Correspondence

Denovo

Case No. 12602

Sept. 21st - 30th, 2002

3. Any party desiring to submit a supplemental exhibit on any issue other than the seismic issue must submit the request in writing and a copy of the supplemental exhibit to the Commission Secretary no later than the close of business on **October 7**, and copy all parties on the request. Any party desiring to object to the submission of another party must do so no later than the close of business on **October 11**, in writing, and copy all parties on the objection.

4. Any party desiring to submit a supplemental exhibit on the seismic issue shall forward the supplemental exhibit to the Commission Secretary for distribution to the Commissioners no later than the close of business on **October 11**.

5. Each party must amend its witness list and Pre-hearing Statement no reflect any changes necessitated by the above and deliver it to the Commission Secretary and the parties no later than the close of business on **October 11**.

Any objections any party desires to present after October 14 must be presented by way of an oral motion during the hearing.

Please do not hesitate to give me a call if you have any questions or wish to discuss this further.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc: Florene Davidson, Commission Secretary

P. 01

TRANSACTION REPORT

SEP-26-2002 THU 11:51 AM

FOR:

DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
SEP-26	11:50 AM	99822047	48"	2	SEND	OK	627	

TOTAL : 48S PAGES: 2

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

September 26, 2002

Via facsimile and first class mail

William F. Carr, Esq.
Holland & Hart and Campbell & Carr
P.O. Box 2208
Santa Fe, New Mexico 87504

W. Thomas Kellahin, Esq.
P.O. Box 2265
Santa Fe, New Mexico 87504-2265

J. Scott Hall, Esq.
Miller, Stratvert & Torgerson, P.A.
P.O. Box 1986
Santa Fe, New Mexico 87504-1986

Re: Case No. 12622, Application of Nearburg Exploration Company L.L.C. for two

P.01

TRANSACTION REPORT

SEP-26-2002 THU 11:44 AM

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DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
SEP-26	11:44 AM	99899857	41″	2	SEND	OK	626	

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Re: Case No. 12622, Application of Nearburg Exploration Company L.L.C. for two

P. 01

TRANSACTION REPORT

SEP-26-2002 THU 11:43 AM

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DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
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P.O. Box 1986
Santa Fe, New Mexico 87504-1986

Re: Case No. 12622, Application of Nearburg Exploration Company L.L.C. for two non-standard gas spacing units, Lea County, New Mexico, *de novo*

KELLAHIN & KELLAHIN
ATTORNEY AT LAW

W. THOMAS KELLAHIN
NEW MEXICO BOARD OF LEGAL SPECIALIZATION RECOGNIZED SPECIALIST IN THE AREA OF NATURAL RESOURCES-OIL AND GAS LAW

P.O. BOX 2265
SANTA FE, NEW MEXICO 87504
117 NORTH GUADALUPE
SANTA FE, NEW MEXICO 87501

TELEPHONE 505-982-4285
FACSIMILE 505-982-2047
TKELLAHIN@AOL.COM

September 23, 2002

HAND DELIVERED

Steve Ross, Esq.
Oil Conservation Commission
1220 S. Saint Francis Drive
Santa Fe, New Mexico 87505

Re: ***NMOCD Case 12908***
Division Nomenclature Case
August 1, 2002

NMOCD CASE 12622 (De Novo)
Nearburg Exploration Company, L.L.C.
Application for Approval of Two Non-Standard 160-acre Gas Proration and Spacing Units
NE/4 and SE/4, Section 34, T21S, R34E, NMPM,
East Grama Ridge-Morrow Gas Pool, Lea County, New Mexico

Mr. Ross:

On behalf of Redrock Operating Ltd, Co, please find enclosed our Motion in Limine and Motion to Strike.

Very truly yours,

W. Thomas Kellahin

cc:
J. Scott Hall, Esq.
Attorney for Raptor Natural Pipeline, LLC
William F. Carr, Esq.
Attorney for Nearburg Exploration Company, L.L.C.
Redrock Operating Ltd. Co.
Attn: Tim Cashon

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

CASE 12622
(De Novo)

APPLICATION OF NEARBURG EXPLORATION COMPANY, LLC FOR TWO ALTERNATIVE UNORTHODOX WELL LOCATIONS AND A NON-STANDARD PRORATION UNIT, LEA COUNTY, NEW MEXICO.

CASE 12908-A
(Severed and Reopened)

APPLICATION OF THE OIL CONSERVATION DIVISION FOR AN ORDER CREATING, CONTRACTING CERTAIN POOLS IN LEA COUNTY LEA COUNTY, NEW MEXICO.

REDROCK OPERATING LTD., CC.'S MOTION IN LIMINE TO LIMIT ARGUMENT AND EVIDENCE TO CERTAIN ISSUES

Comes now Redrock Operating Ltd, Co. ("Redrock") by and through its attorneys, Kellahin & Kellahin, and moves the Commission for an order **in limine** limiting evidence and argument to the geologic, engineering issues including the permitting issues for Nearburg's its Grama Ridge "34" State Well No. 1 and its failure to dedicate the well to a standard 320-acres spacing unit consisting of the E/2 of Section 34, and Nearburg's admission that Redrock has a 5% ORR in that unit based upon its 10% ORR in the S/2 of Section 34 thereby **excluding** from the De Novo hearing any evidence or argument concerning any other issue including settlement, discovery, contracts, title, or the "Redrock Overriding Royalty" which is beyond the jurisdiction of the Commission,

and in support states:

RELEVANT FACTS

(1) Nearburg has admitted that Redrock has a 10% ORR in the S/2 of Section 34 and that issue is not in dispute. **See Examiner Transcript page 25**

(2) There are three (3) critical issues in these cases:

(a) How did Nearburg get itself in this mess and what if anything should the Commission do;

(b) the Pool boundary:

(i) to protect the Gas Storage Unit; and

(ii) separate it from the Morrow production to the East.

(c) The proper 320-acre gas proration and spacing unit for the Nearburg Grama Ridge 34 Well No. 1 in the NE/4 of Section 34:

(i) should it be only 160-acres consisting of the NE/4 of Section 34;

(ii) or should it be the standard 320-acre spacing unit consisting of the E/2 of Section 34.

(3) Certain of Nearburg's proposed Exhibits, including parts of its Chronology, are replete with extraneous materials beyond the jurisdiction of the Commission raising matters outside the scope of the above issues.

I

ARGUMENT

In an effort to overcome the fact that the Division **denied** Nearburg's request for two 160-acre non-standard proration and spacing unit,and unless stopped, Nearburg may attempt any of the following;

(a) to unduly influence the Commission;

(b) attempt to prejudice the Commission against Redrock; Rule 403 NEW MEXICO RULES OF EVIDENCE

(c) misdirect the Commission's attention away from Nearburg's failure to abide by the Division's rules for the permitting of its well;

(d) ask this Commission to interpret or construe contracts and determine title; or

(e) render decisions concerning matters beyond the jurisdiction of the Commission.

All of these issues and associated legal opinions are irrelevant and inadmissible on any of the issues properly before the Commission concerning approval of 2 non-standard spacing units and a change in pool boundaries which may adversely affect correlative rights.

