Richard S. Morris
Atty. - Oil Conservation Comm
Santa Fe

IN THE DISTRICT COURT FOR LEA COUNTY
FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO

AMANDA E. SIMS and GEORGE W. SIMS, Petitioners,	)	
vs.	)	No. 18860
HONORABLE JOHN BURROUGHS, CHAIRMAN, MURRAY E. MORGAN, MEMBER, A. L. PORTER, JR., MEMBER, SECRETARY OF THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO; AND OLSEN OILS, INC., Respondents.	)	

DECISION OF THE COURT

Statement

This cause came on for hearing before the Court, Petitioners Amanda E. Sims and George W. Sims appearing by their attorney, C. N. Morris, and Respondents appearing by Girand, Cowan & Reese of Hobbs, New Mexico; Campbell & Russell of Roswell, New Mexico; and Richard S. Morris, Special Assistant to the Attorney General, c/o Oil Conservation Commission, Santa Fe, New Mexico.

By agreement of counsel in open court it was stipulated that the present members of the Oil Conservation Commission, namely Edwin L. Mechem, Chairman, E. S. Johnny Walker, and A. L. Porter, Jr., Secretary of the Commission, be substituted as parties in lieu of the Respondents constituting the Commission sued herein.

It is so ordered.

It was further agreed in open court that Texas Pacific Coal and Oil Company has acquired all the leasehold and working interest rights formerly held by Olsen Oils, Inc., and its predecessors in title, with full knowledge of all matters in controversy herein, and should be substituted as a party hereto for all purposes, in lieu of Olsen Oils, Inc.

It is so ordered.

Jack Campbell, Esq., of the firm of Campbell & Russell, entered the appearance of that firm as attorney for Texas Pacific Coal and Oil Company, associated with Girand, Cowan and Reese.

It was stipulated in open court that the Court should consider in evidence the record proceedings before the Oil Commission, with the exhibits thereto attached, and orders in Causes 921 (Order R-667), 1567 (Order R-1310), and 2051 (Order R-1761 and R-1766A). Order R-586 of the Commission was introduced without objection, as well as the "Communitization Agreement" dated September 11, 1957.

In addition to the foregoing, a written stipulation relating in part to the facts has been entered into between the parties and is on file herein. In addition, certain facts were stipulated in open court and will appear herein.

Findings of Facts

From all of the foregoing the Court makes the following findings of fact:

1. At all times material hereto Petitioners herein,

Amanda E. Sims and George W. Sims, were the owners of the full mineral interest under the SE¼NW¼, E½SW¼ and SW¼SW¼ of Section 25, Township 22 South, Range 37 East, NMPM, in Lea County, subject to two outstanding Oil and Gas Leases, one being dated April 3, 1944, executed to Gulf Oil Corporation embracing the SE¼NW¼ of Sec. 25, and another dated the same day and embracing the E½SW¼ and SW¼SW¼ of said Sec. 25, also executed to Gulf Oil Corporation. The leasehold estate is now owned and operated by Texas Pacific Coal and Oil Company.

2. At all times material hereto the mineral interests under the NE¼NW¼, W½NW¼ and NW¼SW¼ of Sec. 25 aforesaid were owned; 1/15th by Petitioners and the remainder by the estate of Vivian L. Drinkard and others, subject to an outstanding oil & gas lease now owned and operated by Texas Pacific Coal and Oil Company.

3. The half-section constituting the foregoing mineral interests is in a multiple producing gas area in Lea County, producing from several pays including the "Blindry" pay, as well as the "Tubb."

4. On February 17, 1953, the Commissions Order No. R-264 created the Tubb and Byers-Queen gas pools, and defined the horizontal and vertical limits of these pools. This order also extended the horizontal and vertical of the Justis gas pool. By Order R-407 the vertical limits of the Tubb gas pool were extended. This order provides for standard gas well units of 160; regulations provided for the formation of non-standard

units; production from the Tubb, Byers-Queen and Justis pools was prorated and allocated for the stated reason of protecting and recognizing correlative rights as defined by Section 26(h), Chapter 168, NMSL 1949 (65-3029(h), NMSP 1953); special rules relating to the establishment of non-standard gas producing units were adopted by the Commission Order.

5. An application of R. Olsen Oil Company for an order granting approval of an exception to Rule 5(a) of the Special Rules and Regulations for the establishment of a non-standard gas proration unit of 160 contiguous acres consisting of the SE¼NW¼, E½SW¼, SW¼SW¼ Sec. 25, Twp. 22 S., R. 37 E. (minerals all owned by petitioners). This application (Case No. 929) was heard by the Commission on July 14, 1955, and Order No. R-677 issued August 17, 1955 established the acreage as a non-standard gas unit in the Tubb pool. The order recited Olsen's intention to drill a Tubb well in the center of the SE¼NW¼ of Sec. 25, and provided that upon completion of the well, if productive, it be granted the production allowable of a standard proration unit for said pool, until further order of the Commission.

