KELLAHIN AND KELLAHIN
ATTORNEYS AT LAW
EL PATIO BUILDING
117 NORTH GUADALUPE
POST OFFICE BOX 2265
SANTA FE, NEW MEXICO 87504-2265

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)

TELEPHONE (505) 982-4285
TELEFAX (505) 982-2047

October 18, 1995

HAND DELIVERED

Mr. Michael E. Stogner
Chief Hearing Examiner
Oil Conservation Division
2040 South Pacheco
Santa Fe, New Mexico 87505

Re: ***NMOCD Case 11311***
Application of Nearburg Producing Company
for Compulsory Pooling (Arroyo "16" Well No.1)
Eddy County, New Mexico

NMOCD Case 11310 (Reopened)
Amended Application of Yates Petroleum Company
for Compulsory Pooling (Boyd "X" Well No. 10)
Eddy County, New Mexico

Dear Mr. Stogner:

On behalf of Nearburg Exploration Company, please find enclosed our Memorandum and proposed order for your consideration in this matter which was presented to you at the hearing held on August 10, 1995 and on October 5, 1995.

Very truly yours,

W. Thomas Kellahin

cc: ***Nearburg Producing Company***
Attn: Bob Shelton
cc: ***Earnest Carroll, Esq.***
Attorney for Yates Petroleum Corporation

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

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

CASE NO 11311

APPLICATION OF NEARBURG EXPLORATION COMPANY FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

CASE NO. 11310

APPLICATION OF YATES PETROLEUM CORPORATION FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

NEARBURG EXPLORATION COMPANY'S MEMORANDUM IN SUPPORT OF ITS PROPOSED ORDER

Nearburg Exploration Company ("Nearburg"), by and through its attorneys,m Kellahin & Kellahin hereby submit this Memorandum in support of its Proposed Order to grant Nearburg's compulsory pooling application and correspondingly to deny Yates Petroleum Corporation ("Yates") compulsory pooling application.

THE MATTER OF REOPENING AN ADJUDICATION

Nearburg expresses its concern that the Division in this case has established a precedent which allows a defaulting party, Unit Petroleum Company, to avoid participating in the original adjudication hearing and then afterwards cause a new adjudication to take place in which the same basic issues and disputes are again adjudicated.

The concern is the finality of the adjudication process. Had this matter been a civil trial in a New Mexico District Court, then it could not have been reopened. In the context of the Rule of Civil Procedure SCRA 1986, 1-060(b) (Repl.1994), parties are bound by the evidence and expert opinions that they presented at previous adjudications and are not allowed a new adjudications every time that they produce an adjustment of quantifications presented at trial. Such adjustments could go indefinitely, leading to multiple reopenings of a single case. Parties take their chances based on the information existing at the time of trial. **SEE Fowler-Propsit v. Dattilo, 111 N.M. 573 (1991). Copy attached.**

On October 5, 1995, Counsel for Yates, argued that although the case was concluded, all evidence submitted and the matter taken under advisement, he should be allowed to reopen the Yates case because no order had yet been entered. That is a meaningless difference without a distinction. The point is that the case had been submitted for decision and there are only limited ways it should be reopened.

THE MATTER OF "NEW EVIDENCE"

The only limited way applicable to reopening the subject case is by arguing that you have "newly discovered evidence." See Rules of Civil Procedure, SCRA 1-050 and 1-060.

Yates' "new evidence" was nothing more than presenting evidence that Yates was willing to abandon its prior technical expert's opinions on the best place to locate the first well in the spacing unit in order to gain the support of a defaulting party and in doing so gain a majority of the working interest support so that Yates could "operate" the spacing unit.

Nearburg requests that the Division apply the standard used in civil litigation when one party seeks to reopen an adjudication based upon a contention of new evidence. That standard is set forth in SCRA 1986, 1-059 and 1-060 and means that a hearing can be reopened **if** and only if the "newly-discovered" evidence was in existence prior to the adjudication.

At the time of the original adjudication of this case, Unit Petroleum Company elected not to participate in the hearing. It had the opportunity to come forward and to argue for another well location but failed to do so. After that adjudication, Unit and Yates change their positions. That is not newly discovered evidence.

IN THE MATTER OF THE YATES' CONFLICTING POSITIONS

Yates' new position is inconsistent with its original position. In doing so, Yates has compromised it credibility in this matter and has impeached its own witness.

On July 10, 1995, in NMOCD Case 11265 which dealt with the compulsory pooling of the NE/4 of Section 21, Brent May, Yates' geologic witness, argued to stay away from the SWD wells and testified that:

> "Q: Now, with respect to this location that Yates is proposing to be drilled first, could you summarize for the Examiner why you feel that Yates' location should be drilled prior to the Nearburg location?"
>
> A. .....Some of the other, bigger reasons, though, are that as we've been talking about the SWD locations, the Osage and the Anadarko location, which both of these proposed locations offset, those cause--as a geologist, cause me some concern, and that is where the risk comes into play." (copy attached)

Then on August 10, 1995, Mr. May testified during cross examination and described all of the reasons why he did **not** wanted to the well moved to the south (copy enclosed).

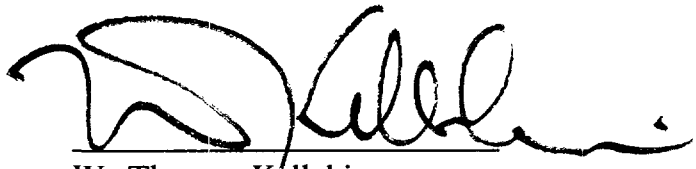
However, by October 5, 1995 hearing Yates is in fact moving south and is now closer to the Osage SWD well than the Nearburg location. That was done not because Mr. May considered it the best thing to do but because Yates' land department wanted to gain a majority of operatorship in the spacing unit.

This case should be decided based upon the optimum well location. This pooling order should not be awarded to the operator who is willing to drill the first well in the spacing unit anywhere so long as it gains the right to operate.

SUMMARY

Nearburg respectfully requests the Division enter it compulsory pooling order grating the application of Nearburg and denying the application of Yates.