Commission's Jurisdiction:

The New Mexico state courts have repeatedly recognized that the Commission is the administrative agency with the "experience, technical expertise and specialized knowledge" to deal with geologic and engineering data also as to prevent waste of a valuable resources and protect the correlative rights of all participants. **Viking Petroleum v. Oil Conservation Comm**, 100 N.M. 451, 672 P.2d 280, 282 (1983), **Rutter & Wilbanks Corporation v. Oil Conservation Commission**, 87 N.M. 286, 532 P.2d 582 (1975); **Grace v. Oil Conservation Commission**, 87 N.M. 205, 531 P.2d 939 (1975).

Contract and title relevancy:

Rule 401 and Rule 402 of the New Mexico Rules of Evidence addresses relevancy. Nearburg intends to rely upon irrelevant evidence.

However, a conservation commission cannot under the guise of meeting its statutory mandate to prevent waste and protect correlative rights, act as an adjudicator of contractual controversies. **See REO Industries v. Natural Gas Pipeline Co. 932 F.2d 447 (5th Cir. 1991).**[1] Redrock is prepared to litigate the fact that Nearburg has violated it fiduciary duties to Redrock and is positioning itself to wrongfully deny Redrock its overriding royalty. The appropriate forum and remedies for resolving those contractual disputes exist but reside with the courts. **See REO Industries, supra.** By the same token, that district court has no business adjudicating those correlative right issues raised in Nearburg's requests which must be resolved by the Commission. Nearburg wants it both

[1] This case deals with the doctrine of primary jurisdiction and the Texas Railroad Commission's jurisdiction, holding among other things, that the Commission could not decide contract interpretation and damages issues.

ways--it will want the Commission to adjudicate the breach of fiduciary obligation dispute between Redrock and Nearburg. What Nearburg wants the Commission to decide is that Nearburg has the legal right to damage Redrock interest. **See Cook v. El Paso Natural Gas Co. 560 F.2d 978 (10th Cir. 1977)**, where the ORR owner was entitled to damages from the operator who operated both the spacing unit with the draining well and the offset spacing unit containing Cook's ORR. The operator, as the common operator, was still liable to the ORR owner even though the New Mexico Commission had precluded a well on the ORR tract because in was in the Oil-Potash area.

Correctly, the Commission should refuse to adjudicate these issues because the Commission does not have jurisdiction to decide contractual disputes. Notably absent from the enumeration of its powers, is the power to interpret contracts and operating agreements and to require specific enforcement of those contract or, in the alternative, to award money damages for any breach of those agreements. **Section 70-2-12.B NMSA 1979.**

Regardless of those litigation issues, the Commission has and must address issues relating to the prevention of waste and the protection of correlative rights. It did so in Order R-10872 by disregarding all these contractual issues and declaring that both Fasken and Mewbourne have the right to develop the Morrow formations in this spacing unit **See Finding (14) of Order R-10872.** It did so in Order R-10872 by focusing on the geologic evidence and concluding that approval of the Fasken location and denial of the Mewbourne location was necessary "...in order to assure the adequate protection of correlative rights, the prevention of waste and in order to prevent the economic loss caused by the drilling of unnecessary wells..."

Settlement Privileged:

Settlement is protected and can not be used by one party against another and is not relevant to the decision of the Commission on the merits. The Commission actively encourages settlement and the fact that Redrock and Nearburg each accuse the other of dealing in bad faith or causing delay is not relevant to the Commission. All Nearburg is doing is attempting to cloud the fact it wants the Commission to allow Nearburg to coverup its mistakes. **SEE Rule 408 New Mexico Rules of Evidence**

Discovery Relevancy

Matter's involving discovery are always not matters which should be used to try and influence or distract the Commission from the technical issues in these cases. **See Rules 403 New Mexico Rules of Evidence**

Hearsay:

Rule 801 New Mexico Rules of Evidence precludes "hearsay" evidence. Nearburg proposes to rely upon hearsay for which there is no exception.

CONCLUSION

Wherefore, Redrock request that the Commission enter an order **in limine** limiting evidence and argument to the geologic and engineering issues and excluding from the De Novo hearing any evidence or argument concerning any other issue than Nearburg's admission that Redrock has a 5% ORR in the production for the date of first from the Nearburg's well is dedicated to a standard 320-acre spacing unit consisting of the E/2 of Section 34.

Respectfully submitted,

KELLAHIN AND KELLAHIN

By: _____

W. Thomas Kellahin

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was mailed to all counsel of record this 23th day of September, 2002.

_____

W. Thomas Kellahin

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

CASE 12622
(De Novo)

APPLICATION OF NEARBURG EXPLORATION COMPANY, LLC FOR TWO ALTERNATIVE UNORTHODOX WELL LOCATIONS AND A NON-STANDARD PRORATION UNIT, LEA COUNTY, NEW MEXICO.

CASE 12908-A
(Severed and Reopened)

APPLICATION OF THE OIL CONSERVATION DIVISION FOR AN ORDER CREATING, CONTRACTING CERTAIN POOLS IN LEA COUNTY LEA COUNTY, NEW MEXICO.

REDROCK OPERATING LTD., CC.'S MOTION TO STRIKE AND OBJECTIONS T0 CERTAIN NEARBURG EXPLORATION COMPANY, LLC.'S EXHIBITS

Comes now Redrock Operating Ltd, Co. ("Redrock") by and through its attorneys, Kellahin & Kellahin, and objects to certain Nearburg Exploration Company, LLC and Nearburg Operating Company's Exhibits (collectively "Nearburg") and moves the Commission to Strike the following exhibits:

(1) Portions of Nearburg's proposed Exhibit #2:

(a) Nearburg's Chronology is argumentive;

(b) based upon hearsay in violation of Rule 801 NMRE;

(c) is replete with extraneous matters;

(d) discusses privileged settlement matters in violation of Rule 408 NMRE; and

(e) contains matters beyond the jurisdiction of the Commission.

(2) Nearburg's proposed Exhibit #12:

(a) a Title Opinion concerning title which is irrelevant and

(b) beyond the jurisdiction of the Commission

(3) Nearburg's proposed Exhibits 13:

(a) a letter concerning a Title Opinion which is irrelevant and

(b) beyond the jurisdiction of the Commission

(4) Nearburg's proposed Exhibits 23:

(a) an assignment concerning title which is irrelevant and

(b) beyond the jurisdiction of the Commission

RELEVANT FACTS

There are three (3) critical issues in these cases:

(a) How did Nearburg get itself in this mess and what if anything should the Commission do;

(b) the Pool boundary:

(i) to protect the Gas Storage Unit; and
(ii) separate it from the Morrow production to the East.

(c) The proper 320-acre gas proration and spacing unit for the Nearburg Grama Ridge 34 Well No. 1 in the NE/4 of Section 34:

(i) should it be only the 160-acres consisting of the NE/4 of Section 34;

(ii) or should it be the standard 320-acre spacing unit consisting of the E/2 of Section 34

I
ARGUMENT

In an effort to overcome the fact that the Division **denied** Nearburg's request for two 160-acre non-standard proration and spacing unit,and unless stopped, Nearburg may attempt any of the following;

(a) to unduly influence the Commission,

(b) attempt to prejudice the Commission against Redrock;

(c) misdirect the Commission attention away from Nearburg's failure to abide by Division's rules for the permitting of its well;

(d) ask this Commission to interpret or construe contracts;

(e) ask the Commission to render decisions beyond the jurisdiction of the Commission.