Prior to this order the Commission had established a non-standard unit consisting of the same lands from the Blinebry gas pool, which well and unit produced gas.

6. After the establishment of this non-standard Rubb unit no well was immediately drilled. On September 11, 1957, Petitioners and R. Olsen Oil Company entered into the "Communitiza-

tion Agreement," commutizing the two original Gulf leases described in Finding 1 insofar as they covered gas rights within the vertical limits of the Tubb gas field.

The two leases which were "commutized," combined, cover the SE¼NW¼, E½SW¼ and SW¼SW¼ which had been approved as a non-standard gas unit in the Tubb pay in the Commission's order No. R-677. This "Agreement," in substance:

(a) Pools the two leases described therein for development of liquid hydrocarbons and dry gas from the Tubb. The production is defined as "commutized substances."

(b) The area pooled shall be developed and operated as an entirety and operation or production from one lease area shall be deemed an operation to the entire interest committed.

(c) Production of commutized substances and disposal thereof shall be in conformity with allocation, allotments, and quotas fixed by any duly authorized person or regulatory body under applicable state statute. This agreement shall be subject to all applicable laws, orders, rules, regulations, and no party hereto shall suffer a forfeiture or be liable in damages for failure to comply with any provisions of this agreement, if such compliance is prevented by, or if such failure results from compliance with any such laws, orders, rules or regulations.

(d) The covenants shall be considered as covenants with the respective interest committed, and to extend to the heirs, successors and assigns of the parties.

7. After this agreement was made and while the agreement and Order No. R-677 were in force, the lease owners drilled a well to the Tubb formation which was completed as a producer about January 1, 1958. The well was drilled in the center of the SE¼NW¼, Sec. 25, at the location approved in the order, which was found therein to be a location that would prevent waste and protect correlative rights.

8. After this well had been on production for some months Olden Oils, Inc. (successor in interest to the leasehold estates of Gulf, R. Olsen Oil Company, et al) applied to the Commission in Case No. 1567 for a 160-acre non-standard gas proration unit in the Tubb field consisting of the N½NW¼, SW¼NW¼ and NW¼SW¼ Sec. 25, T22S, R37E, or in the alternative that an order be entered force-pooling the NW¼ of Sec. 25, and the SW¼ of Sec. 25 as separate standard 160-acres. Due and lawful notice of this application was given to petitioners. Petitioners had refused to consent to standard units because, no doubt, of the existing well on the SE¼SW¼, and Order R-677 creating a non-standard unit, under which petitioners owned the entire mineral interest. It was proposed in the Application in Cause No. 1567 that if the two standard units were force-pooled consisting of the NW¼ and the SW¼ of Sec. 25, a second well in the NE¼SW¼ of Sec. 25 be drilled. If a non-standard unit be approved it would be drilled in the NE¼NW¼ of Sec. 25. The only evidence before the Commission relative to the prevention of waste or the protection of correlative rights was that this would be

accomplished by granting either the non-standard unit, or force-pooling the W½ of Sec. 25 into two standard units.

The Commission found in its Order R-1310 in Cause 1567 that the most efficient and orderly development could be accomplished by force-pooling into standard units.

The Commission ordered:

(1) That the interests of all persons having the right to drill for, produce, or share in the production of dry gas and associated liquid hydrocarbons, or either of them, from the Tubb gas pool underlying the NW¼ of Sec. 25, Twp. 22 S., Rge. 37 E., NMPM, Lea County, New Mexico, be and the same are hereby pooled, said unit to be dedicated to applicant's Sims Well No. 2 located in the SE¼NW¼ of said Sec. 25, and that Olsen Oils, Inc., be and the same is hereby designated as the operator of said pooled unit until further order of the Commission.

(2) That the production from the above-described pooled unit be allocated to each tract in the unit in the same proportion that the acreage in said tract bears to the total acreage in the unit.

(3) That the interests of all persons having the right to drill for, produce, or share in the production of dry gas and associated liquid hydrocarbons, or either of them, from the Tubb gas pool underlying the SW¼ Sec. 25, Twp. 22 S., Rge. 37 E., NMPM, Lea County, New Mexico, be and the same are hereby pooled, and that Olsen Oils, Inc., be and the same is hereby designated as the operator of said pooled unit until further order of the Commission with authority to drill a unit well in the NE¼SW¼ of said Sec. 25.

