

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

CASE NO. 12,086 (Continued)

CONTINUED CASE/AGENDA ITEMS
TRANSCRIPT OF PROCEEDINGS

BEFORE: LORI WROTENBERY, CHAIRMAN
WILLIAM J. LEMAY, COMMISSIONER
JAMI BAILEY, COMMISSIONER

OIL CONSERVATION DIV.
99 JAN 28 PM 4:16

January 14th, 1999

Santa Fe, New Mexico

These matters came on for hearing before the Oil Conservation Commission, LORI WROTENBERY, Chairman, on Thursday, January 14th, 1999, at the New Mexico Energy, Minerals and Natural Resources Department, Porter Hall, 2040 South Pacheco, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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January 14th, 1999
 Commission Hearing
 CASE NO. 12,086 (Continued)
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A P P E A R A N C E S

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* * *

1 WHEREUPON, the following proceedings were had at
2 9:05 a.m.

3 CHAIRMAN WROTENBERY: Okay, we'll call this
4 meeting of the Oil Conservation Commission to order. It's
5 January 14th, 1999, and we're here in the Oil Conservation
6 Division's conference room in Santa Fe, New Mexico. It's
7 shortly after 9:00 a.m.

8 I'm Lori Wrotenbery, I'm Chairman of the Oil
9 Conservation Commission and Director of the Oil
10 Conservation Division. To my left is Commissioner Bill
11 LeMay. To my right is Commissioner Jami Bailey,
12 representing Land Commissioner Ray Powell on the Oil
13 Conservation Commission.

14 To Jami's right is Florene Davidson, the
15 Commission secretary. And then to Bill's left is Lyn
16 Hebert, the Commission's legal counsel, and our court
17 reporter Steven Brenner.

18 Thank you, everybody, for attending today.

19 We've got several items on the agenda, although I
20 think we'll be able to proceed through them in fairly quick
21 order.

22 A couple of business items at the outset.

23 The minutes of the last meeting of the
24 Commission, which was held on December 18th, 1998, there's
25 a copy in your notebooks. Commissioners, have you all had

1 a chance to review those minutes?

2 COMMISSIONER BAILEY: Yes, I have, and I move to
3 accept.

4 COMMISSIONER LEMAY: I second.

5 CHAIRMAN WROTENBERY: All in favor say "aye".

6 COMMISSIONER BAILEY: Aye.

7 COMMISSIONER LEMAY: Aye.

8 CHAIRMAN WROTENBERY: Aye. I don't hear any
9 no's.

10 * * *

11

12 CHAIRMAN WROTENBERY: And then the next item is
13 the Commission's annual open meeting resolutions
14 resolution.

15 Lyn, do you want to walk us through this one?

16 MS. HEBERT: Sure.

17 Commission, the Open Meetings Act requires that
18 every board and the Commission and the State annually adopt
19 its resolution setting forth its open meeting requirements
20 and what notice will be provided to the public of its
21 meetings, its regular meetings, special meetings, and its
22 emergency meetings.

23 And the resolution before you is essentially the
24 same resolution that the Commission adopted last year, with
25 just a few changes made to reflect the different dates, and

1 it provides for ten days' advance notice for your regular
2 meetings, three days' advance notice for any special
3 meetings that would be called, and 24 hours' notice for any
4 emergency meeting that would have to be called.

5 And all the other provisions remain the same as
6 well.

7 CHAIRMAN WROTENBERY: Any questions? I don't
8 hear any questions. I'll entertain a motion to adopt this
9 resolution.

10 COMMISSIONER LEMAY: Madame Chair, I move
11 adoption of the resolution.

12 COMMISSIONER BAILEY: I second.

13 CHAIRMAN WROTENBERY: All in favor say "aye".

14 COMMISSIONER LEMAY: Aye.

15 COMMISSIONER BAILEY: Aye.

16 CHAIRMAN WROTENBERY: Aye. It's unanimous.

17 * * *

18
19 CHAIRMAN WROTENBERY: And then let's see, we had
20 one case that was on the docket for today that has been
21 continued. That's Case 12,086, the Application of Yates
22 Petroleum Corporation and Hanley Petroleum, Inc., for
23 allowable reduction and the escrow of production proceeds,
24 Lea County, New Mexico.