All of these issues and associated legal opinions are irrelevant and inadmissible on any of the issues properly before the Commission concerning approval of 2 non-standard spacing units and a change in pool boundaries which may adversely affect correlative rights.

Settlement is protected and cannot be used by one party against another and is not relevant to the decision of the Commission on the merits. The Commission actively encourages settlement and the fact that Redrock and Nearburg each accuse the other of dealing in bad faith or causing delay is not relevant to the Commission. All Nearburg is doing is attempting to cloud the fact it wants the Commission to allow Nearburg to cover up its mistakes. See Rule 408 New Mexico Rules of Evidence.

Matter's involving discovery are always not matters which should be used to try and influence or distract the Commission from the technical issues in these cases. **See Rule 403 New Mexico Rules of Evidence**

Nearburg has admitted that Redrock has a 10% ORR in the S/2 of Section 34 given it a 5% ORR for a unit consisting of the E/2 of Section 34 and that issue is not in dispute.

CONCLUSION

Wherefore, Redrock request that the Commission grant Redrock's motion striking certain Nearburg exhibits 12, 13, 23 and those portions of Exhibit 2 which are indicated by check mark on attached (1) to this motion.

Respectfully submitted,

KELLAHIN AND KELLAHIN

By: _____

W. Thomas Kellahin

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was mailed to all counsel of record this 23rd day of September, 2002.

_____

W. Thomas Kellahin

GRAMA RIDGE 34 STATE WELL #1

Chronology

1/13/99: Prior lease (#K-03592) owned by Apache Corporation is cancelled by the State of New Mexico. Title failure from non payment of rental. This lease covered the N/2 of Section 34-21/34, Lea County, New Mexico. **TAB 1**.

12/21/99: New Oil and Gas Lease is offered by the State of New Mexico, without stipulation, on the December 1999 SLO sale. Lease is acquired by a representative of GWDC and assigned to GWDC. Lease is effective 1/1/00. **TAB 2**.

2/28/00: Received approved APD from the OCD on a N/2 Section 34 spacing unit. **TAB 3**.

3/1/00: LG&E added the Grama Ridge 34 State #1 well under the existing gas contract.

3/3/00: Purchase of the prospect from Great Western Drilling Company.

3/7/00: Well Spuds.

5/4/00: Received position letter from the SLO. The subsequent and current lease is independent of the unit agreement. **TAB 4**.

6/9/00: Completed well: Morrow perforated 6/10/00. Flowed 2,010 MCFG and 45 B/O with 5300# FTP on a 6/64th choke; estimated that the BH flowing pressure is 6,790#.

6/19/00: Received approved Request for Allowable and Authorization to Transport from the OCD. **TAB 5**.

6/22/00: Received approval from the OCD for test allowable. **TAB 6**.

6/27/00: Filed completion report with the OCD. **TAB 7**.

7/00: Notified in a telephone conversation from the OCD that the N/2 spacing unit crossed two (2) pool boundary lines.

EXHIBIT (1)
Rod Rock

BEFORE THE OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
Case No. 12622 Exhibit No. 2
Submitted by:
NEARBURG EXPLORATION COMPANY, L.L.C.
Special Commission Hearing: September 10, 2002

7/21/00: New Mexico SLO issues a letter advising that our lease is a valid Oil and Gas lease but subject to LG&E's rights to store gas in the unitized formation in the W/2 of Section 34 and the E/2 of Section 33. **TAB 8**.

12/13/00: NEC files an Administrative Application for the formation of two non-standard gas spacing units in the E/2 of Section 34-21/34. Notices of waiver are sent out to all affected parties. **TAB 9**.

1/8/01: NEC receives a waiver from EOG for the formation of the two non-standard spacing units in the E/2 of Section 34. **TAB 10**.

1/9/01: Notices sent to ORRI owners.

1/10/01: Received a letter from the SLO objecting to our request for a waiver to our application for the 160-acre non standard spacing unit. **TAB 11**.

1/23/01: Received a letter from the SLO reversing its prior objection to a waiver for the formation of NEC non-standard spacing units. **TAB 12**.

1/29/01: Notice letter sent to Redrock Operating Ltd. **TAB 13.**

2/01: NEC is advised by telephone that Redrock Operating will not execute the waiver for the two nonstandard spacing units in the E/2 of Section 34-21/34. **TAB 14**.

2/15/01: OCD advises that it has received an objection to NEC's application for two non-standard units and is setting the application for hearing for the 3/22/01. **TAB 15**.

✓ 4/27/01: Received a subpoena from Tom Kellahin (Red Rock Operating) for production of information.

✓ 5/14/01: NEC furnishes information pursuant to the subpoena.

✓ 6/11/01-6/21/01: Settlement efforts continue.

✓ 6/26/01: Advised by Bill Carr that the OCD wants the case heard on June 28 or the well shut in.

✓ 6/28/01: Examiner hearing on application of Nearburg Exploration Company for the creation of two non-standard spacing units in Section 34. Examiner Stogner called the attorneys together after the hearing and indicated that he wanted the parties to try to settle the case. He has scheduled a meeting on July 19th to see if the parties are able to settle. If the case is not settled he will call the case again on the July 27th docket and shut in the well until an order is entered in this case.

✓ 7/26/91: Attempts to settle were unsuccessful.

✓ 7/27/01: The Oil Conservation Division case was re-opened. The examiner was advised we were attempting to set up a settlement meeting but Kellahin indicted that a settlement was not probable. Mr. Stogner ordered the well shut-in.

✓ 8/1–8/20: Settlement efforts continue.

8/19/01: Discussion with EOG concerning possible sale or acreage trade.

11/15/01: Received a letter from the SLO requesting NPC advise them concerning whether we intend to do any additional drilling on the S/2 of Section 34.

11/19/01: Filed notice of our intent to plug the Llano 34 State Com #1 well.

12/8/01: Mailed maps and write-ups to the SLO concerning further drilling in the S/2 of Section 34.

5/23/02: Oil Conservation Division Order No. R-11768 entered denying NEC application for two Non-standard spacing units in Section 34. **TAB 16.**

✓ 6/6/02: Paul Kautz in Hobbs advised that he is up to speed on the geology for a pool boundary change and does not need any information from NEC. If boundary changed, it would be on a motion made by the OCD.

6/22/02: Filed De Novo application for the 160-acre non-spacing unit application.

✓ 6/23/02: Raptor makes application for a continuance of the De Novo hearing from the scheduled July 19 hearing date to August 30, 2002.

8/7/02: Attorney for Redrock called regarding a nomenclature hearing.

8/9/02: Redrock filed a motion to dismiss or reopen the nomenclature hearing.

8/13/02: NEC filed a response to Redrock's motion to dismiss or reopen the nomenclature hearing. Agreed to consolidate the nonstandard spacing unit case and the nomenclature case and request Commission hearing.

8/13/02: NEC filed Joint Motion with Redrock to consolidate cases before the Commission.

560 F.2d 978 COOK V. EL PASO NATURAL GAS CO. (10th Cir. 1977)

JIMMIE COOK, a single woman, Plaintiff-Appellee,
vs.
EL PASO NATURAL GAS COMPANY, a Delaware corporation, and PHILLIPS PETROLEUM COMPANY, a Delaware corporation, Defendants-Appellants.