(4) That the production from the above-described pooled unit be allocated to each tract in the unit in the same proportion that the acreage in said tract bears to the total acreage in the unit.

(5) That Commission Order No. R-677, dated August 17, 1955, be and the same is hereby rescinded upon the effective date of this order.

(6) That the effective date of this order and of all of the provisions contained herein shall be January 1, 1959.

The record of hearing shows that apparently the force pooling was ordered because the operator "preferred the two standard proration units." (Tr 6) No other evidentiary showing indicated any necessary basis for setting aside Order R-677 and force-pooling the property involved.

No application for a re-hearing with respect to this Order No. R-1310 was made by Petitioners herein, nor was any effort made to correct the order by appeal within the time provided by Sec. 65-3-22, NMSA 1953. I cannot agree that the Notice of the hearing on 1567 did not give notice of an alternative application which would, if ordered, upset R-677.

9. Some substantial time after Order R-1310 in Cause 1567 was entered, the operator drilled and completed a Tubb well in the NE¼SW¼ of Sec. 25, and the well's production was attributed to the SW¼ unit. The well was not as large a producer as the well in the SE¼NW¼ originally attributed to the unit established by Order R-677. The production from the well in SE¼NW¼ was allocated to the NW¼ unit.

10. Petitioners, long after the time had expired to obtain a re-hearing on Order R-1310 in Cause 1567, or appealing from said order, and after Olsen Oils, Inc., pursuant to said order had drilled a second Tubb well located in the NE¼SW¼ of Sec. 25, which was a smaller producer than the well in the SE¼NW¼, filed before the Commission in Cause No. 2051 an application for an order vacating and setting aside Order R-1310 entered in Cause 1567, and to substitute therefor a non-standard 160-acre Tubb gas unit in conformity with the "Commutization

Agreement" between the parties dated September 11, 1957, and above referred to. The application sought to re-establish the non-standard unit fixed by Order R-677 and set aside the order force-pooling the W½ of Sec. 25 entered in Order R-1310 dividing the half-section into two standard quarter-section drilling units.

It was stipulated between the parties that Paragraphs 1, 2, 3, and 4 of Petitioners' application filed in this Court were to be considered as true. The records in Causes 1567 (Order R-1310) and the "Commutization Agreement" of September 11 were to be considered as evidence in the case. No further evidence was offered by petitioners indicating any technological basis for upsetting Order R-1310. Petitioners have never consented to unitize the W½ of Sec. 25 into standard units, and the only agreements signed by them have related to non-standard units. The hearing resulted in Commission Order R-1766 denying petitioners' application and finding that petitioners' relief, if any, should be to the courts. Petitioners duly filed their application for a re-hearing which was denied September 28, 1960, and petitioners seek a review of the matter by "Petition for Review," timely filed in this Court. The Court finds that since the second well was drilled after the entry of Order R-1310, and both wells now located on the non-standard unit established by Order R-677, that if the Commission had granted the petitioners' request in Cause No. 2051 an additional well would have to be drilled on the non-standard unit under which

petitioners have 1/15 of the royalty, and the two wells now drilled would both be utilized to the production proration assigned in the field to a single 160-acre producing unit. This would result in economic waste, as only two wells appear from the evidence to be necessary to recover the gas from the W½ of Sec. 25. The petitioners brought about this status by failing to cause a review of Order R-1310 and permitting the intervening drilling activities on the NE¼SW¼ of Sec. 25.

11. The stipulated facts set forth in the written stipulation are adopted by the Court here by reference.

The foregoing constitute the substantive facts in the case necessary to a decision.

Conclusions

In the view the Court takes of the case, one question is decisive of this appeal. However, in view of the probability of further appeal, the Court deems it proper to give full consideration to the several questions raised.

1. Respondents first contend that Cause No. 2051 is a collateral attack upon Order R-1310, which it is contended cannot be made in the manner now presented to the Court. It appears that petitioners had full notice of the hearing resulting in Order R-1310. Petitioners elected not to appear to defend their rights. Had they done so, and had they timely moved for a re-hearing and appealed from the order, this Court, on the facts before the Commission, would have upset the order

as not supported by a preponderance of the evidence. No showing, however, was attempted by petitioners in Cause 2051 of a change of conditions in the area since the former Order R-1310. No re-hearing or appeal from Order R-1310 was made or attempted. It became final except for modification by changed field conditions. Under the facts disclosed here a collateral attack upon the order cannot be made.

