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August 25, 1998
(Our File No. 98-266.00)

MICHAEL J. CONDON

VIA HAND-DELIVERY
David Catanach
Hearing Examiner
New Mexico Oil Conservation Division
2040 South Pacheco
Santa Fe, New Mexico 87505

Re: Pendragon Application; NMOCD Cause No. 11996

Dear Examiner Catanach:

I want to bring an important development to your attention for consideration in connection with this case.

On August 21, 1998, Pendragon filed an Answer and Counterclaim in the Santa Fe County District Court proceeding. A copy of that pleading is enclosed for your review. Pendragon has asserted affirmative claims for relief in that case based upon the allegation that there is communication between the Fruitland coal formation and Pictured Cliffs formation. See Counterclaim, ¶¶ 10-11, 43-45, 49-50. While we agree that there is communication, we obviously deny any claim by Pendragon that the Whiting / Maralex coal seam gas wells are producing Pictured Cliffs gas. Pendragon certainly presented no evidence to support such an allegation at the hearing in this case.

We call Pendragon's recent pleading to your attention since the allegations in that pleading are completely contrary to the proposed findings which Pendragon has submitted in its proposed form of Division order. Specifically, the allegations in the Counterclaim are contrary to Pendragon's proposed Finding 44 ("This evidence establishes that the subject Pictured Cliffs wells do not appear to be in communication with the same reservoir in which the Subject Coal wells are completed"); Finding 59 ("The evidence available on the date of the hearing was insufficient to allow for a determination whether the significantly higher fracture treatments on the Whiting / Maralex coal wells actually penetrated into the Pictured Cliffs formation"); and Finding 79 ("The Subject Pictured Cliffs wells and Subject Coal Gas wells are completed in separate common sources of supply, the production from and the operations in one pool do not result in the impairment of correlative rights in the other"). Pendragon's Counterclaim also contradicts its proposed Finding No. 56, "That coal is an effective

barrier to fracture growth. . . ". If that were true, then the Whiting / Maralex fracture treatments, all of which were performed in the upper, massive coal seam in the area, would not have penetrated the Basal coal seam which is reflected as consistent throughout this area on Whiting / Maralex Exhibit 16.

The administrative record should show that Pendragon participated in a three day hearing before the Division on its own application, and failed to present a shred of evidence that the Whiting / Maralex coal seam gas wells were producing Pictured Cliffs gas, submitted proposed findings to the Division which deny communication between the Fruitland formation and the Pictured Cliffs formation in its Chaco wells, and then filed a counterclaim in the district court proceeding which takes a completely contradictory position. The position taken by Pendragon in the litigation refutes the Application it filed with the Division seeking an order that both the Pendragon Chaco wells and the Whiting coal seam gas wells are producing from the appropriate common share of supply.

Pendragon has judicially admitted communication between the formations. The only remaining question for the Division, based upon Pendragon's own application and the evidence presented at hearing, is to decide to what extent does this communication between formations results in the Pendragon Chaco wells producing coal seam gas. In light of this development, we would request that the Division incorporate the following findings in its Order:

> ( ) While Pendragon denied at the hearing in this case that there was any communication between the Fruitland formation and the Pictured Cliffs formation in Pendragon's Chaco wells, Pendragon has filed an Answer and Counterclaim in the pending district court lawsuit in which Pendragon has admitted communication between the two formations.
>
> ( ) Pendragon introduced no evidence at the hearing in this matter that Whiting was producing any Pictured Cliffs gas through its coal seam wells. In fact, given the depleted state of the Pictured Cliffs formation, and the pressure differential between the coal seam gas formations and the Pictured Cliffs sandstone formation, it is improbable that the Whiting Coal Seam wells produce Pictured Cliffs sandstone gas.
>
> ( ) The only evidence of gas production as a result of communication between the Fruitland formation and the

Pictured Cliffs formation which was introduced at the hearing in this case, and the only conclusion that is consistent with sound geologic, hydraulic and engineering principles, is that the Pendragon Chaco wells are producing coal seam gas.

Thank you for your attention to these matters. If you need any additional information, or have any questions, please feel free to contact me.

Very truly yours,

GALLEGOS LAW FIRM, P.C.

By

MICHAEL J. CONDON

MJC:sa
fxc: John Hazlett
Mickey O'Hare
cc: Scott Hall
Rand Carroll
ioc: J.E. Gallegos

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

WHITING PETROLEUM CORPORATION, a corporation, and MARALEX RESOURCES, INC., a corporation and T. H. McELVAIN OIL AND GAS, a Limited Partnership,

Plaintiffs,

vs.