25 This case has been continued to the Commission's

1 hearing in February. That will be on February 11th, 1999.
2 And it was continued at the request of the Applicants.

3 * * *

4
5 (Various docketed cases taken up at 9:10 a.m.)

6 (The following proceedings had at 11:23 a.m.)

7

8 CHAIRMAN WROTENBERY: Mr. Kellahin?

9 MR. KELLAHIN: Thank you, Madame Chair. My name
10 is Tom Kellahin, I'm an attorney with Kellahin and Kellahin
11 in Santa Fe, New Mexico. I'm appearing in two or three
12 capacities this morning, one as an individual attorney
13 responding to a request from Director at that time, back in
14 October of 1997, to participate with a small group of
15 attorneys to assist the Division in reviewing your notice
16 rules.

17 I'm also here today on behalf of the New Mexico
18 Oil and Gas Association as one of its co-chairmen of the
19 Regulatory Practices Committee, and I'm here to report to
20 you of the activity in response to Mr. LeMay's request to
21 review the notice rules.

22 The Division rulebook, as you can see from the
23 past presentations this morning, has been patched together
24 over time. And the first challenge was to put on the word
25 processor all those rules that dealt with what I

1 characterize notice rules.

2 We did that in the spring of -- or I did that in
3 the spring of last year, and began circulating, then, early
4 drafts with Rand Carroll, and he and I and Mr. Stogner and
5 Mr. Carr and Mr. Catanach and others met on several
6 occasions just to find all the notice rules. We obtained
7 their ideas, the comments and suggestions, and by June,
8 then, had a decent working draft for the lawyers to look
9 at.

10 I met again with Mr. Carroll in June of last year
11 and got some more suggestions from him, and we've generated
12 another draft. In fact, I think this is perhaps the tenth
13 generated draft now.

14 This summer, Ms. Hebert began to participate in
15 that activity, and she and Mr. Carroll and I met on several
16 occasions to more refine the work product. And by November
17 of this year, I submitted back to the agency the working
18 draft at that time.

19 Also in June, I took one of these drafts and
20 began circulating it to the Regulatory Practices Committee
21 of the Association, and we have met each month now, perhaps
22 six times, to discuss the draft. That committee is
23 composed of members of the industry that care about this
24 process, that are actively involved, and whose experience
25 and competence I respect. And we, as of Tuesday's meeting,

1 have an industry notice rule that we are disseminating
2 tomorrow to the industry to get comment from a broader base
3 of constituency about what to do.

4 In addition, we are at the point in time when I
5 get those comments back, that we would like an opportunity
6 to meet with the Division Attorney and Counsel of the
7 Commission to see if we can agree upon the various changes
8 to be made.

9 Here is the dilemma and challenge: The attorneys
10 have a broad spectrum of activity in writing rules that
11 comply with due-process requirements. And so the early
12 drafts among lawyers were very aggressive. They took the
13 concept of notice to the extreme, and we did that
14 purposefully. It was so that people that were non-lawyers,
15 or other lawyers not working with this group, could see the
16 full spectrum of what a notice could potentially look like.
17 And it's easier to delete when you have all ideas in the
18 draft, rather than look at a finished product that may be
19 more simplistic than necessary for an initial discussion.

20 So the early drafts were comprehensive. They
21 addressed the rule book in several ways. First of all,
22 based upon the cases that Ms. Hebert and Mr. Carroll and I
23 have in the various courts of New Mexico, it is clear to us
24 from the comments of the judges that they do not have a
25 clear understanding of the rule-making functions of the

1 Commission. It's easy for them to be confused between
2 rule-making and an adjudicatory process.

3 A sterling example of that is the *Uhden* decision,
4 where the New Mexico Supreme Court said Mrs. Uhden was
5 entitled some additional notice. That, in my mind, was a
6 rule-making case. The Supreme Court says it's an
7 adjudication. There's a significant difference.

