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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.
THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

THE NEW MEXICO OIL CONSERVATION COMMISSION'S RESPONSE TO APPELLANT'S STATEMENT OF REVIEW ISSUES

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and, pursuant to SCRA 2002, Rule 1-074(L), submits the foregoing as its response to Appellants' Statement of Appellate Issues:

I. STATEMENT OF THE ISSUES

This is an appeal of Order No. R-11700-B of the New Mexico Oil Conservation Commission[1] (hereinafter referred to as "the Commission"). In that order, the Commission found that permits to drill two natural gas wells had been improperly granted to David Arrington Oil and Gas Co. (hereinafter referred to as "Arrington") instead of TMBR/Sharp Drilling Inc. (hereinafter referred to as "TMBR/Sharp"). Order No. 11700-B can be found in the Record on Appeal (hereinafter referred to as "RA") at pages 1-8.

[1] The Commission is a three-member body created by the Oil and Gas Act charged with the conservation of oil and natural gas resources, the prevention of waste of oil and natural gas, the protection of correlative rights, and many other tasks related to the production of crude oil and natural gas. See NMSA 1978, §§ 70-2-4, 70-2-6, 70-2-11, 70-2-12 (Repl. 1995 and Supp. 2001).

Arrington assigns two issues on appeal: (1) whether the Commission improperly revoked Arrington's permits, and (2) whether the Commission should have granted Arrington's request to consolidate this dispute with four applications currently pending before the Oil Conservation Division. ~~Order No. R-11700-B should be upheld if, based on the whole record on appeal, it is supported by substantial evidence, if it was within the scope of authority of the Commission, if the order was not "fraudulent, arbitrary or capricious," and was otherwise in accordance with law. NMSA1978, § 39-3-1.1(D) (Supp. 2002) and Rule 1-074, SCRA 2002~~

II. SUMMARY OF THE PROCEEDINGS

This case ~~arises out of a dispute between at least three oil and gas producers over the~~ right to drill natural gas wells in two sections of land in Lea County near Lovington ~~and involves competing applications for permits to drill natural gas wells~~. A permit to drill ~~such~~ a well is required (19.15.3.102 NMAC) and is obtained from a district office of the Oil Conservation Division.[2] ~~This case began~~ On August 8, 2001, ~~when~~ the District Supervisor of the Hobbs District Office of the Oil Conservation Division denied a permit to TMBR/Sharp for its proposed natural gas well named the "Leavelle 23 Well No. 1" to be located in the northeast quarter of Section 23 (T16S, R35E, NMPM, Lea County). RA at 164-166. On the same day, the District Supervisor denied a permit to drill to TMBR/Sharp for its proposed "Blue Fin '25' Well No. 1" to be located in the northwest quarter of Section 25 in the same township (T16S, R35E, NMPM, Lea County). RA at

[2] The Oil Conservation Division is the administrative agency charged with <>. Oil and Gas ACt

161-163. The District Supervisor denied the permits because Arrington had previously been granted permits to drill[3] in the same sections. RA at 161, 164.

TMBR/Sharp filed an application before the Oil Conservation Division pursuant to Rule 1203(A), 19 NMAC 15.N.1203.A, to seek reversal of the ~~decision of the~~ District Supervisor (Case No. 12744) and for an order staying Arrington from commencing operations under the approved permits to drill (Case No. 12731). RA at 226-227. Shortly thereafter, TMBR/Sharp filed suit against Arrington in the Fifth Judicial District Court for declaratory relief, tortuous interference, repudiation, damages and injunctive relief. See RA at 247-285 (Complaint). That suit sought, in part, a declaration that TMBR/Sharp's leases in Sections and 23 and 25 remained valid and that Arrington's leases to the same acreage were not valid. See RA at 252-256.

A Division hearing examiner held an evidentiary hearing on TMBR/Sharp's application on September 20, 2001 and the Director subsequently issued Order No. R-11700 on December 11, 2001. RA at 226-231. The Order denied TMBR/Sharp's applications and left intactthe decision of the District Supervisor. Id.

Subsequent to the Order in the Division case, the Fifth Judicial District Court entered summary judgment in favor of TMBR/Sharp concerning its leases in Sections 23 and 25. RA at 329, 403. See also RA at 294-328 (parties' briefs concerning the motions for summary judgment). Accordingly, on January 7, 2002, TMBR/Sharp filed a petition for hearing *de novo* pursuant to NMSA 1978, § 70-2-13 and Rule 1220 (19 NMAC 15.N.1220). RA at 396-397. Under these provisions, any order of the Oil Conservtaion Division may be heard *de novo* by the Commission. Id. The Commission conducted an

[3] Arrington had been granted a permit to drill its "Blue Drake 23" well, to be located in the southeast quarter of Section 23 on July 3, 2000. RA at 159-160. It had also been granted a permit to drill its "Triple-Hackle Dragon 25" well in the northwest quarter of Section 25 on July 17 or 19, 2001. RA at 156-158.

evidentiary hearing on TMBR/Sharp's applications on March 26, 2002 and issued its Order No. R-11700-B on April 26, 2002. The Commission's Order found in favor of TMBR/Sharp and reversed the decision of the District Supervisor. Appellant filed for rehearing, which was denied by operation of law. See NMSA 1978, § 70-2-25 (Supp. 2001). This appeal ensued.

III. ARGUMENT

A. Introduction.

As noted, this case resulted from competition among at least three oil and gas companies to drill deep natural gas wells to the Mississippian formation below two sections of the same township near Lovington, in Lea County, New Mexico. One of the parties, TMBR/Sharp Drilling Inc., had spent several years searching for natural gas in the general area. RA at 67-72. In fall of 2000, TMBR/Sharp drilled a natural gas well in Section 24. RA at 67, 72. The well was very prolific. RA at 97-98. After being successful with this well, TMBR/Sharp elected to pursue drilling in Sections 23 and 25, where it held interests under oil and gas leases granted by Madeline Stokes and Erma Stokes Hamilton in 1997 to Ameristate Oil and Gas Inc.[4] RA at 72, 167-172, 482-487.

Arrington and Ocean Energy were also interested in the general area. Arrington and Ocean Energy had agreed in December of 2000 to drill a test well in Section 20. RA at 219-225. In March 2001, a person named James D. Huff, identified by Arrington as its agent, obtained leases from Ms. Stokes and Ms. Hamilton on the same property that had also been leased to TMBR/Sharp. RA at 528-533. These leases, referred to by the parties herein as "top leases," would not take effect according to their terms until the

[4] Ameristate and TMBR/Sharp entered into an agreement whereby TMBR/Sharp became the operator of properties listed in the agreement, which included the Stokes/Hamilton leases. RA at 174-210.

leases held by TMBR/Sharp became ineffective. RA at 80-81. See 8 Williams & Myers, Oil and Gas Law 1115-1117 ("top lease" defined)(2001). When Arrington/Huff obtained the top leases to TMBR/Sharp's acreage, they apparently believed that TMBR/Sharp's leases had expired according to their terms (RA at <>); as noted ~~above~~ previously, the District Court disagreed.

After Mr. Huff obtained the top leases, Arrington accordingly applied to the Oil Conservation Division for a permit to drill wells in sections 23 and 25, which were granted and TMBR/Sharp's subsequent applications were denied, as described earlier. The grounds for denying TMBR/Sharp's permits was that permits had already been issued to Arrington in the same "spacing unit." RA at 161, 164. A "spacing unit" is the area that can theoretically be drained by a single well; "spacing rules" of the Oil Conservation Division specify how many wells can be placed on a given tract. See NMSA 1978, § 70-2-12(10); 19 NMAC 15.H.605(B)("Well Acreage and Location Requirements"). In Sections 23 and 25, no more than one well is permitted on each 320-acre parcel. RA at 3 (Order No. R-11700-B, ¶ 12). Each section is, of course, 640 acres, and a "spacing unit" ~~in the disputed sections~~ is ~~thus~~ half of each section. Another problem in this case is that

~~Another parallel dispute exists concerning orientation of the spacing unit in Section 25. The dispute is pending before the Oil Conservation Division in cases 12816, 12841, 12859 and 12860. The Commission refused the requests of Arrington and Ocean Energy to hear all six cases together and Arrington assigns error to this decision. Some background on this issue may therefore be helpful. As noted, a section can contain two 320-acre spacing units, but~~ the resulting 320-acre units can be oriented in a north-south direction or an east-west direction. These are often referred to as "stand-up" or "lay-

down" units. See 8 Williams & Myers, pages 556, 1030. ~~In this case~~, TMBR/Sharp would benefit more from a spacing unit in Section 25 that is a "lay-down" unit (oriented in an east-west orientation) because its interests are apparently concentrated in the north half of the section. See RA at 150, 242. Arrington and Ocean Energy, because their interests are apparently concentrated in the west half of Section 25, would benefit from a stand-up unit (oriented in a north-south direction), and their application for permit to drill the Triple-Hackle Dragon 25 accordingly proposed such a north-south orientation. RA at 152. TMBR/Sharp proposed an east-west orientation for its Bluefin 25 well. RA at 153. Arrington proposed a north-south orientation for its Triple-Hackle Dragon 25 well. RA at 152. The parties seem to agree that the best location for a well in this section is the northwest quarter of Section 25. Compare RA at 152 (Arrington's application) with RA at 153 (TMBR/Sharp's application). A different situation apparently presents itself in Section 23, because both Arrington and TMBR/Sharp proposed units comprising the east half of that Section. Arrington's application to drill the Blue Drake 23 proposed a north-south orientation for the spacing unit (RA at 154), and TMBR/Sharp proposed a north-south orientation for its Leavelle 23 well (RA at 155).

~~It is~~ The issue concerning the orientation of the spacing units ~~not before the~~ Commission or the Court, ~~that~~ is the most contentious. ~~Even though~~ the Commission didn't address ~~the orientation of the units, the parties seem to want to read the~~ Commission's position as ~~having benefited their respective positions *vis a vis* the~~ ~~orientation issue~~. The determination of the proper orientation by the Division (or the Commission) will affect how much each party stands to profit from the exploitation of

the natural gas in Sections 23 and 25. It is a very charged issue, but as noted, ~~it is~~ not before the Court because it was not before the Commission.

B. Standard of Review.

Decisions of the Oil Conservation Commission may be reversed by the District Court on four very limited grounds: (1) if, based on the whole record on appeal, the "decision of the agency was not supported by substantial evidence"; (2) if the agency acted "fraudulently, arbitrarily or capriciously"; (3) if the action "was outside the scope of authority of the agency"; or (4) if the action of the agency "was otherwise not in accordance with law." See NMSA 1978, § 70-2-25(B) (Supp. 2000); NMSA 1978, § 39-3-1.1(D) (Supp. 2000) and Rule 1-074, SCRA 2000.

An agency's decision is supported by "substantial evidence" if evidence presented to the agency is such that "a reasonable mind might accept [it] as adequate to support a conclusion." Fugere v. State Taxation and Revenue Department, 120 N.M. 29, 33, 897 P.2d 216 (Ct.App. 1995); Rutter & Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether evidence is substantial, reviewing courts do not re-weigh the evidence the agency received, but only consider whether it is adequate to support the decision:

> "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [citation omitted] In resolving those arguments of the appellant, *we will not weigh the evidence. By definition, the inquiry is whether, on the record, the administrative body could reasonably make the findings.*

Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 208, 531 P.2d 939 (1975)(emphasis added). While the substantial evidence standard does not require a Court to ignore contradictory evidence if it undermines the reasonableness of a decision,

contradictory evidence is viewed in the light most favorable to upholding the agency decision according to the general standard of reasonableness:

> [W]e view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. [citation omitted] The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision.

Santa Fe Exploration Co. v. Oil Conservation Commission of the State of New Mexico et al., 114 N.M. 103, 114, 835 P.2d 819 (1992).

An "arbitrary or capricious" administrative action is an "illegal action" or where the agency has no proceeded in the manner required by law. Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 783, 907 P.2d 182 (1995), Santa Fe Exploration, supra. at 115. See also Regents of the University of New Mexico v. Hughes, 114 N.M. 304, 309, 838 P.2d 458, 463 (1992)(formulation of judicial review of administrative agency in terms of "arbitrary, unlawful, unreasonable, capricious or not based on substantial evidence" is synonymous with illegality). It is also a decision that does not have a "rational basis" of where the decision is "contrary to logic and reason." Santa Fe Exploration, supra. at 115.

C. The Commission's Order.

The Commission's order dealt with the two major issues raised by the parties: (1) whether TMBR/Sharp's applications to drill should have been approved instead of denied, and (2) whether it was appropriate to hear the permit cases separately from with four pending applications for compulsory pooling in Sections 23 and 25.

On the first issue, the Commission found that TMBR/Sharp should have been issued permits to drill instead of Arrington. RA at 6 (Order, ¶ 29). The Commission's

decision was based on Rules 102, 1101 and 7(O) (19.15.3.102 NMAC, 19 NMAC 15.M.1101, 19.15.1(O)(8) NMAC) of the rules and regulations of the Oil Conservation Division; those regulations restrict issuance of a drilling permit to an "operator" who is a "person who is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." RA at 3 (Order, ¶ 13). The Commission ~~found~~ note d that TMBR/Sharp's leases in sections 23 and 25 were created by the 1987 oil and gas leases of Madeline Stokes and Erma Stokes Hamilton and the joint operating agreement between TMBR/Sharp and Ameristate Oil & Gas, Inc. RA at 3 (Order, ¶¶ 16, 17). The Commission further observed that on March 17, 2001, Ms. Stokes and Ms. Hamilton leased the same property to James D. Huff, a "top lease." RA at 4 (Order, ¶ 19). The Commission also observed Arrington had acquired interests in section 25 by virtue of a "farm-out"[5] agreement from Ocean Energy on September 10, 2001. RA at 4 (Order ¶ 21). Finally, the Commission observed that TMBR/Sharp had filed suit in the Fifth Judicial District Court challenging the validity of the top lease, and that the District Court had issued summary judgment to TMBR/Sharp, declaring the top leases of Arrington ineffective. RA at 4 (Order, ¶ 22). Since, at the time TMBR/Sharp applied for a permit, Arrington lacked a presently-existing mineral lease in the west half of Section 25 or the east half of Section 23, the Commission found that TMBR/Sharp should have been granted a permit to drill when it applied in August 2001. RA at 5-6 (Order ¶¶ 28, 29). The Commission accordingly ordered the permits issued to Arrington rescinded, and the matter of the TMBR/Sharp permits remanded to the District Office for appropriate action. RA at 7-8 (Order, decretal ¶¶ 1, 2). Because Arrington and Ocean Energy asserted that

[5] A "farm-out" agreement is a common form of agreement whereby a lease owner who does not desire to drill at the present time assigns the lease or some portion thereof to another operator who is interested in drilling the well. 8 Williams & Myers, Oil and Gas Law at 377 ("Farmout agreement")(2001).

the District Court's order would be appealed, the Commission expressly retained jurisdiction of the matter. RA at 6, 8 (Order, ¶ 30, decretal, ¶ 5).

On the second issue, the Commission denied the motions to stay the proceedings pending resolution of the competing applications for compulsory pooling. RA at 8 (Order, decretal ¶ 3). The Commission reasoned that that the two proceedings serve different objectives and should not be confused. RA at 6-7 (Order, ¶¶ 33, 34, 35, 36). The Commission found that issuance of a permit to drill enables to the Oil Conservation Division to examine the operator's financial assurance and insure that the operator's designation of pool, spacing and setbacks was accurate. The Commission further found that a compulsory pooling proceeding exists to ensure that unnecessary wells are not drilled and that correlative rights are protected. RA at 6 (Order, ¶ 33). The Commission found that such matters are best dealt with separately to avoid confusion. RA at 7 (Order, ¶¶ 34, 35, 36).

D. The Drilling Permits.

On the issue of the drilling permits, Arrington takes issue with paragraph 29 of the Commission's order, where the Commission found that, at the time Arrington applied for a permit to drill in Sections 23 and 25, it had no authority over the property and should not have been issued a permit to drill. Statement of Appellate Issues, at 7; RA at 6 (Order, ¶ 29). ~~As noted above, the Commission found that *at the time Arrington applied for a drilling permit* it had no authority over the property in Sections 23 and 25 where it proposed to drill wells. RA at 6 (Order, ¶ 31).~~

~~Arrington claims the Commission's findings on this point are erroneous.~~

Arrington claims that *during the time it held a drilling permit* it had a right to drill and

operate lease interests in the W/2 of Section 25 that were "separate and apart" from the leases that were involved in the District Court action. Statement of Appellate Issues, at 7.

Appellant's parsing of this argument (in italics above) is important. While it seems to be undisputed that Appellant has an interest in the west half of Section 25 *now*, the evidence ~~referred to above~~ presented to the Commission after the Dist. Ct.'s order shows that when Arrington filed its applications for a permit to ~~permits to~~ drill in the west half July, 2001, it did not. ~~As noted, the District Court had found those interests invalid. RA at 247-285 (Complaint), 252-256, 294-328, 329, 403, 294-328.~~ move? While Arrington acquired mineral interests on September 10, 2001 that apparently would have otherwise provided a basis for a drilling permit in the west half, that interest was acquired *after* TMBR/Sharp had unsuccessfully attempted to obtain drilling permits in August. See RA at 379-386. Thus, the Commission's findings that TMBR/Sharp had a valid interest *at the time it filed its applications to drill* while Arrington did not, are findings that are supported by substantial evidence. The findings are not erroneous.

Arrington seems to argue that the Commission failed to consider interests in the *east half* of Section 25 (Arrington doesn't refer to Section 23 in this argument). Arrington further argues that the Commission erroneously assumed that the District Court **served to adjudicate "all of the title" owned by Arrington**. Statement of Appellate Issues, at 8. However, Arrington's application for a permit to drill requested a spacing unit consisting of the *west half* of Section 25, not the east half. RA at 152, 156-158. Arrington proposed to drill a well in the northwest quarter of Section 25. Id. The relevance of interests in the east half when Arrington applied for a west half spacing unit, and a well in the northwest corner, is not clear; ~~but~~ this argument ~~it too~~ seems to relate to yet another

pending matter before the Oil Conservation Division[6] and also seems to relate to Arrington's argument that the Commission should have consolidated all the matters together and heard them simultaneously (see below at <>). It is otherwise clear from the evidence presented to the Commission that Arrington had no interest in the west half (the acreage it proposed to dedicate to its well) in August, 2001 when TMBR/Sharp applied for a permit. Indeed, if the interest referred to by Arrington is the farm-out agreement of September 10, 2001, that interest first arose on September 10, 2001, and it doesn't support Arrington's arguments ~~here~~. See RA at 379-386 (farm-out agreement).

~~The~~ Commission ~~didn't~~ "assume" that the District Court adjudicated "all of Arrington's title" (Statement of Appellate Issues, at 8) ~~but~~, ~~because~~ Arrington only presented evidence of the farm-out and the top lease, the Commission could rightfully assume that Arrington had no other interests other than those presented. Although Arrington now seems to argue that it ~~had~~ an "independent interest" or "interests" that otherwise support its application, it did not reveal those interests to the Commission in the proceedings below. Instead, Arrington argued about the validity of the top lease (<cites>), which of course had been ruled without present effect by the District Court, the propriety of the Commission's procedural decisions (<cites>), the <> and the <>.

<Ernie's diatribe>

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[6] On May 15, 2002, Arrington filed an application with the ~~Oil Conservation~~ Division for reinstatement of of its permit to drill its "Glass Eye Midge 25 Well No. 1" somewhere in the east half of Section 25 (the documents are not part of the Commission's file on this matter and the exact location of the proposed well is not of record). ~~The~~ permit to drill this well had been obtained in December of 2001 prior to the District Court"s ruling, and was not brought to the Commission's attention during the hearing of this matter. The District Supervisor cancelled the permit on May 1, 2002, apparently because of the conflict ~~acreage dedication~~ Arrington's application ~~created~~ ~~with~~ the TMBR/Sharp well ~~in the north half of Section 25~~. If Arrington had an independent interest in the east half of Section 25 during August of 2001 when TMBR/Sharp applied for its permits, and those interests would have been relevant to the Commission's consideration of this matter, it was incumbent on Arrington to present evidence of those interests and make those arguments to the Commission. As described in the text below at <>, it did not do so and therefore waived its arguments about the east half of Section 25 on appeal. See cases cited at <>, below.

If Arrington is basing its assignment of error here on some other interest in the east half or even the west half of Section 25 that was not presented to the Commission, Arrington has waived consideration of it by this Court. Duke City Lumber Co. v. New Mexico Environmental Improvement Division, 101 N.M. 301, 308, 681 P.2d 727 (Ct.App. 1983) (party waived objections to testimony of witness during administrative hearing by not objecting); Wolfley v. Real Estate Commission, 100 N.M. 187, 188-189, 668 P.2d 303 (1983) (issues not raised in administrative proceedings will not be considered for the first time on appeal). See also Randolph v. New Mexico Employment Security Department, 108 N.M. 441, 444-445, 774 P.2d 435 (1989) (NMESD's attempt to introduce a letter containing additional evidence after the conclusion of the hearing was improper - the tendered evidence was not to be considered as a part of whole record review by the reviewing courts). ~~The only interests of Arrington that the parties made the Commission aware were the top leases and the farm-out.~~ If Arrington wanted the Commission to consider other interests, ~~it was incumbent on Arrington to provide evidence of those interests. Since it did not,~~ all the Commission could consider was what was before it. And that is all that the Court may consider either. Duke City, Wolfley, Randolph, supra.

Finally, Arrington, citing to Magnolia Petroleum Co. v. Railroad Commission et al., 141 Tex. 96, 170 SW2d 189 (1943), claims that the *practical effect* of the Commission's order was to "adjudicate title." Arrington claims that the Commission exceeded its authority when it rescinded Arrington's permit. Arrington claims that the Commission should have taken the approach spelled out in Magnolia Petroleum. Statement of Appellate Issues, at 9.

The Oil Conservation Commission did not and could not adjudicate title in this case. Order No. R-11700-B expressly deferred to the judgment of the district courts on such matters and agreed that it had no authority to adjudicate title. RA at 5 (Order, at ¶ 27)("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."). As noted, Title is not irrelevant because only an owner may become an operator and obtain a drilling permit. Accord, the Commission cannot adjudicate title, and when situations like this arise, the Commission must defer to the Cts.

