KELLAHIN, KELLAHIN AND AUBREY
Attorneys at Law
El Patio - 117 North Guadalupe
Post Office Box 2265
Santa Fe, New Mexico 87504-2265

W. Thomas Kellahin
Karen Aubrey

Jason Kellahin
Of Counsel

Telephone 982-4285
Area Code 505

RECEIVED
FEB 22 1988
OIL CONSERVATION DIVISION

February 22, 1988

Mr. David Catanach
Oil Conservation Division
P. O. Box 2088
Santa Fe, New Mexico 87504

"Hand Delivered"

Re: Case 9129

Dear Mr. Catanach:

On behalf of Meridian Oil Inc. please find enclosed our Memorandum in support of Amoco's position in this case. We have received Amoco's Brief filed by letter dated February 16, 1988 and concur in the statements made by Amoco.

Very truly yours,

W. Thomas Kellahin

WTK:ca
Enc.

cc: James G. Bruce, Esq.
William F. Carr, Esq.
Kent J. Lund, Esq.
Randy Mundt, Esq. (Federal Express)
Alan Alexander (Federal Express)

STATE OF NEW MEXICO
DEPARTMENT OF ENERGY AND MINERALS
OIL CONSERVATION DIVISION

APPLICATION OF VIRGINIA P. UHDEN, HELEN ORBESEN, AND CARROLL O. HOLMBERG TO VACATE ORDERS NOS. R-7588 and R-7588-A, AND TO ESTABLISH EIGHT NON-STANDARD SPACING AND PRORATION UNITS, SAN JUAN COUNTY, NEW MEXICO. CASE NO. 9129

BRIEF OF MERIDIAN OIL INC.

In accordance with the direction of the Examiner at the January 20, 1988 hearing of the referenced case, Meridian Oil Inc. submits the following:

Statement of Facts

On January 18, 1984, after notice had been given, the Division held a hearing upon the application of Amoco Production Company ("Amoco") in Case 8014 to consider the establishment of Temporary Special Rules and Regulations for the Cedar Hills-Fruitland Basal Coal Pool, San Juan County, New Mexico, including a provision for 320-acre spacing. On July 9, 1984, the Division entered Order R-7588 which granted the application.

On February 18, 1986, after notice had been given, the Division held a hearing to reconsider the special rules for this pool and on March 7, 1986 entered Order R-

7588-A making those rules permanent, including the 320-acre spacing provision.

The applicants are the successors to the original lessors of certain oil and gas leases issued to Stanolind Oil & Gas Company, Amoco's predecessor. These leases cover a portion of the oil & gas minerals which are subject to the Cedar Hills-Fruitland Basal Coal Pool Rules.

Amoco is the operator and a working interest owner in the subject pool.

Meridian Oil Inc. ("Meridian") is a working interest owner in Amoco's Holmberg Gas Com Well #1 located in Unit B, Section 28, T32N, R10W, NMPM, to which the N/2 of said Section 28 is dedicated. Should the applicant's request for a 160-acre non-standard spacing unit be granted, then Meridian's interest in the subject well would be terminated.

On January 20, 1988, the Division concluded the hearing granted to the applicants in this case.

STATEMENT OF ISSUES

Applicants contend that they have been deprived of their property without procedural due process because they did not receive personal notification of either the January 18, 1984 or the February 18, 1986 spacing rule hearing before the Division.

Applicants seek to have the two Orders vacated as to their interests and have eight 160-acre non-standard units created including those areas of the pool that contain acreage leased by applicants to Amoco. In the alternative, applicants seek to stay the spacing order, effective to their interests, as of the date notice was provided to applicants by Amoco.

I. APPLICANT'S LACK STANDING BEFORE THE DIVISION TO ADJUDICATE APPROPRIATE SPACING FOR THE POOL.

The purpose of due process notice and the opportunity to be heard is to ensure that the owners of constitutionally protected property rights do not have those rights impaired by state action without having the opportunity to appear and participate in that process.

The applicants claim to be entitled to such notice. They are not. As a result of the oil and gas lease, the applicants have transferred to Amoco the EXCLUSIVE right to determine within the terms of that lease, how Amoco will investigate, explore, drill and develop the hydrocarbons underlying that property.

In return, the applicants or their predecessors received a bonus payment for the lease, the right to receive a royalty free of cost, and certain other covenants by the lessee which are contained in the lease or which are implied by law.

