hearing before the Division and prior to the hearing of this matter, those individuals conveyed their interest to Gandy Corporation. Through a letter agreement, Gandy Corporation and Pronghorn have become partners in the proposed disposal operation (along with Marks & Garner) and Gandy Corporation has agreed to the use of the property for purposes of saltwater disposal. It seems this transaction has cured any notice issue with respect to the surface owner.

9. A final notice issue was obliquely raised by DKD concerning the extent of the perforations through which injection would be accomplished. Initially, notice was provided that injection would be accomplished through perforations located between 6,000 and 6,200 feet. Later, Pronghorn, after a conversation with a Division engineer, requested that it be permitted to inject from 6,000 to 6,400. It does not appear that this defect is material or that DKD was prejudiced by the change.

10. Thus, it appears that notice is not an issue in this matter and we can consider the merits of the application.

11. As noted, Pronghorn proposes to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose.

12. Rules 701 through 708 (19.15.9.701 through 19.15.9.708 NMAC) govern the injection of produced water into any formation. Injection wells must be equipped, operated, monitored and maintained in such a way as to assure mechanical integrity and prevent leaks and fluid movement adjacent to the well bore. *See* 19.15.9.703(A) NMAC. Furthermore, injection wells must be operated and maintained in such a way as to confine the injected fluids into the interval approved and prevent surface damage or pollution. *See* 19.15.9.703(B) NMAC. In no event will injection operations be permitted to endanger underground sources of drinking water (19.15.9.703(C) NMAC) and such wells must undergo rigorous testing to serve these goals (19.15.9.704 NMAC). Order No. SWD-836 appears to have addressed each of these points, and the parties have not raised any issue with respect to the conditions for injection set out in SWD-836.

13. Although not stated explicitly in the rules, injection operations must not cause waste or threaten correlative rights. Apparently to address this issue the parties focused

their presentations during the hearing of this matter on the potential productivity of the San Andres and Glorieta formations.

14. Pronghorn presented the testimony of a petroleum engineer who testified that he had studied production data, scout ticket data, production test data, log data and other data to reach conclusions concerning the proposed well. He testified that no oil and well in the immediate vicinity of the proposed injection well produced oil or gas from either the San Andres or Glorieta formations in either Section 16 or Section 1. All 35 wells in those sections had penetrated both formations but produced oil and gas only from lower formations such as the Wolfcamp or the Pennsylvania-Strawn. Pronghorn's witness testified that data from electric logs indicated that the resistivity of formation water in the San Andres was 0.165 ohm and 0.86 ohm in the Glorieta; this data demonstrates that the water saturation of the basal San Andres and the upper Glorieta in the vicinity of the proposed injection well exceeds 94 percent. In the two primary zones of permeability, water saturations exceed 98% in the upper interval and 62% in the lower interval. Both zones are therefore wet and will not produce commercial quantities of oil or gas. Pronghorn's expert testified that even though some hydrocarbons are likely present in the reservoir (a "show" of hydrocarbons was seen in the State "T" Well No. 2), the relative permeability of the rock and the water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered. The witness further testified that the nearest production from either the San Andres or the Glorieta formations was six miles south of the proposed injection well.

15. DKD's witness testified it was his intent to drill a well to produce hydrocarbons from "shallow zones" but failed to identify any specific objective and failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas. The witness also testified concerning the potential harm that the proposed injection could cause to DKD's injection well, some 2,000 feet away, but Pronghorn's witness testified that the DKD well was utilizing a zone for disposal that was several thousand feet below the proposed zone. As such, DKD's well is unlikely to be affected by the proposed injection. Furthermore, Pronghorn's expert testified even after nine years of operation at 1,500 barrels per day, water would be swept from the well bore at most 1,320 feet south. Therefore, it is apparent that the proposed well does not pose a danger to DKD's operations or other operations in the vicinity.

16. It thus appears that the Glorieta and San Andres are not productive in the vicinity of the proposed injection well of Pronghorn, that the proposed operation does not pose a physical threat to DKD's operations, and, since water will be swept at most 1,320 feet from the well in nine years, that the proposed operation poses no hazard to other oil and gas operations in the vicinity.

17. Finally, DKD claims that Pronghorn's application threatens its existing operations and substantial investment in those operations and could result ultimately in a loss of approximately 35 to 40 percent of its total revenue. This claim cannot be addressed here; the Commission has no authority to regulate competition among commercial disposal operations.

18. DKD also objects to the application of Pronghorn on legal grounds. This is without question the knottiest issue presented in this matter. DKD argues that since Pronghorn only holds surface rights ~~only~~ at the site of the proposed injection, ~~and not the mineral rights,~~ Pronghorn does not have authority to inject. DKD argues that Pronghorn must hold a mineral right to inject produced water. DKD argues that since Chesapeake holds the mineral interest, Chesapeake's letter stating it had no objection to the application or the issuance of an injection permit is irrelevant.[1]

19. Pronghorn, citing Snyder Ranches Inc. v. Oil Conservation Commission et al., 110 N.M. 637, 798 P.2d 587 (S.Ct. 1990), seems to argue that subsurface trespass is a matter for the courts, not this body, and that the potential for subsurface trespass is essentially irrelevant in this proceeding.

20. It appears to be undisputed that Pronghorn controls a one-acre parcel at the site of the proposed disposal well. It also appears to be undisputed that Pronghorn does not own the relevant mineral lease underlying the one-acre disposal site; that is owned by Chesapeake, who holds a ~~mineral~~ oil & gas lease granted by the State Land Office. It also seems to be undisputed that Chesapeake has acquiesced to the disposal operation proposed by Pronghorn.

21. It would not be responsible for the Commission to grant a salt water disposal permit knowing that the operator has no interest in the proposed disposal site, as apparently suggested by Pronghorn. While Snyder Ranches seems to suggest that the Commission may have no liability for such acts, it does not seem to us to be a responsible regulatory action. If, for example, an applicant for a salt-water disposal well has no good faith claim to title and lacks a good faith belief that it is authorized to use the property on which injection is to occur, this Commission should not blindly issue a permit anyway. *See e.g. In re: the Application of TMBR/Sharp Drilling, Inc. for an Order Staying David H. Arrington Oil & Gas, Inc. from Commencing Operations, Lea County, New Mexico,*

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[1] It is ironic that the wrong DKD accuses Pronghorn of committing --- injecting without having a mineral lease --- also appears to have been committed by DKD. The assignment from Chesapeake to DKD appears not to be valid since it was not approved by the Commissioner of Public Lands pursuant to NMSA 1978, § 19-10-13. *See* paragraph 7, above.

Case No.12731, consolidated with *In re: application of TMBR/Sharp Drilling, Inc. Appealing the Hobbs District Supervisor's Decision Denying Approval of Two Applications for Permit to Drill filed by TMBR/Sharp Drilling, Inc., Lea County, New Mexico*, Case No. 12744, Order No. R-11700-B (the New Mexico Oil Conservation Commission).

22. The right to dispose of water produced in connection with oil and gas exploration and production is usually considered to be inherent in the mineral lessee as a part of the lessee's right use so much of the land as is necessary to explore for and remove the oil and gas. But Pronghorn is not the operator of the lease in question, and proposes to operate a commercial facility that will dispose of water from other leases. The typical oil and gas lease does not appear to grant inherent rights to dispose of water that is produced from another lease, transported to the lease, and proposed for disposal, as is proposed here.