Respectfully submitted,



W. Thomas Kellahin
Kellahin & Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87501

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

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

CASE NO 11311
APPLICATION OF NEARBURG EXPLORATION COMPANY FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO_

CASE NO. 11310
APPLICATION OF YATES PETROLEUM CORPORATION FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

ORDER NO. R-__

NEARBURG EXPLORATION COMPANY'S PROPOSED ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8:15 a.m. on August 10, 1995 and on October 5, 1995 at Santa Fe, New Mexico, before Examiner Michael E. Stogner.

NOW, on this _____ day of October, 1995, The Division Director, having considered the testimony, the recorded and the recommendations of the Examiner, and being fully advised in the premises,

FINDS THAT:

(1) Due public notice having been given as required by law, the Division has jurisdiction of this cause, the parties hereto and the subject matter thereof.

(2) The applicant in Case 11311, Nearburg Exploration Corporation ("Nearburg"), seeks an order pooling all mineral interests in the North Dagger Draw-Upper Pennsylvanian Pool underlying the SE/4 of Section 16, T19S, R25E, forming a standard 160-acre oil/gas spacing unit for said pool to be dedicated to its Arroyo "16" Well No. 1 to be drilled at a standard location in the SE/4SE/4 (Unit P) of said Section, Eddy County, New Mexico.

(3) The applicant in Case 11310, Yates Petroleum Corporation ("Yates"), originally sought an order pooling all mineral interests in the same pool in the same spacing unit to be dedicated to its Boyd "X" Well No. 9 to be drilled at a standard location in the NW/4SE/4 (Unit J) of Section 16, T19S, R25E.

(4) On August 31, 1995, the Division, over the objection of Nearburg, granted Yates' Motion to Reopen its case for the purpose of presenting "new evidence" and to amend its location to a standard well location in the SW/4SE/4 (Unit O) of said Section 16 and to rename its well the Boyd "X" Well No 10.

(5) The significant working interest owners in this spacing unit are as follows:

Nearburg Exploration Company	37.50%
Yates Petroleum Corporation	37.50%
Unit Petroleum Company	23.95%
all other interests	25.00%

(6) On August 10, 1995, these cases were called for hearing and consolidated with both Yates and Nearburg appearing and presenting land, geologic and petroleum engineering evidence.

(7) On October 5, 1995, these cases were Reopened over the objection of Nearburg, with Nearburg and Yates both appearing and with Yates presenting land, geologic and petroleum engineering evidence.

(8) Unit Petroleum Company despite receiving notice from both Yates and Nearburg, failed to appear at either hearing and is in default.

(9) No other interested party appeared in these cases.

(10) The development of this spacing unit in the Cisco/Canyon formation is subject to the Special Rules and Regulations for the North Dagger Draw-Upper Pennsylvanian Pool pursuant to Division Order R-4691-D issued effective April 1, 1991.

(11) Each applicant (Nearburg and Yates) has the right to drill and each proposes to drill a well in this spacing unit, as described above in Findings (2) and (3), to a depth sufficient to test the Upper Pennsylvanian formation (ie Cisco/Canyon).

(12) Cases Nos. 11310 and 11311 were consolidated for the purpose of hearing and should be consolidated for purpose of issuing an order since the granting of one application would require the denial of the other because these cases involve a dispute over operatorship and development of the same 160-acre spacing unit and since it is the long established practice of the Division not to have different operators in the same spacing unit even though multiple wells can be drilled therein. (See Order R-9673-A).

(13) Because of the dispute over the location of the proposed well and who should operate the well, Nearburg and Yates have been unable to agree on a voluntary basis for the pooling of their respective interests in either proposed well or spacing unit.

AUGUST 10, 1995 HEARING

(14) At the August 10, 1995 Hearing:

(a) Yates presented geologic evidence and contended the first well in the spacing unit should be drilled at a standard location in Unit J because this represented a "special case" were it was necessary to stay away from the possible adverse affects of the two salt water disposal ("SWD") wells located to the south in Unit E of Section 16 and Unit D of Section 22;

(b) Nearburg presented geologic evidence and contended the first well in the spacing unit should be drilled at a standard well location in Unit P because that location had the greatest volume of reservoir rock at the highest structural position with the greatest opportunity for commercial quantities of hydrocarbons and demonstrated that:

1. Yates' original location in Unit J would have less dolomite thickness (290 feet) than the Nearburg location in Unit P (360 feet);

2. Yates' original location would have more non-productive limestone stringers than at the Nearburg location;

3. Yates' original location was too close to the Amole Well No. 2 which is a very poor well;

4. Nearburg's location is structurally higher (about 30 feet) than the Yates' location and both the SWD wells.

OCTOBER 5, 1995 HEARING

(15) At the October 5, 1995 Hearing:

(a) Yates' geologic witnesses testified that he still recommended that the first well be drilled in Unit J but he had been overruled by the Yates' land department who now desired to drill the first well in Unit O in order to gain the support of Unit Petroleum Company.

(b) Yates' geologic witnesses reaffirmed his August 10, 1995 testimony and admitted that the new location was moving closer to the SWD wells while moving farther away from the Aparejo Well No. 3 in Unit B of Section 16 with an initial potential of 607 BOPD.

(c) That Yates, in order to gain operatorship over Nearburg, is willing to abandon its preferred location and drill a location suggested by Unit Petroleum Company.

DIVISION FINDINGS

(16) The Division FINDS THAT IT should decide this case based upon its statutory obligation to prevent waste and protect correlative rights utilizing the following criteria and analysis:

(a) **Efforts to obtain voluntary agreement and willingness to negotiate a voluntary agreement**:

(i) Nearburg and Yates presented uncontested evidence: that from February 23, 1995 to March 22, 1995, Yates "swept" the pool by identifying some 39 undrilled spacing units in the pool and then blitzing Nearburg with a total of 39 well proposals and boiler plat AFE's including the original Yates' proposal for the well in Unit J;

(ii) that on May 21, 1995, Nearburg responded to Yates with an alternative well proposal that the well be drilled in Unit P.

(iii) The Division finds that this case cannot be decided based upon which applicant first developed this prospect then proposed its well and then filed a pooling application because the activity initiated by Yates amounts to "bad faith" contrary to the Division's policy and practice that compulsory pooling be used as a last resort only after the parties have engaged in good faith rather than as "negotiating weapon" to be used against each other.

