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

APPLICATION OF FASKEN OIL AND RANCH, LTD. FOR TWO ALTERNATIVE UNORTHODOX WELL LOCATIONS AND A NON-STANDARD PRORATION UNIT, EDDY COUNTY, NEW MEXICO. **CASE NO. 11755**

APPLICATION OF MEWBOURNE OIL COMPANY CORPORATION FOR AN UNORTHODOX WELL LOCATION AND A NON-STANDARD PRORATION UNIT, EDDY COUNTY, NEW MEXICO. **CASE NO. 11723**

APPLICATION OF TEXACO EXPLORATION AND PRODUCTION, INC.FOR CLARIFICATION OR IN THE ALTERNATIVE, AN EXCEPTION TO THE SPECIAL POOL RULES AND REGULATIONS FOR THE CATCLAW DRAWN-MORROW GAS POOL, EDDY COUNTY, NEW MEXICO. **CASE NO. 11868**

ORDER R-10872-A

APPLICATION FOR REHEARING AND MOTION TO STAY COMMISSION ORDER R-10872 BY FASKEN LAND AND MINERALS, LTD. AND FASKEN OIL AND RANCH, LTD.

This application for Re-hearing is submitted by W. Thomas Kellahin, Esq. of Kellahin and Kellahin for and on behalf of Fasken Land and Minerals, Ltd. and Fasken Oil and Ranch, Ltd. (collectively "Fasken").

In accordance with the provisions of Section 70-2-25 NMSA (1978), Fasken requests the New Mexico Oil Conservation Commission enter an order staying Order R-10872-A and granting this Application for Re-Hearing in Cases 11755 (denovo) and Case 11723 (denovo).

INTRODUCTION

A stay of Order R-10872-A and a rehearing are essential so the Commission can enter an order which:

(1) deletes Ordering Paragraph (3) Order R-10872 in which the Commission exceeded its jurisdiction by declaring that Mewbourne had the right to drill its location first which is one of the contractual issues currently being adjudicated by the parties in a Texas State District Court proceeding; and

(2) deletes that portion of Finding (15) in which the Commission exceeded its jurisdiction by deciding that Mewbourne's location would be drilled first based upon its contention that "Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1."

RELEVANT FACTS

1. Irregular Section 1 consists of 853.62 acres is divided into thirds with the central portion of this section being "unleased" federal oil and gas minerals the surface of which is subject to a federal environmental study. As a result, both Fasken and Mewbourne requested approval of a non-standard 297.88 acre unit ("NSP") comprising the southern portion of Irregular Section 1, T21S, R25E, Eddy County, N.M. and described as Lots 29, 30, 31, 32 and the SW/4 (S/2 equivalent).

2. Fasken is the operator of the S/2 equivalent of Irregular Section 1 as a result of a Joint Operating Agreement, AAPL-1956 Model Form, dated April 1, 1970 which includes Mewbourne Oil Company ("Mewbourne") Matador Petroleum Corporation, Devon Energy Corporation, and others, as non-operators.

3. South of Section 1 is Section 12 which Texaco Exploration and Production Inc. ("Texaco") operates as a 632.36 acre gas spacing and proration unit within the Catclaw Draw-Morrow Gas Pool which is currently dedicated to the:

(a) E. J. Levers Federal "NCT-1" Well No. 1 (the Levers Well No 1 located 660 feet from the South line and 1980 feet from the West line of Section 12; and

(a) E. J. Levers Federal "NCT-1" Well No. 2 (the Levers Well No 1 located 2448 feet from the North line and 1980 feet from the West line of Section 12

4. Both well locations are within the current boundary of the Catclaw Draw-Morrow Gas Pool which is subject to the Division's Special Rules and Regulations (Order R-4157-D) which include:

> "Rule: 2...shall be located no closer than 1650 feet to the outer boundary of the section nor closer than 330 feet to any governmental quarter-quarter section line."
>
> "Rule 5: A standard gas proration unit...shall be 640-acres."

5. While the Catclaw Draw-Morrow Gas Pool is still officially "prorated", prorationing has been suspended and the wells in the pool are allowed to produce at capacity.

6. On January 28, 1997 and without obtaining the concurrence of Fasken, as operator, or of the other working interest owners in the S/2 of Irregular Section 1, Mewbourne filed with the Division an application for approval of an unorthodox gas well location 660 feet from the south line and 2310 feet from the East line of said Section 1. This is NMOCD Case 11723 and is referred to as the "Mewbourne location" which encroaches upon Texaco who appeared at the April 3, 1997 Examiner's hearing in opposition to Mewbourne's location.