PENDRAGON ENERGY PARTNERS, INC., a corporation, PENDRAGON RESOURCES, L.P. and J.K. EDWARDS ASSOCIATES, INC., a corporation

Defendants,

and **No. CV-98-01295**

PENDRAGON ENERGY PARTNERS, INC., a corporation, PENDRAGON RESOURCES, L.P. and J.K. EDWARDS ASSOCIATES, INC., a corporation

Counterclaimants,

vs.

WHITING PETROLEUM CORPORATION, a corporation, and MARALEX RESOURCES, INC., a corporation and T. H. McELVAIN OIL AND GAS, a limited Partnership,

Counterclaim-Defendants.

ANSWER OF PENDRAGON ENERGY PARTNERS, INC., PENDRAGON RESOURCES, L.P. AND J.K. EDWARDS ASSOCIATES, INC. TO COMPLAINT FOR TORTIOUS CONDUCT, AND FOR DAMAGES AND EQUITABLE RELIEF
AND
COUNTERCLAIM FOR QUIET TITLE, SLANDER OF TITLE, DAMAGES, AND FOR DECLARATORY AND OTHER EQUITABLE RELIEF

Defendants, Pendragon Energy Partners, Inc. ("Pendragon Energy") Pendragon Resources, L.P. ("Pendragon Resources") and J.K. Edwards Associates, Inc. ("Edwards"), for their Answer to the Plaintiffs' First Amended Complaint for Tortious Conduct, and For Damages and Equitable Relief ("Complaint") state:

IDENTIFICATION OF PARTIES

1. The allegations of Paragraph 1, 2 and 3 are admitted.

2. In response to the allegations of Paragraph 4 of the Complaint, Defendants admit that Pendragon Energy operates certain wells identified in Paragraph 16 of the Complaint, but denies Pendragon Energy owns the oil and gas leasehold working interest dedicated to such wells. By way of further response, Defendants state that approximately seventy-five percent of the working interest is owned by Pendragon Resources, L.P. The remaining allegations of Paragraph 4 are admitted.

3. The allegations of Paragraph 5 and 6 are admitted.

JURISDICTION AND VENUE

4. Defendants admit that this Court has jurisdiction over the parties. Defendants deny that venue is proper in Santa Fe County, and deny the remaining allegations in Paragraph 7 of the Complaint.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

5. The first sentence of Paragraph 8 of the Complaint does not contain allegations for which an answer is required. To the extent that an answer is required, Defendants admit the allegations of the first sentence of paragraph 8 of the Complaint. In response to the second sentence of Paragraph 8 of the Complaint, Defendants admit that in certain

areas, stratigraphic ownership is held by different parties under the same surface acreage. Defendants deny the remaining allegations of Paragraph 8 of the Complaint.

6. Defendants admit the allegations contained in the first sentence of Paragraph 9, with the exception of the erroneous legal description for the Gallegos Federal 26-12-6 No. 2 Well which is in fact located in the west half of Section 6, T26N, R12W, NMPM, San Juan, County New Mexico. In further response, Defendants state that the terms of New Mexico Oil Conservation Division (NMOCD) Order No. R-8768, as amended, more completely and accurately speak for themselves. To the extent that the allegations of Paragraph 9 are inconsistent therewith, they are denied. With respect to the remaining allegations of Paragraph 9, Defendants state that they are without information sufficient to form a belief as to the truth thereof and therefore deny the same and demand strict proof thereof.

7. In response to the allegations in Paragraphs 10 and 11, Defendants state that the terms of the instruments by which the parties acquired their ownership interests in the subject leases more completely and accurately speak for themselves. To the extent that the allegations of Paragraphs 10 and 11 differ from the terms of those instruments, they are denied.

8. With respect to the allegations set forth in Paragraph 12, 13, 14, and 15 of the Complaint, Defendants are without information sufficient to form a belief as to the truth thereof and therefore deny the same and demand proof thereof.

9. To the extent that Paragraph 16 of the Complaint alleges that Pendragon Energy Partners, Inc. owns the oil and gas leasehold working interest dedicated to the referenced wells, it is denied. By way of further response, the referenced working interests are

owned by Pendragon Resources, L.P. Otherwise, all other allegations of Paragraph 16 are admitted.

10. In response to the allegations in Paragraph 17 of the Complaint, Defendants state that the subject wells are completed in the Pictured Cliffs formation. By way of further response, Defendants state that the terms of the NMOCD well spacing and acreage dedication requirement regulations more completely and accurately speak for themselves and that the size of a spacing unit is not necessarily reflective of the actual drainage area of any particular well. To the extent that the allegations of Paragraph 17 are inconsistent with those regulations, they are denied.