8 We now have a case pending before the New Mexico
9 Supreme Court in which Mr. Gallegos' clients for the GLA-66
10 group have appealed your decision on the deep gas 640
11 spacing. They are contending that is an adjudication, the
12 Commission and I are contending it's rule-making. The
13 difference matters.

14 If it is rule-making, then it is a general-based
15 action by the agency where you change a general rule,
16 recognizing that it is impossible to notify everybody in
17 person about the rule change, and you affect everybody
18 equally in a broad-based way.

19 So one of the challenges for us was to clearly
20 write in the rule book the rule-making activities, to be
21 satisfied that they would stay -- they would prevail in a
22 District Court challenge when you enter into a rule-making
23 function.

24 The next thing we did is to look at those
25 activities that are an adjudication, and it's most of what

1 you do. Compulsory pooling, unorthodox well locations,
2 those activities that are directly affecting a collective
3 group that is small enough to be identified, to be noticed,
4 and who can come and participate.

5 Rule 1207 is constructed in that fashion, as we
6 talk now, we've spent a lot of time reorganizing 1207 to
7 make it consistent with the adjudicatory functions of the
8 agency, so we've done all that.

9 We've also compiled all of the notice rules from
10 the other states in the United States that are engaged in
11 this process, and we have looked at most of those.

12 We have also found what works in New Mexico best
13 for us seems to work very well here and is materially
14 different than those used in other states. And so in
15 reviewing other states, we were not particularly captivated
16 by their choice of solution, which often was more tedious
17 and cumbersome than we enjoy here.

18 One of the things we've tried to do is to
19 identify some words of art. "Affected parties" is a word
20 of art. We were looking to balance what could be strictly
21 written as notice rules in compliance with due process to
22 the practicality of compliance.

23 For example, when Burlington brought to you the
24 infill -- or to the Division, the infill drilling case for
25 the Blanco-Mesaverde -- it's a pool or, I don't know, four

1 or five million acres, I guess, and 6000 wells. The
2 dilemma for Burlington is, who do we send notice for a
3 pool-rule change? Well, they spent about \$20,000 and
4 notified 3500 people, just to try to do something about
5 notice.

6 And so in the process, then, we were trying to
7 comply with the *Udden* decision, which we think can be
8 narrowly limited to those instances where you're dealing
9 with a pool-rule change for a spacing that has a producing
10 well. And you could separate that out from other
11 activities that change pool rules.

12 So that was part of the debate, is, we went
13 through all this time and effort, debating how to find a
14 middle ground to write the rule.

15 We now have pretty decent working drafts, I
16 think. I know Mr. Carroll and Ms. Hebert have continued to
17 work on their drafts from their point of view. I need to
18 take the industry draft from the industry's point of view,
19 get it to the industry, and then to somehow meet, see if we
20 can coordinate and consolidate that effort and let you make
21 some policy decisions for us.

22 And we have some extremes to work with. We have
23 the extreme where there is the operator that doesn't want
24 to send notice to anybody. And then we have the operator
25 that wants notice because they want the applicant to give

1 them information. And so you have to strike a balance
2 between a company at one time who is an applicant, doesn't
3 want to send notice to anyone, and is the same party that's
4 wanting notice from his offset because they're concerned
5 about the encroachment.

6 And you have the practicalities of defining who
7 is an effective party, particularly in adjoining tracts
8 that do not yet have production. Think about that for a
9 moment. You have a deep-gas spacing unit. You want a
10 corner shot out of a corner, you want a crowd a 660, and
11 you're crowding sections that do not yet have a spacing
12 unit. To whom do you send notice? We can sit here and
13 talk all day about who gets the notice.

14 Do you have to send title people out and learn
15 the identity of the interest owners for two-thirds of the
16 adjoining section, because hypothetically it could be a
17 standup or a laydown? You could affect interest owners in
18 two-thirds of a section. Do you go to that trouble? What
19 happens if it's in the City of Artesia and there's hundreds
20 of people to find? Is that important to anyone? And so
21 we've debated all that stuff.