Moreover, it is difficult to find a case that more *supports* the Commission's actions than Magnolia Petroleum. In Magnolia Petroleum, an oil and gas producer filed suit against the Texas Railroad Commission (the Texas analogue to the New Mexico Oil Conservation Commission) in Travis County to obtain cancellation of two drilling permits issued to "E.A. Landman." Magnolia Petroleum contended that the permits violated the Railroad Commission's spacing rules and further alleged that the person who had obtained the permits had no title to the property (a quiet title suit had previously been filed in Gregg County, the county in which the property at issue was situated, on this issue). The district court in Travis County cancelled the permit and entered an injunction against the drilling of the two wells. The Travis County court made findings concerning the chain of title of both the minerals and the surface of the disputed tract so as to conclude that a bona fide dispute existed as to the title of the disputed lands --- the court concluded that given the disputed title and the proceedings in Gregg County, the Railroad Commission should not have issued a drilling permit. An intermediate court of appeals remanded the case to the district court to suspend the case until final judgment of the case in Gregg County.

In that posture, the case reached the Supreme Court of Texas, which held the Railroad Commission was without power to adjudicate questions of "... title or rights of possession. These questions must be settled by the courts." Magnolia Petroleum, 170 S.W.2d at 191. The Court further noted that the Railroad Commission lacked the authority to adjudicate title and if it purported to do so, the act would be void: "When the permit is granted, the permittee may still have no such title as will authorize him to drill on the land. If other parties are in possession of the property, as in the present case, they may defend their possession by self-help, or by injunction proceedings. Before the permittee can drill, he must first go to court and establish his title." Id. The Court found that issuance of a drilling permit cannot decide such issues: "[A permit] ... grants no affirmative rights to the permittee to occupy the property, and therefore would not cloud his adversary's title. It merely removes the conservation laws and regulations as a bar to drilling the well ..." Id.

Under Magnolia Petroleum, even if the Commission had "adjudicated title" as Arrington claims, that act would have been void and without effect. The "practical effect" of the Commission's order cannot have "adjudicated title" as Arrington asserts. Magnolia Petroleum holds that any such order is void. The permit issued to TMBR/Sharp only "remove[d] the conservation laws and regulations as a bar to drilling the well ..." Magnolia Petroleum, 170 S.W.2d at 191.

The Texas Supreme Court further held that the Railroad Commission should not completely disregard title questions when it grants a permit to drill. Magnolia Petroleum, 170 S.W.2d at <>. So as to avoid issuing permits to persons without any claim to property upon which a permit to drill is sought, the Court observed that the Railroad

Commisison should refuse to grant a permit unless the applicant can claim the property in "good-faith." Magnolia Petroleum, 170 S.W.2d at 191.[7] The Court further noted that in cases where title was in dispute "... the mere fact that another in good faith disputes his title is not alone sufficient to defeat his right to the permit ..." The Court finally noted that a "good faith dispute" over the title is not grounds "... for suspending the permit or abating the statutory appeal pending settlement of the title controversy." Id.

Arrington apparently claims that a good faith dispute concerning the property (presumably the top leases) still exists, apparently based on the parties' assertions that an appeal of the District Court's summary judgment would be forthcoming after entry of a final order. See RA at 51-51 (statement of Mr. Bruce), 128-129 (statement of Mr. Carroll). But since the District Court issued summary judgment, much more than a "good faith dispute" exists. Here, the District Court has *adjudicated* Arrington's title and found it wanting. RA at 232 (summary judgment). This is a critical difference between this case and Magnolia Petroleum. In Magnolia Petroleum, the Gregg County court had not yet adjudicated title when the permit dispute reached the courts, and the Supreme Court couldn't justify abating the statutory appeal to await adjudication of title. Magnolia Petroleum, 170 S.W.2d at 191. Magnolia Petroleum cannot be stretched to say that the Commission must issue a permit to anyone with a good faith belief in their title if, in fact, a court has declared that title has failed.

E. Consolidation of the Compulsory Pooling Cases.

While the proceedings were pending before the Commission, both Arrington and Ocean Energy attempted to convince the Commission that this matter should be

[7] The "good faith belief" is the same standard the Commission adopted in this case. See RA at 5-6 (Order. at ¶ 28).

consolidated with four "compulsory pooling" cases. RA at <>. The applications in the four cases seek compulsory pooling in sections 23 and 25. RA at 634. A "compulsory pooling order" is an order that designates an operator of a well even if the operator does not own all the mineral interests in the designated unit and cannot obtain voluntary consent of the various interest owners. See NMSA 1978, § 70-2-17(C). Conversely, a compulsory pooling order is not necessary when the operator owns the mineral interetsts in a given spacing unit, or where the operator has obtained consent of all the other interest owners. See RA at 7 (Order, ¶ 35). In compulsory pooling, the interests are "pooled" to the well of the operator and the owners of the mineral interests in the unit share in the production with the operator. Id. Pooling is necessary to ensure that a well is drilled and resources recovered despite the inability of various interest owners to agree on the terms and conditions of drilling and the subsequent production. Id.

The Commission rejected the motions to consolidate, and in so doing pointed out that the applications for compulsory pooling raise entirely different questions than TMBR/Sharp's application for review of the Division's denial of its applications. RA at 6 (Order, ¶¶ 32-36). The Commission found that the matters were not so related that they needed to be dealt with in conjunction with the permit dispute:

> 32. On another issue, Arrington and Ocean Energy have both urged this body to stay these proceedins pending resolution of the applications for compulsory pooling, arguing that a decision on those matters will effectively resolve the issues surrounding the permits to drill.
>
> 33. ... *An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused.* The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable

> requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. *But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights.* NMSA 1978, § 70-2-17(C).

RA at 6.

Arrington assigns error to this decision. Arrington argues that the Commission failed to "completely resolve" the dispute and failed to accord "full relief" to the affected parties. Statement of Appellate Issues, at 10. Arrington argues that the Commission has allowed the issues in this case to "unduly influence events" and has failed to consider its statutory mandates to prevent waste, protect correlative rights and prevent the drilling of unnecessary wells. Id. Arrington argues that the Order in this case has caused Arrington more problems and have frustrated its efforts to develop the east half of Section 25, acreage that Arrington claims "should not have been affected by these proceedings." Id.

The four compulsory pooling cases may be "related" to the permit cases in the sense that they involve the same property and some of the same parties. Beyond this, the cases are unrelated. The Commission's decision to refuse to consolidate the cases was not unreasonable, unlawful or arbitrary, but based on its analysis of the issues and its specialized knowledge of the regulatory programs and the industry. Santa Fe Exploration 114 N.M. at 114-115 ("[T]he resolution and interpretation of [conflicting evidence] requires expertise, technical competence, and specialized knowledge or engineering and geology as possessed by Commission members. . . . Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment."). See also Viking

Petroleum v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983)(the Oil Conservation Commission has experience, technical competence and specialized knowledge dealing with complex matters relating the regulation of exploration and production of oil and natural gas, and the sometimes arcane rules that govern such operations), Grace v. Oil Conservation Commission, 87 N.M. 205, 208, 531 P.2d 939 (1975)(same). The Commission knew that the compulsory pooling matters were unrelated to the permit matter, and knew that it would be confusing and unwieldy to deal with the two matters simultaneously, and therefore declined. RA at 6 (Order, ¶¶ 32, 33).

~~This decision was not unreasonable and was in accordance with law and therefore should not be reversed~~. There is no requirement in law (or otherwise) that the Commission consolidate all related or similar cases and adjudicate all together. *See* NMSA 1978, § 70-2-25(B) (Supp. 2000)(no such requirememnt); NMSA 1978, § 39-3-1.1(D) (Supp. 2000)(no such requirement) and Rule 1-074, SCRA 2000 (no such requirement). As this Court is aware, consolidation of cases before the courts is discretionary, not mandatory (<cites>), and the same is true of cases before an administrative agency. This is because the standard of review focuses on what the Commission did, not what some party advocated it should do. See NMSA 1978, § 39-3-1.1 and Rule 1-074 NMRA (a decision may be set aside only if the agency acted fraudulently, arbitrarily and capriciously, if the final decision was not supported by substantial evidence or if the agency did not act in accordance with law).

Appellant argues that the Commission was *mandated* to address the compulsory pooling applications, citing § 70-2-17(C), Sims v. Mechem, 72 NM 186, 188, 382 P.2d 183, 184 (1963), Kerr-McGee Nuclear Corp. v. New Mexico Environmental

Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct.App. 1981), Van Horn Oil Co. v. Oklahoma Corporation Commission, 753 P.2d 1359, 1363 (1988), Anderson v. Grand River Dam Authority, 446 P.2d 814 (1968) and Am.Jur.2d. ("Administrative Law, Section 522").

do not support this assertion.

However, these citations ~~are not relevant to the question whether the Commission had an affirmative duty to consolidate all the cases and hear them simultaneously~~. Section 70-2-17(C) of the Oil and Gas Act provides the Commission with specific *authority* to enter compulsory pooling orders. It requires the Commission to enter a pooling order only if certain factual predicates are present. But, ~~On~~ its face, section 70-2-17(C) does not require the Commission to consolidate cases to afford a "complete resolution" as proposed by Arrington.

The citation to Sims is not helpful either. Sims involved an application for compulsory pooling on which the Commission had issued a pooling order. The Court in that case noted that "... the commission is *authorized* to require pooling of property when such pooling has not been agreed upon by the parties ..." Sims, 72 N.M. at <> (emphasis added). The specific issue in Sims concerned the Commission's compulsory pooling order, which lacked a finding concerning waste. Sims, 72 N.M. at <>. The case does not stand for any relevant proposition here, and certainly does not stand for the proposition that the Commission has to bring the parties before it and adjudicate whether property should be subject to compulsory pooling.

Appellant's citation to Kerr-McGee and Anderson are similarly misplaced. Kerr-McGee involved the promulgation of *regulations* by the New Mexico Environmental Improvement Board. Several actions of the Board were questioned during the

promulgation of radiation protection regulations. Staff of the Enviornment Department had drafted the proposed rules. The Court held that the Board had in fact impermissibly delegated its authority and the regulations should have been drafted by the Board's staff. Kerr-McGee, 97 N.M. at <>. Anderson involoved a regulation of the Grand River Dam Auhtority requiring permission of adjoining landowners before it would issue a houseboat permit on a lake. After a houseboat powner was unable to obtain approval form the adjoining landowner, the Dam Auhtority took possession of the houseboat and sold it. The Oklahoma Supreme Court decided that the regulation impermissibly delegated the Dam Auhtority's authority to the adjoining landowners. Anderson, 446 P.2d at 819. ~~In~~ This case, by contrast, ~~not only~~ does ~~it~~ not concern rulemaking, ~~but~~ and the Oil Conservation Commission has not delegated authority to anyone. The compulsory pooling cases are not yet before it, but remain pending before they ~~are before~~ the Oil Conservation Division.[8] The issue raised by Arrington is not a question of delegation of authority, but the procedure chosen by the Commission to decide the application.

The citation to Van Horn is the most puzzling reference, because that case upheld numerous purely procedural decisions of the Oklahoma Corporation Commission. In Van Horn, a compulsory pooling proceeding, the Oklahoma Supreme Court upheld the Commission's decisions: (1) to proceed to hearing and deny Van Horn Oil Company's motion to continue, (2) to elect to proceed to hearing despite the fact that Van Horn's principals could not participate because he was on vacation, (3) to conduct an oral hearing on Van Horn's challenge to a hearing officer, (4) to decide contrary to the hearing officer's recommendations, and (5) its refusal to re-open the record to take additional evidence. Van Horn alleged on appeal that the Commission could not overrule the

[8] Describe Division's hearing process and appeal de novo to Commission

findings of its hearing officer once the hearing officer had been delegated authority to hear the matter. The Oklahoma Supreme Court made clear that no such principle exists because the hearing officer's "decision" was only a recommendation to the Corporation Commission, not a decision. Van Horn, 753 P.2d 1359. The Court commented, in *dicta*, that the Commission would have been without power to delegate its decision-making power to the hearing officer. ~~As in Kerr-McGee~~, this citation isn't relavant to this case because the Commission hasn't improperly delegated its power to enter a compulsory pooling order. It simply hasn't consolidated the compulsory pooling cases with the permit dispute as Arrington desires. If it stands for anything, Van Horn stands for the proposition that the Commission has inherent power to manage the cases and matters before it.

As noted earlier, the Oil and Gas Act specifically delegates to the Commission[9] authority to manage its procedural affairs as it sees fit. NMSA 1978, § 70-2-7 (1987) (the division shall prescribe by rule its rules of order or procedure in hearings).
And courts invariably give deference to administrative agencies on purely procedural matters. *See e.g.* In the Matter of the Otero County Electric Cooperative, 108 N.M. 462, 774 P.2d 1050 (1989); Mobil Oil Exploration & Producing S.E. v. United Distribution Companies, 498 U.S. 211, 112 L.Ed.2d 636, 111 S.Ct. 615 (1991); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 55 L.Ed.2d 460, 98 S.Ct. 1197 (1978); Northern Border Pipeline Co. v. Federal Energy Regulatory Comm'n, 129 F.3d 1315, 1319 (D.C. Cir. 1997); United States v. Jenks, 22 F.3d 1513,

[9] The Oil and Gas Act refers to the Oil Conservation Division, but also provides that the Division and the Commission have concurrent jurisdiction. NMSA 1978, § 70-2-6(B).

1518 (10th Cir. 1994), *after remand* 129 F.3d 1348 (10th Cir. 1997); American Airlines Inc. v. Civil Aeronautics Board, 495 F.2d 1010 (D.C. Cir. 1974).

The procedural discretion vested in administrative bodies is critical to their proper functioning and efficiency. For example, in Matter of Otero County, the Supreme Court approved the Public Service Commission's decision to sever an issue of the fairness of a billing method known as "demand metering" from a proceeding devoted to adjudication of customer complaints. The Supreme Court held the Commission had discretion to conduct such an inquiry separately, to preserve the *status quo* of the utility's income stream while separately addressing the important question raised by the customer:

> In this case, the PSC granted a rate request, but ordered a separate proceeding to review the fairness of demand metering. Given the nine-month time constraint of [the Public Utility Act], and the imperative of "just and reasonable" rates under [the Public Utility Act], the PSC's severance is a reasonable procedure under its legislative mandates. This procedure allowed the PSC to leave the utility's income stream intact, while preserving its mandate under [the Public Utility Act] to determine the reasonableness of Otero's rate structure.

Matter of Otero County, 108 N.M. at 465. ~~Similarly~~, Under the Otero County analysis . . . (apply to facts)

Finally, Arrington's apparent contention that the Commission refused to perform mandatory, non-discretionary duties, is not even true. Statement of Appellate Issues, at 10-11. The Commission did not "refuse to hear" the four compulsory pooling cases. It just refused to hear them when Arrington wanted them heard. RA at 8 (Order, ¶ 3, decretal). The cases remain pending before the Oil Conservation Division, they have been heard by the Division hearing examiner, and await disposition. The parties are entitled pursuant to the Oil and Gas Act (§ 70-2-13) to have the matter heard *de novo* by the Commission. Id. Nothing in this procedure suggests that the Commission is attempting to shirk its duties to prevent waste or protect correlative rights or to hear the geological and

Move up

engineering that is required to resolve a compulsory pooling case. To suggest that the Commission's decision to hear these matters separately is a decision to abrogate those responsibilities is simply disingenuous. This was simple procedural decision, no more and no less, designed to separate matters for decision that were dissimilar.

F. ORDER NO. R-11700-B SHOULD BE AFFIRMED UNDER THE STANDARD OF REVIEW

Order No. R-11700-B was well supported by the District Court's declaration that TMBR/Sharp's mineral interests in Sections 23 and 25 had not failed. Arrington having failed to present evidence to the Commission that at the time TMBR/Sharp applied for the permit to drill that Arrington had some independent mineral interest to support its application, Order No. R-11700-B was amply supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion reached. Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 208, 531 P.2d 939 (1975)(emphasis added). The Commission's decision to address the permitting issue separately from the compulsory pooling issue was rational and based on the Commission's understanding of the essential differences between such proceedings. The decision to hear the matters separately was not unreasonable, was not contrary to law, and was not arbitrary or capricious, and as such should be upheld on appeal as well.

<CITES>

STATEMENT OF RELIEF SOUGHT

The Commission requests affirmance of Order No. R-11700-B, dismissal of Arrington's appeal herein, and issuance of the appropriate mandate.

Respectfully Submitted:

Stephen C. Ross
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Certificate Of Service

Counsel for Appellee, the New Mexico Oil Conservation Commission, hereby certifies that a copy of this document was mailed to counsel listed below, this ____ day of September, 2002:

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Courts often speak of these procedural matters being committed to agency discretion. For example, in Mobil Oil Exploration, a dispute concerning whether the Federal Energy Regulatory Commission should have addressed a problem raised by one of the parties during a proceeding, the United States Supreme Court held that the agency is best suited to determine how to handle related yet discrete issues and its decisions in this regard are committed to agency discretion:

> The court clearly overshot its mark if it ordered the Commission to resolve the take-or-pay problem in this proceeding. *An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures* [citations omitted] *and priorities. ... * * * [A]n agency need not solve every problem before it in the same proceeding.* This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing.

Mobil Oil Exploration, 498 U.S. at 230-231 (emphasis added). The holding in Mobil Oil Exploration echoed the Supreme Court's earlier decision on this topic in Vermont Yankee. In that case, an environmental group claimed the Atomic Energy Commission should consider the issue of spent nuclear fuel in a separate nationwide proceeding --- the AEC had instead chose to address the spent fuel issue during individual licensing proceedings. The Supreme Court upheld the AEC's chosen procedure; the Court observed that decisions when to address an issue is a matter of procedure entrusted to the agency's discretion, not that of the reviewing court:

> [T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.
> * * *
> *Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "* [citations omitted] Indeed, our cases could hardly be more explicit in this regard.

Vermont Yankee, 435 U.S. at 524, 534-44 (emphasis added). *See also* American Airlines, 495 F.2d at 1020 (where the Civil Aeronautics Board, in a proceeding concerning "interline" airline fares, had considered the relationship between rates in a separate proceeding from the absolute levels of rates, and the Court of Appeals approved this separate consideration of issues: "The courts have uniformly recognized the Board's authority to arrange its business and order its dockets as expedience may dictate. [citations omitted] In the present case the Board divided its labors in an eminently sensible fashion."); Northern Border, 129 F.3d at 1319 (where the Court held: "We believe it is entirely appropriate, therefore, for FERC to defer [determination whether costs of a pipeline acquisition could properly be included in a rate base] ... until the company's customers have an opportunity to offer their views [in a separate proceeding]. The question of 'how best to handle related, yet discrete, issues in terms of procedures' is a matter committed to agency discretion."); Jenks, 22 F.3d at 1518 (where the defendant refused to apply to the Forest Service for a special use permit to use an access road, but the Court held that the requirement that he apply for a permit was reasonable). The Court in Jenks remarked that an agency possesses substantial procedural latitude implementing its mandate:

> An agency must be given substantial latitude in determining how to implement a statutory mandate. [citations omitted] "As long as an agency's procedures are reasonably designed to permit the agency to 'discharge [its] multitudinous duties,' a court should not interfere." [citations omitted] In the instant case, the Forest Service's permit procedure appears to be a reasonable method of implementing ANILCA's statutory mandate to provide access to inholders while assisting the Forest Service in the management and preservation of forest lands.

Id. <Cite to REA express???>

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
BETTY RIVERA
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

September 13, 2002

James Bruce
Attorney At Law
P.O. Box 1056
Santa Fe, New Mexico 87504

Re: **Case Nos. 12816, 12841, 12859, and 12860 (TMBR/Sharp Drilling, Inc. /Ocean Energy, Inc./David H. Arrington Oil and Gas, Inc.)**

Dear Mr. Bruce:

The Oil Conservation Division (OCD) received your letter to Lori Wrotenbery regarding the above referenced cases on September 11, 2002. The four cases are consolidated into one case and this makes it a unique and complex case to draft. Furthermore, we have other unique and complex cases to be drafted with the same urgency as your clients'.

We have however moved up your case to be drafted, but it is not likely to be issued before September 30, 2002. We hope that the order in this complex case will be issued by the end of October.

Please contact me at (505) 476-3467 if you have any questions.

Sincerely,

Richard Ezeanyim, P.E.
Oil Conservation Division

Cc: David K. Brooks
Stephen C. Ross
F. Andrew Grooms
Derold Maney
W. Thomas Kellahin
J. Scott Hall
William F. Carr
Susan Richardson

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.
THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

THE NEW MEXICO OIL CONSERVATION COMMISSION'S RESPONSE TO APPELLANT'S STATEMENT OF REVIEW ISSUES

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and, pursuant to SCRA 2002, Rule 1-074(L), submits the foregoing as its response to Appellants' Statement of Appellate Issues:

I. STATEMENT OF THE ISSUES

This is an appeal of Order No. R-11700-B of the New Mexico Oil Conservation Commission[1] (hereinafter referred to as "the Commission"). In that order, the Commission found that permits to drill two natural gas wells had been improperly granted to David Arrington Oil and Gas Co. (hereinafter referred to as "Arrington") instead of TMBR/Sharp Drilling Inc. (hereinafter referred to as "TMBR/Sharp"). Order No. 11700-B can be found in the Record on Appeal (hereinafter referred to as "RA") at pages 1-8.

[1] The Commission is a three-member body created by the Oil and Gas Act charged with the conservation of oil and natural gas resources, the prevention of waste of oil and natural gas, the protection of correlative rights, and many other tasks related to the production of crude oil and natural gas. See NMSA 1978, §§ 70-2-4, 70-2-6, 70-2-11, 70-2-12 (Repl. 1995 and Supp. 2001).