No. 76-1370
UNITED STATES COURT OF APPEALS TENTH CIRCUIT
560 F.2d 978
August 03, 1977
Appeal from the United States District Court for the District of New Mexico (D.C. No. 75-080)

COUNSEL

Don M. Fedric of Hunder-Fedric, P.A., for Plaintiff-Appellee.
W. Thomas Kellahin of Kellahin & Fox (Owen M. Lopez of Montgomery, Federici, Andrews & Hannahs, on the brief), for Defendants-Appellants.
AUTHOR: DOYLE

OPINION

Before LEWIS, Chief Judge; BREITENSTEIN and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

In this action the question is whether the plaintiff, who owns a five percent overriding royalty interest in an oil and gas lease, is entitled to recover a compensatory royalty on the basis that the defendants who own a gas well which is located on an adjoining lease have drained gas from a lease under which plaintiff has the five percent overriding royalty interest.

The case was first filed in the State District Court for New Mexico, Eddy County. The defendants, El Paso Natural Gas Company and Phillips Petroleum Company, petitioned for removal to the United States District Court for the District of New Mexico, where the case was tried to the court on December 15, 1975. Judgment was entered for plaintiff-appellee on February 25, 1976.

Mrs. Cook was the owner of a United States Oil and Gas Lease in which the legal description is the W1/2 of Section 29, Township 23 South, Range 31 East, N.M.P.M., Eddy County, New Mexico. She assigned this lease to Phillips Petroleum Company on June 26, 1964, reserving a five percent overriding royalty. In the lease there was a so-called potash stipulation which provided that no wells would be drilled for oil or gas at a location which, in the opinion of the Oil and Gas Supervisor of the Geological Survey, would result in undue waste of potash deposits or would constitute a hazard to or an undue interference with mining operations being conducted for the extraction of potash deposits.

On November 1, 1971, Phillips assigned to E1 Paso an interest in the lease covering the

description mentioned. On February 12, 1973, El Paso completed a well in the E1/2 of Section 29. This was called the Mobil Federal Well No. 1. The proration unit assigned to the well by the New Mexico Oil Conservation Commission consisted of the E1/2 of Section 29. El Paso sought to increase the proration unit to 640 acres which would have included both the West Half and East Half of the Section. This would have embraced the lease of plaintiff-appellee, Mrs. Cook (which lease was assigned, as noted above, to Phillips Petroleum Company).

On May 8, 1974, the United States Geological Survey determined that oil and gas drilling operations to a depth sufficient to test the so-called Morrow formation underlying the W1/2 of Section 29 would result in undue waste of potash and would constitute a hazard to future potash mining. It entered an order prohibiting the drilling of an oil or gas well on the W1/2 of Section 29.

At the conclusion of the trial both sides submitted proposed findings of fact and conclusions of law. The trial court ruling for plaintiff-appellee made findings of fact and conclusions of law in which it determined that: the Mobil Federal No. 1 Well was some 660 feet from the East line of the lease which plaintiff had owned covering the W1/2 of Section 29; thereafter, production was commenced on the Mobil Federal Well on March 22, 1973, and on May 8, 1974, the United States Geological Survey (USGS) issued its prohibition against the drilling of a well on the W1/2 of Section 29. The court also found that the Morrow gas pay zone reservoir for the Mobil Federal No. 1 Well extended into the W1/2 of Section 29, whereby this underground area was contributing approximately 26% of the gas contained in the Morrow gas pay zone reservoir for the Mobil Federal No. 1 Well.

The court further found that the Mobil Federal No. 1 Well was draining gas in substantial quantities from the underground area beneath the W1/2 of Section 29.

The court concluded that since the law implies a duty on an oil and gas lessee to protect the leased premises from offsetting adjoining land drainage of oil and gas, and since this is a covenant which runs with the land and the owner of an overriding royalty interest has standing to invoke the implied covenant to protect against drainage, and where a common lessee exists for two abutting oil and gas leases, the common lessee is obligated to protect its lessor from oil and gas drainage from a well located in the other lease. This is not controlled or limited by the test as to whether a reasonable prudent operator would in the circumstances drill an offset well.

The court further concluded that the common lessee is under a duty to prevent drainage regardless of whether or not the drilling of an offset well on nonproducing land would satisfy the standards of the prudent operator rule.

A further conclusion of the trial court was that the defendants-appellants as common lessees under separate leases covering the E1/2 and W1/2 of Section 29 were under a duty to the plaintiff to protect her interest in the oil and gas under the W1/2 of Section 29 against drainage from the defendants' Mobil Federal No. 1 Well, located in the E1/2 of Section 29.

The court's next conclusion was that the plaintiff had not waived her rights to protection from drainage as a result of the existence of a potash stipulation nor by reason of the USGS prohibition

against a well being drilled.

Nor did she waive or disclaim her rights by assigning her lease to Phillips Petroleum Company.

The terms of the lease do not circumscribe plaintiff's right to be protected from drainage.

The payment of compensatory overriding royalty as an alternative to the drilling of an offset well where the interest owner is suffering losses as a result of drainage is appropriate.

The court finally concluded that as a result of the governmental prohibition, an offset well cannot be drilled upon the W1/2 of Section 29. However, the alternative compensatory remedy is available to her and for that reason she is entitled to judgment.

The contentions of the defendants-appellants are:

First, that any right which plaintiff may have had to a compensatory royalty was nullified by the government prohibition issued by the Geological Survey.

Second, that the express drainage covenant in the plaintiff's lease nullified any implied covenant to protect plaintiff's leasehold from drainage.

Third, that appellants' duty to protect the first lease from drainage resulting from the drilling of a well on the second is limited to the duty imposed upon a reasonably prudent operator.

Fourth, that El Paso and Phillips maintain that they have no duty to protect Mrs. Cook's leasehold from drainage of oil and gas by the drilling of a well on an adjoining leasehold absent the lessor's leasehold being capable of producing oil or gas in quantities sufficient to repay the appellants the cost of drilling, equipping and operating such a well at a reasonable profit.

Fifth, plaintiff is precluded, as an overriding royalty interest owner, from invoking the implied covenant to protect against drainage.

I.

The thrust of the first argument of the appellant companies is that the government prohibition against drilling in the W1/2 of Section 29, the purpose of which was to protect potash deposits under that section, had the effect of excusing performance of any contractual duty including the implied covenant to protect appellee from drainage of the defendants-appellants, and that it was not limited to excusing the drilling of an offset well in the W1/2 of Section 29. They maintain that compensatory royalties need only be paid when there is an obligation, either express or implied, to drill an offset well and since the government prohibited the drilling of a well in the W1/2, the argument goes, there can be no further obligation to perform the covenant to drill an offset well nor can there be an obligation to respond to an implied covenant to protect the plaintiff-appellee from drainage. To accept this argument is to determine that all performance by defendants-appellants is excused.

Contractual performance can indeed be excused where the intervention of a government

regulation or law makes performance impossible. See Thomas v. Pavletich, 31 N.M. 76, 239 P. 862 (1925). In recognizing also that spacing regulations can render a covenant to drill a second well inoperative, Thomas v. Greer, 55 N.M. 335, 233 P.2d 204 (1951), it does not follow that this vitiates all other alternative remedies. The result of acceptance of this argument is to give appellant companies a license to drain the gas from the area under the plaintiff-appellee's assigned lease without paying a royalty--all because the government has prevented the drilling of a well. It would be grossly inequitable to confer such windfalls. It is difficult to see how a prohibition against drilling (governmental intervention) can excuse the party draining gas under another's land from compensating that person for the gas being so taken.