22 What we hope to bring to you is a concise, well
23 thought out draft, so that you don't have to worry about
24 the nuts and bolts of compliance with the law. You can
25 make some policy decisions for us about what you think that

1 line ought to be and where it's located in terms of
2 balancing due process with the practicalities of making
3 this thing work.

4 We can talk about the cases that we've reviewed.
5 They are all over the board in terms of notice. There are
6 some odd cases in Oklahoma that are hard to understand
7 until you look at the factual details, and it really turns
8 upon the individual fact situations. It's hard to get a
9 clear sense of any jurisdiction of a global solution to
10 notice. They pick their way through unique problems and
11 they give a solution like the *Uhdén* case that continues to
12 cause us concern in how to make it work. That was
13 September of 1991, and we're still struggling with the
14 *Uhdén* decision and how broad to read it.

15 There will be those lawyers that will read it so
16 broadly as to say, as now is contended in District Court,
17 that if you have a party that's entitled to notice, that
18 means service by a process server, and our service by
19 mailing is inadequate. That's one of the things on the
20 agenda before Judge Gleney, is that kind of extreme
21 attitude concerning notice. And then on the other hand, we
22 have people that don't want to send notice anymore, so...
23 That's the balance.

24 We have chosen not, at least at this point, to
25 try to reformat the rule book. There is a separation in

1 the rule book where you can look at the individual activity
2 for locations, see it in administrative procedure, and then
3 have to remember to go over in Rule 1207 to see what
4 happens what that activity if it has to go to a hearing.
5 We may decide that there's a better way to reformat this.
6 But I think we're getting very close to agreeing upon a
7 range of choices for you to make in terms about how to
8 satisfy the notice requirements. The current rules need
9 revision.

10 We've also taken the opportunity to try to
11 modernize some of the vocabulary, sentence structure, some
12 of the outdated phrasing, some of the cumbersome language
13 of some of these rules, and we've simply stricken it out to
14 write it in a clear way. My latest draft is some 22 pages,
15 and as soon as I have some comments back from the industry
16 I am prepared to continue the process and meet with the
17 representatives of the Division to see if we can't give you
18 a finished product for debate and discussion perhaps at the
19 April meeting.

20 I stand for questions.

21 CHAIRMAN WROTENBERY: Any questions?

22 COMMISSIONER LEMAY: Just one, Tom. Was there
23 any discussion on any legislation that might be needed to
24 clarify any of that stuff, or is it -- Do you think we can
25 do it all in the administrative law form?

1 MR. KELLAHIN: We have chosen to rewrite the
2 notice rules within the context of your current statutory
3 authority, which is quite broad, and only in those areas
4 like compulsory pooling or statutory unitization do you
5 have to look at those statutory sections, and none of those
6 have limited us in our ideas. So we don't see, at least
7 currently, any need for legislation to satisfy any of the
8 notice things we're working on.

9 But it is tedious. We've spent several days
10 talking about compulsory pooling notifications, how to make
11 that work, how to avoid the Mitchell Energy-Strata problem
12 of filing a pooling application and finding that the party
13 being pooled now discloses to you previously undisclosed
14 partners, how to avoid having someone who's about to be
15 pooled take and scattering their interest to the Artesia
16 phone book, how to get jurisdiction over people as their
17 interest floats around.

18 And so we have some suggestions for you that are
19 consistent with the Commission's decision in that case, but
20 the debate is lengthy on all those topics.

21 We have found some places where we think notice
22 is not required. We looked at downhole commingling, and
23 like tubingless completions, you don't need to send notice
24 to the offset, no one ever objects, no one cares. So we're
25 finding ways to streamline the process and to eliminate

1 notice where it's not necessary, never exercised when
2 given, and focus on those issues where we get the right
3 people before you.