11. In response to the allegations in paragraph 18 of the Complaint, Defendants state that the terms of the instruments by which they acquired their ownership interests in the subject leases more completely and accurately speak for themselves. To the extent the allegations of Paragraph 18 are inconsistent therewith, they are denied. By way of further response, the referenced wells are properly completed in and produce from the Pictured Cliffs formation.

12. Defendants deny the allegations contained in the first two sentences of Paragraph 19 of the Complaint. Defendants are without knowledge or information sufficient to form a belief as to the allegations in the third and fourth sentences of Paragraph 19 of the Complaint and therefore deny the same and demand proof thereof.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 20 and 21 and therefore deny the same and demand strict proof thereof.

14. In response to the allegations of Paragraph 22, Defendants state that they performed stimulation treatments on certain of the Subject Pictured Cliffs wells.

15. In response to the allegations of Paragraph 23, Defendants state that they "acidized" certain of the Subject Pictured Cliffs wells and fracture stimulated ("frac'd") certain other wells. Two of the Subject Pictured Cliffs wells were reperforated in the same intervals as the original perforations. To the extent that Paragraph 23 alleges that any of these operations were "recompletions", they are specifically denied. The remainder of Paragraph 23 does not contain allegations for which a response is required.

16. Defendants deny the allegations of Paragraphs 24, 25, 26, and 27 of the Complaint.

FIRST CLAIM FOR RELIEF

(TRESPASS)

17. Defendants reallege and incorporate by reference their answers to Paragraphs 1 through 27 of the Complaint as their answer to Paragraph 28 of the First Amended Complaint.

18. The allegations of Paragraph 29 of the Complaint are more in the nature of conclusory legal statements for which no response is required. Otherwise, the allegations of Paragraph 29 are denied.

19. Defendants deny the allegations in Paragraphs 30, 31, 32 and 33 of the First Amended Complaint.

SECOND CLAIM FOR RELIEF

(CONVERSION)

20. Defendants reallege and incorporate by reference their answers to Paragraphs 1 through 27 of the Complaint, and Paragraphs 28 through 33 of the Complaint as their answer to Paragraph 34 of the Complaint.

21. Defendants deny the allegations in Paragraphs 35, 36, 37, 38 and 39 of the Complaint.

THIRD CLAIM FOR RELIEF

(NEGLIGENCE)

22. Defendants reallege and incorporate by reference their answers to Paragraphs 1 through 27 of the Complaint, Paragraphs 28 through 34 of the Complaint, and Paragraphs 35 through 39 of the Complaint as their answer to Paragraph 40 of the Complaint.

23. The allegations of Paragraph of 41 of the Complaint are more in the nature of conclusory legal statements for which no response if required. Otherwise, the allegations of Paragraph 41 are denied.

24. Defendants deny the allegations in Paragraphs 42, 43 and 44 of the Complaint.

FOURTH CLAIM FOR RELIEF

(IMPLIED QUASI-CONTRACT; UNJUST ENRICHMENT; ACCOUNTING)

25. Defendants reallege and incorporate by reference their answers to Paragraphs 1 through 27, Paragraphs 28 through 34, Paragraphs 35 through 39, and Paragraphs 40 through 44 as their answer to Paragraph 45 of the Complaint.

26. The allegations of Paragraph 46 are so vague and ambiguous that Defendants cannot reasonably be required to frame a response thereto.

27. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 47 in the Complaint and therefore deny the same and demand proof thereof.

28. The allegations of Paragraph 48 of the Complaint are denied.

FIFTH CLAIM FOR RELIEF

(ACCOUNTING)

29. Defendants reallege and incorporate by reference their answers to Paragraphs 1 through 27 of the Complaint, Paragraphs 28 through 34, Paragraphs 35 through 39, Paragraphs 40 through 44, and Paragraphs 45 through 48 of the Complaint as their answer to Paragraph 49 of the Complaint.

30. Defendants deny the allegations of Paragraph 50 of the Complaint.

31. In response to the allegations of Paragraph 51 of the Complaint, Defendants specifically deny that they had any duty to account to Plaintiffs or to acknowledge Plaintiffs interest in future revenues. All other allegations contained in Paragraph 51 are denied.

32. Defendants deny the allegations in Paragraph 52 of the Complaint.

33. Defendants deny all claims for relief as stated in the Complaint and all allegations in the Complaint not expressly responded to above are hereby denied.