The case of Pan American Petroleum Corporation v. Udall, 192 F. Supp. 626 (D.C. D.C. 1961), furnishes clarification as to the nature of the compensatory royalty. It was there explained that:

In the oil industry compensatory royalties are royalties paid to a land-owner whose land lies adjacent to a producing well, but on whose land no well has been drilled. They are intended to compensate the landowner for losses suffered due to subterranean drainage of oil from his land resulting from the adjacent producing well. They are an alternative to the drilling of a so-called "offset well" to recover the oil before it drains away.

192 F. Supp. at 628. The court went on to rule that the compensatory royalties which had been assessed by the Department of the Interior in that case were arbitrary. The court did acknowledge that some compensatory royalties in a reasonable amount were due. The cause was remanded for redetermination of the amount of royalty.

Appellants rely on this court's decision in Ashland Oil & Refining Co. v. Cities Service Gas Co., 462 F.2d 204 (10th Cir. 1972). But in Ashland we held that where there is impossibility of performance with respect to one of two alternatives, the result is not to relieve the promisor of all obligation in the premises. He does not escape performance of an alternative remedy if one exists. Citing a number of cases at page 211 which hold that the impossibility of one mode of performance does not discharge the obligation to perform on the alternative basis, and also the note in 84 A.L.R. 2d (1976), we concluded that "failure of the withdrawal promise could not frustrate performance of either the entire contract or the optional alternative of performance."

In summary, the appellants' position that the government regulations broadly apply so as to excuse them from all legal obligations which might arise from the lease and the facts is not tenable. Contrary to the appellants' arguments, the purpose of the government regulation is not that of relieving the companies from all their legal obligations.

The purpose of the prohibition against drilling was to protect the potash deposits. It cannot be held to include the release of Phillips and El Paso from their duty to protect the plaintiff-appellee, their assignor, from unlawful drainage of gas.

II.

The next impediment to plaintiff-appellee's recovery urged by appellants is the reasonable

prudent operator doctrine. The essence of this rule is that the duty of a contiguous operator lessee or stranger to drill a well in the interest of preventing drainage is limited by the economics of the situation. The principal test is whether a reasonable prudent operator judging on the basis of economic feasibility would drill an offset well. Would it be profitable? The other element of this doctrine is whether substantial drainage has taken place on the leasehold.

In our view the element of substantiality of the drainage is satisfied by the evidence in the case and the court's findings. The trial court's findings numbered 17 and 18 are:

17. The W1/2 of Section 29 is contributing approximately 26% of the gas contained in the Morrow gas pay zone reservoir for the Mobil Federal #1 Well.

18. The Mobil Federal #1 Well located in the E1/2 of Section 29, is draining gas in substantial quantities from under the W1/2 of Section 29.

The trial court also specifically concluded that a common lessee has a duty to prevent substantial drainage from the nonproducing lease land regardless of whether or not drilling of an offset well on the nonproducing land would be a prudent operation.

The defendants as common lessees under two separate leases covering the E1/2 and the W1/2 of Section 29 are under a duty to plaintiff to protect her interest. The question here is whether the prudent operator rule is to be applied. Appellee contends that it has no applicability in a situation such as that presented where the defendants are common lessees in the W1/2 (the unused portion of the leased tract) which is contributing approximately 26% of the gas contained in the Morrow gas pay zone reservoir for the Mobil Federal No. 1 Well.

There are various reasons assigned for this exception to the reasonable prudent operator rule. It is sometimes emphasized that the common lessee is not a stranger to the situation and is operating on an arm's length situation; that he is subject to a duty to protect the lessee from the harm. Sometimes it is said that there is an unjust enrichment if the lessees are allowed to convert the gas with impunity. Some cases go so far as to characterize this as fraudulent drainage. The history of this is said to be found in the early cases which were seeking to bring this kind of controversy within equity jurisdiction. See 6 Natural Resources Journal, 45 at 54, citing 5 Williams & Meyers Oil & Gas Law, 143; Kleppner v. Lemon, 197 Pa. 440, 47 Atl. 353 (1900); Adkins v. Huntington Dev. & Gas Co., 113 W.Va. 490, 168 S.E. 366 (1933); Lamp v. Locke, 89 W. Va. 138, 108 S.E. 89 (1921). The authors also cite two Tenth Circuit cases which suggest the existence of a duty on the part of the lessee to deal fairly with the interest of his lessor. Phillips Petroleum Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954); Boone v. Kerr-McGee Oil Indus., 217 F.2d 63 (10th Cir. 1954). Some of the decisions which recognize the implied covenant to protect lessor against drainage and do not limit it by the prudent operator doctrine say that the latter rule, while it may apply to a third person, does not apply to a lessor because of the duty of the lessee to refrain from acts which are injurious to the lessor, while at the same time refusing to imply a duty to drill an offset well to protect lessor's land from drainage by third persons.

See for example R.R. Bush Oil Co. v. Beverly-Lincolnland Co., D.C.App. Cal., 158 P.2d 755 (1945). The court in Bush followed Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232 at

240, 73 P.2d 1163. It also followed Geary v. Adams Oil & Gas Co., 31 F. Supp. 830 (E.D. Ill. 1940). The often-cited language of this case is set forth. The emphasis of the language of the defendant-lessor as the beneficiary of the oil drained from plaintiff's land is that it has not only been saved the cost of drilling and equipping a well, but gets the oil without having to pay for it.

Another case which is frequently cited is that of the Supreme Court of Mississippi, Millette v. Phillips Petroleum Co., 48 So.2d 344 (1950), which also enforced an implied covenant to protect against the lessee's impairing the value of the lease. It is said that this extends to a duty to drill offset wells if practical and profitable, and to an obligation to refrain from acts which deplete the lands of his lessor and thus impair the value of the property. The right to recover for breach of an implied covenant to protect the lessor is recognized and enforced.

The Mississippi case of Monsanto Chemical Company v. Andreae, 245 Miss. 11, 147 So.2d 116 (1962), refused to apply the Millette case because the facts did not warrant it.

Perhaps the most significant, although at the same time brief and pointed opinion, is that of the Supreme Court of Texas in Shell Oil Company v. Stansbury, 410 S.W.2d 187, 188 (1966), where the court said:

We approve the holding that Stansbury was entitled to recover damages from Shell upon proof that Shell caused substantial drainage of the lessor's lands, and that a reasonably prudent operator would have drilled a well on the Stansbury land to protect it from drainage. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163 (1937); Meyers and Williams, Implied Covenants in Oil and Gas Leases; Drainage Caused by the Lessee, 40 Texas L.Rev. 923, 929-940 (1962). We disapprove any language in the opinion of Hutchins v. Humble Oil & Refining Co., 161 S.W.2d 571 (Tex.Civ.App. 1942, writ ref. w.o.m.) which conflicts with the principle that a lessee is under a duty to protect his lessor against depletion of the lessor's minerals by the affirmative act of the lessee upon adjacent land.