Arrington assigns two issues on appeal: (1) whether the Commission improperly revoked Arrington's permits, and (2) whether the Commission should have granted Arrington's request to consolidate this dispute with four applications currently pending before the Oil Conservation Division. Order No. R-11700-B should be upheld if, based on the whole record on appeal, it is supported by substantial evidence, if it was within the scope of authority of the Commission, if the order was not "fraudulent, arbitrary or capricious," and was otherwise in accordance with law. NMSA1978, § 39-3-1.1(D) (Supp. 2002) and Rule 1-074, SCRA 2002.

II. SUMMARY OF THE PROCEEDINGS

This case arises out of a dispute between at least three oil and gas producers over the right to drill natural gas wells in two sections of land in Lea County near Lovington, and involves competing applications for permits to drill natural gas wells. A permit to drill such a well is required (19.15.3.102 NMAC) and is obtained from a district office of the Oil Conservation Division.[2] This case began on August 8, 2001, when the District Supervisor of the Hobbs District Office of the Oil Conservation Division denied a permit to TMBR/Sharp for its proposed natural gas well named the "Leavelle 23 Well No. 1" to be located in the northeast quarter of Section 23 (T16S, R35E, NMPM, Lea County). RA at 164-166. On the same day, the District Supervisor denied a permit to drill to TMBR/Sharp for its proposed "Blue Fin '25' Well No. 1" to be located in the northwest quarter of Section 25 in the same township (T16S, R35E, NMPM, Lea County). RA at

[2] The Oil Conservation Division is the administrative agency charged with <>. Oil and Gas ACt

161-163. The District Supervisor denied the permits because Arrington had previously been granted permits to drill[3] in the same sections. RA at 161, 164.

TMBR/Sharp filed an application before the Oil Conservation Division pursuant to Rule 1203(A), 19 NMAC 15.N.1203.A, to seek reversal of the decision of the District Supervisor (Case No. 12744) and for an order staying Arrington from commencing operations under the approved permits to drill (Case No. 12731). RA at 226-227. Shortly thereafter, TMBR/Sharp filed suit against Arrington in the Fifth Judicial District Court for declaratory relief, tortuous interference, repudiation, damages and injunctive relief. See RA at 247-285 (Complaint). That suit sought, in part, a declaration that TMBR/Sharp's leases in Sections and 23 and 25 remained valid and that Arrington's leases to the same acreage were not valid. See RA at 252-256.

A Division hearing examiner held an evidentiary hearing on TMBR/Sharp's application on September 20, 2001 and the Director subsequently issued Order No. R-11700 on December 11, 2001. RA at 226-231. The Order denied TMBR/Sharp's applications and left intactthe decision of the District Supervisor. Id.

Subsequent to the Order in the Division case, the Fifth Judicial District Court entered summary judgment in favor of TMBR/Sharp concerning its leases in Sections 23 and 25. RA at 329, 403. See also RA at 294-328 (parties' briefs concerning the motions for summary judgment). Accordingly, on January 7, 2002, TMBR/Sharp filed a petition for hearing *de novo* pursuant to NMSA 1978, § 70-2-13 and Rule 1220 (19 NMAC 15.N.1220). RA at 396-397. Under these provisions, any order of the Oil Conservtaion Division may be heard *de novo* by the Commission. Id. The Commission conducted an

[3] Arrington had been granted a permit to drill its "Blue Drake 23" well to be located in the southeast quarter of Section 23 on July 3, 2000. RA at 159-160. It had also been granted a permit to drill its "Triple-Hackle Dragon 25" well in the northwest quarter of Section 25 on July 17 or 19, 2001. RA at 156-158.

evidentiary hearing on TMBR/Sharp's applications on March 26, 2002 and issued its Order No. R-11700-B on April 26, 2002. The Commission's Order found in favor of TMBR/Sharp and reversed the decision of the District Supervisor. Appellant filed for rehearing, which was denied by operation of law. See NMSA 1978, § 70-2-25 (Supp. 2001). This appeal ensued.

III. ARGUMENT

A. Introduction.

As noted, this case resulted from competition among at least three oil and gas companies to drill deep natural gas wells to the Mississippian formation below two sections of the same township near Lovington, in Lea County, New Mexico. One of the parties, TMBR/Sharp Drilling Inc., had spent several years searching for natural gas in the general area. RA at 67-72. In fall of 2000, TMBR/Sharp drilled a natural gas well in Section 24. RA at 67, 72. The well was very prolific. RA at 97-98. After being successful with this well, TMBR/Sharp elected to pursue drilling in Sections 23 and 25, where it held interests under oil and gas leases granted by Madeline Stokes and Erma Stokes Hamilton in 1997 to Ameristate Oil and Gas Inc.[4] RA at 72, 167-172, 482-487.

Arrington and Ocean Energy were also interested in the general area. Arrington and Ocean Energy had agreed in December of 2000 to drill a test well in Section 20. RA at 219-225. In March 2001, a person named James D. Huff, identified by Arrington as its agent, obtained leases from Ms. Stokes and Ms. Hamilton on the same property that had also been leased to TMBR/Sharp. RA at 528-533. These leases, referred to by the parties herein as "top leases," would not take effect according to their terms until the

[4] Ameristate and TMBR/Sharp entered into an agreement whereby TMBR/Sharp became the operator of properties listed in the agreement, which included the Stokes/Hamilton leases. RA at 174-210.

leases held by TMBR/Sharp became ineffective. RA at 80-81. See 8 Williams & Myers, Oil and Gas Law 1115-1117 ("top lease" defined)(2001). When Arrington/Huff obtained the top leases to TMBR/Sharp's acreage, they apparently believed that TMBR/Sharp's leases had expired according to their terms (RA at <>); as noted above, the District Court disagreed.

After Mr. Huff obtained the top leases, Arrington applied to the Oil Conservation Division for a permit to drill wells in sections 23 and 25, which were granted and TMBR/Sharp's subsequent applications were denied, as described earlier. The grounds for denying TMBR/Sharp's permits was that permits had already been issued to Arrington in the same "spacing unit." RA at 161, 164. A "spacing unit" is the area that can theoretically be drained by a single well; "spacing rules" of the Oil Conservation Division specify how many wells can be placed on a given tract. See NMSA 1978, § 70-2-12(10); 19 NMAC 15.H.605(B)("Well Acreage and Location Requirements"). In Sections 23 and 25, no more than one well is permitted on each 320-acre parcel. RA at 3 (Order No. R-11700-B, ¶ 12). Each section is, of course, 640 acres, and a spacing unit in the disputed sections is thus half of each section.

Another parallel dispute exists concerning orientation of the spacing unit in Section 25. The dispute is pending before the Oil Conservation Division in cases 12816, 12841, 12859 and 12860. The Commission refused the requests of Arrington and Ocean Energy to hear all six cases together and Arrington assigns error to this decision. Some background on this issue may therefore be helpful. As noted, a section can contain two 320-acre spacing units, but the resulting 320-acre units can be oriented in a north-south direction or an east-west direction. These are often referred to as "stand-up" or "lay-

down" units. See 8 Williams & Myers, pages 556, 1030. In this case, TMBR/Sharp would benefit more from a spacing unit in Section 25 that is a "lay-down" unit (oriented in an east-west orientation) because its interests are apparently concentrated in the north half of the section. See RA at 150, 242. Arrington and Ocean Energy, because their interests are apparently concentrated in the west half of Section 25, would benefit from a stand-up unit (oriented in a north-south direction), and their application for permit to drill the Triple-Hackle Dragon 25 accordingly proposed such a north-south orientation. RA at 152. TMBR/Sharp proposed an east-west orientation for its Bluefin 25 well. RA at 153. Arrington proposed a north-south orientation for its Triple-Hackle Dragon 25 well. RA at 152. The parties seem to agree that the best location for a well in this section is the northwest quarter of Section 25. Compare RA at 152 (Arrington's application) with RA at 153 (TMBR/Sharp's application). A different situation apparently presents itself in Section 23, because both Arrington and TMBR/Sharp proposed units comprising the east half of that Section. Arrington's application to drill the Blue Drake 23 proposed a north-south orientation for the spacing unit (RA at 154), and TMBR/Sharp proposed a north-south orientation for its Leavelle 23 well (RA at 155).

It is the issue concerning the orientation of the spacing units, not before the Commission or the Court, that is the most contentious. Even though the Commission didn't address the orientation of the units, the parties seem to want to read the Commission's position as having benefited their respective positions *vis a vis* the orientation issue. The determination of the proper orientation by the Division (or the Commission) will affect how much each party stands to profit from the exploitation of

the natural gas in Sections 23 and 25. It is a very charged issue, but it is not before the Court because it was not before the Commission.

B. Standard of Review.

Decisions of the Oil Conservation Commission may be reversed by the District Court on four very limited grounds: (1) if, based on the whole record on appeal, the "decision of the agency was not supported by substantial evidence"; (2) if the agency acted "fraudulently, arbitrarily or capriciously"; (3) if the action "was outside the scope of authority of the agency"; or (4) if the action of the agency "was otherwise not in accordance with law." See NMSA 1978, § 70-2-25(B) (Supp. 2000); NMSA 1978, § 39-3-1.1(D) (Supp. 2000) and Rule 1-074, SCRA 2000.

An agency's decision is supported by "substantial evidence" if evidence presented to the agency is such that "a reasonable mind might accept [it] as adequate to support a conclusion." Fugere v. State Taxation and Revenue Department, 120 N.M. 29, 33, 897 P.2d 216 (Ct.App. 1995); Rutter & Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether evidence is substantial, reviewing courts do not re-weigh the evidence the agency received, but only consider whether it is adequate to support the decision:

> "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [citation omitted] In resolving those arguments of the appellant, *we will not weigh the evidence. By definition, the inquiry is whether, on the record, the administrative body could reasonably make the findings.*

Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 208, 531 P.2d 939 (1975)(emphasis added). While the substantial evidence standard does not require a Court to ignore contradictory evidence if it undermines the reasonableness of a decision,

contradictory evidence is viewed in the light most favorable to upholding the agency decision according to the general standard of reasonableness:

> [W]e view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. [citation omitted] The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision.

Santa Fe Exploration Co. v. Oil Conservation Commission of the State of New Mexico et al., 114 N.M. 103, 114, 835 P.2d 819 (1992).

An "arbitrary or capricious" administrative action is an "illegal action" or where the agency has no proceeded in the manner required by law. Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 783, 907 P.2d 182 (1995), Santa Fe Exploration, supra. at 115. See also Regents of the University of New Mexico v. Hughes, 114 N.M. 304, 309, 838 P.2d 458, 463 (1992)(formulation of judicial review of administrative agency in terms of "arbitrary, unlawful, unreasonable, capricious or not based on substantial evidence" is synonymous with illegality). It is also a decision that does not have a "rational basis" of where the decision is "contrary to logic and reason." Santa Fe Exploration, supra. at 115.

C. The Commission's Order.

The Commission's order dealt with the two major issues raised by the parties: (1) whether TMBR/Sharp's applications to drill should have been approved instead of denied, and (2) whether it was appropriate to hear the permit cases separately from with four pending applications for compulsory pooling in Sections 23 and 25.

On the first issue, the Commission found that TMBR/Sharp should have been issued permits to drill instead of Arrington. RA at 6 (Order, ¶ 29). The Commission's

decision was based on Rules 102, 1101 and 7(O) (19.15.3.102 NMAC, 19 NMAC 15.M.1101, 19.15.1(O)(8) NMAC) of the rules and regulations of the Oil Conservation Division; those regulations restrict issuance of a drilling permit to an "operator" who is a "person who is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." RA at 3 (Order, ¶ 13). The Commission found that TMBR/Sharp's leases in sections 23 and 25 were created by the 1987 oil and gas leases of Madeline Stokes and Erma Stokes Hamilton and the joint operating agreement between TMBR/Sharp and Ameristate Oil & Gas, Inc. RA at 3 (Order, ¶¶ 16, 17). The Commission further observed that on March 17, 2001, Ms. Stokes and Ms. Hamilton leased the same property to James D. Huff, a "top lease." RA at 4 (Order, ¶ 19). The Commission also observed Arrington had acquired interests in section 25 by virtue of a "farm-out"[5] agreement from Ocean Energy on September 10, 2001. RA at 4 (Order ¶ 21). Finally, the Commission observed that TMBR/Sharp had filed suit in the Fifth Judicial District Court challenging the validity of the top lease, and that the District Court had issued summary judgment to TMBR/Sharp, declaring the top leases of Arrington ineffective. RA at 4 (Order, ¶ 22). Since, at the time TMBR/Sharp applied for a permit, Arrington lacked a presently-existing mineral lease in the west half of Section 25 or the east half of Section 23, the Commission found that TMBR/Sharp should have been granted a permit to drill when it applied in August 2001. RA at 5-6 (Order ¶¶ 28, 29). The Commission accordingly ordered the permits issued to Arrington rescinded, and the matter of the TMBR/Sharp permits remanded to the District Office for appropriate action. RA at 7-8 (Order, decretal ¶¶ 1, 2). Because Arrington and Ocean Energy asserted that

[5] A "farm-out" agreement is a common form of agreement whereby a lease owner who does not desire to drill at the present time assigns the lease or some portion thereof to another operator who is interested in drilling the well. 8 Williams & Myers, Oil and Gas Law at 377 ("Farmout agreement")(2001).

the District Court's order would be appealed, the Commission expressly retained jurisdiction of the matter. RA at 6, 8 (Order, ¶ 30, decretal, ¶ 5).

On the second issue, the Commission denied the motions to stay the proceedings pending resolution of the competing applications for compulsory pooling. RA at 8 (Order, decretal ¶ 3). The Commission reasoned that that the two proceedings serve different objectives and should not be confused. RA at 6-7 (Order, ¶¶ 33, 34, 35, 36). The Commission found that issuance of a permit to drill enables to the Oil Conservation Division to examine the operator's financial assurance and insure that the operator's designation of pool, spacing and setbacks was accurate. The Commission further found that a compulsory pooling proceeding exists to ensure that unnecessary wells are not drilled and that correlative rights are protected. RA at 6 (Order, ¶ 33). The Commission found that such matters are best dealt with separately to avoid confusion. RA at 7 (Order, ¶¶ 34, 35, 36).

D. The Drilling Permits.

On the issue of the drilling permits, Arrington takes issue with paragraph 29 of the Commission's order, where the Commission found that, at the time Arrington applied for permits to drill in Sections 23 and 25, it had no authority over the property and should not have been issued a permit to drill. Statement of Appellate Issues, at 7; RA at 6 (Order, ¶ 29). As noted above, the Commission found that *at the time Arrington applied for a drilling permit* it had no authority over the property in Sections 23 and 25 where it proposed to drill wells. RA at 6 (Order, ¶ 31).

Arrington claims the Commission's findings on this point are erroneous. Arrington claims that *during the time it held a drilling permit* it had a right to drill and

operate lease interests in the W/2 of Section 25 that were "separate and apart" from the leases that were involved in the District Court action. Statement of Appellate Issues, at 7.

Appellant's parsing of this argument (in italics above) is important. While it seems to be undisputed that Appellant has an interest in the west half of Section 25 *now*, the evidence referred to above shows that when Arrington filed its applications for permits to drill in July, 2001, it did not. As noted, the District Court had found those interests invalid. RA at 247-285 (Complaint), 252-256, 294-328, 329, 403, 294-328. While Arrington acquired mineral interests on September 10, 2001 that apparently would have otherwise provided a basis for a drilling permit, that interest was acquired *after* TMBR/Sharp had unsuccessfully attempted to obtain drilling permits in August. See RA at 379-386. Thus, the Commission's findings that TMBR/Sharp had a valid interest *at the time it filed its applications to drill* while Arrington did not, are findings that are supported by substantial evidence. The findings are not erroneous.

Arrington seems to argue that the Commission failed to consider interests in the *east half* of Section 25 (Arrington doesn't refer to Section 23 in this argument). Arrington further argues that the Commission erroneously assumed that the District Court **served to adjudicate "all of the title" owned by Arrington**. Statement of Appellate Issues, at 8. However, Arrington's application for a permit to drill requested a spacing unit consisting of the *west half* of Section 25, not the east half. RA at 152, 156-158. Arrington proposed to drill a well in the northwest quarter of Section 25. Id. The relevance of interests in the east half when Arrington applied for a west half spacing unit, and a well in the northwest corner, is not clear, but it too seems to relate to another

pending matter before the Oil Conservation Division[6] and also seems to relate to Arrington's argument that the Commission should have consolidated all the matters together and heard them simultaneously (see below at <>). It is otherwise clear from the evidence presented to the Commission that Arrington had no interest in the west half (the acreage it proposed to dedicate to its well) in August, 2001 when TMBR/Sharp applied for a permit. Indeed, if the interest referred to by Arrington is the farm-out agreement of September 10, 2001, that interest first arose on September 10, 2001, and it doesn't support Arrington's arguments here. See RA at 379-386 (farm-out agreement).

The Commission didn't "assume" that the District Court adjudicated "all of Arrington's title" (Statement of Appellate Issues, at 8) but, because Arrington only presented evidence of the farm-out and the top lease, the Commission could rightfully assume that Arrington had no other interests other than those presented. Although Arrington now seems to argue that it had an "independent interest" or "interests" that otherwise support its application, it did not reveal those interests to the Commission in the proceedings below. Instead, Arrington argued about the validity of the top lease (<cites>), which of course had been ruled without present effect by the District Court, the propriety of the Commission's procedural decisions (<cites>), the <> and the <>.

<Ernie's diatribe>

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[6] On May 15, 2002, Arrington filed an application with the Oil Conservation Division for reinstatement of of its permit to drill its "Glass Eye Midge 25 Well No. 1" somewhere in the east half of Section 25 (the documents are not part of the Commission's file on this matter and the exact location of the proposed well is not of record). The permit to drill this well had been obtained in December of 2001 prior to the District Court"s ruling, and was not brought to the Commission's attention during the hearing of this matter. The District Supervisor cancelled the permit on May 1, 2002, apparently because of the conflict the proposed acreage dedication Arrington's application created with the TMBR/Sharp well in the north half of Section 25. If Arrington had an independent interest in the east half of Section 25 during August of 2001 when TMBR/Sharp applied for its permits, and those interests would have been relevant to the Commission's consideration of this matter, it was incumbent on Arrington to present evidence of those interests and make those arguments to the Commission. As described in the text below at <>, it did not do so and therefore waived its arguments about the east half of Section 25 on appeal. See cases cited at <>, below.

If Arrington is basing its assignment of error here on some other interest in the east half or even the west half of Section 25 that was not presented to the Commission, Arrington has waived consideration of it by this Court. Duke City Lumber Co. v. New Mexico Environmental Improvement Division, 101 N.M. 301, 308, 681 P.2d 727 (Ct.App. 1983) (party waived objections to testimony of witness during administrative hearing by not objecting); Wolfley v. Real Estate Commission, 100 N.M. 187, 188-189, 668 P.2d 303 (1983) (issues not raised in administrative proceedings will not be considered for the first time on appeal). See also Randolph v. New Mexico Employment Security Department, 108 N.M. 441, 444-445, 774 P.2d 435 (1989) (NMESD's attempt to introduce a letter containing additional evidence after the conclusion of the hearing was improper - the tendered evidence was not to be considered as a part of whole record review by the reviewing courts). The only interests of Arrington that the parties made the Commission aware were the top leases and the farm-out. If Arrington wanted the Commission to consider other interests, it was incumbent on Arrington to provide evidence of those interests. Since it did not, all the Commission could consider was what was before it. And that is all that the Court may consider either. Duke City, Wolfley, Randolph, supra.

Finally, Arrington, citing to Magnolia Petroleum Co. v. Railroad Commission et al., 141 Tex. 96, 170 SW2d 189 (1943), claims that the *practical effect* of the Commission's order was to "adjudicate title." Arrington claims that the Commission exceeded its authority when it rescinded Arrington's permit. Arrington claims that the Commission should have taken the approach spelled out in Magnolia Petroleum. Statement of Appellate Issues, at 9.

The Oil Conservation Commission did not and could not adjudicate title in this case. Order No. R-11700-B expressly deferred to the judgment of the district courts on such matters and agreed that it had no authority to adjudicate title. RA at 5 (Order, at ¶ 27)("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.").

Moreover, it is difficult to find a case that more *supports* the Commission's actions than Magnolia Petroleum. In Magnolia Petroleum, an oil and gas producer filed suit against the Texas Railroad Commission (the Texas analogue to the New Mexico Oil Conservation Commission) in Travis County to obtain cancellation of two drilling permits issued to "E.A. Landman." Magnolia Petroleum contended that the permits violated the Railroad Commission's spacing rules and further alleged that the person who had obtained the permits had no title to the property (a quiet title suit had previously been filed in Gregg County, the county in which the property at issue was situated, on this issue). The district court in Travis County cancelled the permit and entered an injunction against the drilling of the two wells. The Travis County court made findings concerning the chain of title of both the minerals and the surface of the disputed tract so as to conclude that a bona fide dispute existed as to the title of the disputed lands --- the court concluded that given the disputed title and the proceedings in Gregg County, the Railroad Commission should not have issued a drilling permit. An intermediate court of appeals remanded the case to the district court to suspend the case until final judgment of the case in Gregg County.

In that posture, the case reached the Supreme Court of Texas, which held the Railroad Commission was without power to adjudicate questions of "... title or rights of possession. These questions must be settled by the courts." Magnolia Petroleum, 170 S.W.2d at 191. The Court further noted that the Railroad Commission lacked the authority to adjudicate title and if it purported to do so, the act would be void: "When the permit is granted, the permittee may still have no such title as will authorize him to drill on the land. If other parties are in possession of the property, as in the present case, they may defend their possession by self-help, or by injunction proceedings. Before the permittee can drill, he must first go to court and establish his title." Id. The Court found that issuance of a drilling permit cannot decide such issues: "[A permit] ... grants no affirmative rights to the permittee to occupy the property, and therefore would not cloud his adversary's title. It merely removes the conservation laws and regulations as a bar to drilling the well ..." Id.

Under Magnolia Petroleum, even if the Commission had "adjudicated title" as Arrington claims, that act would have been void and without effect. The "practical effect" of the Commission's order cannot have "adjudicated title" as Arrington asserts. Magnolia Petroleum holds that any such order is void. The permit issued to TMBR/Sharp only "remove[d] the conservation laws and regulations as a bar to drilling the well ..." Magnolia Petroleum, 170 S.W.2d at 191.