(b) **Party with Majority Interest**:

(i) At the August 10, 1995 Hearing, both Yates and Nearburg each had approximately the same percentage interest and each had recently contacted Unit Petroleum Company soliciting participation and had been informed by Unit Petroleum Company that it would take no position in this hearing.

(ii) At the October 5, 1995, Yates advised the Division that Yates now has a majority of the working interest because Yates is willing to ignore its own geologic expert in order to drill another location in Unit O requested by Unit Petroleum Company who voluntarily decided not to participate in this hearing.

(iii) The Division Finds that Unit Petroleum Company, a defaulting party with a smaller working interest than Nearburg or Yates, should not be able to control the outcome of this matter by allowing the parties to proceed to

complete a regulatory hearing on August 10, 1995 and afterwards propose a third alternative location.

(iv) The Division Finds that Yates' should not be rewarded for abandoning its geologic expert's preferred location in order to gain the support of Unit Petroleum Company who voluntarily elected not to participate in these proceedings.

(d) **Geologic Evidence-Well Location**:

(i) The Division finds that Nearburg should receive credit for its proposed location because the Nearburg location is the optimum location and substantially better geologically than the Yates' location.

(ii) The Division further finds that the Nearburg's location helps both Nearburg and Yates obtain the primary objective of either proposed well in this spacing unit which is a development oil well in this pool to encounter the same productive portion of the dolomite as is now producing in other Cisco/Canyon wells at a point in the spacing unit which represents the optimum structural position and reservoir thickness while being away from the edge of the dolomite.

(e) **Estimated Well Costs ("AFE")**:

(i) Nearburg presented its petroleum engineer who prepared its AFE who testified that the Nearburg AFE was a total of $722,985; that the Yates' AFE was $595,700 **but** that the $127,285 difference when appropriate adjustments of $120,155 were made, then the Yates' AFE was only $7,000 less than the Nearburg AFE;

(ii) On October 5, 1995 Yates' petroleum engineer agreed its original AFE was much too high and reduced it from $722,985 to $655,700;

(iii) The Division finds that there is not significant difference in the estimated costs of the well.

(e) **Issues Irrelevant in the Subject Case**:

The Division finds that while in certain cases these topics may have some relevance, they are not of significance in deciding this case: risk factor penalty, overhead rates, prior operations, experience of each operator, and ability to drill and properly complete the subject well.

(17) Based upon the forgoing, Nearburg's application should be approved and Nearburg Producing Company should be designated as operator. Overhead charges for supervision should be set at $5,440 while drilling and $540 while producing.

(18) Since risk of an unsuccessful completion at the either location is very high, the risk penalty should be set at 200%.

(19) Approval as set out in the above findings and in the following order will avoid the drilling unnecessary wells, protect correlative rights, prevent waste and afford the owner of each interest in said unit the opportunity to recover or receive without unnecessary expense his just and fair share of the production in any pool resulting from this order.

IT IS THEREFORE ORDERED THAT:

(1) The application of Nearburg in Case No. 11311 as described in this order is hereby GRANTED.

(2) The application of Yates in Case 11310 as described in this order is hereby DENIED.

(3) All mineral interests, whatever they may be, from the surface to the base of the Cisco/Canyon formation including but not limited to North Dagger Draw-Upper Pennsylvanian Associated Pool underlying the SE/4 of Section 16, Township 19 South, Range 25 East, NMPM, Eddy County, New Mexico, are hereby pooled to form a standard 160-acre spacing and proration unit to be dedicated to a well to be drilled at a standard well location 660 feet from the South line and 660 feet from the East line (Unit P) of said Section 16.

PROVIDED HOWEVER THAT, the operator of said unit shall commence the drilling of said well on or before the __th day of _____, 1996, and shall thereafter continue the drilling of said

well with due diligence to a depth sufficient to test the Cisco/Canyon formation of the subject pool.

PROVIDED FURTHER THAT, in the event said operator does not commence the drilling of said well on or before the ___th day of _____, 1996, Decretory Paragraph No. (3) of this order shall be null and void and of no effect whatsoever, unless said operator obtains a time extension from the Division for good cause shown.

PROVIDED FURTHER THAT, should said well not be drilled to completion, or abandonment, within 180 days after commencement thereof, said operator shall appear before the Division Director and show cause why Decretory Paragraph No. (3) of this order should not be rescinded.

(4) Nearburg Producing Company is hereby designated the operator of the subject well and unit.

(5) After the effective date of this order and prior to commencing said well, the operator shall furnish the Division and each known working interest owner in the subject unit an itemized schedule of estimated well costs.

(6) Within 30 days from the date the schedule of estimated well costs is furnished to him, any non-consenting working interest owner shall have the right to pay his share of estimated well costs to the operator in lieu of paying his share of reasonable well costs out of production, and any such owner who pays his share of estimated well costs as provided above shall remain liable for operating costs but shall not be liable for risk charges.

(7) The operator shall furnish the Division and each known working interest owner an itemized schedule of actual well costs within 90 days following completion of the well; if no objection to the actual well cost is received by the Division and the Division has not objected within 45 days following receipt of said schedule, the actual well costs shall be the reasonable well costs; provided however, if there is an objection to actual well costs within said 45-day period the Division will determine reasonable well costs after public notice and hearing.

(8) Within 60 days following determination of reasonable well

costs, any non-consenting working interest owner who has paid his share of estimated costs in advance as provided above shall pay to the operator his pro rata share of the amount that reasonable well costs exceed estimated well costs and shall receive from the operator his pro rata share of the amount that estimated well costs exceed reasonable well costs.

(9) The operator is hereby authorized to withhold the following costs and charges from production:

A. The pro rata share of reasonable well costs attributable to each non-consenting working interest owner who has not paid his share of estimated well costs within 30 days from the date of schedule of estimated well costs is furnished to him; and

B. As a charge for the risk involved in the drilling of the well, 200 percent of the pro rata share of reasonable well costs attributable to each non-consenting working interest owner who has not paid his share of estimated well costs within 30 days from the date the schedule of estimated costs is furnished to him.

(10) That the terms and conditions of the AAPL Form 610-1982 Model Form Operating Agreement (Nearburg Exhibit 5) are incorporated herein by reference.