Adkins v. Huntington Oil and Gas Company, supra, is an example of use of the fraud analysis. Here again the contention was that there was no duty to either drill an offset well or compensate for injury to the lessor's property. The judgment of the lower court in the Adkins case was modified so as to cancel the lease or, in the alternative, pay a sum of money for damages.

The Supreme Court of Wyoming has also refused to follow the reasonable prudent operator rule in a situation where there was a relationship between the parties. See Olsen v. Sinclair Oil & Gas Company, 212 F. Supp. 332 (D.Wyo. 1963). The persuasive factor to the Wyoming court was that the lessor Olsen was helpless considering that Sinclair there surrendered the lease. At the time of surrender a substantial percentage of all of the gas structure had been withdrawn. The Olsens could not then with economy have drilled a well of their own. The court thus was persuaded by the duty on the part of the lessee not to drain oil or gas from under his lessor's land. It would appear to be balancing the equities.

The closest that the New Mexico court has come to considering this present question is in Cone v. Amoco Production Co., 87 N.M. 294, 532 P.2d 590 (1975), wherein the problem is

discussed and the court acknowledges that many cases reason that the common lessee has a duty to prevent substantial drainage regardless of whether or not drilling of an offset well would be a prudent operation, that is, would produce oil or gas and pay in quantities. The court was not required to determine whether it would apply the reasonable prudent operator rule because the drainage in the Cone case was not substantial.[1]

We conclude that the trial court was correct in its determination that the reasonable prudent operator limitation was not applicable to this case; that in view of the relationship of the parties there existed an implied covenant running to the plaintiff-appellee to refrain from any action which would deplete her property in the lease. There was a direct violation of this implied covenant. It is unnecessary then to consider whether it has undertones of inequitable conduct or unjust enrichment. The appellant companies have violated an implied covenant to refrain from activities that would injure her property interest.

Finally, the trial court's determination that the prudent operator rule was inapplicable is not to be lightly disregarded. The trial judge is a veteran state trial judge as well as a veteran federal trial judge. Under such circumstances his projection is entitled to respect.

III.

The question which is now posed is whether the presence in the lease of an express covenant dealing with the subject of drilling of offset wells precludes the existence or, as the appellants say, negatives the existence of an implied covenant to protect the plaintiff-appellee from drainage.

Having heretofore decided, first, that an implied warranty existed and that it was not negated by a government prohibition against drilling an offset well in the area, and having further concluded that in this context the reasonable prudent operator doctrine did not impede or prevent recovery of damages for drainage, there remains little to decide with respect to the express covenant to drill wells to protect the lease land from drainage.

The theory of defendants-appellants is that where there is contained in the lease an express provision dealing with the obligation to drill offset wells that this automatically displaces the implied covenant to protect from drainage or the implied duty to protect the lessor from damage.[2]

Appellants' main reliance is on this court's decision in Sawyer v. Mid-Continent Petroleum Co., 236 F.2d 518 (10th Cir. 1956). However, Sawyer did not hold, as appellants would have it, that an express lease provision undertaking to drill offset wells automatically displaces an implied covenant to protect against drainage. In Sawyer there was drainage and a compensatory royalty was paid and subsequently a diagonal offset well was drilled. The subsequent suit was an effort on the part of the lessee to recover the sum of $14,259.10, the compensatory royalty money which the plaintiff had paid allegedly by mistake. It seems that after Mid-Continent had drilled and completed the diagonal offset well the company officers learned of an unusual provision in the Sawyer lease. The opinion describes this as follows:

In February 1951, Mid-Continent drilled and completed the diagonal offset, in lieu of which compensatory royalty had been paid. Shortly thereafter, however, the company officers and responsible agents learned of unusual provisions in the Sawyer lease explicitly exonerating the lessee of the obligation to drill the diagonal offset well and suspending all implied obligations until a judicial determination thereof. Mid-Continent thereupon brought this suit for restitution, resulting in the judgment appealed from. (Emphasis supplied.)

236 F.2d at 520.

Sawyer is then a peculiar case with unusual facts. The problem in Sawyer did not involve displacement of an implied covenant in a lease as a result of the presence of a drilling covenant. Rather, the Sawyer lease explicitly exonerated the lessee of its obligation to drill an offset well and suspended all implied obligations.

Other authorities cited by appellants are Magnolia Petroleum Co. v. Page, 141 S.W.2d 691 (Tex. 1940); Sunray DX Oil Co. v. Texaco, Inc., 417 S.W.2d 424 (Tex.Civ.App. 1967). Neither of these purport to deal with our specific issue. They support the general principle of contract law that where a written contract covers a subject nothing may be implied.

Appellants' assumption is that Section 2(c) covers the problem when, in fact, it is somewhat vague in its purposes and doubtful in its coverage. Besides, many cases hold that where it is the lessor whose property is being drained, this doctrine of the positive excluding the implied is not applicable.

Professors Meyers and Williams in their 1962 article in the Texas Law Review describe generally the cases which hold that where the lessee has caused the drainage through his or its operation, the lessor may recover:

Several cases hold that the lessee is liable for breach of duty although a protection well would not produce oil or gas in paying quantities. Under this holding, the operator would appear to be an insurer against permanent loss of oil caused by the lessee's operations. In other cases, the effect is to nullify an express clause of the lease that would, in an ordinary drainage case, bar enforcement of the implied covenant. Thus it has been held that lessor may recover despite a delay rental clause permitting the lessee to pay money in lieu of drilling. Some leases contain express clauses obligating the lessee as a prudent operator to drill a protection well when a draining well is located within a specified distance of the property lines. This clause is usually interpreted to exclude a duty to drill if the draining well is a greater distance away. When the lessee is causing the drainage, however, some cases disregard the express covenant and hold the lessee liable regardless of how far away the draining well may be. Other express clauses limiting the number of wells a lessee must drill have been set aside when the lessee does the draining. Lastly, acceptance of delay rentals with notice of drainage is regarded by many courts as a waiver of the right to enforce the covenant, but has been held not to bar recovery when the lessee is responsible for the drainage.

40 Tex. L.Rev. 926-27.The cases cited by the authors regarding the nullifying of an express

clause have already been discussed in Part II above and are in footnote 10 which reads as follows:

Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286 (1921); Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163 (1937); Bush Oil Co. v. Beverly-Lincoln Land Co., supra; Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So.2d 344 (1950).

The cases which are said by the authors to disregard the express covenant are Bush Oil Co. v. Beverly-Lincoln Land Co., supra; Millette v. Phillips Petroleum Co., supra; contra Hutchins v. Humble Oil & Ref. Co., 161 S.W.2d 571 (Tex.Civ.App. 1942).

The authors at pages 928-29, although critical of the doctrine that allows a lessor to recover notwithstanding the existence of an express covenant which supposedly defines his rights, nevertheless acknowledge that where the drainage is caused by the lessee, the implied covenant is recognized and recovery is allowed on it. The authors finally state that they do not condemn the making of distinctions in drainage cases on the basis of who is causing the drainage. Their objection is to the use of the term "fraudulent drainage" in the place of reasonable analysis. The authors recognize that when a lessee is capturing plaintiff's oil from adjoining wells, he might well be considered a wrongdoer even though fraud is too strong a characterization.