The Texas Supreme Court further held that the Railroad Commission should not completely disregard title questions when it grants a permit to drill. Magnolia Petroleum, 170 S.W.2d at <>. So as to avoid issuing permits to persons without any claim to property upon which a permit to drill is sought, the Court observed that the Railroad

Commisison should refuse to grant a permit unless the applicant can claim the property in "good-faith." Magnolia Petroleum, 170 S.W.2d at 191.[7] The Court further noted that in cases where title was in dispute "... the mere fact that another in good faith disputes his title is not alone sufficient to defeat his right to the permit ..." The Court finally noted that a "good faith dispute" over the title is not grounds "... for suspending the permit or abating the statutory appeal pending settlement of the title controversy." Id.

Arrington apparently claims that a good faith dispute concerning the property (presumably the top leases) still exists, apparently based on the parties assertions that an appeal of the District Court's summary judgment would be forthcoming after entry of a final order. See RA at 51-51 (statement of Mr. Bruce), 128-129 (statement of Mr. Carroll). But since the District Court issued summary judgment, much more than a "good faith dispute" exists. Here, the District Court has *adjudicated* Arrington's title and found it wanting. RA at 232 (summary judgment). This is a critical difference between this case and Magnolia Petroleum. In Magnolia Petroleum, the Gregg County court had not yet adjudicated title when the permit dispute reached the courts, and the Supreme Court couldn't justify abating the statutory appeal to await adjudication of title. Magnolia Petroleum, 170 S.W.2d at 191. Magnolia Petroleum cannot be stretched to say that the Commission must issue a permit to anyone with a good faith belief in their title if, in fact, a court has declared that title has failed.

E. Consolidation of the Compulsory Pooling Cases.

While the proceedings were pending before the Commission, both Arrington and Ocean Energy attempted to convince the Commission that this matter should be

[7] The "good faith belief" is the same standard the Commission adopted in this case. See RA at 5-6 (Order, at ¶ 28).

consolidated with four "compulsory pooling" cases. RA at <>. The applications in the four cases seek compulsory pooling in sections 23 and 25. RA at 634. A "compulsory pooling order" is an order that designates an operator of a well even if the operator does not own all the mineral interests in the designated unit and cannot obtain voluntary consent of the various interest owners. See NMSA 1978, § 70-2-17(C). Conversely, a compulsory pooling order is not necessary when the operator owns the mineral interetsts in a given spacing unit, or where the operator has obtained consent of all the other ointerest owners. See RA at 7 (Order, ¶ 35). In compulsory pooling, the interests are "pooled" to the well of the operator and the owners of the mineral interests in the unit share in the production with the operator. Id. Pooling is necessary to ensure that a well is drilled and resources recovered despite the inability of various interest owners to agree on the terms and conditions of drilling and the subsequent production. Id.

The Commission rejected the motions to consolidate, and in so doing pointed out that the applications for compulsory pooling raise entirely different questions than TMBR/Sharp's application for review of the Division's denial of its applications. RA at 6 (Order, ¶¶ 32-36). The Commission found that the matters were not so related that they needed to be dealt with in conjunction with the permit dispute:

> 32. On another issue, Arrington and Ocean Energy have both urged this body to stay these proceedins pending resolution of the applications for compulsory pooling, arguing that a decision on those matters will effectively resolve the issues surrounding the permits to drill.
>
> 33. ... *An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused.* The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable

> requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. *But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights.* NMSA 1978, § 70-2-17(C).

RA at 6.

Arrington assigns error to this decision. Arrington argues that the Commission failed to "completely resolve" the dispute and failed to accord "full relief" to the affected parties. Statement of Appellate Issues, at 10. Arrington argues that the Commission has allowed the issues in this case to "unduly influence events" and has failed to consider its statutory mandates to prevent waste, protect correlative rights and prevent the drilling of unnecessary wells. Id. Arrington argues that the Order in this case has caused Arrington more problems and have frustrated its efforts to develop the east half of Section 25, acreage that Arrington claims "should not have been affected by these proceedings." Id.

The four compulsory pooling cases may be "related" to the permit cases in the sense that they involve the same property and some of the same parties. Beyond this, the cases are unrelated. The Commission's decision to refuse to consolidate the cases was not unreasonable, unlawful or arbitrary, but based on its analysis of the issues and its specialized knowledge of the regulatory programs and the industry. Santa Fe Exploration 114 N.M. at 114-115 ("[T]he resolution and interpretation of [conflicting evidence] requires expertise, technical competence, and specialized knowledge or engineering and geology as possessed by Commission members. . . . Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment."). See also Viking

Petroleum v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983)(the Oil Conservation Commission has experience, technical competence and specialized knowledge dealing with complex matters relating the regulation of exploration and production of oil and natural gas, and the sometimes arcane rules that govern such operations), Grace v. Oil Conservation Commission, 87 N.M. 205, 208, 531 P.2d 939 (1975)(same). The Commission knew that the compulsory pooling matters were unrelated to the permit matter, and knew that it would be confusing and unwieldy to deal with the two matters simultaneously, and therefore declined. RA at 6 (Order, ¶¶ 32, 33).

This decision was not unreasonable and was in accordance with law and therefore should not be reversed. There is no requirement in law (or otherwise) that the Commission consolidate all related or similar cases and adjudicate all together. *See* NMSA 1978, § 70-2-25(B) (Supp. 2000)(no such requirememnt); NMSA 1978, § 39-3-1.1(D) (Supp. 2000)(no such requirement) and Rule 1-074, SCRA 2000 (no such requirement). As this Court is aware, consolidation of cases before the courts is discretionary, not mandatory (<cites>), and the same is true of cases before an administrative agency. This is because the standard of review focuses on what the Commission did, not what some party advocated it should do. See NMSA 1978, § 39-3-1.1 and Rule 1-074 NMRA (a decision may be set aside only if the agency acted fraudulently, arbitrarily and capriciously, if the final decision was not supported by substantial evidence or if the agency did not act in accordance with law).

Appellant argues that the Commission was *mandated* to address the compulsory pooling applications, citing § 70-2-17(C), Sims v. Mechem, 72 NM 186, 188, 382 P.2d 183, 184 (1963), Kerr-McGee Nuclear Corp. v. New Mexico Environmental

Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct.App. 1981), Van Horn Oil Co. v. Oklahoma Corporation Commission, 753 P.2d 1359, 1363 (1988), Anderson v. Grand River Dam Authority, 446 P.2d 814 (1968) and Am.Jur.2d. ("Administrative Law, Section 522").

However, these citations are not relevant to the question whether the Commission had an affirmative duty to consolidate all the cases and hear them simultaneously. Section 70-2-17(C) of the Oil and Gas Act provides the Commission with specific *authority* to enter compulsory pooling orders. It requires the Commission to enter a pooling order only if certain factual predicates are present. On its face, section 70-2-17(C) does not require the Commission to consolidate cases to afford a "complete resolution" as proposed by Arrington.

The citation to Sims is not helpful either. Sims involved an application for compulsory pooling on which the Commission had issued a pooling order. The Court in that case noted that "... the commission is *authorized* to require pooling of property when such pooling has not been agreed upon by the parties ..." Sims, 72 N.M. at <> (emphasis added). The specific issue in Sims concerned the Commission's compulsory pooling order, which lacked a finding concerning waste. Sims, 72 N.M. at <>. The case does not stand for any relevant proposition here, and certainly does not stand for the proposition that the Commission has to bring the parties before it and adjudicate whether property should be subject to compulsory pooling.

Appellant's citation to Kerr-McGee and Anderson are similarly misplaced. Kerr-McGee involved the promulgation of *regulations* by the New Mexico Environmental Improvement Board. Several actions of the Board were questioned during the

promulgation of radiation protection regulations. Staff of the Enviornment Department had drafted the proposed rules. The Court held that the Board had in fact impermissibly delegated its authority and the regulations should have been drafted by the Board's staff. Kerr-McGee, 97 N.M. at <>. Anderson involoved a regulation of the Grand River Dam Auhtority requiring permission of adjoining landowners before it would issue a houseboat permit on a lake. After a houseboat powner was unable to obtain approval form the adjoining landowner, the Dam Auhtoirty took poession of the houseboat and sold it. The Oklahoma Supreme Court decided that the regulation impermissibly delegated the Dam Auhtority's authority to the adjoining landowners. Anderson, 446 P.2d at 819. In this case, by contrast, not only does it not concern rulemaking, but the Oil Conservation Commission has not delegated authority to anyone. The compulsory pooling cases are not yet before it, they are before the Oil Conservation Division.[8] The issue raised by Arrington is not a question of delegation of authority, but the procedure chosen by the Commission to decide the application.

The citation to Van Horn is the most puzzling reference, because that case upheld numerous purely procedural decisions of the Oklahoma Corporation Commission. In Van Horn, a compulsory pooling proceeding, the Oklahoma Supreme Court upheld the Commission's decisions: (1) to proceed to hearing and deny Van Horn Oil Company's motion to continue, (2) to elect to proceed to hearing despite the fact that Van Horn's principals could not participate because he was on vacation, (3) to conduct an oral hearing on Van Horn's challenge to a hearing officer, (4) to decide contrary to the hearing officer's recommendations, and (5) its refusal to re-open the record to take additional evidence. Van Horn alleged on appeal that the Commission could not overrule the

[8] Describe Division's hearing process and appeal de novo to Commission

findings of its hearing officer once the hearing officer had been delegated authority to hear the matter. The Oklahoma Supreme Court made clear that no such principle exists because the hearing officer's "decision" was only a recommendation to the Corporation Commission, not a decision. Van Horn, 753 P.2d 1359. The Court commented, in *dicta*, that the Commission would have been without power to delegate its decision-making power to the hearing officer. As in Kerr-McGee, tjhis citation isn't relavant to this case because the Commission hasn't improperly delegated its power to enter a compulsory pooling order. It simply hasn't consolidated the compulsory pooling cases with the permit dispute as Arrington desires. If it stands for anything, Van Horn stands for the proposition that the Commission has inherent power to manage the cases and matters before it.

As noted earlier, the Oil and Gas Act specifically delegates to the Commission[9] authority to manage its procedural affairs as it sees fit. NMSA 1978, § 70-2-7 (1987) (the division shall prescribe by rule its rules of order or procedure in hearings).
And courts invariably give deference to administrative agencies on purely procedural matters. *See e.g.* In the Matter of the Otero County Electric Cooperative, 108 N.M. 462, 774 P.2d 1050 (1989); Mobil Oil Exploration & Producing S.E. v. United Distribution Companies, 498 U.S. 211, 112 L.Ed.2d 636, 111 S.Ct. 615 (1991); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 55 L.Ed.2d 460, 98 S.Ct. 1197 (1978); Northern Border Pipeline Co. v. Federal Energy Regulatory Comm'n, 129 F.3d 1315, 1319 (D.C. Cir. 1997); United States v. Jenks, 22 F.3d 1513,

[9] The Oil and Gas Act refers to the Oil Conservation Division, but also provides that the Division and the Commission have concurrent jurisdiction. NMSA 1978, § 70-2-6(B).

1518 (10th Cir. 1994), *after remand* 129 F.3d 1348 (10th Cir. 1997); American Airlines Inc. v. Civil Aeronautics Board, 495 F.2d 1010 (D.C. Cir. 1974).

The procedural discretion vested in administrative bodies is critical to their proper functioning and efficiency. For example, in Matter of Otero County, the Supreme Court approved the Public Service Commission's decision to sever an issue of the fairness of a billing method known as "demand metering" from a proceeding devoted to adjudication of customer complaints. The Supreme Court held the Commission had discretion to conduct such an inquiry separately, to preserve the *status quo* of the utility's income stream while separately addressing the important question raised by the customer:

> In this case, the PSC granted a rate request, but ordered a separate proceeding to review the fairness of demand metering. Given the nine-month time constraint of [the Public Utility Act], and the imperative of "just and reasonable" rates under [the Public Utility Act], the PSC's severance is a reasonable procedure under its legislative mandates. This procedure allowed the PSC to leave the utility's income stream intact, while preserving its mandate under [the Public Utility Act] to determine the reasonableness of Otero's rate structure.

Matter of Otero County, 108 N.M. at 465.

Finally, Arrington's apparent contention, that the Commission refused to perform mandatory, non-discretionary duties, is not even true. Statement of Appellate Issues, at 10-11. The Commission did not refuse to hear the four compulsory pooling cases. It just refused to hear them when Arrington wanted them heard. RA at 8 (Order, ¶ 3, decretal). The cases remain pending before the Oil Conservation Division, they have been heard by the Division hearing examiner, and await disposition. The parties are entitled pursuant to the Oil and Gas Act (§ 70-2-13) to have the matter heard *de novo* by the Commission. Id. Nothing in this procedure suggests that the Commission is attempting to shirk its duties to prevent waste or protect correlative rights or to hear the geological and

engineering that is required to resolve a compulsory pooling case. To suggest that the Commission's decision to hear these matters separately is a decision to abrogate those responsibilities is simply disingenuous. This was simple procedural decision, no more and no less, designed to separate matters for decision that were dissimilar.

F. ORDER NO. R-11700-B SHOULD BE AFFIRMED UNDER THE STANDARD OF REVIEW

Order No. R-11700-B was well supported by the District Court's declaration that TMBR/Sharp's mineral interests in Sections 23 and 25 had not failed. Arrington having failed to present evidence to the Commission that at the time TMBR/Sharp applied for the permit to drill that Arrington had some independent mineral interest to support its application, Order No. R-11700-B was amply supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion reached. Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 208, 531 P.2d 939 (1975)(emphasis added). The Commission's decision to address the permitting issue separately from the compulsory pooling issue was rational and based on the Commission's understanding of the essential differences between such proceedings. The decision to hear the matters separately was not unreasonable, was not contrary to law, and was not arbitrary or capricious, and as such should be upheld on appeal as well.

<CITES>

STATEMENT OF RELIEF SOUGHT

The Commission requests affirmance of Order No. R-11700-B, dismissal of Arrington's appeal herein, and issuance of the appropriate mandate.

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Courts often speak of these procedural matters being committed to agency discretion. For example, in Mobil Oil Exploration, a dispute concerning whether the Federal Energy Regulatory Commission should have addressed a problem raised by one of the parties during a proceeding, the United States Supreme Court held that the agency is best suited to determine how to handle related yet discrete issues and its decisions in this regard are committed to agency discretion:

> The court clearly overshot its mark if it ordered the Commission to resolve the take-or-pay problem in this proceeding. *An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures* [citations omitted] *and priorities. ... * * * [A]n agency need not solve every problem before it in the same proceeding.* This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing.

Mobil Oil Exploration, 498 U.S. at 230-231 (emphasis added). The holding in Mobil Oil Exploration echoed the Supreme Court's earlier decision on this topic in Vermont Yankee. In that case, an environmental group claimed the Atomic Energy Commission should consider the issue of spent nuclear fuel in a separate nationwide proceeding --- the AEC had instead chose to address the spent fuel issue during individual licensing proceedings. The Supreme Court upheld the AEC's chosen procedure; the Court observed that decisions when to address an issue is a matter of procedure entrusted to the agency's discretion, not that of the reviewing court:

> [T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.
> * * *
> *Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "* [citations omitted] Indeed, our cases could hardly be more explicit in this regard.

Vermont Yankee, 435 U.S. at 524, 534-44 (emphasis added). *See also* American Airlines, 495 F.2d at 1020 (where the Civil Aeronautics Board, in a proceeding concerning "interline" airline fares, had considered the relationship between rates in a separate proceeding from the absolute levels of rates, and the Court of Appeals approved this separate consideration of issues: "The courts have uniformly recognized the Board's authority to arrange its business and order its dockets as expedience may dictate. [citations omitted] In the present case the Board divided its labors in an eminently sensible fashion."); Northern Border, 129 F.3d at 1319 (where the Court held: "We believe it is entirely appropriate, therefore, for FERC to defer [determination whether costs of a pipeline acquisition could properly be included in a rate base] ... until the company's customers have an opportunity to offer their views [in a separate proceeding]. The question of 'how best to handle related, yet discrete, issues in terms of procedures' is a matter committed to agency discretion."); Jenks, 22 F.3d at 1518 (where the defendant refused to apply to the Forest Service for a special use permit to use an access road, but the Court held that the requirement that he apply for a permit was reasonable). The Court in Jenks remarked that an agency possesses substantial procedural latitude implementing its mandate:

> An agency must be given substantial latitude in determining how to implement a statutory mandate. [citations omitted] "As long as an agency's procedures are reasonably designed to permit the agency to 'discharge [its] multitudinous duties,' a court should not interfere." [citations omitted] In the instant case, the Forest Service's permit procedure appears to be a reasonable method of implementing ANILCA's statutory mandate to provide access to inholders while assisting the Forest Service in the management and preservation of forest lands.

Id. <Cite to REA express???>

TRANSMITTAL COVER SHEET

OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3440
(505)476-3462 (Fax)

PLEASE DELIVER THIS FAX:

TO: All Counsel

FROM: Steve Ross

DATE: 9-18

PAGES: 6

SUBJECT: Amoyta v. NMOCD

Please review & approve! Thanks!

IF YOU HAVE TROUBLE RECEIVING THIS FAX, PLEASE CALL THE OFFICE NUMBER ABOVE.

DRAFT

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

MOTION TO ENLARGE PAGE LIMIT

COMES NOW Appellee, the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"), by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and moves the Court for an Order enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages. As grounds for the motion, Appellee states:

1. This matter is an appeal of an Order of the New Mexico Oil Conservation Commission. As such it is governed in part by Rule 74 of the Rules of Civil Procedure, NMRA 1-074 (2002).

2. Rule 74(N) restricts the argument portion of the statement of appellate issues to fifteen (15) pages except with permission of the Court to the contrary.

3. This appeal concerns highly technical issues related to the regulation of oil and natural gas drilling, and Appellee is concerned that it will be unable to assist the Court to understand the complex issues in fifteen pages. However, Appellee believes that the issues can be fully addressed in no more than twenty pages of argument.

DRAFT

4. Counsel of record have been contacted and do not oppose the page enlargement or this motion.

WHEREFORE, Appellee moves the Court for an Order en enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages.

Respectfully Submitted:

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
(505) 476-3462 (facsimile)

DRAFT

Certificate Of Service

Counsel for Appellee, the New Mexico Oil Conservation Commission, hereby certifies that a copy of this document was mailed to counsel listed below, this ____ day of September, 2002:

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

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

James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056

Respectfully Submitted:

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
(505) 476-3462 (facsimile)

DRAFT

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.
THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ORDER ENLARGING PAGE LIMIT

THIS MATTER having come before the court upon motion of Appellee, the New Mexico Oil Conservation Commission, by and through its counsel of record, for an Order enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages, and the Court having reviewed the pleadings, noted that Rule 74 of the Rules of Civil Procedure, NMRA 1-074 (2002) imposes, without permission of the Court, a fifteen (15) page restriction on argument, and noted the concurrence of counsel for Appellant,

FINDS that the motion is well-taken and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the page limit for the argument portion of Appellee's statement of review issues should be, and hereby is, extended to not more than twenty (20) pages.

_____
The Honorable Daniel A. Sanchez

Submitted by:

DRAFT

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
505) 476-3462 (facsimile)

Telephonically approved, September 18, 2002:

J. Scott Hall
Miller, Stratvert & Torgerson P.A.
P.O. Box 1986
Santa Fe, New Mexico 87504
(505) 989-9614 (telephone)
(505) 989-9857 (facsimile)
Attorney for Appellant

W. Thomas Kellahin
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504-2265
(505) 982-4285 (telephone)
(505) 982-2047 (facsimile)
Attorney for TMBR/Sharp Drilling Inc.

James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056
(505) 982-2043 (telephone)
(505) 982-2151 (facsimile)
Attorney for Ocean Energy

P. 01

TRANSACTION REPORT

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FOR:

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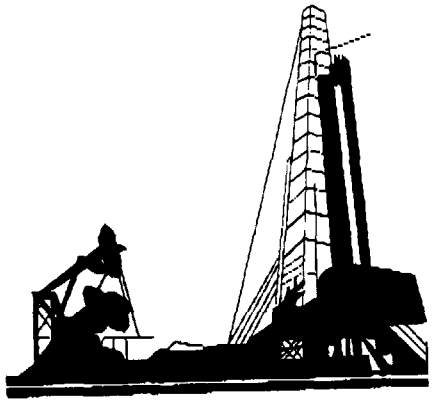

TRANSMITTAL COVER SHEET

OIL CONSERVATION DIVISION
1220 S. ST. FRANCIS DRIVE
SANTA FE, NM 87505
(505) 476-3440
(505)476-3462 (Fax)

PLEASE DELIVER THIS FAX:

TO: All Counsel

FROM: Steve Ross

P. 01

TRANSACTION REPORT

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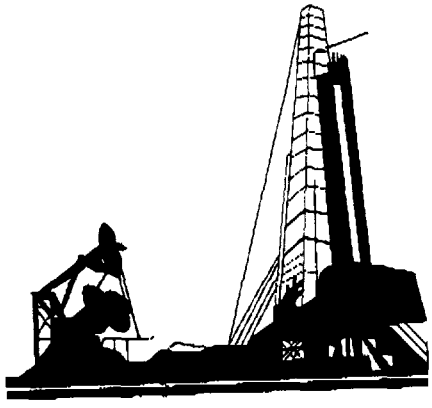

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P. 01

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SEP-18-2002 WED 03:19 PM

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DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
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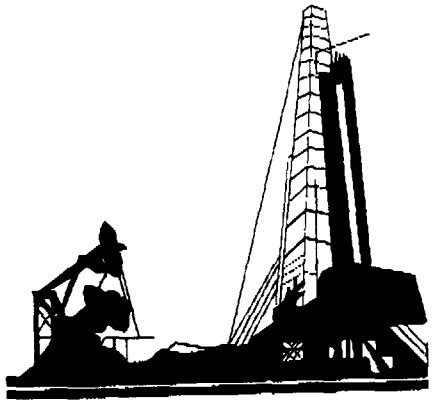

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SANTA FE, NM 87505
(505) 476-3440
(505)476-3462 (Fax)

PLEASE DELIVER THIS FAX:

TO: All Counsel

FROM: Steve Ross

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

September 19, 2002

The Honorable Judge Daniel A. Sanchez
Judge Steve Herrera Judicial Complex
P.O. Box 2268
Santa Fe, New Mexico 87504-2268

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Dear Judge Sanchez,

Please find enclosed an agreed motion and order for an enlargement of the page limit for the response of the Oil Conservation Commission to the Statement of Appellate Issues. If the order is acceptable, I would appreciate if you would sign it and forward both the motion and order to the clerk's office for filing.