23. However, these principles appear to be of doubtful application here, because Pronghorn proposes dispose of produced water in strata that are not productive of oil or gas. These strata may not be subject to the lease Chesapeake holds because the *lessor* may retain rights to use the subsurface not encumbered by an oil and gas or mineral lease:

> While an oil and gas lease, with the right of ingress and egress to explore for, discover, develop, and remove the oil and gas, conveys an interest in real estate, it does not convey an greater interest in the soil, except the oil and gas, than to enable the owner of the lease to use the soil in carrying out and availing the leases of the above-named rights. The fee in the soil, remains in the lessor unencumbered with those rights of the lessee. The lessee ... at most, is the owner of the oil and gas, in place, and merely has the right to use the solid portion so far as necessary to bore for, discover, and bring to the surface the oil and gas.

Jones-Noland Drilling Co. v. Bixby, 34 N.M. 413, 417, 292 P. 382 (S. Ct. 1929). *See also* 1 Williams & Myers, Oil and Gas Law § 202 (2001); Yoder & Owen, "Disposal of Produced Water," 37 Rocky Mountain Mineral Law Institute, § 21.02[2].

24. Thus, it appears that mineral lessors (sometimes referred to in these proceedings as the "surface owners") may have some say whether Pronghorn may inject into the non-productive zones underlying their property. Pronghorn is of course the owner of the one-acre parcel immediately adjoining the property, but it is virtual certainty that produced water will be swept farther than this during the course of injection. Pronghorn's witness appeared to testify that water might be swept as far as 1,320 feet during a nine-year period; this encompasses an area greater than one-acre in size. No

party has provided information about who owns the remainder of the surface likely to be impacted by the disposal well.

25. Nevertheless, the parties have not addressed this issue at all and Pronghorn appears to harbor a good faith belief that it has authority to inject. or will obtain (FN)

26. The parties seem to agree that a salt-water disposal easement must be obtained from the State Land Office before injection operations proposed by Pronghorn may ~~can~~ commence. DKD testified that it has obtained such a permit for its disposal well, and Pronghorn appears ~~to be~~ willing to obtain a permit as well.

26. The parties disagree on the effect of the salt-water disposal easement. DKD seems to argue that a salt-water disposal easement is authorized under the State Land Office's rules when it is ancillary to oil and gas operations on an existing lease; DKD seems to argue that an oil or gas lease must be obtained before a salt-water easement will become effective. This is the same problem discussed earlier, and the regulations of the State Land Office seem consistent with the discussion above. *See* 19.2.11.1 NMAC *et seq.* The regulations expressly state that "... an oil and gas lessee is entitled to use so much of the land as is necessary to explore for and remove the oil and gas, he does not need additional permission of the commissioner to dispose of the salt water upon or under the leased land so long as the water being disposed of is produced exclusively from wells upon the state trust land ..." 19.2.11.8 NMAC. However, where produced water comes from another lease (e.g. a commercial facility like DKD's and the one proposed by Pronghorn), the rules clearly specify that a separate, disposal site easement must be obtained. *Id.* The operator, depending on the circumstances, may also be required to obtain a right of way easement for any needed pipelines, roads or other conveyances. *Id.*

27. Obviously, this body is not qualified to interpret these regulations on behalf of the State Land Office, and this order should therefore be conditioned appropriately. Similarly, this order should be conditioned to address the possibility that consent of the appropriate mineral lessors (surface owners) may be required as well; this should be accomplished by requiring that Pronghorn satisfy itself that parties affected by the proposed discharge have consented and any discharges without such consent are at its own risk.

28. Administrative notice is taken of Order No. SWD-836 and the accompanying file.

IT IS THEREFORE ORDERED THAT:

1. The application of Pronghorn is granted and Order No. SWD-836 (granting Pronghorn Management Corporation a permit to utilize the State "T" Well No. 2 (API No. 30-025-03735) for injection of produced water) shall be and hereby is reinstated.

2. Pronghorn shall secure a salt-water disposal site easement pursuant to 19.2.11.1 NMAC *et seq.* if deemed necessary or advisable by the State Land Office and this order shall be expressly conditioned upon issuance of such a permit in such circumstance.

3. Pronghorn shall satisfy itself that all parties affected by the proposed discharge (such as mineral lessors/surface owners) have consented to the discharge. Any discharges that Pronghorn makes without such consent shall be ~~made~~ at its own risk.

4. Jurisdiction of this matter is retained for the entry of such further orders as the Commission may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

LORI WROTENBERY, CHAIR

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

S E A L

34 N.M. 413, 282 P. 382 JONES-NOLAND DRILLING CO. V. BIXBY (S. Ct. 1929)
1929 N.M. Lexis 91

JONES-NOLAND DRILLING CO.

vs.

BIXBY

No. 3291
SUPREME COURT OF NEW MEXICO
34 N.M. 413, 282 P. 382, 1929 N.M. LEXIS 91
November 06, 1929

Appeal from District Court, Eddy County; Brice, Judge.

Action by Jones-Noland Drilling Company, a copartnership whose members are James L. Noland and others, against Phillip L. Bixby. From the judgment, defendant appeals.

SYLLABUS

SYLLABUS BY THE COURT

1. The trial court properly taxed as costs the necessary expenses of the sheriff in keeping and preserving attached personal property in his possession and control.

2. Findings of fact of the trial court supported by substantial evidence will not be disturbed on appeal.

3. Where property is attached and is under the control of the sheriff, and judgment is awarded the attaching creditor and the court orders that, unless the judgment is paid immediately, the property be sold by the sheriff in the manner provided by law, and the rules of the court relative to the sale of the property upon execution, and the judgment debtor pays the judgment prior to the sale, it is not error to tax as costs the commissions provided for in section 1267, Code 1915.

COUNSEL

Reese & Reese, of Roswell, for appellant.
Reid, Hervey, Dow & Hill, of Roswell, for appellee.

JUDGES

Bickley, C. J. Watson and Parker, JJ., concur. Catron and Simms, JJ., did not participate.
AUTHOR: BICKLEY

OPINION

*{*414}* OPINION OF THE COURT This is an action wherein plaintiff (appellee) caused to be attached all the right, title, and interest of defendant (appellant) in and to "the real estate, oil-well, rig, pump equipment, oil and water storage tanks, and machinery situated upon and being the land described as," etc.

The case was tried before the court and judgment entered in favor of plaintiff against the defendant, together with costs of suit. The judgment further provided that, unless the judgment

was paid immediately, the sheriff should sell the property attached "at public sale, under the laws and rules of this court relative to sales of property upon execution," etc.

After the property had been duly advertised for sale, the plaintiff and defendant entered into a stipulation whereby defendant paid the judgment and interest accrued, and a portion of the costs, and deposited in escrow in the First National Bank of Roswell the sum of $ 866.86 to cover costs found by the district court to be due, and provided for the disposition of said sum in a manner dependent upon the decision of said court.