In our case there is no serious dispute as to whether the defendants are draining substantial quantities of gas from the plaintiff's former leasehold. Moreover, defendants do not seek to establish that they are not gaining an unfair advantage. Rather, their position is that what they are doing is lawful. In our view, however, the law does not support them in this position. Hence, we must hold that the presence of this positive provision regarding offset wells does not prevent recognition of an implied covenant to protect plaintiff and does not preclude recovery on such a covenant.

IV.

Does the plaintiff as an overriding royalty interest owner have standing to bring an action claiming violation of the implied covenant to protect against drainage?

It is argued without citing any persuasive authority that the plaintiff as the owner of an overriding royalty does not have standing in court to enforce the obligation of the lease and therefore of the implied covenant to protect against drainage. We disagree.

This problem is fully considered by Williams and Meyers in their treatise on oil and gas law. See 5 Oil and Gas Law (1975). It is true that there is very little case law on this subject. The authors, however, have collected the authorities and have set forth the general rule as being that a successor in interest to the original lessor may enforce the covenants implied in the lease. This is said to be a matter of traditional land law. The elements which must be satisfied are that the covenant be in writing; the parties intend that the covenant run to the successor; the covenant touches and concerns the land; and the parties are in privity of estate.

The requirement of writing is satisfied because the covenants are implied in a written

instrument. The intent requirement is satisfied in the typical lease which provides for assignment by either party and for the covenants to be binding on heirs, executors, administrators, successors, or assigns. The authors also explain that the privity of estate as well as the touch and concern requirements are both fulfilled in this kind of lease.

The underlying rationale for the right of the royalty interest owner to enforce the implied covenant is that the 0 covenants run with the land. Hence, even a transferee of a nonparticipating royalty interest or nonexecutive mineral interest is said to have the same right. In our case, of course, the plaintiff is the successor to the original lessor who upon transfer retained an overriding royalty interest.

The authors also call attention to the cases of Warren v. Amerada Petroleum Corp., 211 S.W.2d 314 (Tex. Civ. App. 1948), and Compton v. Fisher-McCall, 298 Mich. 648, 299 N.W. 750 (1941). These are not directly in point, but they lend some support to the conclusion that the plaintiff here has standing. In Warren, the court stated that the plaintiff, a holder of a nonparticipating royalty interest, had the same right as the lessor to enforce implied covenants in a lease pertaining to mineral rights. In Compton, the court held that the lessor-plaintiff had not failed to join a proper party by failing to join a post-lease transferee of a nonparticipating royalty interest. In stating that the implied covenants of the lease were divisible, the court implied that the royalty interest holder could bring its own action.

There is somewhat of a dearth of case authority on denying the right of a royalty interest owner to bring such an action.

Also to be noted is that in the case at bar the plaintiff is in a very difficult position due to the fact that the lessor has no incentive to bring an enforcement action because the United States, the lessor, is collecting its royalty both from the E1/2 of Section 29 and from the W1/2 as well. Since the United States is not being deprived of anything, the only thing remaining is for the plaintiff to bring the action herself. It is impossible to say that she lacks standing or interest to bring the action since she is the only one who has a pecuniary interest which is affected.

The judgment of the district court is affirmed.

OPINION FOOTNOTES

1 The language found in the Cone opinion is as follows:

Some states have applied what is termed the "prudent operator" rule. Breaux v. Pan American Petroleum Corporation, 163 So.2d 406 (Ct.App.La. 1964), cert. denied 246 La. 581, 165 S.2d 481 (1964). Succinctly stated, this rule says that it is the duty of the lessee to prevent substantial drainage of oil or gas from the leased land, when an offset well could be drilled which would produce oil or gas in paying quantities. 5 Williams and Meyers, Oil & Gas Law, § 821 at 78 (1972). On the other hand, other jurisdictions expressly reject the prudent operator rule in this limited factual situation and establish a more liberal rule. Phillips Petroleum Company v. Millette, 221 Miss. 1, 72 So.2d 176, 74 So.2d 731 (1954); R.R. Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal.App.2d 246, 158 P.2d 754 (1945).According to the reasoning of these cases, a common lessee has a duty to prevent substantial draining of the leased land, regardless of whether or not the drilling of an offset well would be a prudent operation, i.e., produce oil or gas in paying quantities.

2 Section 2(c) of the lease is as follows:

(c) Wells--1.To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties or rentals are paid into different funds than those of this lease, or in lieu of any part of such drilling or production, with consent of the Director of the Geological Survey, to compensate the Lessor in full each month for the estimated loss of royalty through drainage in the amount determined by such Director; (2)...; and (3) promptly after due notice in writing to drill and produce such other wells as the Secretary of Interior may reasonably require in order that the leased premises may be properly and timely developed and produced in accordance with good operating practices.

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558 F.2d 1366 UNITED STATES V. OLIVAS (10th Cir. 1977)

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

JOE AGAPITO OLIVAS, Defendant-Appellant.

No. 76-1444
UNITED STATES COURT OF APPEALS TENTH CIRCUIT
558 F.2d 1366
June 22, 1977

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. CR-75-212)

COUNSEL

Don J. Svet (Victor R. Ortega, United States Attorney, C. Richard Baker, Assistant U.S. Attorney, with him on the briefs) for Plaintiff-Appellee.

Jerry C. Connell (Bohm, Connell and McLellan, with him on the briefs) for Defendant-Appellant.

AUTHOR: BREITENSTEIN

OPINION

Before LEWIS, Chief Judge, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Defendant-appellant was indicted for, and found guilty by a jury of, four narcotics offenses arising out of two separate transactions. The sentence on each count imposed a seven-year term plus a three year special parole with the sentences to run concurrently. We affirm the convictions and remand the case for resentencing.

The transactions occurred on May 16, and June 2, 1975. Defendant was indicted on June 24, arrested in California on November 21, and returned to New Mexico on December 3. He immediately retained counsel. At arraignment on December 10 he pleaded not guilty. Trial was set for January 5. On December 29 defense counsel requested a trial continuance on the ground of insufficient time for preparation. The continuance was denied.

Failure to allow sufficient time for trial preparation can be a violation of a defendant's

constitutional right to effective counsel. See Powell v. Alabama, 287 U.S. 45, 71. The grant of a continuance is discretionary with the trial court and reviewable only for abuse of discretion. United States v. Tyler, 10 Cir., 459 F.2d 647, 648, cert. denied 409 U.S. 951 and United States v. Ledbetter, 10 Cir., 432 F.2d 1223, 1225. The exercise of that discretion will not be disturbed on appeal in the absence of a clear showing of abuse resulting in manifest injustice. United States v. Hill, 10 Cir., 526 F.2d 1019, 1022, cert. denied 425 U.S. 940 and United States v. Spoonhunter, 10 Cir., 476 F.2d 1050, 1056.

Defense counsel had 33 days to prepare for trial in this routine narcotics case. Although the charges were serious, the factual problems were not complex. Five witnesses, including defendant, testified for the defense. The basic defense was entrapment. The evidence for the government was sufficient to convict and the jury showed by its verdict that it believed the government witnesses.

With regard to entrapment, appellate counsel ask us to read the record. We have done so. The defense was properly presented to, and rejected by, the jury. Martinez v. United States, 373 F.2d 810, 812. There was no entrapment as a matter of law. See Willis v. United States, 8 Cir., 530 F.2d 308, 312, cert. denied 429 U.S. 838.