I have enclosed a copy of the motion and order and would receiving an endorsed copy of each by return mail.

Please feel free to give me a call at 476-3451 if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc (w/enclosures):
James Bruce, Esq.
W. Thomas Kellahin, Esq.
J. Scott Hall, Esq.

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

MOTION TO ENLARGE PAGE LIMIT

COMES NOW Appellee, the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"), by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and moves the Court for an Order enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages. As grounds for the motion, Appellee states:

1. This matter is an appeal of an Order of the New Mexico Oil Conservation Commission. As such it is governed in part by Rule 74 of the Rules of Civil Procedure, NMRA 1-074 (2002).

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3. This appeal concerns highly technical issues related to the regulation of oil and natural gas drilling, and Appellee is concerned that it will be unable to assist the Court to understand the complex issues in fifteen pages. However, Appellee believes that the issues can be fully addressed in no more than twenty pages of argument.

4. Counsel of record have been contacted and do not oppose the page enlargement or this motion.

WHEREFORE, Appellee moves the Court for an Order en enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages.

Respectfully Submitted:

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
(505) 476-3462 (facsimile)

Certificate Of Service

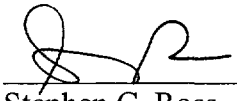
Counsel for Appellee, the New Mexico Oil Conservation Commission, hereby certifies that a copy of this document was mailed to counsel listed below, this 19th day of September, 2002:

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

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

James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056

Respectfully Submitted:



Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
(505) 476-3462 (facsimile)

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ORDER ENLARGING PAGE LIMIT

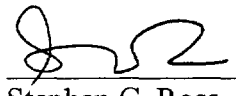
THIS MATTER having come before the court upon motion of Appellee, the New Mexico Oil Conservation Commission, by and through its counsel of record, for an Order enlarging the page limit for the argument portion of Appellee's statement of appellate issues from fifteen (15) pages to twenty (20) pages, and the Court having reviewed the pleadings, noted that Rule 74 of the Rules of Civil Procedure, NMRA 1-074 (2002) imposes, without permission of the Court, a fifteen (15) page restriction on argument, and noted the concurrence of counsel for Appellant,

FINDS that the motion is well-taken and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the page limit for the argument portion of Appellee's statement of review issues should be, and hereby is, extended to not more than twenty (20) pages.

The Honorable Daniel A. Sanchez

Submitted by:



Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
505) 476-3462 (facsimile)

Telephonically approved, September 18, 2002:

J. Scott Hall
Miller, Stratvert & Torgerson P.A.
P.O. Box 1986
Santa Fe, New Mexico 87504
(505) 989-9614 (telephone)
(505) 989-9857 (facsimile)
Attorney for Appellant

W. Thomas Kellahin
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504-2265
(505) 982-4285 (telephone)
(505) 982-2047 (facsimile)
Attorney for TMBR/Sharp Drilling Inc.

James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056
(505) 982-2043 (telephone)
(505) 982-2151 (facsimile)
Attorney for Ocean Energy

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

October 9, 2002

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87504

James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056

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

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Gentlemen,

Please find enclosed a copy of the Oil Conservation Commission's Response to the Statement of Appellate Issues, which will be filed today. Please feel free to give me a call if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc: Susan R. Richardson
Richard Montgomery

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

October 9, 2002

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87504

James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056

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

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Gentlemen,

Please find enclosed a copy of the Oil Conservation Commission's Response to the Statement of Appellate Issues, which will be filed today. Please feel free to give me a call if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc: Susan R. Richardson
Richard Montgomery

Ross, Stephen

From: Ross, Stephen
Sent: Thursday, September 12, 2002 8:52 AM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. NMOCC

Scott,

Thanks to Amanda et al for putting the Record on Appeal in a nice loose leaf binder and returning it so promptly. You must have heard about our budget woes. I really appreciate being able to let your people use documents without worrying about whether they'll return.

Not that I'm excited about starting work on a response, but I haven't seen a copy of your statement of reasons. I only wonder because sometimes mail simply doesn't get to me. I consistently have mail from the Court of Appeals returned (to the Court) stamped "Returned: no apartment number/space no." The Court is definitely losing patience with me. Have you sent me a copy?

Steve

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

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Friday, September 06, 2002 9:47 AM
To: SRoss@state.nm.us
Cc: t.kellahin@worldnet.att.net
Subject: Arrington v. NMOCC

Steve: Our Statement of Appellate Issues is due today, but the Court closes at noon. The Court secretary says that they will treat filings made next Monday as timely if opposing counsel agrees. Based on our earlier conversations, I am representing to the Court's secretary that you would agree to a Monday filing. Tom Kellahin agrees to filing on Monday. If for any reason you disagree with my actions, let me know as soon as possible.

Thanks.

Scott (989-9614)

JAMES BRUCE
ATTORNEY AT LAW

POST OFFICE BOX 1056
SANTA FE, NEW MEXICO 87504

324 MCKENZIE STREET
SANTA FE, NEW MEXICO 87501

(505) 982-2043
(505) 982-2151 (FAX)

September 11, 2002

Hand Delivered

Lori Wrotenbery
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Re: Case Nos. 12816, 12841, 12859, and 12860 (TMBR/Sharp Drilling, Inc./Ocean Energy, Inc./David H. Arrington Oil & Gas, Inc.)

Dear Ms. Wrotenbery:

I am very reluctant to write this letter, but I am compelled to request prompt issuance of an order in the above cases.

The cases involve pooling of contradicting standup and laydown units for Atoka/Morrow/Mississippian wells in §25-16S-35E. TMBR/Sharp requested a laydown N½ unit, while Ocean and Arrington sought W½ and E½ units, respectively. The cases were consolidated for hearing, and were heard on May 16th and 17th.

The problem arises due to expiring farmout agreements owned by Ocean Energy covering 100% of the working interest in the SW¼ §25 (Arrington owns an interest in the farmouts). The farmouts were to expire on June 30, 2002. This fact was testified to at hearing, and Ocean Energy requested expedited issuance of an order. When it appeared that no order would be issued by June 30th, Ocean Energy was able to obtain extensions of the farmouts until September 30, 2002. See Exhibit A attached hereto.

September 30th is now upon us, but still no order has been issued. Ocean Energy has informed me that an additional extension of the farmouts may not be granted. **If you have questions about the farmouts, you may contact F. Andrew Grooms at Branex Resources, Inc., one of the primary farmors (telephone no. (505) 622-1001).** If Ocean Energy is successful in its pooling case (by September 30th), it need not drill an additional well in the W½ §25. However, if it is unsuccessful, it either has to (1) commence a

well in the SW¼ §25, or (2) relinquish its rights under the farmout agreements. A third option is to file suit in District Court under *force majeure*. That option is not favored by Ocean Energy, because it would have to sue people with whom it has made a deal, and because success in District Court is not ensured.

Based on the foregoing, issuance of an order is essential. If the order is adverse to Ocean Energy, it may be forced to commence a well in the SW¼ §25. While I won't re-argue the case, Ocean Energy believes that would be wasteful.

Commencing a second well in the W½ §25 raises another issue: If Ocean Energy must commence a well in the SW¼ §25, it needs an APD approved by the Division. TMBR/Sharp, based on Commission Order No. R-11700-B, has an APD for the N½ §25 (now on appeal to District Court). Ocean does not desire a S½ §25 well unit, because that would be used against it in this case.[1] Thus, it requests, as an interim measure, that its APD for the Triple Hackle Dragon Well No. 2, located in the SW¼ §25, be approved for a W½ well unit. The final well units can be sorted out on appeal. Moreover, despite the Commission's position in Order No. R-11700-B that conflicting APD's cannot be issued, that very same thing was done **subsequent to Order No. R-11700-B** for two wells in the S½ §36-14S-34E (See the files for API Nos. 30-025-35869 and 30-025-35899).

I note that the Division's order in the consolidated cases will be appealed to the Commission, regardless of who prevails at the Division level. Please call me if you have any questions, or if an interim conference needs to be set up on this matter.

Very truly yours,

James Bruce

Attorney for Ocean Energy, Inc.

cc: David K. Brooks
Stephen C. Ross
F. Andrew Grooms
Derold Maney
W. Thomas Kellahin
J. Scott Hall
William F. Carr
Susan Richardson

---

[1] In addition, Arrington has a case pending before the Division (No. 12876) to re-instate an APD for an E½ §25 well unit. Although that case has been stayed by the Division, Arrington had pre-existing title in the E½ §25, which under the reasoning of Commission Order No. R-11700-B should never have been revoked, because Arrington's APD pre-dated TMBR/Sharp's N½ §25 APD.

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL & GAS, INC.,

Appellant,

v. **No. D-0101-CV-2002-1391**

NEW MEXICO OIL CONSERVATION COMMISSION,

Appellee.

AFFIDAVIT OF DEROLD MANEY

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

Derold Maney, being duly sworn upon his oath, deposes and states:

1. I am over the age of 18, and have personal knowledge of the matters stated herein.

2. I am employed by Ocean Energy, Inc. as a petroleum landman.

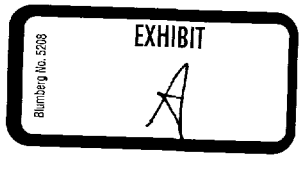
3. Ocean Energy, Inc. has obtained farmout agreements, as amended, covering 100% of the oil and gas leasehold working interest in the SW¼ of Section 25, Township 16 South, Range 35 East, N.M.P.M., Lea County, New Mexico.

4. The farmout agreements, as amended, required a well to be commenced on the SW¼ of Section 25, or on lands pooled therewith, by July 1, 2002.

5. In late June 2002 Ocean Energy, Inc. obtained extensions of the farmout agreements. The farmout agreements have been restated and amended, so that Ocean Energy, Inc. is allowed until September 30, 2002 to commence a well on the SW¼ of Section 25, or on lands pooled therewith.

Derold Maney

Derold Maney



SUBSCRIBED AND SWORN TO before me this 22nd day of August, 2002, by Derold Maney.

Notary Public

My Commission Expires:

3/14/05

Ross, Stephen

From: Ross, Stephen
Sent: Monday, September 09, 2002 1:17 PM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. NMOCC

Hi Scott,

As we discussed Friday, this is fine with me.

Steve

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

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Friday, September 06, 2002 9:47 AM
To: SRoss@state.nm.us
Cc: t.kellahin@worldnet.att.net
Subject: Arrington v. NMOCC

Steve: Our Statement of Appellate Issues is due today, but the Court closes at noon. The Court secretary says that they will treat filings made next Monday as timely if opposing counsel agrees. Based on our earlier conversations, I am representing to the Court's secretary that you would agree to a Monday filing. Tom Kellahin agrees to filing on Monday. If for any reason you disagree with my actions, let me know as soon as possible.

Thanks.

Scott (989-9614)

Ross, Stephen

From: shall@mstLAW.com
Sent: Friday, September 06, 2002 9:47 AM
To: SRoss@state.nm.us
Cc: t.kellahin@worldnet.att.net
Subject: Arrington v. NMOCC

Steve: Our Statement of Appellate Issues is due today, but the Court closes at noon. The Court secretary says that they will treat filings made next Monday as timely if opposing counsel agrees. Based on our earlier conversations, I am representing to the Court's secretary that you would agree to a Monday filing. Tom Kellahin agrees to filing on Monday. If for any reason you disagree with my actions, let me know as soon as possible.

Thanks.

Scott (989-9614)

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

MILLER, STRATVERT & TORGERSON, P.A.

LAW OFFICES

RANNE B. MILLER
ALAN C. TORGERSON
ALICE T. LORENZ
GREGORY W. CHASE
STEPHEN M. WILLIAMS
STEPHAN M. VIDMAR
SETH V. BINGHAM
TIMOTHY R. BRIGGS
RUDOLPH LUCERO
DEBORAH A. SOLOVE
GARY L. GORDON
LAWRENCE R. WHITE
SHARON P. GROSS
VIRGINIA ANDERMAN
MARTE D. LIGHTSTONE
J. SCOTT HALL
THOMAS R. MACK
TERRI S. BEACH
THOMAS M. DOMME
RUTH O. PREGENZER
JEFFREY E. JONES

ROBIN A. GOBLE
JAMES R. WOOD
DANA M. KYLE
KIRK R. ALLEN
RUTH FUESS
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PLEASE REPLY TO SANTA FE

* NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN NATURAL RESOURCES - OIL & GAS LAW
** NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN REAL ESTATE LAW

August 26, 2002

HAND-DELIVERED
Honorable Daniel A. Sanchez
First Judicial District Court
Judge Steve Herrera Judicial Complex
Grant & Catron
Santa Fe, New Mexico 87504-2268

02 AUG 26 PM 3:37

Re: *David H. Arrington Oil and Gas, Inc. v. New Mexico Oil Conservation Commission*;
1st Judicial District Cause No. D-101-CV-2002-1391

Dear Judge Sanchez:

In accordance with LR1-306(G), enclosed is a motion briefing package consisting of (1) Arrington's Motion For Temporary Stay Pending Consolidation, (2) TMBR/Sharp Drilling, Inc.'s Response, and (3) the New Mexico Oil Conservation Commission's Response. I do not intend to file a reply brief and therefore, this matter is ready for your consideration.

Thank you for your attention to this matter.

Very truly yours,

J. Scott Hall

JSH/glb
Enclosures
cc: **Steve Ross, Esq.**
W. Thomas Kellahin, Esq.

William F. Carr, Esq.
James Bruce, Esq.

RECEIVED

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

JASON KELLAHIN (RETIRED 1991)

02 AUG 19 PM 2:19

August 19, 2002

HAND DELIVERED

William J. Parras
District Court Clerk
Grant & Catron
Santa Fe, New Mexico 87501

Re: NOTICE OF EXCUSAL
Arrington v. Oil Conservation Commission
Case No. D0101CV200201391

Dear Mr. Parras:

The reference case was filed on June 25, 2002 and assigned to Judge Art Encinias. On August 12, 2002, I filed the enclosed Notice of Excusal. On August 13, 2002, I received the enclosed notice from you that my Notice of Excusal was not filed within 10 days of Notice of the reassignment of this case to the Honorable Margaret Kegel.

Mr. Scott Hall, Mr. Steve Ross and I did not received any notice of the reassignment of the case to Judge Kegel.

Judge Kegel office has informed Mr. Hall that because of my Notice of Excusal, she has vacant a motion hearing which was set buy Judge Kegel to heard on August 28, 2002 at 11:OO.

Please send me verification that counsel were notify of the reassignment of this case to Judge Kegel.

Respectfully submitted,

W. Thomas Kellahin

cc: Honorable Margaret Kegel

Susan R. Richardson
Richardson R. Montgomery
Robert T. Sullivan
Cotton, Bledsoe, Tighe, & Dawson, P.C.
Attorneys for TMBR/Sharp Drilling Inc.

J. Scott Hall, Esq.
Attorneys for Appellant

Stephen C. Ross, Esq.
Attorney for the Commission

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August 15, 2002

HAND-DELIVERED

Hon. Margaret Kegel
First Judicial District Court
Judge Steve Herrera Judicial Complex
Grant & Catron
Santa Fe, New Mexico 87504-2268

Re: *David H. Arrington Oil and Gas, Inc. v. New Mexico Oil Conservation Commission*; 1st Judicial District Cause No. D-101-CV-2002-1391

Dear Judge Kegel:

Based on the enclosed notice, it appears you remain the judge on this case. Accordingly, I presume that the Appellant's Motion For Temporary Stay will continue be heard on August 28th at 11:00 a.m. as previously scheduled. If this is incorrect, please advise.

Very truly yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall

JSH/ao
Enclosure(s) – as stated

cc: Steve Ross, Esq. NMOCC Counsel
W. Thomas Kellahin
Susan Richardson Attorneys for TMBR/Sharp Drilling, Inc.
James Bruce, Esq. Attorney for Ocean Energy, Inc.

9700/29218

Ross, Stephen

From: shall@mstLAW.com
Sent: Thursday, September 12, 2002 9:00 AM
To: sross@state.nm.us
Cc: Gbell@mstLAW.com
Subject: RE: Arrington v. NMOCC

Steve: I was over there on Tuesday and Mike Stogner asked me what he was supposed to do with this Arrington Statement Of Appellate Issues he received. I told him to throw it away, thinking it was a duplicate sent to him by mistake. Now I know it was your copy that was misdirected to him. I'll fax you a copy right away. If you want more time to respond, you know you have my standing concurrence.

Scott

-----Original Message-----
From: Ross, Stephen [mailto:sross@state.nm.us]
Sent: Thursday, September 12, 2002 8:52 AM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. NMOCC

Scott,

Thanks to Amanda et al for putting the Record on Appeal in a nice loose leaf binder and returning it so promptly. You must have heard about our budget woes. I really appreciate being able to let your people use documents without worrying about whether they'll return.

Not that I'm excited about starting work on a response, but I haven't seen a copy of your statement of reasons. I only wonder because sometimes mail simply doesn't get to me. I consistently have mail from the Court of Appeals returned (to the Court) stamped "Returned: no apartment number/space no." The Court is definitely losing patience with me. Have you sent me a copy?

Steve

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

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Friday, September 06, 2002 9:47 AM
To: SRoss@state.nm.us
Cc: t.kellahin@worldnet.att.net
Subject: Arrington v. NMOCC

Steve: Our Statement of Appellate Issues is due today, but the Court closes at noon. The Court secretary says that they will treat filings made next

Monday as timely if opposing counsel agrees. Based on our earlier conversations, I am representing to the Court's secretary that you would agree to a Monday filing. Tom Kellahin agrees to filing on Monday. If for any reason you disagree with my actions, let me know as soon as possible.

Thanks.

Scott (989-9614)

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

Ross, Stephen

From: Ross, Stephen
Sent: Thursday, August 22, 2002 6:04 PM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. NMOCC

Works for me. If we keep up like this the Supreme Court will be assigning a judge!

Steve

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

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Thursday, August 22, 2002 3:47 PM
To: SRoss@state.nm.us; t.kellahin@worldnet.att.net
Subject: Arrington v. NMOCC

Steve, Tom:

This appeal was assigned from Judge Kegel to Jim Hall who has recused himself and is now before Judge Carol Vigil. I will DQ her and will let you know who the case is reassigned to as soon as we can find out. In the meantime, would you all agree to another motion/order extending the time to file our Statement of Appeal? I'd like to get the new judge, whomever that might be, to hear the motion for temporary stay before putting any more work into the actual appeal. I'm thinking another 2 weeks from the current Sept. 6th date should be sufficient.

Let me know.

Thanks.

Scott

Stephen C. Ross
Assistant General Counsel
Energy, Minerals and Natural Resources Department
Oil Conservation Commission
1220 S. St. Francis Dr.
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PLEASE REPLY TO SANTA FE

August 9, 2002

HAND-DELIVERED

Hon. Margaret Kegel
First Judicial District Court
Judge Steve Herrera Judicial Complex
Grant & Catron
Santa Fe, New Mexico 87504-2268

Re: *David H. Arrington Oil and Gas, Inc. v. New Mexico Oil Conservation Commission*; 1st Judicial District Cause No. D-101-CV-2002-1391

Dear Judge Kegel:

In accordance with LR1-306(G), enclosed is a motion briefing package consisting of (1) Arrington's Motion For Temporary Stay Pending Consolidation, (2) TMBR/Sharp Drilling, Inc.'s Response, and (3) the New Mexico Oil Conservation Commission's Response. I do not intend to file a reply brief and therefore, this matter is ready for your consideration. I understand the motion is set for hearing on August 28, 2002 at 11:00 a.m.

Thank you for your attention to this matter.

Very truly yours,

J. Scott Hall

JSH/kam
Enclosures a/s

cc: Steve Ross, Esq. NMOCC Counsel
W. Thomas Kellahin
Susan Richardson Attorneys for TMBR/Sharp Drilling, Inc.
James Bruce, Esq. Attorney for Ocean Energy, Inc.

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

August 7, 2002

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87504

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Dear Scott,

Please find enclosed two copies of the Commission's response to the Motion to Stay Pending Consolidation. In accordance with the package procedure described in LR1-306(G), please submit the response to the Court at the appropriate time.

Please feel free to give me a call if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc (w/enclosures):
James Bruce
W. Thomas Kellahin
Ernest L. Carroll
Susan R. Richardson
Richard Montgomery

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.
THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

RESPONSE TO MOTION FOR TEMPORARY STAY PENDING CONSOLIDATION

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and for its Response to Appellant's Motion for a Temporary Stay Pending Consolidation of Appellant, states as follows:

1. Appellant has moved this Court to stay its own appeal in this matter so that four additional administrative matters pending before the Oil Conservation Division (hereinafter referred to as "the Division") can work their way through the administrative process and be consolidated with this case at some unspecified time in the future. This unprecedented motion has no basis in the relevant statutes governing this appeal (NMSA 1978, §§ 70-2-25 and 39-3-1.1) or the Rules of Civil Procedure, particularly Rule 1-074, NMRA, and should be denied.

2. This appeal is taken from an order of the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"). The Commission is a three-member body created by the Oil and Gas Act. See NMSA 1978, § 70-2-4 (Repl. 1995).

The principal responsibilities of the Commission are the conservation of oil and natural gas and the prevention of waste. See NMSA 1978, § 70-2-6.

3. The Order at issue is Order No. 11700-B, issued on April 26, 2002. Order No. 11700-B is contained in the Record on Appeal at pages 1-8. In the order, the Commission found that two permits to drill natural gas wells in Lea County, New Mexico had been improperly granted to Appellant.