Upon the hearing of plaintiff's motion to retax the costs, upon the evidence the court found as facts, among other things, that certain described land upon which said property of defendant was situated was leased from the state of New Mexico, and was evidenced by an ordinary *{*415}* form of oil and gas lease, which, among others, contained the following provisions:

> "And with the right of removing, either during or after the term hereof, all and any improvements placed or erected on the premises by the lessee, including the right to pull all casing, subject, however, to the conditions hereinafter set out.
>
> "16. In drilling wells, all water bearing strata shall be noted in the log, and the lessor reserves the right to require that all or any part of the casing shall be left in any non-productive well when the lessor deems it to the interest of the State of New Mexico to maintain said well or wells for water. For such casing so left in wells, the lessor shall pay or cause to be paid, the lessee the reasonable value thereof."
>
> "18. The lessee shall not remove any machinery or fixtures placed on said premises nor draw the casing from any well unless and until all payments and obligations due the lessor under the terms of this agreement shall have been paid or satisfied. The lessee's right to remove the casing is subject to the provisions of paragraph 16 above."

The court further found that said lease had been assigned to said plaintiff, and under the terms thereof an oil well was drilled that was, at the time of the trial, a commercial producing well; that said property of defendant was all attached to the real estate and used for the purpose of pumping oil from the well and for taking same to the pipe line, and with the intention on the part of the defendant that said property should be used in pumping and extracting oil from the oil well located on said leased land, so long as the well should produce oil in commercial or paying quantities; that the sheriff had charge of all said property and placed his agent there to look after the same; that the agent did not live right at the property, but some distance away, but visited it sufficiently to give it proper care and custody; that a caretaker or guard was necessary to protect said property; that the sheriff charged mileage to relieve the guard, $ 9.25; that the sheriff charged the full commissions as though the property had been attached, advertised, and sold, though such property was attached and advertised but not sold.

The court concluded as a matter of law from the facts found that the property in question was personal property, in that, under the original contract with the state, the lessee {*416} had the right to remove the property from the leased land, it being the intention that the property should remain the lessee's, and that, under such circumstances, the property was personal and subject to attachment, and was properly in the care and custody of the sheriff; that the sheriff was only entitled to one-half of the fees given by law for the sale of property under attachment, for the reason that the property was not sold. The court allowed the item of $ 9.25 for mileage to relieve the guard.

Counsel for appellant have grouped their assignments of error into three fundamental questions, which they represent as the main issues involved. They are:

"I. Did the Court err in ordering taxed as costs in said cause, the per diem of guard, alleged to be in charge of the attached property from 12/2/25 to 6/4/26, 194 days at $ 4.00, $ 776.00?

"II. Did the Court err in ordering taxed as costs, Mileage to relieve alleged guard, 74 Miles at 12 I/2 cent, $ 9.25?

"III. Did the District Court err in ordering taxed as costs, commission on collection of alleged execution 3 days before date set for sale.

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I/2 of 4% of $ 500.00          $ 10.00
I/2 of 2% of $ 3,134.17          31.34?"
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We will consider these questions in the order stated.

Appellant's first point is based primarily upon the contention that the property attached in this case was real estate, and therefore no guards' fees could be taxed.

In determining whether personal property loses or retains its identity as a chattel by being placed on land, it is generally said that the intention of the parties is a controlling factor. 26 C. J. Fixtures, § 5. An agreement by the owner of the land in favor of the owner of the article at the time of annexation to the effect that the article may be removed as personalty operates to preserve the personal character of the article annexed. 26 C. J. Fixtures, § 39. Fixtures which are removable by the tenant under a lease have been decided to be subject to levy and sale as chattels on execution against the tenant. 26 C. J. Fixtures, § 123; 17 R. C. L. p. 119; note, L. R. A. 1915E, 829, 830.

{*417} Furthermore, while the court found that the property in question was situated on and attached to the real estate described in the lease and used for the purpose of pumping oil from the well and taking same to the pipe line, we agree with the trial court that it was not annexed to the

interest in the real estate embraced in the leasehold. While an oil and gas lease, with the right of ingress and egress to explore for, discover, develop, and remove oil and gas, conveys an interest in real estate, it does not convey a greater interest in the soil, except the oil and gas, than to enable the owner of the lease to use the soil in carrying out and availing the leases of the above-named rights. The fee in the soil, except the oil and gas, remains in the lessor unincumbered with those rights of the lessee. The lessee is not the owner of the solids of the earth which the pumping and other equipment is annexed. He, at most, is the owner of the oil and gas, in place, and merely has the right to use the solid portion so far as necessary to bore for, discover, and bring to the surface the oil and gas. If the equipment were a part of the realty, it would not belong to the lessee, but to the lessor, with the same right in the lessee to use it as he has to use the other portions of the solid realty only. Moore v. Carey Bros. Oil Co. (Tex. Com. App.) 269 S.W. 75, 39 A. L. R. 1247.

Nor does the fact that the well is a producer alter the situation. In the case of a producing well, the interested parties doubtless have rights in having the casing remain intact, but this does not change the title to the casing nor its character as personalty because, if the well ceases to be a producer, the lessee would have the right to remove the same as his personal, individual property, subject to qualifying provisions in the agreement. See Orfic Gasoline Production Co. v. Herring (Tex. Civ. App.) 273 S.W. 944.

So we hold that the property involved in the case at bar was levied on, not as real estate, but as personal property.

Appellant asserts, in support of his first point, that a sheriff has no authority to charge custodian's fees in connection with a levy of a writ of attachment on real estate, *{*418}* but, holding as we do that the property attached is not real estate, we need not discuss this question. Further grounds argued in support thereof are that, even if the equipment is personal property and liable to attachment as such, the sheriff is not entitled to custodian's fees, for the reason that he did not seize and keep the same in his possession, and further that the charges were not reasonably necessary for which they were incurred.

The court found the facts contrary to these contentions and such findings, being supported by substantial evidence, will not be disturbed. The manner in which the duty was discharged is sufficient so far as the law is concerned. See 6 C. J. Attachments, §§ 591, 594, 595. We think the return to the writ of attachment is sufficient so far as its consideration in connection with the proposition here involved is concerned.

Appellant assails the item of traveling expense of the sheriff in relieving the guard in the amount of $ 9.25. In addition to the argument heretofore made, it is claimed that the charge is unreasonable. As we view the findings of the court, the contrary was found, and we are not convinced that the finding should be disturbed.

In support of his third proposition, appellant points to section 1267, Code 1915, as the only statute dealing with commissions which the sheriff may charge in cases where the sheriff has collected a judgment on execution, without making a sale of the judgment debtor's property.

The writ of attachment is in the nature of an "execution in advance." As to the similarity of

the writs of execution and attachment, Waples on Attachment (2d Ed.) § 228, says:

> "The writ of attachment, issued at the beginning of a suit, is really a preliminary execution dependent for its ultimate efficacy upon the rendering of judgment in favor of the plaintiff. It will be better understood by treating it as such. It has all the characteristics of a writ of execution in the first stage. The plaintiff may point out property to the officer. The officer may require security for indemnity in doubtful cases. The property seized comes into the lawful custody of the officer. Enough should be {*419} attached to cover the alleged indebtedness of the defendant, without excessive margin. No greater loss should be imposed on the debtor than is reasonably necessary to do justice to the creditor and satisfy the other demands of the law. Competing attachments usually take rank in chronological order as in executions. The parallel will hold good in many other particulars. When judgment in favor of the attaching creditors has been obtained, his original writ merely requires an order of sale to render it equivalent to an execution -- seizure having been made already."