7. Fasken analysis indicates that Mewbourne's location is on the downthrown side of a fault and is fault separated from Texaco's Levers Well No. 2 and would not be able to compete for Morrow gas now being produced by Texaco in that wellbore. Therefore, Fasken proposed to Mewbourne and the other owners in the S/2 of Irregular Section 1 that Morrow gas well be drilled at a location 750 feet from the West line and 2080 feet from the South line of Section 1. This is NMOCD Case 11755 and is referred to as the "Fasken location" which does not encroach upon Texaco. Fasken's proposed location will also test a Cisco structure which the parties do not believes exists at the Mewbourne location.

8. Texaco appeared at the Commission hearing in opposition to the Mewbourne location and proposed an 81.4% production penalty.

9. Texaco acknowledged that it could not complain about the Fasken location because Fasken's location was more than 1650 feet away from Texaco's unit boundary event despite its belief that only the Fasken location
would drain the reservoir from which the Texaco well is producing.

10. The Fasken location is standard as to Texaco's Section 12 but is unorthodox as to Section 2 which is operated by Penwell Energy Inc. who waived any objection to Fasken's location.

11. Although Fasken has a legitimate business disagreement with Mewbourne with respect to the optimum well location, on April 30, 1997, Mewbourne filed litigation in a District Court in Midland Texas contending that Fasken, among other things, owed Mewbourne a fiduciary duty and that Fasken had breached the Joint Operating Agreement by proposing an alternative location for approval by the Division. These contractual issues are still in litigation.

12. On September 12, 1997, the Division entered Order R-10872 approving the Fasken location and denying the Mewbourne location.

13. On October 30, 1997, the Commission held an evidentiary hearing at which Fasken, Mewbourne and Texaco each presented geological evidence in an effort to support their respective positions.

14. At the Commission hearing and over Fasken's objection, Mewbourne introduce testimony and evidence concerning this contractual dispute, the priority of well proposals and the division of interests and asked the Commission to take this evidence into consideration when it decided the well location cases.

15. On December 12, 1997, the Commission released Order R-10872-A which was dated December 11, 1997 but contained only the signatures of Commissioners LeMay and Bailey. On December 31, 1997, the Commission issued Order R-10872-A which now contained the signatures of all three Commissioners but instead of being dated December 31, 1997 still showed a date of December 11, 1997.

GROUNDS FOR REHEARING

POINT I:

THE COMMISSION EXCEEDED ITS JURISDICTION BY DECIDING THE PRIORITY OF MULTIPLE WELL PROPOSALS

Unless this order is amended, the Commission has now established a new precedent for deciding unorthodox well location cases. For the first time in the history of the agency, the Commission has applied its compulsory pooling criteria to an unorthodox location case and made its decision based upon facts which are irrelevant and inadmissible as to any of the issues properly before the Commission.

The Commission has jurisdiction to decide the priority in which competing well proposals will be drilled only within the context of compulsory pooling applications (Section 70-2-17.C). In a compulsory pooling case, the Commission often decides such matters based upon which party has the largest individual interest and which party proposed the well first. The Commission does so because under the explicit language of the pooling statute, the Commission should adjudicate such interests because there is no contract to guide the actions of the parties.

However, the Commission's decision in the subject cases has nothing to do with compulsory pooling. The subject cases are not analogous to the compulsory pooling situation because here there is a contract to guide the actions of the parties. The Commission approved the Fasken location and, subject to a production penalty also

approved the Mewbourne location. At that point it should have simply stopped. Unfortunately, the Commission went beyond anything it was required to do by gratuitously deciding that Mewbourne's location should be drilled first. In doing so, the Commission impermissably interposed its opinion as to which location should be drilled first, a matter which is clearly beyond the jurisdiction of the Commission. There are no waste or correlative rights issues involved in a decision based a finding that Mewbourne location gets drilled first because "Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1."

Historically and until now, the Commission has decided unorthodox well locations based upon the geology and reservoir engineering to determine if that location adversely affected the correlative rights of the party being encroached upon. With this case, the Commission awards the drilling of the first well to Mewbourne who filed its application first without obtaining the concurrence of Fasken, as operator, or of the other working interest owners in the spacing unit. The Commission awards the drilling of the first well to Mewbourne who has the largest single interest despite the fact that a majority (57%) of the working interest owners have agreed to join in the Fasken well. With this case, the Commission has made its decision on facts having nothing to do with either waste or correlative rights. A decision that Mewbourne's location shall be drilled first does nothing to either prevent waste or protect correlative rights. It advances no interest of the State of New Mexico.