4. The Commission based its ruling in-part on a ruling of the Fifth Judicial District Court that Appellant's mineral interests were not valid. See Record on Appeal, at 394-95 (decision of Judge Clingman); Order No. R-11700-B, ¶¶ 22, 28 and 29. However, the Oil and Gas Regulations (19 NMAC) clearly specify that only an "operator" may be granted a Permit to Drill an oil or natural gas well. See 19 NMAC 15.M.1101.A, 19.15.3.102 NMAC. An "operator" is a person who is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." NMAC 19.15.1.7.O(8). In this case, the Division had issued permits to drill to Appellant on the assumption that it was duly authorized and was in charge of development of the lease. See Order No. R-11700-B, Record on Appeal at 1-7. The District Court's ruling made it clear that Appellant had no such authority. The Commission therefore ruled that Appellant had no authority over the tracts in question, could not be an "operator" under the Oil and Gas Regulations, and should not have been granted a permit to drill.[1] See Order No. R-11700-B at ¶¶ 22, 28 and 29 (Record on Appeal at 4-6). The Commission's

[1] The Commission expressly found that it lacked the jurisdiction to determine the validity of any title or the validity or any oil and gas lease and that jurisdiction over such matters resided in the courts of the State of New Mexico. See Order No. R-11700-B, ¶ 27, Conclusion of Law (Record on Appeal at 6, 7).

order thus stands for the proposition that a party should not be permitted by the Commission to drill a well to access mineral interests belonging to someone else. Id.

5. The four administrative proceedings Appellant proposes to consolidate are very different. Those proceedings involve applications by various parties for "compulsory pooling" of all interests in two spacing units[2] to a single operator for drilling. See NMSA 1978, § 70-2-17(C). A compulsory pooling order permits an operator to operate a well despite the fact that the operator does not own all of the relevant mineral interests in a designated unit and cannot obtain consent of the various interest owners. The interests are "pooled" to the well of the operator and the interest owners share in the production with the operator. Id. Pooling is necessary to ensure that a well is drilled and resources recovered despite the inability of various interest owners to agree on the terms and conditions of drilling and the subsequent production. Id.

6. Appellant moves this Court to stay the appeal so that these four matters can work their way through the administrative process and finally arrive in this Court. Apparently at that point, Appellant then proposes to file another motion to consolidate those matters with this appeal. However, there is no basis for this highly unusual request, particularly as the four compulsory pooling cases are still at the administrative level. To stay this appeal to await those cases would circumvent important requirements of Rule 1-042 of the Rules of Civil Procedure.

---

[2] A spacing unit is an area of specified acreage that represents the acreage that can be drained by a single well, and governs how many wells can be placed on a given tract. See NMSA 1978, § 70-2-12(10); 19 NMAC 15.H.605(B)("Well Acreage and Location Requirements"). In this case, a spacing unit is 320 acres. See Order No. R-11700-B, ¶ 12 (RA at 3).

7. NMRA 2002, Rule 1-042 provides that an action "pending before the court" may be consolidated for a joint hearing or trial with another "pending" action when the two actions "involv[e] a common question of law or fact ...":

> **A. Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

8. On its face, Rule 1-042 does not permit consolidation of matters that are not "pending before the Court." The four compulsory pooling matters are not before the Court (or even the Commission at this stage). Instead, they are currently pending before the Oil Conservation Division.[3] Before the compulsory pooling matters can reach this Court, *all* of the following must occur: (1) an adverse order of the Oil Conservation Division; (2) an appeal *de novo* to the Commission pursuant to NMSA 1978, § 70-2-13; (3) an adverse Commission order after hearing; (4) a denial of a motion for rehearing pursuant to NMSA 1978, § 70-2-25(A); and (5) the filing of an appeal to this Court pursuant to NMSA 1978, §§ 70-2-25(B) and 39-3-1.1.

9. The device Appellant intends to employ to avoid the "pending case" requirement of Rule 1-042 is the stay "pending" a motion to consolidate (which will apparently be filed at some indeterminate time in the future) when (and if) the administrative matters reach this Court.

10. There is simply no basis for using a stay to permit administrative matters to "catch up" so that they can be consolidated. Certainly, no basis for such an unorthodox

[3] The Division is a part of the Energy, Minerals & Natural Resources Department. NMSA 1978, § 70-2-5. The Division employs hearing examiners, hears disputed matters in an administrative adjudicatory context, and makes it own orders. NMSA 1978, §§ 70-2-13. Decisions of the Division may be appealed *de novo* to the Commission. Id. This appeal started with applications filed by TMBR/Sharp Drilling, and the Division's decisions were appealed *de novo* to the Commission.

procedure exists in the relevant Supreme Court Rules governing this appeal or in the relevant appeal statues. See Rule 1-062(A)(stay of judgment unless stayed), Rule 1-062(D)(stay of order below upon appeal after deposit of supersedeas bond), Rule 1-062(E)(taking of an appeal by the state operates as a stay), Rule 1-074(S)(stay of an order of an administrative agency permitted only after a showing of likelihood to succeed on the merits, irreparable harm, and lack of irreparable harms to others, and posting of a surety or bond), NMSA 1978, §§ 70-2-25 and 39-3-1.1 (no stay provided for).

11. Not only is the "pending case" requirement not met, the requirement that the cases to be consolidated involve a "common question of law or fact" of Rule 1-042 is also lacking. The Commission was well aware of the differences between a dispute involving a permit to drill and an application for compulsory pooling, and so stated in its Order in this matter:

> 33. ... *An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused.* The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. *But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights.* NMSA 1978, § 70-2-17(C).

Record on Appeal, at 6.

12. The four compulsory pooling cases are "related" to this appeal only in the sense that they involve the same property and some of the same parties. Beyond this, as the foregoing demonstrates, the cases are unrelated. This appeal involves essentially a matter of law: whether Appellant is an "operator" and therefore entitled to receive a permit to drill. The resolution of that question in turn implicates a question of real property law (which has been resolved against Appellant by the Fifth Judicial District Court and *res judicata* in this proceeding) and proper application of the Oil and Gas Regulations. Review of these issues implicates a particular standard of review on appeal. See NMRA 2002, Rule 1-074(Q)(4)(whether the action of the agency was in accord with law). The four compulsory pooling matters involve application of principles of petroleum engineering and geology to determine the proper orientation of spacing units and the application of these facts to the obligations under the Oil and Gas Act to protect correlative rights and prevent waste. These issues, if ever presented to a Court for review, would be governed by a whole record review to determine if substantial evidence exists to support the decision. See NMRA 2002, Rule 1-074 (Q)(2)(whether agency's decision, based on a whole record review, is supported by substantial evidence); NMSA 1978, § 39-3-1.1(D)(2)(same standard).

13. Without any pending case before the Court and without a common question of law or fact, no grounds exist for a stay "pending consolidation."

14. Moreover, Appellant's motion seeks relief that was denied repeatedly at the administrative level, and at the very least should be a part of the assignment of error to be reviewed by the Court, not a motion for direct relief.

15. Appellant attempted to delay or consolidate this matter at the administrative matter on at least two previous occasions. See Record on Appeal at 413-18, 558-63, 640-658. Each request was denied. See Order No. R-11700-A (RA at 556-57)(denying motion to continue); R-11700-B, decretal paragraph 3 (RA at 8). The Commission decided to refuse the stay in this matter so as to avoid confusing the permitting matter with the four compulsory pooling matters:

> 32. On another issue, Arrington and Ocean Energy have both urged this body to stay these proceedings pending the resolution of the applications for compulsory pooling, arguing that a decision on those matters will effectively resolve the issues surrounding the permits to drill.
>
> 33. Arrington and Ocean Energy's conclusion does not necessarily follow. An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused. The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights. NMSA 1978, § 70-2-17(C).
>
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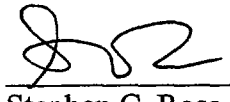

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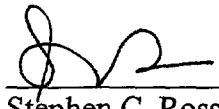

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P. 01

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GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

August 7, 2002

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87504

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Dear Scott,

Please find enclosed two copies of the Commission's response to the Motion to Stay Pending Consolidation. In accordance with the package procedure described in LR1-306(G), please submit the response to the Court at the appropriate time.

P. 01

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Sincerely,

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Assistant General Counsel

Cc (w/enclosures):
James Bruce
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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

RESPONSE TO MOTION FOR TEMPORARY STAY PENDING CONSOLIDATION

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, and for its Response to Appellant's Motion for a Temporary Stay Pending Consolidation of Appellant, states as follows:

1. Appellant has moved this Court to stay its own appeal in this matter so that four additional administrative matters pending before the Oil Conservation Division (hereinafter referred to as "the Division") can work their way through the administrative process and be consolidated with this case at some unspecified time in the future. This unprecedented motion has no basis in the relevant statutes governing this appeal (NMSA 1978, §§ 70-2-25 and 39-3-1.1) or the Rules of Civil Procedure, particularly Rule 1-074, NMRA, and should be denied.

2. This appeal is taken from an order of the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"). The Commission is a three-member body created by the Oil and Gas Act. See NMSA 1978, § 70-2-4 (Repl. 1995).

The principal responsibilities of the Commission are the conservation of oil and natural gas and the prevention of waste. See NMSA 1978, § 70-2-6.

3. The Order at issue is Order No. 11700-B, issued on April 26, 2002. Order No. 11700-B is contained in the Record on Appeal at pages 1-8. In the order, the Commission found that two permits to drill natural gas wells in Lea County, New Mexico had been improperly granted to Appellant.

4. The Commission based its ruling in-part on a ruling of the Fifth Judicial District Court that Appellant's mineral interests were not valid. See Record on Appeal, at 394-95 (decision of Judge Clingman); Order No. R-11700-B, ¶¶ 22, 28 and 29. However, the Oil and Gas Regulations (19 NMAC) clearly specify that only an "operator" may be granted a Permit to Drill an oil or natural gas well. See 19 NMAC 15.M.1101.A, 19.15.3.102 NMAC. An "operator" is a person who is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." NMAC 19.15.1.7.O(8). In this case, the Division had issued permits to drill to Appellant on the assumption that it was duly authorized and was in charge of development of the lease. See Order No. R-11700-B, Record on Appeal at 1-7. The District Court's ruling made it clear that Appellant had no such authority. The Commission therefore ruled that Appellant had no authority over the tracts in question, could not be an "operator" under the Oil and Gas Regulations, and should not have been granted a permit to drill.[1] See Order No. R-11700-B at ¶¶ 22, 28 and 29 (Record on Appeal at 4-6). The Commission's

[1] The Commission expressly found that it lacked the jurisdiction to determine the validity of any title or the validity or any oil and gas lease and that jurisdiction over such matters resided in the courts of the State of New Mexico. See Order No. R-11700-B, ¶ 27, Conclusion of Law (Record on Appeal at 6, 7).

order thus stands for the proposition that a party should not be permitted by the Commission to drill a well to access mineral interests belonging to someone else. Id.

5. The four administrative proceedings Appellant proposes to consolidate are very different. Those proceedings involve applications by various parties for "compulsory pooling" of all interests in two spacing units[2] to a single operator for drilling. See NMSA 1978, § 70-2-17(C). A compulsory pooling order permits an operator to operate a well despite the fact that the operator does not own all of the relevant mineral interests in a designated unit and cannot obtain consent of the various interest owners. The interests are "pooled" to the well of the operator and the interest owners share in the production with the operator. Id. Pooling is necessary to ensure that a well is drilled and resources recovered despite the inability of various interest owners to agree on the terms and conditions of drilling and the subsequent production. Id.

6. Appellant moves this Court to stay the appeal so that these four matters can work their way through the administrative process and finally arrive in this Court. Apparently at that point, Appellant then proposes to file another motion to consolidate those matters with this appeal. However, there is no basis for this highly unusual request, particularly as the four compulsory pooling cases are still at the administrative level. To stay this appeal to await those cases would circumvent important requirements of Rule 1-042 of the Rules of Civil Procedure.

[2] A spacing unit is an area of specified acreage that represents the acreage that can be drained by a single well, and governs how many wells can be placed on a given tract. See NMSA 1978, § 70-2-12(10); 19 NMAC 15.H.605(B)("Well Acreage and Location Requirements"). In this case, a spacing unit is 320 acres. See Order No. R-11700-B, ¶ 12 (RA at 3).

7. NMRA 2002, Rule 1-042 provides that an action "pending before the court" may be consolidated for a joint hearing or trial with another "pending" action when the two actions "involv[e] a common question of law or fact ...":

> **A. Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

8. On its face, Rule 1-042 does not permit consolidation of matters that are not "pending before the Court." The four compulsory pooling matters are not before the Court (or even the Commission at this stage). Instead, they are currently pending before the Oil Conservation Division.[3] Before the compulsory pooling matters can reach this Court, *all* of the following must occur: (1) an adverse order of the Oil Conservation Division; (2) an appeal *de novo* to the Commission pursuant to NMSA 1978, § 70-2-13; (3) an adverse Commission order after hearing; (4) a denial of a motion for rehearing pursuant to NMSA 1978, § 70-2-25(A); and (5) the filing of an appeal to this Court pursuant to NMSA 1978, §§ 70-2-25(B) and 39-3-1.1.

9. The device Appellant intends to employ to avoid the "pending case" requirement of Rule 1-042 is the stay "pending" a motion to consolidate (which will apparently be filed at some indeterminate time in the future) when (and if) the administrative matters reach this Court.

10. There is simply no basis for using a stay to permit administrative matters to "catch up" so that they can be consolidated. Certainly, no basis for such an unorthodox

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[3] The Division is a part of the Energy, Minerals & Natural Resources Department. NMSA 1978, § 70-2-5. The Division employs hearing examiners, hears disputed matters in an administrative adjudicatory context, and makes it own orders. NMSA 1978, §§ 70-2-13. Decisions of the Division may be appealed *de novo* to the Commission. Id. This appeal started with applications filed by TMBR/Sharp Drilling, and the Division's decisions were appealed *de novo* to the Commission.

procedure exists in the relevant Supreme Court Rules governing this appeal or in the relevant appeal statues. See Rule 1-062(A)(stay of judgment unless stayed), Rule 1-062(D)(stay of order below upon appeal after deposit of supersedeas bond), Rule 1-062(E)(taking of an appeal by the state operates as a stay), Rule 1-074(S)(stay of an order of an administrative agency permitted only after a showing of likelihood to succeed on the merits, irreparable harm, and lack of irreparable harms to others, and posting of a surety or bond), NMSA 1978, §§ 70-2-25 and 39-3-1.1 (no stay provided for).

11. Not only is the "pending case" requirement not met, the requirement that the cases to be consolidated involve a "common question of law or fact" of Rule 1-042 is also lacking. The Commission was well aware of the differences between a dispute involving a permit to drill and an application for compulsory pooling, and so stated in its Order in this matter:

> 33. ... *An application for a permit to drill serves different objectives than an application for compulsory pooling and the two proceedings should not be confused.* The application for a permit to drill is required to verify that requirements for a permit are satisfied. For example, on receipt of an application, the Division will verify whether an operator has financial assurance on file, identify which pool is the objective of the well so as to identify the proper well spacing and other applicable requirements, ensure that the casing and cementing program meets Division requirements and check the information provided to identify any other relevant issues. The acreage dedication plat that accompanies the application (form C-102) permits verification of the spacing requirements under the applicable pool rules or statewide rules. Compulsory pooling is related to these objectives in that compulsory pooling would not be needed in the absence of spacing requirements. 1 Kramer & Martin, The Law of Pooling and Unitization, § 10.01 (2001) at 10-2. *But its primary objectives are to avoid the drilling of unnecessary wells and to protect correlative rights.* NMSA 1978, § 70-2-17(C).

Record on Appeal, at 6.

12. The four compulsory pooling cases are "related" to this appeal only in the sense that they involve the same property and some of the same parties. Beyond this, as the foregoing demonstrates, the cases are unrelated. This appeal involves essentially a matter of law: whether Appellant is an "operator" and therefore entitled to receive a permit to drill. The resolution of that question in turn implicates a question of real property law (which has been resolved against Appellant by the Fifth Judicial District Court and *res judicata* in this proceeding) and proper application of the Oil and Gas Regulations. Review of these issues implicates a particular standard of review on appeal. See NMRA 2002, Rule 1-074(Q)(4)(whether the action of the agency was in accord with law). The four compulsory pooling matters involve application of principles of petroleum engineering and geology to determine the proper orientation of spacing units and the application of these facts to the obligations under the Oil and Gas Act to protect correlative rights and prevent waste. These issues, if ever presented to a Court for review, would be governed by a whole record review to determine if substantial evidence exists to support the decision. See NMRA 2002, Rule 1-074 (Q)(2)(whether agency's decision, based on a whole record review, is supported by substantial evidence); NMSA 1978, § 39-3-1.1(D)(2)(same standard).

13. Without any pending case before the Court and without a common question of law or fact, no grounds exist for a stay "pending consolidation."

14. Moreover, Appellant's motion seeks relief that was denied repeatedly at the administrative level, and at the very least should be a part of the assignment of error to be reviewed by the Court, not a motion for direct relief.

15. Appellant attempted to delay or consolidate this matter at the administrative matter on at least two previous occasions. See Record on Appeal at 413-18, 558-63, 640-658. Each request was denied. See Order No. R-11700-A (RA at 556-57)(denying motion to continue); R-11700-B, decretal paragraph 3 (RA at 8). The Commission decided to refuse the stay in this matter so as to avoid confusing the permitting matter with the four compulsory pooling matters:

> 32. On another issue, Arrington and Ocean Energy have both urged this body to stay these proceedings pending the resolution of the applications for compulsory pooling, arguing that a decision on those matters will effectively resolve the issues surrounding the permits to drill.
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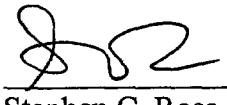

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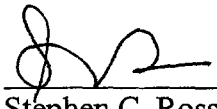

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W. THOMAS KELLAHIN*

*NEW MEXICO BOARD OF LEGAL SPECIALIZATION RECOGNIZED SPECIALIST IN THE AREA OF NATURAL RESOURCES-OIL AND GAS LAW

JASON KELLAHIN (RETIRED 1991)

FACSIMILE COVER SHEET

DATE: August 6, 2002
TIME: 3:30 PM

NUMBER OF PAGES: -13-

***

TO: Steve Ross, Esq.
OF: OCC
FAX NO: 476-3462

CONFIDENTIAL ATTORNEY WORK PRODUCT

RE: TMBR/Sharp-Arrington dispute

Dear Steve:

Attached is a draft of a response to Arrington's motion to stay the Permit appeal. I could never decide if Scott is a day late filing Arrington's appeal. I count he had 30 days from May 26th to file. The appeal was filed on June 25th which appears to be the last day.

Regards,

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

v. **No. D-101-CV-2002-1391**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

TMBR/SHARP DRILLING, INC.
RESPONSE TO
ARRINGTON'S MOTION FOR TEMPORARY STAY
PENDING CONSOLIDATION

TMBR/Sharp Drilling, Inc. ("TMBR/Sharp") the prevailing party appearing before the New Mexico Oil Conservation Commission ("Commission") opposes the motion of David H. Arrington Oil and Gas, Inc. ("Arrington") to stay Arrington's appeal of Commission Order R-11700-B pending the Commission's decision in four (4) New Mexico Oil Conservation Division ("Division") cases still pending before the Division's hearing examiner, and in support of its opposition states:

ARRINGTON'S MOTION IS AN ATTEMPTING TO PREEMPT THE APPELLATE PROCESS

On four (4) prior occasions,[1] Arrington has sought and has been denied the consolidation of the TMBR/Sharp-Arrington dispute over the issuance by the Division of permits to drill ("the Permit Cases") with four subsequently filed compulsory pooling cases which were heard by the Division on May 17-18, 2002 and have not yet reached the Commission (the Pooling Cases")

Arrington's appeal to this Court raises three (3) issues[2] with the core issue being its contention that the Commission cannot separately hear and decide the Permit Cases from the Pooling Cases.

Instead of pursuing its appeal, Arrington's motion attempts to have the Court delay the appeal of the Permit Cases until such time, if and when, an appeal of the Commission's Order in the four Pooling Cases reaches the Court. What Arrington is attempting to do with this motion is to delay the appeal of the Permit Cases and thereby achieve the consolidation of the Permit Cases with the Pooling Cases.

---

[1] On March 26, 2002 in Case 12731 and 12744 (DeNovo) Arrington argued that the Permit Cases should be consolidated with the Pooling Cases (see Finding (32) Order R-11700-B). On May 15, 2002, Arrington filed an Application for Rehearing before the Commission which argued this same issue (Denied by Commission's failure to grant within 10 days of filing. On March 21, 2001, Arrington filed a motion to continue the Commission's hearing of the Permit Cases until the Division had decided the Pooling Cases (denied by Commission). On May 9, 2001, Arrington filed a response in the Pooling Cases contending that they should be joined with the Permit cases.

[2] Arrington's issues are: (a) that on July 31, 2001, when it filed for its APD, Arrington had a working interest ownership in the W/2 of Section 25 separate from the Hamilton/Stokes disputed leases; (b) that the Commission committed error by not consolidating the Permit cases with the Pooling cases; (c) that the Permit Cases involve a ministerial act which should have been decided in connection with the Pooling Cases.

SUMMARY OF PROCEEDINGS

THE PERMIT CASES:

This dispute involves the permitting of a gas well ("APD") to be drilled in Section 25, T16S, R36E, Lea County, New Mexico for gas production from the Townsend-Morrow Gas Pool, (created by Order R-4114 dated September 1, 1970) and from the Townsend-Mississippi Gas Pool (created by Order R-6328 dated May 1, 1980).

This dispute arose when TMBR/Sharp filed two applications for permit to drill ("APDs") in an attempt to drill two additional wells in accordance with the provisions of Paragraph 12 of the Original Stoke Lease, but was denied those APDs by the OCD-Hobbs only because the OCD had already issued approvals for APDs to Arrington for two wells whose designated spacing units included the disputed leasehold properties and were in conflict with TMBR/Sharp's APDs.