Count I of the indictment charged possession of heroin with intent to distribute on May 16. Count II charges distribution of heroin on the same day. Count III charges possession of heroin with intent to distribute on June 2. Count IV charges distribution of heroin on the same day. The alleged acts were all in violation of the same subsection of the United States Code, 21 U.S.C. 841 (a)(1). Counts III and IV were based on a single transfer of heroin on June 2. Counts I and II were based on a May 16 transfer of heroin, except that on that day the federal agent was permitted to examine a sample of the heroin before the sale. The close proximity of the sampling and sale convinces us that in reality they were part of one transaction.

Prince v. United States, 352 U.S. 322, a case under the Bank Robbery Act, holds that Congress did not intend to increase the maximum sentence when two violations of the same statute are shown by a single act. The Fourth Circuit applied Prince to the narcotics statute involved in this appeal in United States v. Atkinson, 4 Cir., 512 F.2d 1235, 1240, cert. denied 45 LW 3280, and United States v. Curry, 4 Cir., 512 F.2d 1299, 1305-1306, cert. denied 423 U.S. 832. The Sixth Circuit came to the same conclusion in United States v. Stevens, 6 Cir., 521 F.2d 334, 336-337, and United States v. King, 6 Cir., 521 F.2d 356, 358-359.

Our unpublished opinion in United States v. Prieto, 10 Cir., No. 75-1413, opinion filed April 5, 1976, is not to the contrary. That decision allows separate convictions for offenses arising out of the same transaction but does not address the question of sentence. The fact that defendant was sentenced to concurrent terms does not render the illegal sentence non-prejudicial.United States v. Davis, 10 Cir., 544 F.2d 1056, 1058.

We agree with the Fourth and Sixth Circuits that separate sentences may not be imposed for offenses arising from the same transaction. The anomaly of a conviction going apparently unvindicated does not bar the correction of sentence. One sentence for each transaction achieves

a just result consistent with legislative intent. See United States v. Stevens, 521 F.2d at 337.

The judgment of conviction is affirmed on each count and the case is remanded with directions to vacate one of the concurrent sentences imposed on Counts I and II and one of the concurrent sentences imposed on Counts III and IV.

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September 26, 2002

VIA FACSIMILE

Steve Ross, Esq.
Oil Conservation Commission
1220 S. Saint Francis Drive
Santa Fe, New Mexico 87505

Re: ***NMOCD Case 12908***
Division Nomenclature Case
Segregated and Reopened

NMOCD CASE 12622 (De Novo)
Nearburg Exploration Company, L.L.C.
Application for Approval of Two Non-Standard 160-acre
Gas Proration and Spacing Units
NE/4 and SE/4, Section 34, T21S, R34E, NMPM,
East Grama Ridge-Morrow Gas Pool, Lea County, New Mexico

Dear Mr. Ross:

In accordance with your letter dated September 12, 2002 in which you advised that the Commission would go forward with the hearing on October 21, 22, 2002 despite the personal difficulties of counsel, I canceled, at substantial expense, the last part of my attendance at a reunion. My revised plans provide that I will be gone from October 5 to October 18th.

I have just received your letter dated September 26, 2002, dealing with pre hearing matters and setting a schedule that I am not able to meet. I respectfully request that this schedule to modified. Unless modified, I will have no other choose but to withdraw a counsel for Redrock.

Very truly yours,

W. Thomas Kellahin

cfx: J. Scott Hall, Esq.
Attorney for Raptor Natural Pipeline, LLC
William F. Carr, Esq.
Attorney for Nearburg Exploration Company, L.L.C.
Redrock Operating Ltd. Co.
Attn: Tim Cashon

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Monday, September 30, 2002

To: Stephen Ross
Oil Conservation Commission
Fax : 476-3462
Phone: 476-3451

From: William F. Carr
Fax : 505-983-6043
Phone: 505-988-4421

Message:
Please see attached letter. This will not be hand-delivered until tomorrow.
Thank you.

☒ No Confirmation Copy — Number of pages including cover sheet: 3

Attorney Number: 5101 Client/Matter Number: 00005.0011 Time Deadline:
Operator Initials: Date Transmitted: Time:

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September 30, 2002

HAND DELIVERED

Stephen C. Ross, Esq.
Assistant General Counsel
Oil Conservation Division
New Mexico Department of Energy,
Minerals and Natural Resources
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505

Re: New Mexico Oil Conservation Division Case 12908: Division Nomenclature Case, August 1, 2002.

New Mexico Oil Conservation Division Case 12622 (De Novo): Aplication of Nearburg Exploration Company, L.L.C. for approval of two non-standard 160-acre gas spacing and proration units, Lea County, New Mexico.

Dear Mr. Ross:

This letter responds to the pre-hearing deadlines set by the Commission on September 26, 2002 and Mr. Kellahin's letter of that date concerning potential problems resulting from that schedule.

Nearburg will respond to the motions filed by Redrock as quickly as possible - hopefully on October 2nd - but in no event later than October 3rd. We will also file Nearburg's Amended Prehearing Statement on that date. The Prehearing statement will be changed only to identify Terry Durham, Nearburg's geophysist, as a possible witness. Mr. Durham may be called to review our seismic exhibits. These are the same seismic exhibits previously filed by Nearburg.

Only minor revisions are being made to the Nearburg exhibits. Cross sections are being revised to make them easier to read. We also are preparing an additional location map which will be used to identify particular wells to the Commission as we work through our testimony. The purpose of this exhibit is to facilitate our presentation and only shows information contained in the exhibits previously produced.

HOLLAND & HART LLP
ATTORNEYS AT LAW

Nearburg will not file pre-hearing motions.

We will attempt to expedite the pre-hearing process as much as possible so that all issues can be resolved prior to October 5th.

Very truly yours,

William F. Carr

cc: W. Thomas Kellahin, Esq.
J. Scott Hall, Esq.
Robert Shelton
Nearburg Exploration Company, L.L.C.

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September 30, 2002

HAND DELIVERED

Stephen C. Ross, Esq.
Assistant General Counsel
Oil Conservation Division
New Mexico Department of Energy,
Minerals and Natural Resources
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505

Re: New Mexico Oil Conservation Division Case 12908: Division Nomenclature Case, August 1, 2002.

New Mexico Oil Conservation Division Case 12622 (De Novo): Aplication of Nearburg Exploration Company, L.L.C. for approval of two non-standard 160-acre gas spacing and proration units, Lea County, New Mexico.

Dear Mr. Ross:

This letter responds to the pre-hearing deadlines set by the Commission on September 26, 2002 and Mr. Kellahin's letter of that date concerning potential problems resulting from that schedule.

Nearburg will respond to the motions filed by Redrock as quickly as possible - hopefully on October 2nd - but in no event later than October 3rd. We will also file Nearburg's Amended Prehearing Statement on that date. The Prehearing statement will be changed only to identify Terry Durham, Nearburg's geophysist, as a possible witness. Mr. Durham may be called to review our seismic exhibits. These are the same seismic exhibits previously filed by Nearburg.

Only minor revisions are being made to the Nearburg exhibits. Cross sections are being revised to make them easier to read. We also are preparing an additional location map which will be used to identify particular wells to the Commission as we work through our testimony. The purpose of this exhibit is to facilitate our presentation and only shows information contained in the exhibits previously produced.

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