AFFIRMATIVE AND/OR ADDITIONAL DEFENSES

FIRST DEFENSE

The Complaint fails to state a claim, in whole or in part, upon which relief may be granted.

SECOND DEFENSE

If damages were sustained by Plaintiffs, which is specifically denied, such damages were a direct and proximate cause of acts, occurrences, omissions, negligence, or other wrongful conduct of individuals or entities other than Defendants, or due to causes within the control and dominion of individuals or entities other than Defendants, thereby barring any relief, in whole or in part against Defendants.

THIRD DEFENSE

There is insufficient factual or legal predicate for an award of punitive damages.

FOURTH DEFENSE

Plaintiffs' claims for punitive damages are barred by the United States Constitution and the New Mexico Constitution.

FIFTH DEFENSE

Plaintiffs were contributarily or comparatively negligent and/or engaged in other wrongful conduct, thereby barring, in whole or in part, any recovery against Defendants.

SIXTH DEFENSE

The damages complained of, which are specifically denied, resulted from independent intervening causes, thereby barring any recovery against Defendants.

SEVENTH DEFENSE

Plaintiffs have unclean hands thereby barring any recovery against Defendants.

EIGHTH DEFENSE

If Plaintiffs have suffered any damages, which is specifically denied, Plaintiffs have failed to mitigate their damages.

NINTH DEFENSE

This Court lacks jurisdiction, to proceed with any and all claims concerning any remedies because governmental entities other than this Court have primary jurisdiction.

TENTH DEFENSE

Plaintiffs have an adequate remedy at law and have not been irreparably harmed and, therefore, are barred from equitable or injunctive relief.

ELEVENTH DEFENSE

Plaintiffs caused or allowed in whole or in part the damages, if any, complained of in the Complaint.

TWELFTH DEFENSE

Plaintiffs' claims are barred in this judicial district because venue is improper.

THIRTEENTH DEFENSE

Plaintiffs' have failed to join necessary or indispensable parties which is required under NMRA 1-019 of the New Mexico Rules of Civil Procedure.

FOURTEENTH DEFENSE

Plaintiffs' claims are barred under the doctrines of waiver, estoppel, and acquiescence.

FIFTEENTH DEFENSE

Plaintiffs lack standing.

SIXTEENTH DEFENSE

Plaintiffs' claims are barred under the doctrine of laches.

SEVENTEENTH DEFENSE

This Court lacks jurisdiction over the subject matter of this action.

EIGHTEENTH DEFENSE

Plaintiffs' claims are barred and otherwise precluded by virtue of the doctrine of force majeure and the occurrence of force majeure events.

NINETEENTH DEFENSE

Defendants reserves the right to plead additional affirmative defenses and counterclaims which may become known during the course of discovery.

WHEREFORE, Defendants pray that the Complaint and each of its individual counts against them be dismissed with prejudice, that the Court enter an award in their favor, for their costs and attorneys fees for defending this action, and for such other and further relief as the Court deems just and proper.

COUNTERCLAIM FOR QUIET TITLE, SLANDER OF TITLE, DAMAGES, AND FOR FOR DECLARATORY AND OTHER EQUITABLE RELIEF

Counterclaimants Pendragon Energy Partners Inc., Pendragon Resources, L.P. and J.K. Edwards Associates Inc., for their Counterclaim against Whiting Petroleum Corporation, Maralex Resources, Inc., and T.H. McElvain Oil and Gas, L.P. state:

THE PARTIES

1. Counterclaimant Pendragon Energy Partners, Inc. ("Pendragon Energy") is a Colorado Corporation authorized to do business in New Mexico with its principal place of business in Denver, Colorado. Counterclaimant Pendragon Resources, L.P. ("Pendragon Resources") is a Delaware Limited Partnership authorized to do business in New Mexico with its principal place of business in Denver, Colorado. Counterclaimant J.K. Edwards Associates, Inc. ("Edwards") is a Colorado Corporation authorized to do business in New Mexico with its principal place of business in Denver, Colorado.

2. Counterclaim-Defendant Whiting Petroleum Corporation ("Whiting") is a Delaware Corporation authorized to do business in New Mexico with its principal place of business in Denver, Colorado. Counterclaim-Defendant Maralex Resources, Inc. ("Maralex") is a Colorado Corporation authorized to do business in New Mexico with its principal place of business in Ignacio, Colorado. Counterclaim-Defendant T.H. McElvain Oil and Gas, L.P. ("McElvain") is a New Mexico limited partnership with its principal place of business in Santa Fe, New Mexico.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the parties, but venue is contested in this County.