The foregoing text is cited with approval in Herman Goepper & Co. v. Phoenix Brewing Co., 115 Ky. 708, 74 S.W. 726. In McGuire & Co. v. Barnhill, 89 Ark. 209, 115 S.W. 1144, it was decided that "executions" is a broader term than "attachments."

So, under the record in this case, we think the term "executions" as used in section 1267 of the Code is sufficiently broad to include attachment.

From all of the foregoing, it appears that the judgment of the trial court is correct, and must be affirmed, and the cause remanded, and it is so ordered.

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

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

CASE NO. 12905

THE APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

ORDER NO. R-11855-B

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (hereinafter referred to as "the Commission") for evidentiary hearing on March 20, 2003 at Santa Fe, New Mexico on application of Pronghorn Management Corporation (hereinafter referred to as "Pronghorn"), *de novo*, opposed by DKD, L.L.C. (hereinafter referred to as "DKD"), and the Commission, having carefully considered the evidence, the pleadings and other materials submitted by the parties hereto, now, on this 17th day of April, 2003,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties and the subject matter herein.

2. This matter is before the Commission on application of Pronghorn for review *de novo*.

3. In this matter, Pronghorn seeks a permit pursuant to Rule 701 of the Rules and Regulations of the Oil Conservation Division, 19.15.9.701 NMAC (11-02-2000), to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to ~~utilize~~ the State "T" Well No. 2 (API No. 30-025-03735) for this purpose. Disposal is to be accomplished through 2 7/8 inch plastic-lined tubing set in a packer located at approximately 5,590 feet. DKD opposes the application on various grounds.

4. Before moving to the merits of the dispute, the subject of notice should be addressed. Notice was raised as an issue in the Oil Conservation Division's orders and

use

(The use of the word "utilize" instead of the simpler word "use" was one of my College poetry professor's pet peeves. It's funny how those things stick with

the parties hereto presented evidence and testimony on the subject during the Division's proceeding (but not during the hearing *de novo*).

5. An operator desiring to inject produced water must apply for a permit and serve a copy of the application on the "owner of the surface of the land upon which each injection or disposal well is to be located" and "each leasehold operator within one-half mile of the well" proposed for ~~discharge~~ injection. *See* 19.15.9.701(A) and (B) NMAC.

6. Pronghorn ~~such~~ an application for administrative approval of its proposed operation on April 5, 2002. On April 30, 2002 the Oil Conservation Division (hereinafter referred to as "the Division") issued Administrative Order No. SWD-836 and granted the application. Such applications may be ~~approved~~ administratively ~~unless~~ an objection to the order is filed within fifteen days ~~of issuance~~. *See* 19.15.9.701(C) NMAC. DKD objected to the application within that time period and advised the Division that it operates a well within one-half ~~mile of the State~~ "T" Well No. 2. DKD also advised the Division that it had not been provided notice of the administrative application as required by Form C-108 and Rule 701, 19.15.9.701(B)(2) NMAC. The Division ~~advised~~ Pronghorn by letter of July 9, 2002 that Order No. SWD-836 would be suspended pending the outcome of a hearing before a Division examiner. On September 5, 2002, the Division conducted a hearing on the matter. The failure to provide notice to DKD apparently formed the basis for the Division's suspension of Order No. SWD-836.

7. Circumstances have changed substantially since the Division hearing. During the hearing *de novo* it became apparent that DKD was not in fact notified of the initial application, but it also became apparent that DKD was not a record "leasehold operator within one-half mile of the [proposed disposal] well" pursuant to Rule 701, 19.15.9.701(B)(2). Almost six weeks after the application was filed, an assignment from Chesapeake to DKD was recorded (May 14, 2002).[1] Moreover, the fact that the document was unrecorded strongly suggests that notice to DKD's predecessor-in-interest was appropriate. *See* NMSA 1978, § 70-1-2 (Repl. 1995)(effect of failure to record). Nevertheless, after being notified of the potential notice issue, the Division set the matter for hearing. The subsequent hearing before the Division in which DKD actively participated (as well as during the hearing on the application for review *de novo)* cured any defect in the ~~application.~~ notice.

8. Another notice issue addressed by the Division concerned notice to surface owners Felipe A. Moreno and Adelaida P. Moreno. It seems to be undisputed that these persons, owners of record of surface rights at the proposed injection site, were not notified of the application in this matter. However, subsequent to the hearing before the Division and prior to the hearing of this matter, those individuals conveyed their interest to Gandy Corporation. Through a letter agreement, Gandy Corporation and Pronghorn have become partners in the proposed disposal operation (along with Marks & Garner)

[1] As the assignment does not bear the approval of the State Land Office, its validity is in doubt. *See* NMSA 1978, § 19-1-13 (Repl. 1994).

and Gandy Corporation has agreed to the use of the property for purposes of saltwater disposal. It seems this transaction has cured any notice issue with respect to the surface owner.

9. A final notice issue was obliquely raised by DKD concerning the extent of the perforations through which injection would be accomplished. Initially, notice was provided that injection would be accomplished through perforations located between 6,000 and 6,200 feet. Later, Pronghorn, after a conversation with a Division engineer, requested that it be permitted to inject from 6,000 to 6,400. It does not appear that this defect is material or that DKD was prejudiced by the change.

10. Thus, it appears that notice is not an issue in this matter and we can consider the merits of the application.

11. As noted, Pronghorn proposes to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to ~~utilize~~ use the State "T" Well No. 2 (API No. 30-025-03735) for this purpose.

12. Rules 701 through 708 (19.15.9.701 through 19.15.9.708 NMAC) govern the injection of produced water into any formation. Injection wells must be equipped, operated, monitored and maintained in such a way as to assure mechanical integrity and prevent leaks and fluid movement adjacent to the well bore. *See* 19.15.9.703(A) NMAC. Furthermore, injection wells must be operated and maintained in such a way as to confine the injected fluids into the interval approved and prevent surface damage or pollution. *See* 19.15.9.703(B) NMAC. In no event may injection operations be permitted to endanger underground sources of drinking water (19.15.9.703(C) NMAC) and injection wells must undergo rigorous testing to serve these goals (19.15.9.704 NMAC).

13. Order No. SWD-836 appears to have addressed each of these points, and the parties have not raised any issue with respect to the conditions for injection set out in SWD-836. Administrative notice is taken of Order No. SWD-836 and the accompanying file.

14. Although not stated explicitly in the rules, injection operations must not cause waste or threaten correlative rights. Apparently to address this issue the parties focused their presentations on the potential productivity of the San Andres and Glorieta formations.

15. Pronghorn presented the testimony of a petroleum engineer who testified that he had studied production data, scout ticket data, production test data, log data and other data to reach conclusions concerning the proposed well. He testified that no well in the immediate vicinity of the proposed injection well produced oil or gas from either the San Andres or Glorieta formations in either Section 16 or Section 1. All 35 wells in those sections had penetrated both formations but produced oil and gas only from lower formations such as the Wolfcamp or the Pennsylvania-Strawn. Pronghorn's witness

testified that data from electric logs indicated that the resistivity of formation water in the San Andres was 0.165 ohm and 0.86 ohm in the Glorieta; this data demonstrates that the water saturation of the basal San Andres and the upper Glorieta in the vicinity of the proposed injection well exceeds 94 percent. In the two primary zones of permeability, water saturations exceed 98% in the upper interval and 62% in the lower interval. Pronghorn's expert testified that even though some hydrocarbons are likely present in the reservoir (a "show" of hydrocarbons was seen in the State "T" Well No. 2), the relative permeability of the rock and the water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered. The witness further testified that the nearest production from either the San Andres or the Glorieta formations was six miles south of the proposed injection well.