Section 70-2-17(A) and (B) of New Mexico's Oil & Gas Act, requires that in order to **prevent waste and correlative rights** (emphasis added) the Division must establish spacing units for each pool including the size of those units and the number of wells per spacing unit. In accordance with these sections, the Division has determined that wells drilled in these two pools shall be governed by Division Rule 104 which provides, in part, that Spacing units shall contain 320-acres (being half of a standard section and that no more than two wells be drilled.[3]

The Division, for the pools involved in this dispute, allows the Operator to select the orientation of the spacing unit.[4] Section 70-2-18(A) provides in part that:

---

[3] See Finding (12) Order R-11700-B.

[4] The Division allows the Operator to chose to dedicate the N/2, S/2, E/2 or W/2 of a section to the well. The Division does not require that the Operator submit geologic evidence to establish the orientation selected as a pre-condition for obtaining the Division's approval of an APD. **See Finding (34) Order R-11700-B**

> "Whenever the operator of any oil or gas well shall dedicate lands comprising a standard spacing or proration unit to an oil or gas well, it shall be the obligation of the Operator....to obtain voluntary agreements pooling said lands or interests or an order of the division pooling said lands..."

The Division requires (19 NMAC 15.M.1101.A) that "before commencing drilling or deepening operations, or before plugging a well back to another zone, the operator must file a permit to do so." (This is Form C-101 and it **must** be accompanied by Form C-102 **Well Location and Acreage Dedication Plat**) Rule 19 NMAC 15.N.1102.A is the Division rule which states "Form C-102 is a dual purpose form used to show the exact location of the well and **the acreage dedicated thereto** (emphasis added). The form is also used to show the ownership and status of each lease contained within the dedicated acreage. When there is more than one working interest owner or royalty owner on a given lease, designation of the majority owner will be sufficient. **See Finding (33) and (35) Order R-11700-B.**

Rule 19 NMAC 15.N.1102.B says all information required on Form C-102 shall be filled out and certified by the operator of the well except for the well location on this plat which is certified by a professional surveyor or engineer. This Division Rule, as well as all Division rules, are authorized by NMSA, 1979, Section 70-2-11.A which states:

> "The division is hereby empowered and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof." **See Finding (13) Order R-11700-B.**

On August 6, 2001 and August 7, 2001, respectively, TMBR/Sharp filed two APD's with the Hobbs Office of the Division requesting approval to drill:

> (a) its Blue Fin "25" Well No. 1 in Unit E and to dedicate it to the N/2 of Section 25, T16S, R35E.
>
> (b) its Leavelle "23" Well No. 1 in Unit G and to dedicate it to the E/2 of Section 23, T16S, R35E.

On August 8, 2001, the Hobbs Office of the Division denied the TMBR/Sharp permits because Arrington already had conflicting permits on the acreage.

On December 13, 2001, the Division entered Order R-11700, refusing to approve TMBR/Sharp's APD because on July 17 and July 30, 2001, respectively, the Division approved an APD for Arrington for its:

> (a) Triple Hackle Dragon "25" Well No. 1 for a spacing unit consisting of the W/2 of Section 25
>
> (b) Blue Drake "23" Well No. 1 for a spacing unit consisting of the E/2 of Section 23

The Division based its decision on Arrington's "claim of colorable title" to the Hamilton/Stokes top leases, and stated that:

(a) "(22) that "Arrington has demonstrated at least a colorable claim of title that would confer upon it a right to drill its proposed wells, no basis exists to reverse or overrule the action of the District Supervisor in approving the Arrington APDs."

(b) "(21) The Oil Conservation 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."

On December 27, 2001, the Lea County District Court, had exercised that jurisdiction and ruled that TMBR/Sharp's Hamilton/Stokes leases are still valid and in

effect and Arrington's Hamilton/Stokes top leases are not in effect.

On March 26, 2002, the Commission held a De Novo hearing concerning Order R-11700. On April 26, 2002, the Commission entered Order R-11700-B which rescinded the Division's approval of Arrington's APD's and ordered that the Division's district supervisor approve TMBR/Sharp's two APD's filed in August 6 and 7, 2001.

On May 1, 2002, Chris Williams, Supervisor of the Hobbs Office of the Division, voided the W/2 and E/2 APDs of Arrington and granted the two APDs requested by TMBR/Sharp in August of 2001. On May 7, 2002, TMBR/Sharp, having voluntarily consolidated 82% of the working interest ownership in the N/2 of Section 25, commenced drilling its Blue Fin "25" Well No. 1 in Unit E dedicated to the N/2 of Section 25, T16S, R35E. While TMBR/Sharp had been granted an order by the Lea County District Court[5] that an event of force majeure under Paragraph ____ of the Stokes/Hamilton leases existed which prevented it from complying with the 180-day continuous drilling clause, once the permits to drill were granted, time was of the essence to drill the next well in order to be in compliance with the leases.

THE COMPULSORY POOLING CASES:[6]

TMBR/Sharp's compulsory pooling case:

In accordance with Section 70-2-18(A), TMBR/Sharp has filed a dedication of lands comprising a standard spacing unit N/2 Section 25 (Division Form C-102). Section 17-2-17(A) provides that if the Operator who has drilled or proposes to drill a well on said unit is unable to obtain a voluntary agreement, then it may have the Division pool all interest within the "spacing or proration unit as a **unit**"._ (emphasis added)

---

[5] Order of the Honorable Gary Clingman dated_____.

[6] A description of the four compulsory pooling cases is attached is Exhibit "A"

On January 25, 2001, TMBR/Sharp filed an application for compulsory pooling for the remaining working interest owners in the N/2 of Section 25. In accordance with NMSA (1979) Section 70-2-17, and Order R-11700-B, on May 7, 2002, TMBR/Sharp spudded the Blue Fin 25 Well No. 1 after filing an application for compulsory pooling of the remaining working interest owners in the N/2 of Section 25.

At the time of the hearing, TMBR/Sharp controlled 82% of the working intest ownership, Arrington controlled 16% and two parties who could not be located controlled 2% of the N/2 of Section 25. TMBR/Sharp has 100% of the working interest in the NW/4 of Section 25, and its compulsory pooling case is necessary in order to consolidate certain owners in the NE/4 of Section 25 to form a 320-acre spacing unit consisting of the N/2 of Section 25. At the hearing, TMBR/Sharp presented geological and geophysical evidence which demonstrated that the appropriate development of Section 25 is best accomplished by orientation of the spacing units N/2 and S/2.

TMBR/Sharp originally developed the concept for the exploration of Section 23, 24, 25 and 26. (Big Tuna prospect). The project started in 1991 and over time, over $7 million was spent on land, geological and geophysical analysis, and drilling. Prior to commencing the Blue Fin 24 Well No. 1 in the SW/4 of Section 24, TMBR/Sharp offered to Ocean a share of the Big Tuna Prospect on three different occasions, including a January 31, 2001 meeting in Ocean's office in Houston, Texas.

After being afforded an opportunity for a detailed review of TMBR/Sharp's geology, including its 3-D seismic data, Ocean declined to participate based on its belief that the Chester formation would be structurally too low and therefore too wet (water saturation too high to allow for commercial production of hydrocarbons.)

By lease dated March 27, 2001, Arrington top leased the TMBR/Sharp's Hamilton/Stokes leases which cover lands in Section 23, 24, and 25, among others. Arrington was aware that TMBR/Sharp had obtained a drilling permit for the Blue Fin

24 Well No. 1 in November of 2000. On March 29, 2001, TMBR/Sharp spudded its Blue Fin 24 Well No. 1 in the SW/4 of Section 24. On June 29, 2002, TMBR/Sharp completed the Blue Fin "24" Well No .1 for production from the Chester Formation.

On July 24, 2002, David H. Arrington personally told Jeff Phillips, President of TMBR/Sharp, that TMBR/Sharp would not be able to timely drill wells in Section 23 or 25 necessary to perpetuate the Stokes/Hamilton leases. These leases have a 180 day continuation drilling clause between wells. On July 19, 2001, Arrington obtained an approved APD from the Division for its well to be drilled in Unit E and dedicated to the W/2 Section 25. Arrington had no intention of drilling a well but obtained its permit because it wanted to block TMBR/Sharp from obtaining a competing permit which was denied on August 8, 2001.

TMBR/Sharp was the first working interest owner to propose a well in Section 25. At the time of filing its compulsory pooling application, neither Ocean or Arrington had an interest of record in the N/2 of Section 25. Arrington had no interest in the W/2 of Section 25.

Ocean's farm-ins are confined to the SW/4 of Section 25 and Arrington did not receive an interest in Ocean's various farm-ins in the SW/4 of Section 25 until November 14, 2001.

Ocean's two compulsory pooling cases:

On July 19, 2001, Arrington obtained an approved APD for its Triple Hackle Dragon 25 Well No.1 dedicated with the W/2 of Section 25. On January 24, 2002, Arrington proposed the well to TMBR/Sharp. Some six months after the Permit Case dispute on February 2, 2001 and again on April 9, 2002, Ocean filed a compulsory pooling application with the Division. These cases were heard by the Division on May 16-17, 2002 and no order has yet been entered by the Examiner.

Ocean's compulsory pooling applications are an attempt by Ocean to substitute itself for Arrington on the APD approved by the Division on July 19, 2001. Ocean has failed to take any reasonable action to preclude its farm-ins from expiring on July 1, 2002. Its farm-ins contain force majeure clauses which arguably could offer protection from expiration in appropriate circumstances.

Arrington's compulsory pooling case

On December 17, 2001, Arrington, without notice to TMBR/Sharp, obtained an approved APD for his Glass Eye Midge 25 Well No.1 dedicated with the E/2 of Section 25. On December 17, 2001, Arrington held no interest in the NE/4 of Section 25. It obtained its interest from Huff by assignment recorded on February 4, 2001. The SE/4 of Section 25 is controlled by Yates Petroleum Corporation. On March 26, 2002, the Commission held a hearing concerning Arrington's APD for the W/2 of Section 25 and TMBR/Sharp's APD for the N/2 of Section 25.

At no time during that hearing, did Arrington inform the Commission that Arrington claimed an approved APD for the E/2 of Section 25 which would be in conflict with the APD's for the N/2 (TMBR/Sharp) then being decided by the Commission. Arrington has waived any claim for a spacing unit consisting of the E/2 of Section 25 by its failure to raise this issue at the time of the Commission hearing. Moreover, once the Commisisno determined Arrington's Triple Hackle Dragon Well No 1 permit should be voided, TMBR/Sharp's application for its Blue Fin 25 Well No 1. was granted.

More than nine (9) months after the Permit Case dispute, on May 21, 2002, Arrington filed a compulsory pooling application for the E/2 of Section 25 with the Division which proceeded to hearing on May 16, 2002. On May 1, 2001, the Division canceled its approval of Arrington's APD for its Glass Eye Midge 25 Well No.1 dedicated with the E/2 of Section 25.

POINTS AND AUTHORITIES

Arrington's motion is premised upon its misunderstanding of the Oil & Gas Act and its refusal to accept the fact that the Commission has separated its well permitting process from the compulsory pooling process.

Arrington attempts to complicate the current proceedings before this Court by claiming the Commission was in error the four (4) previous times it denied Arrington's attempts to join the Pooling Cases with the Permit Cases.

The drilling activity presently being undertaken by TMBR/Sharp is the culmination of an arduous administrative process that it has gone through at almost every level of decision making authority of the Division, then the Commission and now the Court.

At every opportunity Arrington asserts that the Permit Case dispute and the Pooling Case dispute must be heard contemporaneously and has yet to demonstrate any statutory basis for its assertions. In fact, there are none. The Oil & Gas Act authorizes the Division to separate Pooling Cases from Permit Cases. There are waste and correlative rights issues involved in the Permit Cases which are separate from the waste and correlative rights issues involved in the Pooling Cases. **See Finding (32-33) Order R-11700-B for an example.**

Arrington's reliance upon Simms v. Mechem, 72 N.M. 186 (1963), is misplaced. The fact that Simms v. Mechem, (supra), required the Commission to make waste and correlative rights findings in a compulsory pooling case does not mean that a order entered in the Permit Cases was "improvidently issued." Arrington also argues that the issuance of is approval for an application for permit to drill ("APD") is a ministerial. The Court need only refer to the Commission's order in this case to see that approving an APD is part of the Division's regulatory system established to "present waste and correlative rights". **See Order R-11700-B.**

CONCLUSION

Arrington takes every opportunity to try and confuse the waste and correlative rights issues addressed in compulsory pooling cases with those found in the Permit Cases. Arrington does not like the four (4) prior decisions by which the Division and Commission which rejected Arrington attempts to consolidate the Permit Cases with the Pooling Cases. Arrington is apparently intent on rearguing this core issue of pooling in whatever forum it can find. And now, without benefit of allowing the Court the appropriate time to deal with this core issue during the appeal process, Arrington seeks to have the Court issue a stay order that allows Arrington to wins on appeal simply by postponing the appeal of the Permit Case.

Wherefore, Arrington's motion to stay should be denied.

Respectfully submitted,

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Attorneys for TMBR/Sharp Drilling Inc.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was transmitted by facsimile to counsel of record this 7th day of August 2002, as follows:

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Fax: 505-989-9857
Attorneys for Appellant

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Attorney for the Commission

James Bruce, Esq.
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Santa Fe, New Mexico 87504
Fax: 505-982-2151
Attorney for Ocean Resources

W. Thomas Kellahin

EXHIBIT "A"

The following four (4) compulsory pooling applications which involved Section 25, T16S, R35E, were set for an Examiner Hearing in May 2, 2002 but then continued until May 16, 2002 to be heard after the Commission entered it Order R-11700-B on April 26, 2002:

(a) TMBR/Sharp's application for compulsory pooling of the N/2 of Section 25 for its Blue Fin 25 Well No. 1 in Unit E of that section. Cases 12816 filed January 25, 2002

(b) Ocean Energy, Inc. ("Ocean") application for compulsory pooling of the W/2 of Section 25 for its Triple Hackle Dragon 25 Well No. 1 in Unit E of that section. Case 12841 filed February 2, 2002

(c) Ocean Energy, Inc. ("Ocean") application for compulsory pooling of the W/2 of Section 25 for its Triple Hackle Dragon 25 Well No. 2 in Unit K of that section. Case 12860 filed April 9, 2002

(d) Arrington's application for compulsory pooling of the E/2 of Section 25 for its Glass-Eyed Midge 25 Well No 1 in Unit A of that section. Cases 12859 filed April 9, 2002

P.01

TRANSACTION REPORT

AUG-06-2002 TUE 03:54 PM

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DATE	START	SENDER	RX TIME	PAGES	TYPE	NOTE	M#	DP
AUG-06	03:48 PM	5059822047	5'46"	14	RECEIVE	OK		

Ross, Stephen

From: Ross, Stephen
Sent: Thursday, August 01, 2002 10:23 AM
To: 'shall@mstLAW.com'
Subject: RE: Arrington v. NMOCC

Of course, Scott. You can put me down as concurring.

Steve

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Dept.
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(505) 476-3451

-----Original Message-----
From: shall@mstLAW.com [mailto:shall@mstLAW.com]
Sent: Thursday, August 01, 2002 10:20 AM
To: SRoss@state.nm.us; t.kellahin@worldnet.att.net
Subject: Arrington v. NMOCC

Steve, Tom:

Arrington's Statement of Reasons in the appeal is due on (or about) Aug. 23rd. I'd like to have a 2 week extension to Sept 6th. Will you agree?

Thanks

J. Scott Hall
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NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
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Lori Wrotenbery
Director
Oil Conservation Division

July 25, 2002

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87504

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Dear Scott,

Thank you for your letter of July 18. Apologies for not responding sooner, but I have been out of the office.

In your letter you requested that certain items from the Oil Conservation Division's proceedings in Cases 12731 and 12744 be included in the Record on Appeal. I respectfully disagree. As you are aware, the proceedings before the Commission were *de novo* pursuant to NMSA 1978, § 70-2-13. As such, the papers, orders, pleadings and other documents referred to in your letter, all of which pertain to the Division's proceedings, are irrelevant to the appeal by Arrington of the Commission's Order. The Commission conducted its own hearing and did not consider the Division's proceedings. And, as you are probably aware, the Commission did not take administrative notice of the Division's proceedings, nor was it requested to do so by Arrington.

I also disagree that any documents be included in the Record on Appeal concerning Case No. 12816. That case is not before the Commission or the Court and therefore documents in that case have no discernable relevance to this matter.

I have already included in the Record on Appeal documents referred to in your letter dated March 18, March 20 and May 15, 2002. There were no exhibits offered or accepted into evidence during the April 26, 2002 hearing, so no documents can be included in the Record from that date. The May 1 and May 9 letters from Mr. Williams, the Hobbs District Supervisor, were issued after the Commission's order was issued and also played no part in its deliberations and therefore have questionable relevance to the appeal; nor do I have copies of those documents. If you care to provide copies, I would be glad to review them and give my opinion whether they should be included in the Record.

Please give me a call if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc: Counsel of record

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
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July 25, 2002

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87504

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

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Please give me a call if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc: Counsel of record

MILLER, STRATVERT & TORGERSON, P.A.

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PLEASE REPLY TO SANTA FE

* NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN NATURAL RESOURCES - OIL & GAS LAW
** NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN REAL ESTATE LAW

July 18, 2002

BY FACSIMILE TRANSMISSION: 476-3462
Mr. Steve Ross, Esq.
New Mexico Oil Conservation Commission
1220 South St. Francis
Santa Fe, New Mexico 87505

02 JUL 22 PM 1:15 OIL CONSERVATION DIV

Re: *David H. Arrington Oil and Gas, Inc. v. New Mexico Oil Conservation Commission*
1st Judicial District No. D-101-CV-2002-1391

Dear Steve:

I have reviewed your draft of the Record of Appeal Contents. Based on that review, it appears that the following items were not listed in the draft:

Date	Item
08/24/01 -	Letter from Kellahin to Wrotenbery forwarding application for Emergency Order (12731)
08/24/01 -	Emergency Order (12731)
09/01/01 -	Arrington's Motion to Dismiss (TMBR/S harp's) Application in 12731
09/06/01 -	Motion to Dismiss (12731)
09/14/01 -	Letter from Kellahin to Wrotenbery forwarding Response to Arrington's Motion to Dismiss (12731)
09/14/01 -	Response to Arrington's Motion to Dismiss (12731)

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02/15/02 - Exhibits for NMOCD February 15, 2002 Hearing (if any)

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03/18/02 - Letter from Kellahin to Wrotenbery forwarding TMBR/Sharp's Pre-Hearing Statements on 12731 and 12744

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05/01/02 - Letter from Chris Williams to Arrington re: cancellation of Intent to Drill

05/09/02 - Letter from Hall to Chris Williams re: Arrington's right to drill

05/15/02 - Letter from Bruce to Wrotenbery forwarding application for rehearing (12731 and 12744)

05/15/02 - Application for ReHearing and Request for Partial Stay of Order No. R-11700-B (12731 and 12744)

All of the foregoing materials should be contained in the records of the Division and Commission and we accordingly request their inclusion in the Record On Appeal Contents. If you are unable to locate any of the identified materials, please let me know and I will work with you to obtain copies. As you know, I was not counsel of record for Arrington in the Division and Commission hearings, so I do not have ready access to all the materials. However, we will work with Mr. Carroll's former firm to obtain copies of the missing materials.

Very truly yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall

JSH/ao

cc: Client
W. Thomas Kellahin, Esq.
James Bruce, Esq.
William F. Carr, Esq.
Suzette Johnson

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PLEASE REPLY TO SANTA FE

* NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN NATURAL RESOURCES - OIL & GAS LAW
** NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN REAL ESTATE LAW

FACSIMILE TRANSMISSION COVER SHEET

DATE: July 18, 2002

TO: Steve Ross, Esq. FAX NO.: 476-3462

FROM: J. Scott Hall, Esq. OPERATOR: Amanda

MESSAGE:

NUMBER OF PAGES INCLUDING COVER SHEET: 4

IF YOU DO NOT RECEIVE THE ENTIRE DOCUMENT, PLEASE CALL OUR SANTA FE OFFICE AS SOON AS POSSIBLE AT (505) 989-9614.

* * * * * * * *

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PLEASE REPLY TO SANTA FE

* NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN NATURAL RESOURCES - OIL & GAS LAW
** NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN REAL ESTATE LAW

July 18, 2002

BY FACSIMILE TRANSMISSION: 476-3462
Mr. Steve Ross, Esq.
New Mexico Oil Conservation Commission
1220 South St. Francis
Santa Fe, New Mexico 87505

Re: *David H. Arrington Oil and Gas, Inc. v. New Mexico Oil Conservation Commission*
1st Judicial District No. D-101-CV-2002-1391

Dear Steve:

I have reviewed your draft of the Record of Appeal Contents. Based on that review, it appears that the following items were not listed in the draft:

Date	Item
08/24/01 -	Letter from Kellahin to Wrotenbery forwarding application for Emergency Order (12731)
08/24/01 -	Emergency Order (12731)
09/01/01 -	Arrington's Motion to Dismiss (TMBR/S harp's) Application in 12731
09/06/01 -	Motion to Dismiss (12731)
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Very truly yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall

JSH/ao

cc: Client
W. Thomas Kellahin, Esq.
James Bruce, Esq.
William F. Carr, Esq.
Suzette Johnson

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

JASON KELLAHIN (RETIRED 1991)

July 15, 2002

VIA FACSIMILE

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

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

Re: Arrington v. Commission
C-101-CV-2002-1391

Gentlemen:

Attached is my proposed entry of appearance and motion to designate TMBR/Sharp as an appellee. Scott and I talked about this on Friday, and while it is not clear that such a motion is necessary, it is easy to do. I have shown it to be unopposed. Please call me if you have any objection. I will file it tomorrow after lunch.

Regards,

W. Thomas Kellahin

cc: TMBR/Sharp
Attn: Rick Montgomery, Esq.

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
BETTY RIVERA
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

July 15, 2002

J. Scott Hall
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Santa Fe, New Mexico 87504

James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056

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

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Dear Counsel,

Please find enclosed an endorsed copy of the Record on Appeal Contents and the Title Page in this matter. These documents and the Record on Appeal were filed with the Court today.

I made one copy of the entire record, and you are welcome to borrow it during the briefing process or make your own copy. I normally make a copy for each party, but because of the number of attorneys and budget problems this year I was unable to do so.