The Lessors (applicants) have granted to the lessee (Amoco) the right to pool the leased lands with other lands to form spacing and proration units up to 640 acres in size, consistent with state regulations. The lessors have transferred to AMOCO those property rights which include the right to make operational decisions such as when and where to drill the well, how to drill the well, and how the wells should be spaced. In making those decisions, the lessee is obligated to exercise good faith in accordance with prudent operator standards.

The relationship between the Applicants and Amoco is a contractual one and the rights and duties of the parties with respect to each other are governed by the law regarding that contract.

The lessee, on its behalf and on behalf of its lessors, appears before the Oil Conservation Division to discuss such operational decisions as the spacing of wells and the creation of temporary and permanent rules for that production. The lessors correctly are not involved in spacing cases because they have transferred that right to the lessee.

Under Division Rule 1203, an applicant must be an operator or producer or "any other person with a property interest." While the applicants, as royalty owners, would have a property interest to allow them to participate or be an applicant before the Division in

certain types of hearings (i.e., compulsory pooling and statutory unitization), they have no standing in a spacing rule case nor can they be an applicant in a non-standard proration unit case. The property interest to participate in either of these two types of cases was transferred by the applicants' predecessor to Amoco and it is Amoco, and only Amoco, who has standing to maintain such an application before the Division.

In reality, the applicants are improperly attempting to use the regulatory process to repudiate their contract with Amoco. The real issue is whether Amoco has performed its contract with the applicants. That is an issue over which the Division has no jurisdiction. Simply stated, the applicants, if they have a complaint about Amoco's operations under the lease, must litigate that claim in the courts and not with the Division.

The applicants are attempting to conceal a contractual dispute by disguising it as a procedural due process claim. They are claiming that they should have received a personal notification of Amoco's application to increase spacing from 160 acres (statewide) to 320 acres, when, in fact, their lease granted to Amoco the absolute discretion to seek spacing as large as 640 acres. In Amoco Production Co. v. Jacobs, 746 F.2d 1394 (10th Cir. 1984), the lessors contended that the unitization was unenforceable because they never

consented to the formation of the unit. Their claim is similar to that made by the applicants in this case, wherein they argue that the pooling of their leases with others as a result of the establishment of 320-acre spacing was ineffective because they did not participate in the Division proceedings. Just as approval by governmental authority was a proper exercise of the contractual rights of unitization in the Jacobs case, the Division's approval of 320-acre spacing was a proper exercise by Amoco of its contractual right to create 320-acre spacing units, which included the applicants' leased acreage. There is nothing in the Jacobs case to even suggest that the lessors were entitled to advance personal notice that the governmental authority was about to or, in fact, did consider and determine proper spacing for the pool.

The foregoing points to the fact that in their lease to Amoco, applicants could have provided for a pooling clause that limited pooling and spacing to 160 acres. Instead, applicants agreed to a provision which allowed Amoco spacing as large as 640 acres per well.

The property interest applicants are seeking to assert in their application was by agreement transferred by applicants, predecessor to Amoco. It is impossible to take the application of a contractual pooling provision in the Amoco lease and transform that into state action

by the Division that has deprived the applicants of a property right. See Manufacturers National Bank of Detroit v. Director, Department of Natural Resources, 362 N.M. 2d 572, 84 OGR 103 (Mich. 1985).

II. EDWARDS V. MCHUGH

Applicants' contend that Edwards v. McHugh, Rio Arriba County Case 85-373, provides precedent for their position. Such reliance is unwarranted and, indeed, prohibited. No opinion was ever publish in the Edwards case. Indeed, ~~the~~ ET was disposed of by entry of a Partial Summary Judgment on August 20, 1987 followed by a December 11, 1987 Order of Dismissal which resulted from an out-of-court settlement between the parties.

In New Mexico both the Court of Appeals and the Supreme Court have established that unpublished opinions have no precedential value.

> The motion also relied upon certain unreported memorandum decisions of this Court. We decline to consider the applicability of the memorandum decisions to the facts of this case because they have not been officially reported and are unpublished. Hammon v.Reeves, 89 N.M. 387, 552 P.2d 1235 (Ct. App. 1976).
>
> An order or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be cited as precedent. State v. Jaramillo, 92 N.M. 617, 593 P.2d 58 (1979).

Surely, if the Court of Appeals and Supreme Court have determined that their unpublished opinions are not to be given precedential value the Division may not give

a district court's unpublished opinion any precedential value.

It should also be recognized by the Division that the Edwards case was not an appeal from an order and as such was not law laid down by the court after judicial review of an administrative decision and the Commission is not bound by the doctrine of stare decisis in this case.