16. DKD's witness testified it was his intent to drill a well to produce hydrocarbons from "shallow zones" but failed to identify any specific objective and failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas. The witness also testified concerning the potential harm that the proposed injection could cause to DKD's injection well, some 2,000 feet away, but Pronghorn's witness testified that the DKD well was ~~utilizing~~ using a zone for disposal that was several thousand feet below the proposed zone. Furthermore, Pronghorn's expert testified even after nine years of operation at 1,500 barrels per day, water would be swept from the well bore at most 1,320 feet south. Therefore, it is apparent that the proposed well does not pose a danger to DKD's operations or other operations in the vicinity.

17. It thus appears that the Glorieta and San Andres are wet and will not produce commercial quantities of oil or gas in the vicinity of the proposed injection well. It also appears that the proposed operation will not pose a physical threat to DKD's operations, ~~and~~ since water will be swept at most 1,320 feet from the well in nine years. Nor does it appear that the proposed operation poses ~~a~~ hazard to other oil and gas operations in the vicinity.

18. DKD seems to claim that Pronghorn's application threatens its existing operations and its substantial investment in those operations and could result ultimately in a loss of approximately 35 to 40 percent of its total revenue. This claim cannot be addressed here; the Commission has no authority to regulate competition among commercial disposal operations.

19. Finally, DKD objects to the application of Pronghorn on legal grounds. DKD argues that a mineral right is necessary to operate the proposed injection well, but that Chesapeake owns the mineral interest and Pronghorn only owns a small surface parcel.[2]

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[2] DKD's argument that a mineral lease is necessary is undercut by its own operations. The assignment from Chesapeake to DKD on the property where DKD maintains its own injection operation appears not to be valid since it was not approved by the Commissioner of Public Lands

DKD argues that Chesapeake's letter stating it has no objection to the application or the issuance of an injection permit is irrelevant.

20. Pronghorn, citing Snyder Ranches Inc. v. Oil Conservation Commission et al., 110 N.M. 637, 798 P.2d 587 (S.Ct. 1990), seems to argue that subsurface trespass is a matter for the courts, not this body, and that the potential for subsurface trespass is essentially irrelevant in this proceeding.

21. It appears to be undisputed that Pronghorn controls a one-acre parcel at the site of the proposed disposal well. It also appears to be undisputed that Pronghorn does not own the relevant mineral interest underlying the one-acre disposal site; that is owned by Chesapeake, who holds an oil and gas lease granted by the State Land Office. It also seems to be undisputed that Chesapeake has acquiesced in writing to the disposal operation proposed by Pronghorn.

22. DKD's assertion that the right to inject water produced in connection with oil and gas exploration and production can be drawn from a mineral lease appears to be correct; the right to inject fluids is usually considered to be inherent in the mineral lessee as a part of the lessee's right to use so much of the land as is necessary to explore for and remove the oil and gas. DKD's apparent assertion that the typical oil and gas lease does not grant inherent rights to dispose of water that is produced from another lease, transported to the lease, and proposed for disposal also appears to be correct.

23. However, a surface owner like Pronghorn may also possess an independent right to permit injection into non-productive zones underlying the property. This right is theoretical and no conclusions should drawn in this case concerning it. An interesting discussion appears in the annals of the Rocky Mountain Mineral Law Institute. *See* Yoder & Owen, "Disposal of Produced Water," 37 Rocky Mountain Mineral Law Institute, § 21.02[2].

24. Snyder Ranches clearly holds that a salt water disposal permit under Rule 701 (19.15.9.701 NMAC) is merely a license to inject and does not confer any specific property right on the holder. Thus, the issue of subsurface trespass is the responsibility of the operator, as correctly observed by Pronghorn. ~~There is no requirement in the rules and regulations of the Division that a person seeking a permit to inject produced water provide proof to the Division (or the Commission) that it holds any particular real property interest in the injection zone.~~

25. As noted, Pronghorn owns the property in the immediate vicinity of the proposed injection operation. Chesapeake, the mineral lessee, has indicated it has no objection to the proposed injection operation. Pronghorn has indicated its willingness to

pursuant to NMSA 1978, § 19-10-13. Thus, DKD appears not to possess a mineral lease for its injection operations either. *See* paragraph 7, above.

OK as is, but perhaps a little confusing

to be discussed in question, the applicant may be required to show a good faith claim to the right to use the well ??

should add a statement that the Division / Commission cannot decide questions of title or property rights?

seek from the State Land Office a salt-water disposal easement; if issued, such a permit would seem to ratify the letter of Chesapeake. Given these undisputed facts, Pronghorn meets any reasonable criteria for issuance of a permit.

26. The reason the permit to dispose of produced water exists in the first place is to ensure that formations potentially productive of oil or gas are protected from the ~~discharge oil~~ and that sources of fresh water are protected. As noted, SDW-836 appears to meet these objectives.

27. For the foregoing reasons, the application of Pronghorn herein should be approved.

IT IS THEREFORE ORDERED THAT:

1. The application of Pronghorn is granted and Order No. SWD-836 (granting Pronghorn Management Corporation a permit to utilize the State "T" Well No. 2 (API No. 30-025-03735) for injection of produced water) shall be and hereby is reinstated.

2. Jurisdiction of this matter is retained for the entry of such further orders as the Commission may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

LORI WROTENBERY, CHAIR

S E A L

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

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

CASE NO. 12905

THE APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

ORDER NO. R-11855-B

ORDER OF THE OIL CONSERVATION COMMISSION

BY THE COMMISSION:

THIS MATTER came before the Oil Conservation Commission (hereinafter referred to as "the Commission") for evidentiary hearing on March 20, 2003 at Santa Fe, New Mexico on application of Pronghorn Management Corporation (hereinafter referred to as "Pronghorn"), *de novo*, opposed by DKD, L.L.C. (hereinafter referred to as "DKD"), and the Commission, having carefully considered the evidence, the pleadings and other materials submitted by the parties hereto, now, on this 17th day of April, 2003,

FINDS,

1. Notice has been given of the application and the hearing on this matter, and the Commission has jurisdiction of the parties and the subject matter herein.

2. This matter is before the Commission on application of Pronghorn for review *de novo*.

3. In this matter, Pronghorn seeks a permit pursuant to Rule 701 of the Rules and Regulations of the Oil Conservation Division, 19.15.9.701 NMAC (11-02-2000), to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose. Disposal is to be accomplished through 2 7/8 inch plastic-lined tubing set in a packer located at approximately 5,590 feet. DKD opposes the application on various grounds.

4. Before moving to the merits of the dispute, the subject of notice should be addressed. Notice was raised as an issue in the Oil Conservation Division's orders and the parties hereto presented evidence and testimony on the subject during the Division's proceeding (but not during the hearing *de novo*).

5. The rules and regulations of the Oil Conservation Division (hereinafter referred to as "the Division") require that an operator desiring to inject produced water apply for a permit and serve a copy of the application on the "owner of the surface of the land upon which each injection or disposal well is to be located" and "each leasehold operator within one-half mile of the well" proposed for ~~discharge~~ injection. *See* 19.15.9.701(A) and (B) NMAC.

