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

May 9, 2002

HAND-DELIVERED

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

Re: NMOCD Case Nos. 12816, 12859, 12860 and 12841

Dear Ms. Wrotenbery:

Enclosed is an original and two copies of the Response of David H. Arrington Oil and Gas, Inc. to Motion of TMBR/Sharp Drilling, Inc. to Continue Case 12816 and to Dismiss Cases 12859, 12860 and 12841.

Thank you for your assistance.

Very truly yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall

JSH/glb
Enclosures
cc: David Brooks
Michael Stogner
Bill Baker

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

IN THE MATTER OF THE APPLICATIONS OF DAVID H. ARRINGTON OIL AND GAS, INC., TMBR/SHARP DRILLING, INC., AND OCEAN ENERGY, INC. FOR COMPULSORY POOLING, LEA COUNTY, NEW MEXICO

CASE NOS. 12816, 12859, 12860 and 12841

DAVID H. ARRINGTON OIL AND GAS, INC.'S RESPONSE TO MOTION OF TMBR/SHARP DRILLING, INC. TO CONTINUE CASE 12816 AND TO DISMISS CASES 12859, 12860 AND 12841

David H. Arrington Oil and Gas, Inc., ("Arrington"), through its attorneys, Miller Stratvert & Torgerson, P.A., (J. Scott Hall), for its Response to the Motion To Continue and To Dismiss filed on behalf of TMBR/Sharp Drilling, Inc., ("TMBR/Sharp"), states:

FACTUAL BACKGROUND

Some time ago[1], Movant TMBR/Sharp filed its Application for Compulsory Pooling in Case No. 12816 seeking to consolidate working interests in the N/2 of Section 25, T-16-South, Range 35 East, NMPM for the drilling of its Blue Fin "25" Well No. 1 in the NW/4 of Section 25. Previously, TMBR/Sharp's efforts to obtain an APD for its proposed well became entangled in the collateral proceedings in Case Nos. 12731 and 12744 where it challenged APD's issued prior in time to Arrington. Those consolidated cases ultimately resulted in the issuance by the New Mexico Oil Conservation Commission of Order No. R-11700-B on April 26, 2002, which found, among other things, that the Division's District I Supervisor should issue an APD to TMBR/Sharp for its proposed well. In addition, the Commission

[1] TMBR/Sharp's Application was filed on January 28, 2002.

expressly retained jurisdiction over the matter, noting that separate court proceedings to resolve title issues could affect the outcome these pending administrative cases.

In the interim, Ocean Energy filed separate compulsory pooling applications (Case No. 12841 and Case No. 12860) seeking to pool the W/2 of Section 25 for two alternative proposed Mississippian formation well locations in the NW/4 and SW/4, respectively. More recently, Arrington has filed its application for compulsory pooling to create an E/2 unit[2] in Section 25 for its Glass-Eyed Midge 25 No. 1 Atoka/Morrow/Mississippian well to be drilled in the NE/4. The E/2 Arrington unit and the N/2 TMBR/Sharp unit are in obvious conflict. Significantly, Arrington's application does not present a title or permitting issue like TMBR/Sharp's applications in Case Nos. 12731 and 12741 did; Arrington's C-101 APD for the Glass-Eyed Midge 25 No. 1 well was issued by the Division on December 17, 2001. Its C-102 reflecting an E/2 unit was filed on November 29, 2001.

POINTS AND AUTHORITIES

The Motion To Continue: Arrington vigorously opposes the TMBR/Sharp motion to continue Case No. 12816. It is clear that geologic and economic waste issues should determine the outcome of these disputed cases, not resolution of collateral title issues. Accordingly, the Division should discharge its statutory function and resolve these matters at the earliest opportunity. Moreover, it is in the interests of administrative efficiency and economy that all four cases be heard simultaneously at the May 16th examiner hearing. The Division should resist any further efforts of TMBR/Sharp to delay resolution of this long-standing dispute.

[2] Arrington's APD for an E/2 unit was filed on November 29, 2001.

The Motion To Dismiss: Arrington opposes TMBR/Sharp's motion to dismiss Case Nos. 12859, 12860 and 12841.

Under TMBR/Sharp's reading of Order No. R-11700-B, it is now "entitled" to proceed with the drilling of its well, as "[t]he Commission decision in favor of TMBR/Sharp eliminates the need for the Division to decide the Ocean and Arrington compulsory pooling cases". (Motion To Dismiss, Pg. 3).

The basis of the TMBR/Sharp motion to dismiss is its unfounded belief that the possession of an APD "precludes the Division from entering an order granting the relief sought in Cases 12841, 12859 and 12860." (Motion to Dismiss, Pg. 1). It is the essence of the TMBR/Sharp argument that the Division's statutory hearing process must be subservient to the routine processing of an APD.

TMBR/Sharp knows better.

TMBR/Sharp Argues That The Division's Adjudicatory Function Is Substituted By A Ministerial Act.