III. CONTRARY TO THE CLAIM OF THE APPLICANT, THE DATE OF THE SPACING ORDER AND ~~THE~~ NOT DATE OF PERSONAL NOTICE CONTROLS THE ALLOCATION OF REVENUES AND PRODUCTION FROM THE SUBJECT WELL

Applicants incorrectly contend that should the Division enter an order affirming the propriety of 320-acre spacing that decision is effective to the applicants only from the date of personal notice to the applicants.

That position is in direct conflict with Section 70-2-18(a), N.M.S.A., 1978, which states in part:

> Any division order that increases the size of a standard spacing or proration unit for a pool, or extends the boundaries of such a pool, shall require dedication of acreage to existing wells in the pool in accordance with the acreage dedication requirements for said pool, and all interests in the spacing or proration units that are dedicated to the affected wells shall share in production from the effective date of the said order.

Assuming for argument that the Applicant's have a sufficient property interest to be entitled to notice

and participation before the Commission, the applicants have failed to establish that 320-acre spacing was then, or is now, wrong for this pool. In the absence of such a finding of different conditions and justification for change in spacing, the appropriate time at which to make spacing effective for all parties, including the applicants, is the date of the spacing order. To do otherwise violates Section 70-2-18(a), N.M.S.A., 1978.

IV. THE SUBJECT DIVISION HEARINGS WERE RULE MAKING HEARINGS AND NOT ADJUDICATION OF PROPERTY RIGHTS

In order to prevent waste and protect correlative rights, the Oil and Gas Act authorized the Division to establish proration units (Section 70-2-17-B, N.M.S.A., 1978) to enforce pooling within proration or spacing units (Section 70-2-17-C, N.M.S.A., 1978) and to limit or prorate production (Section 70-2-12-A, N.M.S.A., 1978). The Division has established statewide rules, which establish spacing and production rates when no special pool rules are established. The Division has also established procedures for establishing new pools with special rules, when available information indicates the need. Order R-7588 and R-7588-A are such cases. They are concerned with the prevention of waste. They are not correlative rights (i.e., property rights) cases in that

they do not involve a determination of ownership interest by either compulsory pooling or prorationing. The only correlative rights issue involved is the preservation of reservoir energy. Therefore, the constitutional due process mandates are not applicable.

Amoco and the Division followed the statutory procedure as well as the Division's own rules in both cases. Amoco filed an application to establish the pools with 320.0-acre spacing. The Division published notice in accordance with the Oil and Gas Act and its own rules. The statute and those rules provide constitutionally sufficient notice because the hearing was a rulemaking hearing, not a hearing to adjudicate property rights. The sole purpose of the hearing was to allow the Division to take evidence in order for it to make a finding as to what area a well in this pool could effectively drain and to establish spacing units in accordance with those findings in order to prevent the wasteful drilling of unnecessary wells - wells which cost in excess of half a million dollars and which could unnecessarily deplete reservoir energy.

The Commission, after hearing, made findings that one well could effectively drain 320.0 acres from the pool. Those orders do not constitute a determination of ownership, nor did the Division determine how the production was to be allocated. The Division's Orders

did nothing more than determine the well spacing which should be used to effectively and efficiently produce the reservoir without waste and to protect the correlative rights of the parties with respect to the hydrocarbons and reservoir energy.

CONCLUSION

The applicants are attempting to manipulate the administrative regulatory process in such a way as to avoid the contractual provision of their leases with Amoco. They want to obtain a windfall and avoid the outcome of the bargain their predecessors made when these leases were executed.

A spacing order in New Mexico does not pool royalty interests and does not "deprive" lessors of their property. The applicant's property rights in this case were determined solely by the terms of the lease contract which they agreed to and from which they have already derived benefit.

To grant the applicants' request would be to play havoc with the pool rules and with the entire conservation system. The Division cannot write one set of rules for the applicants in the pool while leaving everyone else in the pool on another set of rules. In effect, the Division will be saying that all wells drain 320 acres except those involving the applicants.

Simply stated, the applicants complain of the lack of an opportunity to be heard before the Division and the Division has granted them that opportunity. The applicants have failed to provide substantial evidence to demonstrate that 320-acre spacing is anything other than proper for this pool and therefore their application should be denied.

Respectfully submitted:

W. Thomas Kellahin, Esq.
Kellahin, Kellahin & Aubrey
P. O. Box 2265
Santa Fe, New Mexico 87504

Attorneys for Meridian Oil Inc.