(11) $5,440 per month while drilling and $540 per month while producing are hereby fixed as reasonable charges for supervision (combined fixed rates); the operator is hereby authorized to withhold from production the proportionate share of such supervision charges attributable to each non-consenting working interest, and in addition thereto, the operator is hereby authorized to withhold from production the proportionate share of actual expenditures required for operating such well, not in excess of what are reasonable, attributable to each non-consenting working interest.

(12) Any unleased mineral interest shall be considered a seven-eighths (7/8) working interest and a one-eighth (1/8) royalty interest for the purpose of allocating costs and charges under the terms of this order.

(13) Any well costs or charges which are to be paid out of production shall be withheld only from the working interest's share of production, and no costs or charges shall be withheld from production attributable to royalty interests.

(14) All proceeds from production from the subject well which are not disbursed for any reason shall be placed in escrow in Eddy County, New Mexico, to be paid to the true owner thereof upon demand and proof of ownership; the operator shall notify the Division of the name and address of said escrow agent within 30 days from the date of first deposit with said escrow agent.

(15) Should all the parties to this compulsory pooling reach voluntary agreement subsequent to the entry of this order, this order shall thereafter be of no further effect.

(16) The operator of the subject well and unit shall notify the Director of the Division in writing of the subsequent voluntary agreement of all parties subject to the compulsory pooling provisions of this order.

(17) Jurisdiction of this cause is retained for the entry of such further orders as the Division may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

WILLIAM J. LEMAY,
Director

807 P.2d 757

Jennifer FOWLER-PROPST and David Propst, Plaintiffs-Appellants,

v.

Joa DATTILO, Defendant-Appellee.

No. 12140.

Court of Appeals of New Mexico.

Jan. 22, 1991.

Certiorari Denied March 27, 1991.

Purchasers of home brought misrepresentation and professional negligence action relating to their acquisition of house that turned out to have inadequate water well. Within three months after entry of judgment on jury verdict in favor of purchasers, purchasers sold house for more than they paid for it, and defendant moved for relief for judgment on ground of newly discovered evidence. The District Court, Santa Fe County, Art Encinias, D.J., granted motion, and purchasers appealed. The Court of Appeals, Hartz, J., held that purchasers' sale of home for more than they paid for it, within about three months after purchasers obtained judgment for misrepresentation and professional negligence relating to allegedly inadequate water well, was not "newly discovered evidence" entitling defendant to new trial.

Reversed with directions.

1. New Trial ⇐128(1)

Defendant, who in motion for new trial on ground of newly discovered evidence did not allege fraud, did not satisfy requirements for setting aside judgment on ground of fraud, despite contention that her motion gave rise to inference of fraud by plaintiffs. SCRA 1986, Rules 1-009, subd. B, 1-060, subd. B(2, 3).

2. Judgment ⇐343

Subsection of rule permitting relief from judgment to be granted for "any other reason justifying relief" cannot serve as escape hatch when new evidence does not satisfy requirements for being "newly discovered evidence"; rather, such subsection is limited in scope to reasons not addressed in five preceding clauses. SCRA 1986, Rule 1-060, subds. B, B(2, 6).

3. New Trial ⇐100

Purchasers' sale of home for more than they paid for it, within about three months after purchasers obtained judgment for misrepresentation and professional negligence relating to allegedly inadequate water well, was not "newly discovered evidence" entitling defendant to new trial on ground that sale showed that purchasers had suffered no damages. SCRA 1986, Rule 1-060, subds. B, B(2).

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

4. Judgment ⇐378

Fact finder's determinations in support of award of damages are not determinations of historical truth, but the making of an estimate or prediction of future events to establish damages, so that should determinations be proved wrong by subsequent events, subsequent events are not "newly discovered evidence" warranting relief from judgment; however, when judgment provides relief other than damages, posttrial events may justify setting aside judgment. SCRA 1986, Rules 1-060, subds. B, B(2, 5).

Ellen S. Casey, Hinkle, Cox, Eaton, Coffield & Hensley, Santa Fe, for plaintiffs-appellants.

Winston Roberts-Hohl, Santa Fe, for defendant-appellee.

OPINION

HARTZ, Judge.

The district court ruled that newly discovered evidence required setting aside a judgment in favor of plaintiffs. Plaintiffs contend that the district court erred because the new evidence concerned an event that did not occur until after trial. We reverse. A new trial should not be granted solely on the ground that a post-trial event undercuts a prediction which formed the basis for the assessment of damages.

Plaintiffs sued defendant Dattilo for misrepresentation and professional negligence relating to the sale of a house that turned out to have an inadequate water well. On July 11, 1989, the jury returned a verdict in favor of plaintiffs, finding that the house was worth $69,560.02 less than it would have been worth with a proper well. Judgment was entered on the verdict on July 26. The following month plaintiffs put the house on the market. They sold it on October 4 for a price greater than what they had paid for it and much greater than the value estimated by their witnesses at trial. On October 20 Dattilo filed a motion pursuant to SCRA 1986, 1–060(B)(2), requesting that the judgment be set aside on the ground that the sale demonstrated that plaintiffs had suffered no damage. The district court granted a new trial, ruling that "after-occurring events which shed light on a condition which was at issue at the trial" constitute newly discovered evidence.

Rule 1–060(B) sets forth the grounds upon which a final judgment may be set aside by the district court. The pertinent portion of the rule states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 1–059 [governing motions for new trial];
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one-year after the judgment, order or proceeding was entered or taken.

[1, 2] B(2), which concerns newly discovered evidence, is the provision cited both in Dattilo's motion to set aside the judgment and in the district court's order. No other provision applies in this case. On appeal Dattilo asserts for the first time that her motion "gives rise to an inference of fraud by the plaintiffs," apparently attempting to rely on B(3) as authority for the district court's order. Her district court motion, however, included no allegation of fraud. Because Dattilo did not plead or prove fraud, B(3) does not apply. *Cf.* SCRA 1986, 1–009(B) (must plead fraud with particularity); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 877 n. 24 (5th Cir.1984) (must plead fraud with particularity in independent proceeding to reopen judgment); *Brown v. Pennsylvania R.R.*, 282 F.2d 522, 527 (3d Cir.1960) (to prevail under Federal Rule of Civil Procedure 60(b)(3) there must be clear and convincing evidence of fraud), *cert. denied*, 365 U.S. 818, 81 S.Ct. 690, 5 L.Ed.2d 696 (1961). In her appellate brief Dattilo also explicitly contends that she can rely on B(6). We reject that contention as well. B(6) cannot serve as an excape hatch when new evidence does not satisfy the requirements for being "newly discovered evidence." It is limited in scope to reasons not addressed in the five preceding clauses. *See Rios v. Danuser Machine Co.*, 110 N.M. 87, 792 P.2d 419 (Ct.App.1990); *Corex Corp. v. United States*, 638 F.2d 119 (9th Cir.1981).[1]

1. In *National Anti-Hunger Coalition v. Executive Committee*, 711 F.2d 1071, 1075 n. 3 (D.C.Cir. 1983), the court suggested that a report issued shortly after judgment could show the pre-judgment intentions of the report's authors and therefore justify a new trial under Federal Rule of Civil Procedure 60(b)(6) (the equivalent of our Rule 1–060(B)(6)). But the statement was pure dictum and the scope of the court's suggestion is not entirely clear.