6. Pronghorn filed an application for administrative approval of the operation described in paragraph 3 on April 5, 2002. On April 30, 2002 the ~~Oil Conservation~~ Division ~~(hereinafter referred to as "the Division")~~ issued Administrative Order No. SWD-836 granting the application. Such applications may be approved administratively unless an objection to the Order is filed within fifteen days of issuance. *See* 19.15.9.701(C) NMAC. DKD objected to the application within that time period and advised the Division that it operates a well within one-half mile of the State "T" Well No. 2. DKD also advised the Division that it had not been provided notice of the administrative application as required by Form C-108 and Rule 701, 19.15.9.701(B)(2) NMAC. The Division advised Pronghorn by letter of July 9, 2002 that Order No. SWD-836 would be suspended pending the outcome of a hearing before a Division examiner. On September 5, 2002, the Division conducted a hearing on the matter. The failure to provide notice to DKD apparently formed the basis for the Division's suspension of Order No. SWD-836.

7. It also appears that circumstances have changed substantially since the Division hearing. For example, as a basis for its protest of Order No. SWD-836, DKD claimed it had not received notice of the application. During the hearing *de novo* it became apparent that although DKD was not in fact notified of the initial application, it was not a record "leasehold operator within one-half mile of the [proposed disposal] well" pursuant to Rule 701, 19.15.9.701(B)(2). When Pronghorn filed its application, it notified the State Land Office, Chesapeake Operating Inc. (hereinafter referred to as "Chesapeake"), Charles B. Gillespie Jr., Pronghorn Management and Energen Resources. In addition, notice of the application was published on March 26, 2002 in the Lovington Daily Leader. Almost six weeks after the application was filed, an assignment from Chesapeake to DKD was recorded (May 14, 2002), but as the assignment does not bear the approval of the State Land Office, its validity is in doubt. *See* NMSA 1978, § 19-1-13 (Repl. 1994). Moreover, the fact that the document was unrecorded at the time the application was filed strongly suggests that notice to DKD's predecessor-in-interest was appropriate. *See* NMSA 1978, § 70-1-2 (Repl. 1995)(effect of failure to record). Nevertheless, after being notified of the potential notice issue, the Division set the matter for hearing. The subsequent hearing before the Division in which DKD actively participated (as well as during the hearing on the application for review *de novo)* cured any defect in the ~~application.~~ notice

8. Another notice issue addressed by the Division concerned notice to surface owners Felipe A. Moreno and Adelaida P. Moreno. It seems to be undisputed that these persons, owners of record of surface rights at the proposed injection site, were not notified of the application in this matter. However, subsequent to the hearing before the Division and prior to the hearing of this matter, those individuals conveyed their interest

to Gandy Corporation. Through a letter agreement, Gandy Corporation and Pronghorn have become partners in the proposed disposal operation (along with Marks & Garner) and Gandy Corporation has agreed to the use of the property for purposes of saltwater disposal. It seems this transaction has cured any notice issue with respect to the surface owner.

9. A final notice issue was obliquely raised by DKD concerning the extent of the perforations through which injection would be accomplished. Initially, notice was provided that injection would be accomplished through perforations located between 6,000 and 6,200 feet. Later, Pronghorn, after a conversation with a Division engineer, requested that it be permitted to inject from 6,000 to 6,400. It does not appear that this defect is material or that DKD was prejudiced by the change.

10. Thus, it appears that notice is not an issue in this matter and we can consider the merits of the application.

11. As noted, Pronghorn proposes to dispose of produced water into the San Andres and Glorieta formations. Pronghorn seeks to utilize the State "T" Well No. 2 (API No. 30-025-03735) for this purpose.

12. Rules 701 through 708 (19.15.9.701 through 19.15.9.708 NMAC) govern the injection of produced water into any formation. Injection wells must be equipped, operated, monitored and maintained in such a way as to assure mechanical integrity and prevent leaks and fluid movement adjacent to the well bore. *See* 19.15.9.703(A) NMAC. Furthermore, injection wells must be operated and maintained in such a way as to confine the injected fluids into the interval approved and prevent surface damage or pollution. *See* 19.15.9.703(B) NMAC. In no event will injection operations be permitted to endanger underground sources of drinking water (19.15.9.703(C) NMAC) and injection wells must undergo rigorous testing to serve these goals (19.15.9.704 NMAC). Order No. SWD-836 appears to have addressed each of these points, and the parties have not raised any issue with respect to the conditions for injection set out in SWD-836.

13. Although not stated explicitly in the rules, injection operations must not cause waste or threaten correlative rights. Apparently to address this issue the parties focused their presentations during the hearing of this matter on the potential productivity of the San Andres and Glorieta formations.

14. Pronghorn presented the testimony of a petroleum engineer who testified that he had studied production data, scout ticket data, production test data, log data and other data to reach conclusions concerning the proposed well. He testified that no well in the immediate vicinity of the proposed injection well produced oil or gas from either the San Andres or Glorieta formations in either Section 16 or Section 1. All 35 wells in those sections had penetrated both formations but produced oil and gas only from lower formations such as the Wolfcamp or the Pennsylvania-Strawn. Pronghorn's witness testified that data from electric logs indicated that the resistivity of formation water in the San Andres was 0.165 ohm and 0.86 ohm in the Glorieta; this data demonstrates that the water saturation of the basal San Andres and the upper Glorieta in the vicinity of the

proposed injection well exceeds 94 percent. In the two primary zones of permeability, water saturations exceed 98% in the upper interval and 62% in the lower interval. Both zones are therefore wet and will not produce commercial quantities of oil or gas. Pronghorn's expert testified that even though some hydrocarbons are likely present in the reservoir (a "show" of hydrocarbons was seen in the State "T" Well No. 2), the relative permeability of the rock and the water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered. The witness further testified that the nearest production from either the San Andres or the Glorieta formations was six miles south of the proposed injection well.

15. DKD's witness testified it was his intent to drill a well to produce hydrocarbons from "shallow zones" but failed to identify any specific objective and failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas. The witness also testified concerning the potential harm that the proposed injection could cause to DKD's injection well, some 2,000 feet away, but Pronghorn's witness testified that the DKD well was utilizing a zone for disposal that was several thousand feet below the proposed zone. As such, DKD's well is unlikely to be affected by the proposed injection. Furthermore, Pronghorn's expert testified even after nine years of operation at 1,500 barrels per day, water would be swept from the well bore at most 1,320 feet south. Therefore, it is apparent that the proposed well does not pose a danger to DKD's operations or other operations in the vicinity.

16. It thus appears that the Glorieta and San Andres are not productive in the vicinity of the proposed injection well of Pronghorn, that the proposed operation does not pose a physical threat to DKD's operations, and, since water will be swept at most 1,320 feet from the well in nine years, that the proposed operation poses no hazard to other oil and gas operations in the vicinity.

17. Finally, DKD claims that Pronghorn's application threatens its existing operations and substantial investment in those operations and could result ultimately in a loss of approximately 35 to 40 percent of its total revenue. This claim cannot be addressed here; the Commission has no authority to regulate competition among commercial disposal operations.