Please feel free to give me a call if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc: Ernest L. Carroll
Susan R. Richardson
Richard Montgomery

DRAFT

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

TITLE PAGE

COMES NOW Appellee, the New Mexico Oil Conservation Commission, by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, pursuant to Rule 1-074(H) NMRA (2000), and states that the following are the attorneys who represent the parties in this appeal:

Representing David H. Arrington Oil and Gas Inc.:

J. Scott Hall
Miller, Stratvert & Torgerson P.A.
P.O. Box 1986
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Representing Ocean Energy:

James Bruce
P.O. Box 1056
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(505) 982-2151 (facsimile)

Representing the New Mexico Oil Conservation Commission:

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
(505) 476-3462 (facsimile)

Respectfully Submitted.

Stephen C. Ross
Special Assistant Attorney General
Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
(505) 476-3462 (facsimile)

DRAFT

Certificate of Service

I, Stephen C. Ross, hereby certify that a copy of the foregoing pleading was mailed to counsel listed below, this ____ day of July, 2002:

J. Scott Hall
Miller, Stratvert & Torgerson P.A.
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Santa Fe, New Mexico 87504

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James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056

Stephen C. Ross

Litigation Update

July 3, 2002

Arrington Oil and Gas, Inc. v. New Mexico Oil Conservation Commission, No. D-101 CV 2002-1391, First Judicial District Court, Santa Fe County

This case, filed June 25, 2002, is an appeal of two consolidated cases that were heard by the New Mexico Oil Conservation Commission on March 26, 2002. In the first case (No. 12730) TMBR/Sharp sought an order voiding permits obtained by Arrington and awarding or confirming permits to drill to TMBR/Sharp relating to the same property. In the second case (No. 12744) TMBR/Sharp sought reversal of the action of the Supervisor of District 1 of the Oil Conservation Division denying two applications for permits to drill. The Commission ordered the permits of TMBR/Sharp issued and the permits to Arrington voided because a the District Court in Lea County found that Arrington had no presently existing interest in the sections of land at issue.

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Betty Rivera
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

July 1, 2002

J. Scott Hall
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Santa Fe, New Mexico 87504-1056

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

Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Gentlemen,

Please find enclosed a draft of the Record on Appeal Contents and the Title Page in this matter.

Please review the Record on Appeal Contents carefully, as I have listed each document that appears in our files. If anything is missing, please let me know as soon as possible and forward a copy of the missing document. Please also review the Title Page for any discrepancies in addresses or telephone numbers. I plan to file both documents no later than July 25.

Mr. Hall discussed briefly with me consolidating this matter with the pending pooling cases and delaying the filing of the Record on Appeal until those matters are also appealed. However, other parties oppose this idea and my client is also reluctant to postpone a decision, so I plan to timely file the Record on Appeal.

Please feel free to give me a call if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc: Ernest L. Carroll
Susan R. Richardson
Richard Montgomery

DRAFT

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

RECORD ON APPEAL CONTENTS

COMES NOW Appellee, the New Mexico Oil Conservation Commission (hereinafter referred to as "the Commission"), by and through its attorney of record Stephen C. Ross, Special Assistant Attorney General, pursuant to Rule 1-074(H) NMRA (2002), and files the following with the Clerk of the Court as the Record on Appeal in the above-captioned matter, the following:

1. Order No. R-11700-B of the Commission, dated April 26, 2002 (Record on Appeal at 000);

2. Transcript of proceedings before the Commission of February 15, 2002, stenographically recorded (A at 00);

3. Transcript of the evidentiary hearing of March 26, 2002, stenographically recorded (RA at 000);

4. Transcript of proceedings before the Commission of April 26, 2002, stenographically recorded (RA at 000);

5. Exhibits introduced during the hearing of March 26, 2002 (RA at 000);

6. Copies of the below-listed papers and pleadings filed in the proceedings of the agency:

a. Application for Hearing *de novo* (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated January 8, 2002 (RA at 00);

b. Motion to Re-Open Cases 12731 and 12744 and Amend Order R-11700 (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated January 24, 2002 (RA at 00);

c. Letter of Stephen C. Ross (the Commission) dated January 25, 2002 (RA at 00);

d. Docket of the Commission Hearing of February 15, 2002 (RA at 00);

e. Letter of W. Thomas Kellahin (TMBR/Sharp) dated March 15, 2002 (RA at 00);

f. Motion to Vacate the Commission Hearing of March 26, 2002 (David H. Arrington) and cover letter of Suzette Johnson, dated March 15, 2002 (RA at 00);

g. Response to TMBR/Sharp Drilling's Motion to Re-Open Cases and Amend Division Order (David H. Arrington), dated March 15, 2002 (RA at 00);

h. Pre-Hearing Statement (David H. Arrington) and proposed exhibits, dated March 18, 2002 (RA at 00264-71);

i. Pre-Hearing Statement (TMBR/Sharp), proposed exhibits and cover letter of W. Thomas Kellahin, dated March 18, 2002 (RA at 00);

j. Letter of Stephen C. Ross (the Commission) dated March 19, 2002;

k. Response to the Motion to Continue (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated March 21, 2002 (RA at 00);

l. Order No. R-11700-A of the Division Director concerning the Motion to Stay, issued March 21, 2002 (RA at 00);

m. Motion to Vacate the Commission Hearing of March 26, 2002 (David H. Arrington) and cover memorandum of Suzette Johnson, dated March 21, 2002 (RA at 00);

n. Letter of Suzette Johnson (David H. Arrington) dated March 22, 2002 (RA at 00);

o. Supplement to Pre-hearing Statement (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated March 25, 2002 (RA at 00);

p. Entry of Appearance of James Bruce on behalf of Ocean Energy, dated March 25, 2002 (RA at 00);

q. Docket of the Commission Hearing of March 26, 2002 (RA at 00);

r. Motion to Supplement the Record (TMBR/Sharp) and cover letter of W. Thomas Kelahin, dated April 15, 2002 (RA at 00);

s. Letter of Stephen C. Ross (the Commission) dated April 16, 2002 (RA at 00);

t. Response to Motion to Supplement the Record and Response to the April 26, 2002 Request (David H. Arrington) and cover letter of Christie Troublefield, dated April 17, 2002 (RA at 00);

u. Letter of James Bruce (Ocean Energy) dated April 20, 2002 (RA at 00);

v. Entry of Appearance of J. Scott Hall on behalf of David H. Arrington, dated April 23, 2002 (RA at 00);

w. Docket of the Commission Hearing of April 26, 2002 (RA at 00);

x. Application for Rehearing and Motion to Stay Order (Ocean Energy) and cover letter of James Bruce, dated May 15, 2002 (RA at 00);

y. Application for Rehearing and Motion to Stay Order (David H. Arrington) and cover letter of J. Scott Hall, dated May 15, 2002 (RA at 00);

z. Letter of W. Thomas Kellahin (TMBR/Sharp) dated May 16, 2002;

aa. Consolidated Response to Applications for Rehearing and Motions to Stay (TMBR/Sharp) and cover letter of W. Thomas Kellahin, dated May 22, 2002 (RA at 00); and

bb. Notice of Appeal (Arrington), filed June 25, 2002.

Respectfully Submitted.

Stephen C. Ross
Assistant General Counsel
Energy, Minerals & Natural Resources Department
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3451 (telephone)
(505) 476-3462 (facsimile)

DRAFT

Certificate of Service

I, Stephen C. Ross, hereby certify that a copy of the foregoing pleading was mailed to counsel listed below, this ____ day of July, 2002:

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Richard Montgomery
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500 West Illinois, Suite 300
Midland, Texas 79701

James Bruce
P.O. Box 1056
Santa Fe, New Mexico 87504-1056

_____
Stephen C. Ross

DRAFT

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

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Respectfully Submitted.

_____

Stephen C. Ross
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Oil Conservation Commission
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NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

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July 1, 2002

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Re: *David H. Arrington Oil And Gas, Inc. v. The New Mexico Oil Conservation Commission,* Santa Fe County Cause No. D-101-CV-2002-1391

Gentlemen,

Please find enclosed an endorsed copy of my Entry of Appearance in this matter. Please feel free to give me a call if you have any questions.

Sincerely,

Stephen C. Ross
Assistant General Counsel

COPY

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DAVID H. ARRINGTON OIL AND GAS, INC.

Appellant,

No. D-101-CV-2002-1391

v.

THE NEW MEXICO OIL CONSERVATION COMMISSION

Appellee.

ENDORSED
First Judicial District Court

JUL 0 1 2002

Santa Fe, Rio Arriba &
Los Alamos Counties
PO Box 2268
Santa Fe, NM 87504-2268

ENTRY OF APPEARANCE

COMES NOW Stephen C. Ross, Special Assistant Attorney General, and hereby enters his appearance in this matter on behalf of Appellee the New Mexico Oil Conservation Commission.

Respectfully Submitted.

Stephen C. Ross
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Certificate of Service

I, Stephen C. Ross, hereby certify that a copy of the foregoing pleading was mailed to counsel listed below, this 1st day of July, 2002:

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Stephen C. Ross

MAGNOLIA PETROLEUM CO. v. RAILROAD COMMISSION et al.
No. 8040.

Supreme Court of Texas.
March 31, 1943.
Rehearing Denied April 28, 1943.

1. Mines and minerals ⇐51(1)

Prior to enactment of conservation statutes, party in possession, or any one who could obtain possession peaceably, could drill for oil notwithstanding title dispute, and if it later developed that he had no title, he had to account to true owner for value of oil removed.

2. Mines and minerals ⇐52

Prior to enactment of conservation statutes, either party involved in suit to determine title to land on which each desired to drill for oil might have an injunction to preserve the status quo pending settlement of the title controversy, or a receiver might be appointed to drill well and hold proceeds of oil to await outcome of title suit.

3. Mines and minerals ⇐92

A permit from Railroad Commission to drill for oil does not authorize permittee to take possession of land and drill where there is a dispute as to title thereto.

4. Mines and minerals ⇐92

The function of Railroad Commission in granting permit to drill for oil is to administer conservation laws, and in granting permit it does not undertake to adjudicate questions of title or right to possession, but those questions are to be settled by courts.

5. Mines and minerals ⇐52, 92

Where person obtaining permit from Railroad Commission to drill for oil is not in possession of land, he may not drill for oil until his title has been established by courts, and persons in possession may defend their possession by self-help or by injunction proceedings.

6. Mines and minerals ⇐52

A holder of permit to drill oil well who brings suit to establish his title to land on which he desires to drill may have a receiver appointed to drill well and hold proceeds to await final judgment on title issue.

7. Mines and minerals ⇐52
Quieting title ⇐7(1)

Where title to oil land is in dispute, but permittee is in possession, or can obtain possession peaceably, his adversary may resort to court for determination of title dispute and therein ask for injunction or for a receivership.

8. Mines and minerals ⇐92

An order of Railroad Commission granting permit to drill oil well grants no affirmative right to permittee to occupy property and does not cloud title claimed by another, but order merely removes conservation laws and regulations as a bar to drilling well and leaves permittee to his rights at common law.

9. Quieting title ⇐44(2)

In suit to determine title to land claimed by holder of permit to drill oil well, fact that a permit has been granted is not admissible in support of permittee's title.

10. Mines and minerals ⇐92

The Railroad Commission should not grant permit to drill oil well to one who does not claim property in good faith, but if applicant makes reasonably satisfactory showing of good faith claim of ownership, fact that title is in dispute will not defeat his right to permit.

11. Mines and minerals ⇐92

The existence of dispute as to title to land for which permit has been obtained to drill for oil is not ground for suspending permit or abating statutory appeal from Railroad Commission's order pending settlement of title controversy.

12. Appeal and error ⇐840(1), 1177(6)

In suit to cancel permit to drill oil wells on ground that tract involved was a voluntary subdivision in derogation of oil spacing rule, where district judge had not passed on question of voluntary subdivision, and there was nothing to show that larger tract, from which tract in question was segregated, was entitled to no well or that it had all wells to which it would be entitled without regard to subdivision, reviewing court could not determine question, but was required to remand the case.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Suit by the Magnolia Petroleum Company against the Railroad Commission of Texas and another to cancel and annul a permit to drill two oil wells as an exception to spacing rule 37 and enjoin the drilling thereof. To review a judgment of the Court of Civil Appeals, 163 S.W.2d 446, reversing a judgment of the District

Court canceling the permit, the plaintiff brings error.

Judgments of the District Court and of the Court of Civil Appeals reversed and cause remanded.

Walace Hawkins, of Dallas, Paul A. McDermott, of Ft. Worth, and Dan Moody, J. B. Robertson, and Powell, Rauhut & Gideon, all of Austin, for petitioner.

Gerald C. Mann, Atty. Gen., E. R. Simmons, Grover Sellers, Lloyd Armstrong, and James D. Smullen, and E. A. Landman, Asst. Attys. Gen., for respondents.

ALEXANDER, Chief Justice.

This is a Rule 37 case. E. A. Landman applied to the Railroad Commission for a permit to drill two oil wells on a narrow strip of 1.26 acres of land in Gregg County as an exception to the Commission's spacing regulations. The application was opposed by Magnolia Petroleum Company on the ground that Landman had no title because the land was within the boundaries of one of its own leases, and on the alternative ground that the 1.26-acre tract was a voluntary subdivision in derogation of Rule 37. The Commission granted the permit, reciting that it was necessary to prevent confiscation and waste. The Magnolia filed a statutory suit in the district court of Travis County to test the validity of said order. In that suit the Magnolia introduced its chain of title, and also showed that the identical land was involved in a trespass to try title suit between the same parties then pending in the district court of Gregg County. It disclaimed any desire to have the title question settled in the Travis County suit, but alleged merely that there was a bona fide title controversy, and prayed that the permit be cancelled on that ground. The Magnolia also alleged that the 1.26-acre tract constituted a part of a voluntary subdivision of a larger tract made subsequent to the spacing regulations, and, therefore, could form no basis for an exception thereto. Upon a trial without a jury, the district court rendered judgment cancelling the permit and restraining the drilling of the well. The judge filed findings of fact in which he traced the claim of title of each party, and also found that the Magnolia had actual possession of both the surface and the minerals. He concluded as a matter of law that a bona fide controversy as to the title of the leasehold was shown, and that consequently the Commission had no jurisdiction to grant the permit. He further stated that since this conclusion settled the case, he did not pass on the question of voluntary subdivision. Landman and the Railroad Commission appealed to the Court of Civil Appeals. That court reversed the judgment cancelling the permit and abated the suit, suspended the permit, and remanded the case to the district court with instructions to retain it suspended upon its docket pending determination of the title suit in Gregg County. 163 S.W.2d 446.

[1, 2] The effect of a bona fide title dispute on the power of the Railroad Commission to grant a permit as an exception to Rule 37 is a question never before decided by this Court. In order to view the problem in its proper perspective, we must first consider the situation as it was at common law before the conservation statutes were enacted. No permit was then required to drill for oil. If there was a title dispute, the party who had possession, or who could obtain possession peaceably, could drill for oil. If it later developed that he had no title, he had to account to the true owner for the value of the oil removed. Bender v. Brooks, 103 Tex. 329, 127 S.W. 168, Ann.Cas.1913A, 559; Right of Way Oil Co. v. Gladys City Oil & Gas Mfg. Co., 106 Tex. 94, 157 S.W. 737, 51 L.R.A.,N.S., 268; Gulf Production Co. v. Spear, 125 Tex. 530, 84 S.W.2d 452; 1 Summers Oil and Gas, Perm.Ed., § 23, p. 32 et seq.; 31 Tex. Jur. 531. Pending settlement of the controversy in a suit brought for that purpose, either party in a proper case might have an injunction to preserve the status quo. 1 Summers, Oil and Gas, Perm.Ed., § 29, p. 77; 31 Tex.Jur. 534. Or, upon proper showing, in order to prevent waste, a receiver might be appointed to drill the well and hold the proceeds of the oil to await the outcome of the title suit. 1 Summers, Oil and Gas, Perm.Ed., § 30, p. 80; Guffey v. Stroud, Tex.Com.App., 16 S.W.2d 527, 64 A.L.R. 730; 31 Tex.Jur. 534.

[3-9] In our opinion, the situation is not materially changed by the conservation laws. In cases where the Court of Civil Appeals has considered the matter, it seems to have been erroneously assumed that such a permit affirmatively authorizes the permittee to take possession of the land and drill. Consequently, it has been held that unless the applicant has an undisputed title to the leasehold, the Commission has no power to grant him a permit. Tide Water Oil Co. v. Railroad Commission, Tex.Civ.

App., 76 S.W.2d 553; Altgelt v. Texas Company, Tex.Civ.App., 101 S.W.2d 1104, writ dismissed. We do not think the permit has this effect. The function of the Railroad Commission in this connection is to administer the conservation laws. When it grants a permit to drill a well it does not undertake to adjudicate questions of title or rights of possession. These questions must be settled in the courts. When the permit is granted, the permittee may still have no such title as will authorize him to drill on the land. If other parties are in possession of the property, as in the present case, they may defend their possession by self-help, or by injunction proceedings. Before the permittee can drill, he must first go to court and establish his title. In that suit, upon proper showing, he may have a receiver appointed to drill the well and hold the proceeds to await the final judgment on the title issue. On the other hand, if he has possession, or can obtain possession peaceably, his adversary may resort to the courts for a determination of the title dispute, and therein ask for an injunction or for a receivership. In short, the order granting the permit is purely a negative pronouncement. It grants no affirmative rights to the permittee to occupy the property, and therefore would not cloud his adversary's title. It merely removes the conservation laws and regulations as a bar to drilling the well, and leaves the permittee to his rights at common law. Where there is a dispute as to those rights, it must be settled in court. The permit may thus be perfectly valid, so far as the conservation laws are concerned, and yet the permittee's right to drill under it may depend upon his establishing title in a suit at law. In such a suit the fact that a permit to drill had been granted would not be admissible in support of permittee's title.

[10, 11] Of course, the Railroad Commission should not do the useless thing of granting a permit to one who does not claim the property in good faith. The Commission should deny the permit if it does not reasonably appear to it that the applicant has a good-faith claim in the property. If the applicant makes a reasonably satisfactory showing of a good-faith claim of ownership in the property, the mere fact that another in good faith disputes his title is not alone sufficient to defeat his right to the permit; neither is it ground for suspending the permit or abating the statutory appeal pending settlement of the title controversy.

[12] The Magnolia contends alternatively that even if Landman's title is good, the judgment of the district court cancelling the permit should be affirmed because it appears as a matter of law from the judge's findings of fact that the 1.26-acre tract is a voluntary subdivision in derogation of Rule 37. We find no merit in this contention. The 1.26-acre tract appears to be a part of a voluntary subdivision of the 9-acre tract. Landman alleged in his pleadings that the owners of the remainder of the 9-acre tract joined with him in his application for the permit. There is no statement of facts, and the findings do not show that the 9-acre tract, from which the 1.26-acre tract was segregated, is entitled to no well or that it has all the wells to which it would be entitled without regard to the subdivision. Neither does it appear whether or not the Commission took into consideration the needs of the 9-acre tract as a whole in locating the two wells on the 1.26-acre tract. See in this connection Railroad Commission v. Magnolia Pet. Co., 130 Tex. 484, 109 S.W.2d 967; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73; Humble Oil & Refining Co. v. Potter, Tex.Civ.App., 143 S.W.2d 135; Railroad Commission v. Miller, Tex.Civ. App., 165 S.W.2d 504. The district judge expressly stated that he did not pass on the question of voluntary subdivision. Consequently, the case must be remanded for a new trial.

The judgments of the district court and of the Court of Civil Appeals are reversed, and the cause is remanded to the district court for a new trial.

KIMBELL MILLING CO. v. GREENE.

No. 8021.

Supreme Court of Texas.

March 17, 1943.

Rehearing Denied April 28, 1943.

1. Appeal and error ⇐846(5)

Where case was tried before court without jury and no findings of fact were filed, Supreme Court was required to view the evidence in light most favorable to the judgment of the trial court.

@ Williams & Meyers Oil and Gas Law (2001)

§ 945. Whether Pooling or Unitization Must Occur Before Drilling of Well

It has been urged in some instances that particular pooling statutes require that pooling occur before rather than after the drilling of a well. This argument has been rejected in *Hunter Co. v. McHugh*[1] in Louisiana, *Superior Oil Co. v. Foote*[2] in Mississippi, and *Wood Oil Co. v. Corporation Commission*[3] in

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Tiger Flats Production Co. v. Oklahoma Petroleum Extracting Co., 711 P.2d 106, 88 *O.&G.R.* 167 (Okla. 1985) (holding that in a suit by the unit operator to foreclose a lien on the leasehold interest of working interest owners who failed to pay their proportionate share of unit expenses, the trial court could order a deficiency judgment to the extent that the amount realized from foreclosure of lien was insufficient to pay the claim);

Arkla Exploration Co. v. Shadid, 710 P.2d 126, 86 *O.&G.R.* 353 (Okla. App. 1985) (discussing the determination of whether costs incurred were required and reasonable).

§ 945

[1] Hunter Co. v. McHugh, 202 La. 97, 11 So. 2d 495 (1943), *appeal dismissed,* 320 U.S. 222 (1943). A well was drilled in 1938 on a 190-acre leasehold and thereafter, in 1941, Order 28–B established 320-acre drilling units. The court rejected the contention of Hunter Co. that this order was unconstitutional insofar as it required it to pool or unitize the 190-acre leasehold with sufficient acreage to conform with the 320-acre unit.

Gorenflo v. Texaco, Inc., 566 F. Supp. 722 (M.D. La. 1983), *aff'd,* 735 F.2d 835, 81 *O.&G.R.* 284 (5th Cir. 1984), rejected an argument that the pooling clause construed permitted pooling only for purposes of production and not for purposes of exploration.

[2] Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85, 844, 1 *O.&G.R.* 735, 1239, 37 A.L.R.2d 415 (1952). The court commented as follows on the matter:

"It is contended that compulsory pooling under Sec. 10(a) is available only before and not

Oklahoma. A contrary holding would seriously impair the authority of the regulatory agency to protect the public interest in the conservation of mineral resources. A narrow construction of pooling statutes, limiting the commission's authority in this respect, should be avoided.

(Text continued on page 687)