By asserting that the issuance of an APD by the District Office somehow obviates the need for further administrative action, TMBR/Sharp is exalting a mere ministerial act over the substantive and discretionary quasi-judicial function that the Division is *mandated* to perform under N.M. Stat. Ann. 1978 Sections 70-2-17 and 70-2-18.[3]

In a situation such as this, where multiple owners have not agreed to pool their interests, under the Division's compulsory pooling statutes, on application, the agency is obliged to convene a hearing and consider evidence probative of whether pooling is necessary

[3] Compulsory Pooling proceedings are identified as adjudicatory matters at 19 NMAC 15N.1207.A(1).

"...to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste". N. M. Stat. Ann. 1978 Section 70-2-17(C). See Simms v. Mechem 72 N.M. 186, 188, 382 P.2d 183, 184 (1963). ("Unquestionably the commission is authorized to require pooling of property when such pooling has not been agreed upon by the parties[.]") Where the evidence presented substantially supports affirmative findings and conclusions on any one of these issues, then the statute directs that the Division "***shall pool*** all or any part of such lands or interests or both in the spacing or proration unit." *Id.*, (emphasis added). Even under this statutory hearing process, depending on the evidence, the issuance of a compulsory pooling order is discretionary and is by no means an entitlement. This quasi-judicial function is expressly reserved to the Commission and the Director or her duly appointed examiners (N. M. Stat. Ann. 1978 sec. 70-2-13) and ***no part*** of it may be delegated by fiat under the guise of a ministerial approval of a drilling permit. *See* Kerr-McGee Nuclear Corp. v. New Mexico Environmental Improvement Board, 97 N.M. 88, 97, 637 P.2d 38, 47 (Ct. App. 1981). In Kerr-McGee, the Court of Appeals held that duties which are quasi-judicial in nature, and which require the exercise of judgment cannot be delegated. Id. As Kerr-McGee was a case of first impression in New Mexico, the Court of Appeals relied on Oklahoma case law. The Supreme Court of Oklahoma in Van Horn Oil Co. v. Okla. Corp. Com'n., 753 P.2d 1359, 1363 (1988) cited to the same authority relied on the New Mexico Court of Appeals when it quoted:

> Administrative bodies and officers cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions discretionary or quasi-judicial in character, or which require the exercise of judgment.

Citing, Anderson v. Grand River Dam Authority, 446 JP.2d 814 (1968). The Anderson Court also quoted with approval from American Jurisprudence and Corpus Juris Secundum:

> In 2 Am. Jur. 2nd Administrative Law, Section 222, it is said: It is a general principal of law, expressed in the maxim "delegates no protest delegare", that a delegated power may not be further delegated by the person to whom such power is delegated and than in all cases of delegated authority, or personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment and discretion, the authority is purely personal and cannot be delegated to another***. A commission charged by law with power to promulgate rules, cannot in turn, delegate that power to another."

Because New Mexico has expressly adopted Oklahoma law, it is the law in this state that an administrative body may not delegate a statutory function, particularly in the manner that TMBR/Sharp advocates.

In making any determination under the compulsory pooling statute, under long-standing practice,[4] the Division will consider evidence relating to, among other matters: (1) the presence or absence of a voluntary pooling agreement; (2) whether a reasonable and good-faith effort was made to obtain the voluntary participation of others[5]; (3) reasonableness of well costs; (4) geologic and engineering evidence bearing on the avoidance of waste and the protection of correlative rights, including the drilling of unnecessary wells; (5) the assessment of a risk penalty; and (6) whether a proposal is otherwise in the interests of conservation. The mere approval of a drilling permit and the filing of an acreage dedication plat serve to do none of these things and neither have any of the functions enumerated above been delegated outside the Division's regular hearing process.[6]

---

[4] *See* Morris, Richard, *Compulsory Pooling of Oil and Gas Interests in New Mexico,* 3 Nat. Resources J. 316 (1963).

[5] In this case, the reasonableness of the TMBR/Sharp efforts to obtain voluntary participation of the parties it seeks to pool is in question. *See* Exhibit A, attached.

[6] N. M. Stat. Ann. 1978 Section 70-2-17(C): "All orders effecting such pooling shall be made after notice and hearing[.]"

It is specious reasoning to argue that any portion of the pooling process is subsumed by the mere processing of an APD. Order No. R-11700-B, Par. 33. ("An application for a permit to drill serves different objectives than an application of compulsory pooling and the two proceedings should not be confused.") Moreover, the issuance of a drilling permit does not constitute any determination of a property right. *See* Gray v. Helmerich & Payne, Inc., et al. 843 S.W. 2d 579 (Tex. 2000). TMBR/Sharp is asserting that compulsory pooling is unnecessary only because it must remain consistent with the position it has taken in the ongoing litigation in the 5th Judicial District Court. There, TMBR/Sharp is advancing the highly tenuous argument that the filing of a C-102 acreage dedication plat was sufficient to "pool" acreage into a unit comprised of the W/2 of Section 25 (sic), T-16-S, R-35-E, thus perpetuating its Stokes oil and gas lease.[7] Were it to argue otherwise, then its court case would be finished.