[3] The question to be decided in this case is part of the broader question of when, if ever, evidence that comes into existence after trial can be considered "newly discovered evidence" within the meaning of Rule 1-060(B)(2). Because the issue has not arisen in reported New Mexico decisions, we examine precedents from other jurisdictions. In particular, cases interpreting Federal Rule of Civil Procedure 60(b), upon which our Rule 1-060(B) is based, are persuasive. *See Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 659 P.2d 888 (1983).

Generally, courts have required that "the evidence must have been in existence at the time of the trial." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2859, at 182 (1973). The leading, if not the first, case in support of this proposition is *Campbell v. American Foreign S.S. Corp.*, 116 F.2d 926 (2d Cir.), *cert. denied*, 313 U.S. 573, 61 S.Ct. 959, 85 L.Ed. 1530 (1941). In *Campbell* the defendant moved for a new trial because the plaintiff, who had been awarded damages for personal injury, obtained a sedentary job as a union official after the trial. The defendant argued that a new trial was necessary because damages turned out to be excessive. The court wrote:

> If it were ground for a new trial that facts occurring subsequent to the trial have shown that the expert witnesses made an inaccurate prophecy of the prospective disability of the plaintiff, the litigation would never come to an end. The weight of authority is against the granting of a new trial on the ground of unexpected improvement in the plaintiff's condition, unless the evidence is sufficient to show fraud.

Id. at 928. *Accord Ryan v. United States Lines Co.*, 303 F.2d 430 (2d Cir.1962) (worker denied new trial to seek greater damages when examination ten months after trial revealed increased disability). A number of other courts have reached the same conclusion, denying new trials because of the fear of never-ending litigation. *See, e.g., Brown v. Pennsylvania R.R.* (after trial, defendant declared plaintiff unfit to work and laid him off); *Prostrollo v. University of S.D.*, 63 F.R.D. 9 (D.S.D.1974) (evidence of grades of on- and off-campus students awarded in semester that ended after trial); *Anthony v. Earnest*, 443 So.2d 1256 (Ala.Civ.App.1983) (after award of damages for defendant's failure to provide water supply to property, it was error to vacate judgment on ground that after trial the water authority had completed a line to plaintiff's property); *Patrick v. Sedwick*, 413 P.2d 169 (Alaska 1966) (post-trial discovery of new technique to treat plaintiff's condition); *Wagner v. Loup River Pub. Power Dist.*, 150 Neb. 7, 12, 33 N.W.2d 300, 303-304 (1948) ("A failure of justice in a particular instance is ofttimes not so great an evil as that there should be no certain end to litigation"); *In re Disconnection of Certain Territory from Highland City*, 668 P.2d 544 (Utah 1983) (post-judgment annexation by city of land adjacent to land disconnected from city by the judgment).

The rule articulated in Wright and Miller has not always been strictly followed. Some courts have considered newly discovered evidence to include post-trial recantations by witnesses, *see Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 516 (8th Cir.) (grand jury testimony shows that testimony offered at trial was perjured), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984); *cf. City of Mesquite v. Scyene Inv. Co.*, 295 S.W.2d 276 (Tex.Ct.App.1956) (author of affidavit used to obtain summary judgment retracts on ground of misunderstanding), and post-judgment expert analysis of documents that had existed at the time of trial. *See Chilson v. Metropolitan Transit Auth.*, 796 F.2d 69 (5th Cir.1986) (post-trial audit establishing overpayment).

Of particular pertinence are cases which have permitted new trials on the ground that a post-judgment event shows the inaccuracy of an opinion expressed at trial as to value or condition. In a case very similar to the one before us, *Forshagen v. Payne*, 225 S.W.2d 229 (Tex.Ct.App.1949), damages had been awarded to the plaintiffs because a lot did not have a working water well, as had been represented by the defendant. Shortly after trial the plaintiffs

resold the lot at approximately the price they had paid for it. The appellate court affirmed the trial court's order setting aside the prior judgment and awarding a new trial. It found no obstacle to considering post-trial evidence to be "newly discovered evidence" and explained, "[J]ustice and fairness would require re-examination of the question of damages in another trial." *Id.* at 231.

In *Vanalstyne v. Whalen*, 15 Mass.App. 340, 445 N.E.2d 1073 (1983), a personal injury plaintiff suffered his first epileptic seizures several weeks after judgment. The court affirmed a grant of a new trial. It reasoned that although the seizures were post-trial evidence, they proved a pre-judgment fact—the plaintiff's actual medical condition at the time of trial.

Other courts, however, have followed the Wright-and-Miller rule in such circumstances. In another case like this one, *Bachtle v. Bachtle*, 494 A.2d 1253 (Del. 1985), a former spouse sought to modify a property division on the ground that the sale price of the marital residence substantially exceeded the estimate at trial. The Delaware Supreme Court refused to set aside the judgment.

Similarly, in *Rogers v. Ogg*, 101 Ariz. 161, 416 P.2d 594 (1966) (in banc), the defendant in a personal injury case moved for a new trial on the ground that the plaintiff, who had been compensated for brain damage, had been graduated from high school and had completed six semesters of college after the trial. These post-trial events presumably established that the plaintiff's brain condition at the time of trial was not as bad as the jury had found. Yet the motion was denied.