4 One of the debates we're having is the one Mr.
5 Stogner alluded to. When you're a common operator
6 encroaching on your own operations but you have different
7 working interest owners in each spacing unit, do you send
8 notice to anyone else?

9 We have one faction of the industry that says no,
10 that common operator has contractual obligations with his
11 interest owners, he is precluded from self-dealing, and he
12 needs to be careful because he can get sued.

13 The other faction says that all may be well and
14 good, but it's convenient to give notice and come and have
15 that matter solved here before these regulators and not
16 spend money on litigation. We want to know what our
17 operator is doing, and if it looks wrong we want to come
18 oppose it.

19 You're ultimately going to have to decide that
20 kind of issue for us, because we can't decide it among
21 ourselves. That's what we would bring to you for decision.
22 You wouldn't have to sit here and write the rule.

23 COMMISSIONER LEMAY: But there was consensus you
24 didn't need legislation to do any of this, so you --

25 MR. KELLAHIN: Exactly.

1 COMMISSIONER LEMAY: -- operated within the
2 current Oil and Gas Act?

3 MR. KELLAHIN: Yes, sir.

4 CHAIRMAN WROTENBERY: Commissioner Bailey, any
5 questions?

6 COMMISSIONER BAILEY: Did you say that there
7 would be a proposal ready for us for the April hearing?

8 MR. KELLAHIN: Yes, ma'am.

9 COMMISSIONER BAILEY: Will that proposal be
10 circulated with the docket prior to the hearing so that we
11 have an opportunity to look at that?

12 MR. KELLAHIN: You'll have to tell me. We have
13 not planned a regulatory practices meeting for February,
14 because the same people are involved in the legislative
15 process. Our first meeting is not until March. I need
16 that meeting to get the poll of the industry back to us, so
17 that I can see if there's further revisions in the industry
18 draft.

19 So perhaps the April meeting could be a more
20 detailed presentation of the specifics, and then have you
21 specifically put it on a later docket for action. So we
22 would have it to you before April, but we would not expect
23 you to have studied it or be prepared to decide it by then.

24 COMMISSIONER BAILEY: Right, sounds good.

25 MR. KELLAHIN: Okay. And I'd give you the draft

1 today, but I haven't released it to the industry, and I
2 don't want to be criticized for not doing that.

3 CHAIRMAN WROTENBERY: Mr. Carroll, Ms. Hebert, do
4 you have any comments you would make?

5 MR. HEBERT: No, I think Mr. Kellahin covered all
6 of the issues we've been discussing. I do think that we've
7 talked about including in the procedure section some of the
8 standard procedures that are followed, that are done in
9 some other form. We'd like to pull those in and put them
10 in the rule book.

11 CHAIRMAN WROTENBERY: Now, are those part of your
12 current draft?

13 MR. KELLAHIN: Ms. Hebert reminds me of that.
14 She took the initiative to find all the Division memos and
15 all these unwritten rules that Mr. Carr and I get paid
16 money to know about, and now everybody's going to know
17 about them. We've attempted not to do it, but I guess
18 she's going to anyway.

19 (Laughter)

20 CHAIRMAN WROTENBERY: Okay.

21 MR. KELLAHIN: So both the industry draft and the
22 Division's draft do include additional rules, and I have
23 inserted where she has suggested all those memos, so
24 they're in the rule book. We have taken the opportunity to
25 write a rule on *ex parte* conduct, we've put the prehearing

1 statement stuff in the rule book, how to find a stay of a
2 Commission order, how to do that -- a Division order.
3 That's in the rule book.

4 We have put a lot of things in there that people
5 have thought of, so it's more comprehensive than just a
6 couple of notice rules.

7 CHAIRMAN WROTENBERY: Anybody else have any
8 questions or comments at this stage?

9 If not, thank you very much, Mr. Kellahin --

10 MR. KELLAHIN: Thank you.

11 CHAIRMAN WROTENBERY: -- for the report, and
12 we'll look forward to your report in April.

13 (Thereupon, these proceedings were concluded at
14 11:40 a.m.)

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