Finally, TMBR/Sharp's assertion that Order No. R-11700-B confers upon it a "prior right" to drill, making moot the pooling applications in Cases 12859, 12860 and 12841, is contra-indicated by express terms of the Order itself:

"Issuance of the permit to drill does not prejudge the results of a compulsory pooling proceeding, and any suggestion that the acreage dedication plat attached to an application to drill somehow "pools" the acreage is expressly disavowed."

(Order No. R-11700-B, Par. 34).

Order No. R-11700-B Is Not Final.

Order No. R-12170-B continues to be subject to further administrative action. As indicated above, the Commission determined that it would retain jurisdiction over Case Nos.

[7] TMBR/Sharp Drilling, Inc. v. David H. Arrington Oil and Gas, Inc., et al., 5th Judicial District Court No. CV-2001-315C; Claimant's Motion for Partial Summary Judgment Regarding Filing of Unit Designation, Pg. 9.

12731 and 12744 pending final resolution of the title dispute among Arrington, Ocean Energy and TMBR/Sharp that remains ongoing in the 5th Judicial District Court, noting that the outcome there could affect the related administrative proceedings before the Commission. Additionally, Arrington intends to submit a request for rehearing in Case Nos. 12731/12744, that may be followed by further appellate review. Alternatively, Arrington may seek the issuance of an amended order to correct a number of erroneous findings. TMBR/Sharp's declaration that these proceedings are now over is premature and is thus not a legitimate basis for its Motion To Dismiss.

TMBR/Sharp's Stated Intent To Commence Drilling. In its Motion, TMBR/Sharp represents:

> "In accordance with NMSA (1978) Section 70-2-17, TMBR/Sharp intends to drill the Blue Fin Well No. 2 prior to the compulsory pooling of the remaining working interest owners in the N/2 of Section 25." (Motion To Dismiss, Pg. 3.)

TMBR/Sharp's stated intent to "drill now, pool later" is to be taken with a grain of salt. Proceeding in such a fashion, while arguably permissible, is certainly precipitous and exposes TMBR/Sharp and its non-operating partners to substantial economic risk and legal uncertainty. While we agree that it has been the agency's interpretation of Section 70-2-17(C) that an operator may initiate compulsory pooling *after* a well has been drilled, the issuance of a pooling order is not a given, particularly in a vigorously contested case such as this. A number of other considerations, geology, unit orientation, economic waste and the drilling of unnecessary wells among them, may prevent the issuance of an order favorable to TMBR/Sharp. Moreover, proceeding to drill now and pool later would impair, if not outright

preclude, TMBR/Sharp from making the statutorily required showing that it made a good faith effort to obtain the voluntary agreement of the other affected interest owners.

Any advantage TMBR/Sharp would hope to gain going into a subsequent compulsory pooling proceeding with a pre-drilled well is far outweighed by the risks. The time ultimately consumed by these contested administrative and judicial proceedings is presently unknown and when a compulsory pooling order may finally be issued cannot be predicted. In the interim, while it may have completed a well fully capable of producing, no allowable will be assigned to the well until TMBR/Sharp can demonstrate that all interests have been consolidated or a non-standard unit has been approved by the Division. (19 NMAC 15.M.1104.C: "No allowable will be assigned to any well until a standard unit...has been communitized or pooled and dedicated to the well.") Until then, the Blue Fin 25 Well No. 1 would remain shut-in. (*See* Case No. 12622; *Application of Nearburg Exploration Company, L.L.C. For Approval of Two Non-Standard Spacing and Proration Units, Lea County, New Mexico.*)

CONCLUSION

For all the foregoing reasons, TMBR/Sharp's Motion To Dismiss should be denied and Case Nos. 12859, 12860 and 12841 should proceed to hearing at the earliest opportunity.

MILLER, STRATVERT & TORGERSON, P.A.

By _____

J. Scott Hall
Attorneys for David H. Arrington Oil & Gas, Inc.
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Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on the 9th day of May, 2002, as follows:

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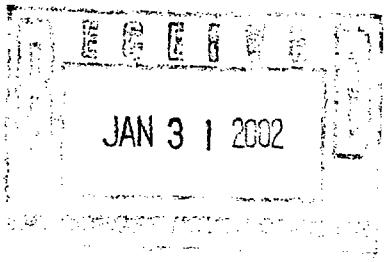

January 29, 2002

Mr. Michael Stogner
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Case 12816

Re: Compulsory Pooling Hearing

Dear Mr. Stogner,

I received the enclosed 'registered' letter on January 26th from Mr. Phil Brewer, Attorney for TMBR/Sharp Drilling, regarding the above subject.

I just wanted the Division to be aware, that contrary to article 3 of the Application for Compulsory Pooling, no one from TMBR/Sharp has ever contacted me regarding a lease, AFE, or operations, etc, nor some of the other mineral owners, that I am familiar with. I feel that this issue should be clarified, prior to the Division issuing a Compulsory Pooling Order.

Thank you for your consideration in this matter.

Sincerely,

M. Mark Caldwell

Enclosure

EXHIBIT A