[4] Underlying the results in decisions such as *Rogers* and *Bachtle* is a policy consideration that we find dispositive here. In those cases, as in this one, everyone knew that the fact finder was not determining a historical truth but was making an estimate, a prediction of future events, to establish damages.[2] For example, in personal injury litigation, experts attempt to assess the injured party's condition in order to predict future disability, medical care, pain and suffering, etc. Both parties know that their expert testimony may be proved wrong by subsequent events. Yet neither expects a favorable damage award to be set aside when future events show that the prediction was inaccurate. Such adjustments could go on indefinitely, leading to multiple reopening of a single case. Parties take their chances based on the information existing at the time of trial. As stated more than half a century ago in *Woods v. Kentucky Traction & Terminal Co.*, 252 Ky. 78, 86, 65 S.W.2d 961, 964 (Ky.Ct.App.1933):

> The courts, upon considerations of public policy, as a rule are not favorable to the granting of new trials on newly discovered evidence claiming to show a changed condition subsequent to trial * * * "particularly where verdicts rest in any degree upon expert evidence as to future resultant conditions reasonably to be apprehended." Especially are they inclined to regard with disfavor evidence as to subsequent events disproving the character or extent of bodily injury for which recovery was had, as where subsequent to a trial for damages for personal injuries something occurs showing that the bodily condition of plaintiff was not such in fact as was supposed to be by the jury. [Citations omitted in original.]

Accord Nordin Constr. Co. v. City of Nome, 489 P.2d 455, 473 (Alaska 1971) ("If it were grounds for a new trial that facts occurring subsequent to the trial have shown an inaccurate prophecy, litigation would never come to an end").

The very presence of statutory mechanisms to adjust for future events in assessing damages—such as the fund created by the Medical Malpractice Act to pay future medical bills, *see* NMSA 1978, Section 41-5-7 (Repl.Pamp.1989), and the provisions of the Workers' Compensation Act for payment of future medical expenses and for

2. When the judgment provides relief other than damages, post-trial events may justify setting aside the judgment. *See, e.g.*, R. 1-060(B)(5) (no longer equitable that judgment have prospective application).

reevaluation of the worker's condition, *e.g.*, NMSA 1978, Section 52-1-56 (Repl.Pamp. 1987)—suggests that the common understanding is that in other circumstances the trial puts an end to such inquiries. In other words, the parties expect post-judgment repose. Indeed, the regularity with which parties seek lump-sum settlements for medical expenses under the Medical Malpractice Act and the Workers' Compensation Act illustrates the attraction that certainty and repose hold for all parties.

The reasonable expectations of the parties should be no different in a case like the one before us. When witnesses value an item of property, they are in essence predicting what a willing buyer would pay a willing seller. Everyone at trial knows that the testimony consists of estimates. Everyone knows that the estimates may be wrong, even quite wrong. No one expects the trial to be put off until the occurrence of some definitive event that establishes damages with certainty. Nevertheless, all expect the trial to end the controversy.

Because the grant of a new trial by the district court was founded on a post-trial event that is material solely to undermine the predictions of experts at trial relating to damages, we reverse the district court with directions to reinstate the original judgment.

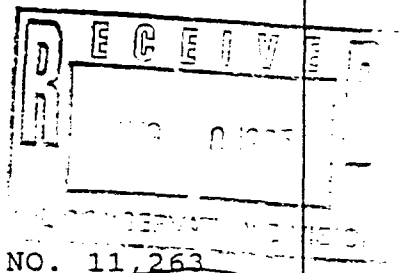
IT IS SO ORDERED.

BIVINS and APODACA, JJ., concur.

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION



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

APPLICATIONS OF YATES PETROLEUM CORPORATION AND NEARBURG EXPLORATION COMPANY

CASE NO. 11,263
11,265
(Consolidated)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

ORIGINAL

BEFORE: DAVID R. CATANACH, Hearing Examiner

July 27th, 1995

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Division, DAVID R. CATANACH, Hearing Examiner, on Thursday, July 27th, 1995, 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.

* * *

I N D E X

July 27th, 1995
Examiner Hearing
CASE NOS. 11,263, 11,265 (Consolidated)

* * *

A. That's correct.

Q. With respect to the type of wells, meaning just good, bad or what have you, how do these six wells rate, generally, with the rest of the wells in North Dagger Draw?

A. Five of the six are very good wells. In fact, all of the 160 proration units except the one in the northeast of 21 are at their current allowable.

Q. Now, the numbers that are outside, that you have posted outside of each one of these producing wells, numbers -- such as up in the northwest of the northwest, it's minus 4166. What is that?

A. That's just the structural component. That's the structural position that the Canyon dolomite came in on each well. So that's just showing how I drew my contour lines.

Q. All right, that is what you are basing your opinion that the Yates Petroleum location is structurally higher than the Nearburg; is that correct?

A. That's correct.

Q. And the -- In your opinion, does the way the -- in particular, these six wells that are drilled, do they substantiate the fact or denote a trend of this structure dipping off to the northeast?

A. Yes.

Q. Now, with respect to this location that Yates is

proposing to be drilled first, could you summarize for the Examiner why you feel that Yates' location should be drilled prior to the Nearburg location?

A. Well, as I stated before, the structure is slightly higher than the Nearburg location. That's one reason.

Some of the other, bigger reasons, though, are that as we've been talking about the SWD locations, the Osage and the Anadarko location, which both of these proposed locations offset, those cause -- as a geologist, cause me some concern, and that is where the risk comes into play.

Both of these locations have risk because of the SWDs. I feel, though, that the Yates location has less risk than the Nearburg location. And why I state that is because the Nearburg location, in its close proximity to both SWDs, could be affected by both, whereas the Yates location is only close to the Osage 1 SWD, so it may only be affected by the Osage. And I say "may" because we don't really know until we get up there and drill.

But looking at the Anadarko SWD, it has already been offset by the Nearburg Ross Ranch 22 Number 2. That well has a very high water cut, and in my opinion, I feel like that it may have some effect on the Ross Ranch, the Anadarko disposal well.

If you don't --

MR. ERNEST CARROLL: All right.

EXAMINER CATANACH: -- you don't have to.

MR. ERNEST CARROLL: I appreciate it. I'll see if I can do it, but I just can't --

EXAMINER CATANACH: After that time, I'll start working on the Order.

Okay, there being nothing further in these cases, Case 11,263 and 11,265 will be taken under advisement.

And this hearing is adjourned.