Wood Oil Company v. Corporation Commission, 239 P(2) 1021
City of Socorro v. Cook, 173 P 682; 24 NM 202
Van Patten v. Boyd, 150 P 917; 20 NM 250

It is true that in Oklahoma there is a statute prohibiting a collateral attack on the Commission's orders; however, the Oklahoma Court has held that the legislature did not intend that an application to modify an unappealed from order made on the ground that such order was based on faulty geological data or permitting excess taking of gas was a collateral attack.

Application of Bennett (1960), 352 P(2) 114

The application herein filed contained no suggestion of changed geological data, excess gas proration, or the like, but rested its claim upon an alleged violation of the September 11, 1955 "Commutization Agreement," by the Commission order. The jurisdiction of the Commission to make the order is questioned. This was a claim which could have been asserted by them at the hearing resulting in Order R-1310, had they elected to appear and assert it.

2. It is next contended by Respondents that by failing to take advantage of its administrative rights before the Commission

in failing to defend, in failing to seek a rehearing as provided by statute (NMSA 1953, Sec. 65-3-22) as a basis for appeal from the order, and in failing to exhaust their administrative remedies to review the order, Petitioners are precluded from now seeking to avoid the order by the present action.

With this contention the Court is in agreement with Respondents, particularly in view of the facts here presented. One cannot stand idly by and permit others to expend large sums of money on the basis of an order of a Commission prima facia valid, and then be heard to complain as a result of their own lethargy or failure to act. In this case Petitioners owned all the royalty under the unit established when the first Tubb well was drilled. Order R-1310 upset the unit established by Order R-677 and force-pooled the W½ of Sec. 25 into two standard units consisting of the NW¼ and the SW¼ of Sec. 25. Petitioners stood by and let a well be drilled on the NE¼SW¼ of Sec. 25. Had this well been a larger well than the first well drilled, their production would have increased. It turned out to be a smaller well, and their production decreased. They took their chances and cannot be heard to complain now, when they failed to complain by properly preserving their administrative and legal remedies to upset Order R-1310.

Shell Oil Company v. Kern, 355 P(2) 997 (Okla.)

In the meantime Olsen drilled the second well, and if the Commission should now set aside Order R-1310 and revert to the unit set up by Order R-677, an additional well would have

to be drilled under the land upon which petitioners only own a 1/15 royalty interest. This would result in economic waste. The undisputed evidence is that the two wells now penetrating the Tubb gas zone can fully drain the W½ of Sec. 25. The prevention of economic waste is one of the prime obligations of the Commission under our statute.

3. It is next contended by the Respondents that the Commission has full power to force-pool as ordered by R-1310. Petitioners contend the Commission was without jurisdiction to enter this Order R-1310 because of the existence of the contract of September 11, 1957. Petitioners contend that the "communitization contract" is violated by the order and the Oil Conservation Commission was without power or jurisdiction to change the unit as originally established. In the first place Petitioners, not having participated in the hearing to urge the existance of the contract and not having appealed from the order, although parties to the proceedings in view of the changed conditions precipitated by the order, cannot now in good conscience attack it if the Commission acted within its jurisdiction and power.

No attack is made upon the authority of the State in the exercise of its police powers to regulate fugacious minerals by requiring pooling, force-pooling, sharing in production and in safeguarding and preventing physical or economic waste in the production of such minerals. The rule of capture is sub-

ject to be modified by the state in the lawful exercise of its police powers.

Palmer Oil Corp. v. Phillips, 231 P(2) 997 (Okla.)
City Service Gas Co. v. Peerless, 71 S.Ct. 251; 340 US 179
Hunter v. Justice Court, 223 P(2) 465 (Cal.)
Wooton v. Bush, 261 P(2) 256
Wood Oil Co. v. Corporation Comm., 258 P(2) 378
U. S. v. Cotton Valley Operators, 77 F.Supp. 409
Dec. Digest "Mines and Minerals" Key 92.3

Section 65-3-14, NMSA 1953, provides in Section (b) as follows:

"The commission may establish a proration unit for each pool, such being the area that can be efficiently and economically drained and developed by one well, and in so doing the commission shall consider the economic loss caused by the drilling of unnecessary wells, the protection of correlative rights, including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells, and the prevention of reduced recovery which might result from the frilling of too few wells."