18. DKD also objects to the application of Pronghorn on legal grounds. This is without question the knottiest issue presented in this matter. DKD argues that since Pronghorn only holds surface rights at the site of the proposed injection, Pronghorn does not have authority to inject. DKD argues that Pronghorn must hold a mineral right to inject produced water. DKD argues that since Chesapeake holds the mineral interest, Chesapeake's letter stating it had no objection to the application or the issuance of an injection permit is therefore irrelevant.[1]

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[1] It is ironic that the wrong DKD accuses Pronghorn of committing --- injecting without having a mineral lease --- also appears to have been committed by DKD. The assignment from Chesapeake to DKD appears not to be valid since it was not approved by the Commissioner of Public Lands pursuant to NMSA 1978, § 19-10-13. *See* paragraph 7, above.

19. Pronghorn, citing Snyder Ranches Inc. v. Oil Conservation Commission et al., 110 N.M. 637, 798 P.2d 587 (S.Ct. 1990), seems to argue that subsurface trespass is a matter for the courts, not this body, and that the potential for subsurface trespass is essentially irrelevant in this proceeding.

20. It appears to be undisputed that Pronghorn controls a one-acre parcel at the site of the proposed disposal well. It also appears to be undisputed that Pronghorn does not own the relevant mineral lease underlying the one-acre disposal site; that is owned by Chesapeake, who holds an oil and gas lease granted by the State Land Office. It also seems to be undisputed that Chesapeake has acquiesced in writing to the disposal operation proposed by Pronghorn.

21. It would not be responsible for the Commission to grant a salt water disposal permit knowing that the operator has no interest in the proposed disposal site, as apparently suggested by Pronghorn. While Snyder Ranches seems to suggest that the Commission ~~may have~~ has no liability for such acts, it does not seem to us to be a responsible regulatory action. If, for example, an applicant for a salt-water disposal well has no good faith claim to title and lacks a good faith belief that it is authorized to use the property on which injection is to occur, this Commission should not blindly issue a permit anyway. *See e.g. In re: the Application of TMBR/Sharp Drilling, Inc. for an Order Staying David H. Arrington Oil & Gas, Inc. from Commencing Operations, Lea County, New Mexico,* Case No.12731, consolidated with *In re: application of TMBR/Sharp Drilling, Inc. Appealing the Hobbs District Supervisor's Decision Denying Approval of Two Applications for Permit to Drill filed by TMBR/Sharp Drilling, Inc., Lea County, New Mexico*, Case No. 12744, Order No. R-11700-B (the New Mexico Oil Conservation Commission).

22. The right to dispose of water produced in connection with oil and gas exploration and production is usually considered to be inherent in the mineral lessee as a part of the lessee's right to use so much of the land as is necessary to explore for and remove the oil and gas. This seems to be the principle upon which DKD has based its objection to Pronghorn's application. But Pronghorn is not the operator of the lease in question, and proposes to operate a commercial facility that will dispose of water from other leases. The typical oil and gas lease does not appear to grant inherent rights to dispose of water that is produced from another lease, transported to the lease, and ~~proposed~~ injected for disposal, as is proposed here.

23. However, these principles appear to be of doubtful application in this matter ~~anyway~~ because Pronghorn proposes dispose of produced water in strata that are not productive of oil or gas. These strata may not be subject to the lease Chesapeake holds because the lessor may retain rights to use nonproductive areas of the subsurface not encumbered by an oil and gas or mineral lease:

> While an oil and gas lease, with the right of ingress and egress to explore for, discover, develop, and remove the oil and gas, conveys an interest in real estate, it does not convey a greater interest in the soil, except the oil

In this case it's because the lessor does not ~~have~~ own the surface ~~rights~~

> and gas, than to enable the owner of the lease to use the soil in carrying out and availing the leases of the above-named rights. The fee in the soil, except the oil and gas, remains in the lessor unencumbered with those rights of the lessee. The lessee ... at most, is the owner of the oil and gas, in place, and merely has the right to use the solid portion so far as necessary to bore for, discover, and bring to the surface the oil and gas.

Jones-Noland Drilling Co. v. Bixby, 34 N.M. 413, 417, 292 P. 382 (S. Ct. 1929). *See also* 1 Williams & Myers, Oil and Gas Law § 202 (2001); Yoder & Owen, "Disposal of Produced Water," 37 Rocky Mountain Mineral Law Institute, § 21.02[2].

24. Thus, ~~it appears that mineral lessors or~~ surface owners may have some say whether Pronghorn may inject into the non-productive zones underlying the property; Pronghorn ~~is of course the~~ owns ~~er of~~ the one-acre parcel immediately adjoining the property, but there is nothing in the record concerning the remaining surface ownership in the vicinity. ~~but it is virtual certainty that~~ This could become an issue for Pronghorn in the future because produced water will be swept farther than the boundaries of Pronghorn's parcel during the course of injection and Pronghorn's witness appeared to testify that water might be swept as far as 1,320 feet during a nine-year period~~; this encompasses an area greater than one-acre in size. who holds an interest like this whose property is likely to be impacted by the disposal well.~~ But Pronghorn at this time possesses a legitimate claim to the surface estate on which it proposes to conduct its operations and the application should not be denied on this ground. Pronghorn should carefully consider the issue of trespass and the implications of the Snyder Ranches case on its future operations.

25. ~~Nevertheless, the parties have not addressed this issue at all and Pronghorn appears to harbor a good faith belief that it has, or will obtain, authority to inject from the State Land Office.~~

~~26.~~ On a related issue, the parties seem to agree that a salt-water disposal easement must be obtained from the State Land Office before injection operations proposed by Pronghorn may commence. DKD testified that it has obtained such a permit for its disposal well, and Pronghorn appears willing to obtain a permit as well.

26. The parties disagree on the effect of the salt-water disposal easement. DKD seems to argue that a salt-water disposal easement is authorized under the State Land Office's rules when it is ancillary to oil and gas operations on an existing lease; DKD seems to argue that an oil or gas lease must be obtained before a salt-water easement will become effective. This is the same problem discussed earlier, and the regulations of the State Land Office seem consistent with the discussion above. *See* 19.2.11.1 NMAC *et seq*. The regulations expressly state that "... an oil and gas lessee is entitled to use so much of the land as is necessary to explore for and remove the oil and gas, he does not need additional permission of the commissioner to dispose of the salt water upon or under the leased land so long as the water being disposed of is produced exclusively from wells upon the state trust land ..." 19.2.11.8 NMAC. However, where produced water comes from another lease (e.g. a commercial facility like DKD's and the one proposed by

Pronghorn), the rules clearly specify that a separate, disposal site easement must be obtained. *Id.* The operator, depending on the circumstances, may also be required to obtain a right of way easement for any needed pipelines, roads or other conveyances. *Id.*

27. Obviously, this body is not qualified to interpret these regulations on behalf of the State Land Office, and this order should therefore be conditioned appropriately. ~~**Similarly, this order should be conditioned to address the possibility that consent of the appropriate mineral lessors or surface owners may be required as well; this should be accomplished by requiring that Pronghorn satisfy itself that parties affected by the proposed discharge have consented and any discharges without such consent are at its own risk.**~~

28. For the foregoing reasons, the application of Pronghorn herein should be approved.

29. Administrative notice is taken of Order No. SWD-836 and the accompanying file.

IT IS THEREFORE ORDERED THAT:

1. The application of Pronghorn is granted and Order No. SWD-836 (granting Pronghorn Management Corporation a permit to utilize the State "T" Well No. 2 (API No. 30-025-03735) for injection of produced water) shall be and hereby is reinstated.