(Thereupon, these proceedings were concluded at 6:00 p.m.)

* * *

I do hereby certify that the foregoing is a complete record of the proceedings in the Examiner hearing of Case No. 11263 11265, heard by me on July 27 1995.

David R. Catanach, Examiner
Oil Conservation Division

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:	CASE NOS. 11,310 11,311 (Consolidated)
APPLICATIONS OF YATES PETROLEUM CORPORATION AND NEARBURG EXPLORATION COMPANY	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: MICHAEL E. STOGNER, Hearing Examiner

August 10th, 1995

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Division, MICHAEL E. STOGNER, Hearing Examiner, on Thursday, August 10th, 1995, 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.

* * *

I N D E X

August 10th, 1995
Examiner Hearing
CASE NO. 11,310, 11,311 (Consolidated)

* * *

CROSS-EXAMINATION

BY MR. KELLAHIN:

Q. Mr. May, when you're developing exploration strategy for picking these wells in the North Dagger Draw, is a critical part of that strategy to find locations that have the greatest net thickness of dolomite?

A. That always helps, and it's --

Q. Why does that help?

A. Well, like I said before, when you have a thicker net pay, you have the potential for having a thicker hydrocarbon column. But it's not essential.

As I pointed out in the north half of 16, those wells had less pay, but they're very good wells. So it's nice to have, but it's not essential.

Q. All right. When you're beginning to develop an exploration strategy, one of the criteria then, is net thickness of dolomite?

A. Yes.

Q. The greater net thickness, the greater storage capacity for potential hydrocarbons, and therefore you lessen the risk if you have an area of greater net thickness?

A. That's definitely one of the pieces of the puzzle, yes.

Q. When I look at Exhibit 11, I'm looking at a net

dolomite thickness map, I guess?

A. That's correct.

Q. How do we get net?

A. Okay, what I did here is basically added up every foot of dolomite that appeared within the Canyon section.

Q. Is there some kind of cutoff value to determine it?

A. No, I did not use any gamma-ray cutoffs or anything like that. It's strictly dolomite.

Q. All right. As we move, then, in this area of the lighter -- There's a greenish blue area.

A. Yes.

Q. I'm not good with the colors, but you see where I'm talking about?

A. Yes, sir.

Q. That is an area of greater net dolomite thickness?

A. Yes, sir, that's correct.

Q. And as we move north into the blue area, we're reducing net dolomite thickness because we're getting these stringers of limestone; is that what's happening?

A. That's correct, as you move towards the edge of the dolomite, the dolomite fans and the limestone -- you get more limestone.

Q. Okay. When I look at the map, show me the net

dolomite value, then, that is the equivalent for the Nearburg location.

A. That would be a little bit over 350 feet, maybe 360 feet of dolomite.

Q. Okay. And when I get to the Yates location, what's the value there?

A. Maybe 295, 290. But let me point out that there's a special case in this one, in this case, because of the SWDs and the possible or unknown effects that they may have.

Q. We'll get to that.

A. Okay.

Q. I'll give you a chance to talk about those.

When I'm looking at the criteria, though, of net dolomite thickness, you will agree with me that the Nearburg location, as to that criteria, is superior?

A. I wouldn't call it superior. It has more dolomite thickness. But as I've stated before, you look at the -- especially the two spots on the north half of the north half of 16. They have less than either one. Both of those wells are still producing around 500 barrels of oil each.

Q. All right, we'll get to those.

When we're looking at the criteria of net dolomite thickness, though, the Nearburg location has

approximately 70 feet better because it's thicker?

A. If that's the only criteria you've used, yes, it's a better location, if that's the only criteria you use.

Q. Let's examine the saltwater disposal infringement issue as a criteria.

You were looking at the Nearburg -- I'm sorry, the Yates-operated Osage SWD well. Where on this Exhibit 11 would we find that well?

A. It would be approximately -- Let's see, it would be in the southwest of the northeast of Section 21.

Q. All right. When I look at Section 21, there is a value of 370 feet?

A. Yes, sir.

Q. Is that the value for the disposal well?

A. Yes, sir.

Q. And Yates over time put 6.5 million barrels of produced water into that well in the Cisco/Canyon formation?

A. Approximately, yes.

Q. All right. And you don't know, and I don't know, and Mr. Fant doesn't know where that water went, do we?

A. Not at this point.

Q. Let's go to the cross-section, which is your Exhibit Number 8. We've got a copy of that Osage disposal

well on the far right side of this display, don't we?

A. Yes, sir.

Q. Okay. Now, the hearing we had two weeks ago when we were discussing with Examiner Catanach where best to locate the well in the northeast of Section 21 --

A. Yes, sir.

Q. -- that dealt with a well proposal for your Ross EG Federal 14, was it?

A. Yes, sir.

Q. And that well would have been located in Unit Letter B of Section 21, to the south of where we're talking about now?

A. Yes, sir. Yes, sir.

Q. All right. In the southeast quarter of Section 16, you're suggesting we should be farther away from the disposal well than the Nearburg proposed location?

A. Could you rephrase that? I'm not sure I --

Q. Yes, sir, I'm not sure I know what I said either. When we're looking at the Boyd X 9 well --

A. Yes, sir.

Q. -- the topic of this hearing --

A. Yes, sir.

Q. -- it is farther removed away from the dispute we had before Examiner Catanach over the north half of the northeast of 21?

A. It's even further away from both of those disposal wells, yes, sir.

Q. All right. In terms of Yates' choice, are we going to drill Section 16 first, before we drill anything in 21?

A. From what I understand, Nearburg has an expiring lease, and we cannot. If I had my druthers, yes, I would prefer to drill in Section 16 first, before Section 21. But because of that expiring lease, I feel that evidently we can't.

Q. Okay.

A. Whoever wins that.

Q. When we look at your cross-section, I'm looking at a stratigraphic cross-section.

A. Yes, sir.

Q. I'm not going to be able to use this as a way to see structural position, at least on this cross-section.

A. Not so well. But even though the wells -- even though this is stratigraphic, they're not too far off structure. But yes, it would better to have a structural cross-section to do that.

Q. We have found on Exhibit 11, as we move north, we're getting into an area where we have more of these limestone stringers which are nonproductive portions of this reservoir?