POINT II:

THE COMMISSION HAS ADJUDICATED A CONTRACTUAL DISPUTE

A conservation commission, under the guise of meeting its statutory mandate to prevent waste and protect correlative rights, **cannot** act as an adjudicator of contractual controversies. **See REO Industries v. Natural Gas Pipeline Co. 932 F.2d 447 (5th Cir. 1991).**[1] Notably absence from the Commission's enumerated powers, is the power to interpret contracts and operating agreements and to require specific enforcement of those contract or, in the alternative, to award money damages for any breach of those agreements. **Section 70-2-12.B NMSA 1979.**

This spacing unit is subject to a joint operating agreement and does not require the Commission to use its authority to pool those interests. The parties are involved in litigation commenced by Mewbourne in a Texas district court in which one of the issues is whether Fasken's or Mewbourne's well proposal gets drilled first. The appropriate forum and remedies for resolving those contractual disputes exist but resides with the court and not with the Oil Conservation Commission. **See REO Industries, supra.** By the same token, that district court has no business adjudicating those correlative right issues raised in these well location requests which must be resolved by the Commission. Mewbourne wants it both ways--it will want the

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

Commission to adjudicate the dispute between Fasken and Mewbourne over various items in this operating agreement, including who can operate and when and how wells can be proposed. What Mewbourne wanted and what the Commission did was to decide that Mewbourne has the right to drill the first well. That portion of Order R-10872-A amounts to the Commission adjudicating a contract issue.

The New Mexico state courts have repeatedly recognized that the Commission is the administrative agency with the "experience, technical expertise and specialized knowledge" to deal with geologic and engineering data also as to prevent waste of a valuable resources and protect the correlative rights of all participants. **Viking Petroleum v. Oil Conservation Comm**, 100 N.M. 451, 672 P.2d 280, 282 (1983), **Rutter & Wilbanks Corporation v. Oil Conservation Commission**, 87 N.M. 286, 532 P.2d 582 (1975); **Grace v. Oil Conservation Commission**, 87 N.M. 205, 531 P.2d 939 (1975). The Commission must address issues relating to the prevention of waste and the protection of correlative rights. It did so in Order R-10872-A by declaring that both Fasken and Mewbourne have the right to develop the Morrow formations in this spacing unit and approving both wells. **See Ordering Paragraph (1) of Order R-1087-A.**

However, the Commission went further and decided that Mewbourne gets to drill the first well by its actions, the Commission has exceeded its authority and preempted the adjudication of that issue before the court.

POINT III:

THE COMMISSION'S DECISION IS BASED UPON IRRELEVANT AND INADMISSIBLE EVIDENCE

Anticipating that Mewbourne would attempt to influence the Commission's decision by introducing inadmissible evidence at the Commission hearing, Fasken filed a Motion in Limine asking the Commission for an order to limit evidence and argument to the geologic and engineering issues. Specifically, Fasken sought to exclude from the DeNovo hearing any evidence or argument concerning the well proposals between Fasken and Mewbourne, what percentage of the interest owners supported either or both proposals, the respective ownership interests in the spacing unit and all other issues involved in the "Fasken-Mewbourne contractual dispute" which is currently the subject of litigation in State District Court, Midland County, Texas.

Included in Fasken's Motion in Limine was a request to exclude any consideration of the priority of multiple well proposals made which is one of the contractual issues being litigated.

The Commission took that motion under advisement but then, over the objection of Fasken, allowed Mewbourne's landman, Steve Cobb, to testify about the priority of well proposals and the percentage of interest for each of the working interest owners in that unit and the status of commitment to either well proposal. Thereafter, the Commission relied upon this very evidence in its ultimate decision to authorize Mewbourne to drill its well first.

The Commission's admission and reliance upon inadmissible and irrelevant evidence introduced by Mewbourne over Fasken's objection amounts to an improper denial of the motion in limine, constitutes reversible error and requires that the Commission grant a rehearing in order to correct its mistake.

WHEREFORE, Fasken Land and Minerals, Ltd and Fasken Oil and Ranch, Ltd. respectfully requests the New Mexico Oil Conservation Commission enter an order staying Order R-10872-A and granting this Application for Re-Hearing in Cases 11755 (denovo) and Case 11723 (denovo).

Respectfully submitted,

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