2. Pronghorn shall secure a salt-water disposal site easement pursuant to 19.2.11.1 NMAC *et seq.* if deemed necessary or advisable by the State Land Office and this order shall be expressly conditioned upon issuance of such a permit in such circumstance.

~~**3. Pronghorn shall satisfy itself that all parties affected by the proposed discharge (such as mineral lessors/surface owners) have consented to the discharge. Any discharges that Pronghorn makes without such consent shall be at its own risk.**~~

3. Jurisdiction of this matter is retained for the entry of such further orders as the Commission may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JAMI BAILEY, MEMBER

ROBERT LEE, MEMBER

LORI WROTENBERY, CHAIR

S E A L

110 N.M. 637, 798 P.2d 587 SNYDER RANCHES, INC. V. OIL CONSERVATION COMM'N (S. Ct. 1990) 1990 N.M. Lexis 327

SNYDER RANCHES, INC., Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO and MOBIL PRODUCING TEXAS & NEW MEXICO, INC., Respondents-Appellees

No. 18860
SUPREME COURT OF NEW MEXICO
110 N.M. 637, 798 P.2d 587, 1990 N.M. LEXIS 327
October 09, 1990, Filed
Appeal from the District Court of Lea County; R. W. Gallini, District Judge.

COUNSEL

Carpenter, Crout & Olmsted, Michael R. Comeau, Rebecca Dempsey, Santa Fe, New Mexico, Neal & Neal, J. W. Neal, Hobbs, New Mexico, For Appellant.

Robert G. Stovall, Santa Fe, New Mexico, For Appellee Oil Conservation Commission.

Montgomery & Andrews, W. Perry Pearce, Santa Fe, New Mexico, For Appellee Mobil Producing Texas & New Mexico, Inc.

JUDGES

Kenneth B. Wilson, Justice. Dan Sosa, Jr., Chief Justice, Joseph F. Baca, Justice, we concur.
AUTHOR: WILSON

OPINION

*{*638}* **WILSON, Justice.**

Petitioner-appellant Snyder Ranches, Inc. (Snyder Ranches) appeals a district court judgment in favor of respondents-appellees Mobil Producing Texas & New Mexico, Inc. (Mobil) and the Oil Conservation Commission of the State of New Mexico (Commission). We affirm the district court.

Mobil filed an application with the Oil Conservation Division of the Energy, Minerals, and Natural Resources Department of the State of New Mexico for authority to inject salt water through a disposal well into an underground formation known as the Silura-Devonian. Mobil's disposal well is located in the section adjoining Snyder Ranches's property, less than one-quarter mile west of the western boundary of Snyder Ranches's land. Expert testimony established that a northwest-southeast trending sealing fault lies east of the disposal well which will stop the migration of the injected salt water at the fault line. Snyder Ranches protested Mobil's application, and the case was heard by the Commission. At this hearing both Mobil and Snyder Ranches appeared through counsel and presented testimony and exhibits. The Commission granted Mobil's application. Snyder Ranches then petitioned the district court for a review of the Commission's order. After studying the exhibits, briefs, and transcript of the proceedings before the Commission, the district court concluded that the Commission order granting Mobil's application was supported by substantial evidence, not contrary to law, and not arbitrary or

capricious.

On appeal Snyder Ranches claims that substantial evidence does not support the district court's finding that salt water injected by Mobil would not move into the formation underlying Snyder Ranches's property. Snyder Ranches insists that the evidence before the court shows clearly that the fault line in question crosses *{*639}* a corner of their property and, since it is uncontroverted that the salt water will migrate to the fault, the salt water will cause underground encroachment on some portion of its land. Snyder Ranches argues that when the Commission granted Mobil's application, it authorized a trespass by Mobil upon Snyder Ranches's property, and therefore the permit to inject salt water is illegal.

Snyder Ranches raised several other correlative issues, and all parties filed extensive briefs justifying their legal positions. As we find the trespass issue dispositive, we do not reach the other points of appeal.

We may have arrived at a different result than the Commission or the district court if we were the fact finders in this case. However, we are constrained by the following standard which limits our review.

The district court may not on appeal substitute its judgment for that of the administrative body, but is restricted to considering whether, as a matter of law, the administrative body acted fraudulently, arbitrarily, or capriciously, whether the administrative order is substantially supported by evidence, and generally whether the active administrative body was within the scope of its authority.

Elliott v. New Mexico Real Estate Comm'n, 103 N.M. 273, 275, 705 P.2d 679, 681 (1985).

On appeal to this Court, the review of an administrative decision is the same as before the district court. However, our review requires a two-fold analysis. Ultimately, we must decide whether the district court was correct in finding substantial evidence to support the [administrative body's] order. In making that decision, we must independently examine the entire record.

National Council on Compensation Ins. v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988) (citations omitted).

In **Duke City Lumber Co. v. New Mexico Environmental Improvement Board,** 101 N.M. 291, 681 P.2d 717 (1984), this Court held that for purposes of reviewing administrative decisions the substantial evidence rule is expressly modified to include whole record review. Under whole record review, the court views the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence.

... The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.

Id. at 282, 756 P.2d at 562 (citations omitted). "Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole

record, is unreasonable or does not have a rational basis...." **Perkins v. Department of Human Servs.,** 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987).

On appeal, the role of an appellate court in determining whether an administrative agency has abused its discretion by acting in an arbitrary and capricious manner, is to review the record to determine whether there has been unreasoned action without proper consideration in disregard for the facts and circumstances. Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though another conclusion might have been reached.

Id. at 655, 748 P. 2d at 28 (citations omitted).

In this case an exhibit was introduced which shows the fault *{*640}* line touching the western boundary of Snyder Ranches's property. Snyder Ranches argues that this contact is proof positive that the fault line must include part of their land. We do not agree. The fact that the fault line and the boundary line merge at a particular point does not mean that the fault line encompasses land beyond the boundary line. While we recognize that a boundary line is an imaginary line infinitely narrow, whereas the pencil mark upon a plat is extremely large in proportion to the scale of the overall plat, and while we recognize that a fault line drawn upon a plat is by necessity arbitrary, as the twisting path of a fault line cannot be accurately represented by a straight line upon a plat, these are considerations for the fact finder who is in the best position to weigh the evidence and determine the facts of the controversy.

Having found substantial evidence to support the Commission and district court's conclusions, our analysis should end. However, in order to avoid future error, we take this opportunity to answer Snyder Ranches's assertion that the granting of Mobil's application to inject salt water into the disposal well authorizes a trespass against Snyder Ranches's property. We do not agree.

The State of New Mexico may be said to have licensed the injection of salt water into the disposal well; however, such license does not authorize trespass. The issuance of a license by the State does not authorize trespass or other tortious conduct by the licensee, nor does such license immunize the licensee from liability for negligence or nuisance which flows from the licensed activity. **See Lummis v. Lilly,** 385 Mass. 41, ..., 429 N.E.2d 1146, 1150 (1982); **Summer v. Township of Teaneck,** 53 N.J. 548, 556, 251 A.2d 761, 765 (1969). In the event that an actual trespass occurs by Mobil in its injection operation, neither the Commission's decision, the district court's decision, nor this opinion would in any way prevent Snyder Ranches from seeking redress for such trespass.

The district court is affirmed.

IT IS SO ORDERED.