Section (c) provides:

"The pooling of properties or parts thereof shall be permitted, and, if not agreed upon, may be required in any case when and to the extent that the smallness or shape of a separately owned tract would, under the enforcement of a uniform spacing plan or proration unit, otherwise deprive or tend to deprive the owner of such tract of the opportunity to recover his just and equitable share of the crude petroleum or natural gas, or both, in the pool; Provided, that the owner of any tract that is smaller than the drilling unit established for the field, shall not be deprived of the right to drill on and produce from such tract, if same can be done without waste; but in such case, the allowable production from such tract, as compared with the allowable production therefrom if such tract were a full unit, shall be in ratio of the area of such tract to the area of a full unit. All orders requiring such pooling shall be upon terms and conditions that are just and reasonable, and will afford to the owner of each tract in the pool the opportunity to recover or receive his just and equitable share of the oil or gas, or both, in the pool as above provided, so far as may be practicably recovered without waste. In the event such pooling is required, the costs of development and operation of the pooled unit shall be limited to the lowest actual expenditures required for such purpose including a reasonable charge for supervision; and in case of any dispute as to such costs, the commission shall determine the proper costs."

The Hearing Examiner does not affect this case.

Under this section the pooling of properties under the enforcement of a uniform spacing plan or proration unit is specifically authorized, and if not agreed upon, may be required. The facts show the non-uniform unit was agreed upon (subject to qualifications), but that Petitioners had refused to agree upon a uniform spacing unit program. Under these facts the power of the Commission to force-pool cannot be doubted, assuming our statutes valid.

But Petitioners contend that by the force-pooling the terms of their contract have been violated. This contention does not appear to be supported by the "commutization contract" itself. The contract, in part, provides:

> "Production of commutized substances and disposal thereof shall be in conformity with allocation, allotments and quotas made or fixed by any duly authorized person or regulatory body under applicable state statute. This agreement shall be subject to all applicable laws, orders, rules or regulations, and no party hereto shall suffer a forfeiture or be liable in damages for failure to comply with any of the provisions of this agreement if such compliance is prevented by, or if such failure results from, compliance with any such laws, orders, rules or regulations."

This precludes any contention that the unit agreement should be so holy as not to be subject to change by lawful authority. At any rate, if the contract has been violated by the parties, resort may be made to the Courts to redress any wrong committed between them.

Monsanto Chemical Co. v. Southern Natural Gas, 102 S(2) 223 That is not a matter within the Oil Conservation Commission's domain.

Even in the absence of the contractual provisions above, leases or contracts with respect to the development and production of oil, gas or other minerals, must be made subject to the police power of the state exercised in protecting natural resources, and any provisions of law with respect thereto form a part of such contracts as though written therein.

LeBaue v. Daneiger Oil Co., 49 S(2) 93 (La.)

It appears therefore that the Oil Conservation Commission had jurisdiction of the subject matter considered resulting in Order R-1310, as well as jurisdiction of the persons involved, including the petitioners, and lawful authority is granted to decide the questions presented. There are the three essential elements of "jurisdiction."

State v. Patten, 69 P(2) 931; 41 NM 395
Persky v. Channon, 123 P(2) 726; 46 NM 159
Truitt v. Dist. Ct., 96 P(2) 710; 44 NM 10; 176 ALR 51

It is next contended that Order R-1310 deprives the Petitioners of "vested" rights, thus failing to protect their "correlative rights."

It is elementary that a "vested right" is a right which is absolute, complete, and unconditional within itself. No such absolute right exists as applied to fugatious minerals such as oil or gas, they being subject to the laws of the state and regulations as exist in this state adopted by the Oil Conservation Commission to aid in the exercise of the police power of the state. "Correlative rights" within the act are defined as follows:

65-3-29(h)--"'Correlative rights' means the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy."

Even assuming the right of petitioners at this late hour to attack Order R-1310, certainly no showing has been made or attempted that petitioners have not or will not receive their fair share of the total recoverable gas from the Tubb pay in the W½ of Sec. 25. If they do not now receive as much as they formerly received, it has resulted from their own inaction and from their own choice.

There is no common ownership of oil or gas in a particular field in subsurface owners other than the "correlative right" to the oil or gas passing beneath each subsurface owner's location, and "common reservoir" or "common source" or "common supply" means the strata through which oil, gas and other hydrocarbons may be passing. It is in no sense a surface reservoir, of which each surface owner, as tenant in common, owns a particular portion.

Bell Corporation v. Bell View Oil Syndicate, 76 P(2) 167, 175

Even as to water, the doctrine of "correlative rights" limits the taking of ground waters to the land owner's proportionate share thereof.

Bistow v. Cheateau, 255 P(2) 173 (Ariz.)

Exceptions are granted to each finding and conclusion herein. All findings or conclusions submitted contrary to the above are denied. Exceptions are allowed.

Judgment may be entered dismissing the Petitioners' "Petition for Review" in Cause No. 18860, and said cause of action.

DATED this 7 day of December, 1961.

District Judge

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