A. Yes, sir, that's correct.

Q. And you've given us a mud log on Exhibit 9, and it's got an orange line on it that, if we line it up with the orange line on the second log over from the right on Exhibit 8, we can begin to read them?

A. Yes, sir.

Q. All right. What you're telling us, that when you put this log together this orange line on the mud log has a reading over on the right where we're seeing dolomite and limestone, aren't we?

A. That's correct.

Q. What was your criteria in terms of the cross-plot porosity to decide that was the top of the reservoir?

A. On the electric log --

Q. Either one.

A. -- or on the mud log? Of course, the mud log is shown. The mud logger logged dolomite, and I was actually out there and did see the samples. It was dolomite.

On the electric log -- There's a PE curve on the electric log, and it would be the third curve from the right. It's a dashed curve. You notice through all the purple it is deflecting back to the left. When you get into the uncolored line, it deflects back to the right. And in that thin section there is deflection to the left, almost exactly as the rest of the dolomite.

Also, the neutron density profiles suggest dolomite.

The other thing, too, the drilling break -- You rarely get drilling breaks like that in limestone. That's a dolomite drilling break.

Q. All right, let's look at the cross-section, then, on this Amole Number 2 well. We get down where you shaded in purple what is without question dolomite?

A. Yes, sir.

Q. You see that?

A. Yes, sir.

Q. And there's equivalent to a perforation there?

A. Yes. Which part, I'm sorry? Because there's several perforations.

Q. It's the first big perforated section, there's a tiny little perforation up there.

A. Okay, around the 7700 depth?

Q. Yes, sir.

A. Okay.

Q. And let's look at what happens to the curves in that area where you have the larger perforation.

A. Yes, sir.

Q. And there's no disagreement about the dolomite, because look at the density curve that's moved to the right and the neutron curve has gone to the left. Do you see

where I'm looking?

A. Okay, they've both deflected to the left, the density and the neutron.

Q. But the separation is larger.

A. Oh, yes. There is separation, yes, sir.

Q. That separation, then, gives you as a geologist an indication that that's dolomite?

A. That's one of the indicators, yes.

Q. All right. When we move up into this area that's in dispute between you and Mr. Elger, you have got an orange line up above this area, where the neutron curve and the density curve have closed considerably.

A. That's correct.

Q. And that will have closed because we have this infiltration of lime?

A. I disagree. I still stand by that that's dolomite. There is some separation, yes. It's not as much as the section you described lower down. But the reason I feel that's true, the density is in a good spot for the dolomite. It's the neutron that's the problem, and I feel the problem is because it's a little bit gassy. Gas will pull the neutron down. And that's my explanation of why you don't see the good porosity in both curves there.

But when you look over at the mud log and that drilling break, that's the best drilling break in the whole

section of the dolomite, and we log dolomite there. There's also a gas kick. I firmly believe that is dolomite reservoir rock.

Q. Okay, the way this cross-section is oriented, I'm not seeing the picture going from west to east.

A. No, this is just a north-south.

Q. All right. What I want to ask you is, when I look at the Amole Number 2 well, how do you forecast or project what your well location is going to look like in relation to the Amole Number 2 well?

A. There's a possibility it can look similar to the Amole 2. Also, there's a possibility you could move over one 40 and get a complete thick section of dolomite. Changes happen real fast with the dolomite in Dagger Draw.

Q. Is it your preference to be this close to the Amole Number 2 well?

A. Yes, sir, it is.

Q. And at what rate is that well currently producing?

A. That well IP'd for 162 barrels of oil, and I believe the last production I saw, it was still around 130 to 140 barrels a day.

Q. And how does that compare to the productivity of the other wells in this area?

A. It's not as good as some of the others, but it's

as good as some.

Q. It's a poor well isn't it?

A. It's a mediocre well. It's not a great well. I wouldn't call it a poor well.

Q. But you want to be next to this one?

A. Yes, sir, that's correct.

Q. What do you figure is going to be the ultimate recovery out of this well?

A. I don't know. You'll have to ask an engineer that.

Q. We talked about one of the other criteria is structural position.

A. Yes, sir.

Q. And you've got a structure map here, Exhibit 10. Have you help us interpret some values.

If you look at Exhibit 10, will you give us what you consider to be the top of the dolomite at the Yates location and then what you think you're going to find at the Nearburg location, using your interpretation?

A. I would say the Yates -- the top of the Yates location would be around a minus 4160, and the Nearburg location around a minus 4180.

Q. Twenty feet, give or take, difference?

A. Yes, sir, something like that.

Q. And I believe you said that regardless, both

locations should be preferable structural in the reservoir?

A. Yes, sir, That's correct.

Q. And so a structural difference is not going to decide this case?

A. It's real small, so it's not a big deal. Like I said, what worries me is the order in which all these wells are drilled. I still feel like eventually all four wells will be drilled, probably.

Q. When you look at your proposed location --

A. Yes, sir.

Q. -- there's an AFE dated here in March of this year. When did you make a choice of preference as to that being the location?

A. I don't remember, but I'm sure it was -- we proposed, I think -- We looked at spotting all four wells, and if I remember right, we were waiting till we drilled the Amole 2, and that may have been when we made the decision to go with that one, the direct offset. I can't remember exactly. We may have made that decision even before we made the --

Q. Well, and that was my question --

A. So I'm not sure --

Q. -- and you don't know --

A. I'm not sure, I can't remember off the top of my head.

Q. You can't remember if you've picked this location without having data on the Amole 2 or vice-versa?

A. Right.

MR. KELLAHIN: That concludes my examination. Thank you, Mr. Examiner.

EXAMINER STOGNER: Thank you, Mr. Kellahin.

Mr. Carroll, any redirect?

MR. ERNEST CARROLL: No we don't.

EXAMINER STOGNER: Nor do I. I have no other questions.

MR. ERNEST CARROLL: We call our next witness, then, Bob Fant.

ROBERT S. FANT,

the witness herein, after having been first duly sworn upon his oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ERNEST CARROLL:

Q. Would you please state your name, place of residence and employment for the record?

A. My name is Robert Fant. I live in Artesia, New Mexico. I'm employed by Yates Petroleum Corporation as a petroleum engineer.

Q. Prior to this hearing, have you had a chance to acquaint yourself both with the Application of Yates Petroleum and the Application of Nearburg, which are Cases