FACTUAL BACKGROUND

4. Pendragon Resources and J.K. Edwards, together, are the owners of oil and gas leasehold working interests from the base of the Fruitland Coal formation to the base of the Pictured Cliffs formation in and to certain acreage located in San Juan County, New Mexico more particularly described in Paragraph 14, below (referred to herein as the "Subject Lands"), subject only to valid and subsisting easements, rights-of-way, contracts, leases, and other instruments of record in the chain of title to the Subject Lands which are not material to the subject of this action. The ownership of these Counterclaimants arises pursuant to various mesne assignments of interests and transfers of operating rights in Federal Oil and Gas Leases covering the Subject Lands and limited, generally, by depth or formation. Copies of said conveyances, assignments and transfers are not attached hereto for the reason that said instruments are of public record and are lengthy.

5. Whiting, Maralex and McElvain acquired ownership of oil and gas leasehold working interests in the lands described in Paragraph 6, below, and in other lands, from the surface to the base of the Fruitland "Coal-Gas" formation, subject only to valid and subsisting easements, rights of way, contracts, leases, and other instruments of record in the chain of title to the subject lands which are not material to the subject of this action. The ownership of Whiting, Maralex and McElvain arises pursuant to various mesne assignments of interests, farm-outs and transfers of operating rights under Federal Oil and Gas Leases covering the Subject Lands and limited, generally, by depth or formation. Copies of said conveyances and transfers are not attached hereto for the reason that said instruments are of a public record and are lengthy.

6. On or about July 1992, Maralex acquired its interests in the Subject Lands and, as operator, began drilling a number of wells completed in the Basin-Fruitland Coal Gas Pool prior to the expiration of certain federal tax credits at the end of that calendar year. These wells ("the Subject Coal Gas Wells") are identified as follows:

Well Name	Location
Gallegos Federal 26-12-6 No. 2	W ½, Section 6, T12N, R12W, N.M.P.M.
Gallegos Federal 26-12-7 No. 1	W ½, Section 7, T26N, R12W, N.M.P.M.
Gallegos Federal 26-13-1 No. 1	E ½, Section 1, T26N, R13W, N.M.P.M.
Gallegos Federal 26-13-1 No. 2	W ½, Section 1, T26N, R13W, N.M.P.M.
Gallegos Federal 26-13-12 No.1	N ½, Section 12, T26N, R13W, N.M.P.M.

7. Pursuant to the Special Rules and Regulations for the Basin-Fruitland Coal Gas Pool established by the New Mexico Oil Conservation Division (NMOCD) in Order No. R-8768 and R-8768-A, each of the Subject Coal Gas Wells was required to have a

standard spacing unit containing 320 acres dedicated to it. The Subject Coal Gas Wells were to be drilled and completed within the horizontal limits of the Basin-Fruitland Coal Gas Pool as defined by Order No. R-8768, as amended. The Order also established the vertical limits of the pool.

8. In 1993, subsequent to the drilling of the Subject Coal Gas Wells, Maralex attempted to "complete" its wells by performing heavy, aggressive fracture stimulation treatments (or "Frac" treatments) in the Fruitland Coal formation by the injection of extraordinarily large volumes of fracturing fluids into the coal at extremely high rates. To "frac" a well is a term used to refer to the methods used by the oil and gas industry to increase the deliverability of a producing well by pumping a liquid or other substance into a well under pressure to crack (fracture) and prop open the hydrocarbon bearing formation. Fracture treatments are a commonly used method to stimulate oil and gas production that has been applied to well over half of the wells drilled in the United States.

9. The fracture completions performed by Maralex on the Subject Coal wells consisted of fracture fluid volumes on the average of 41,030 gallons at proppant weights averaging 72,656 pounds, injected at treating rates ranging between 45 to 60 barrels per minute ("BPM"). The specific fracture completions for the Gallegos Federal 26-12-6 No. 2 well consisted of a fracture fluid volume of 81,025 gallons with a 121,700 pound proppant weight injected at treating rates between 45 to 60 BPM. The fracture completion for the Gallegos Federal 26-12-7 No. 1 consisted of a fracture fluid volume of 85,223 gallons with a proppant weight of 119,200 pounds injected at treating rates of 45 to 60 BPM.

10. The design, supervision and implementation of the fracture treatments of the Subject Coal Wells by the officers, employees and/or agents of the Counterclaim-Defendants were knowingly undertaken in such a manner that the fractures escaped out of the coal formation and grew vertically downward thereby causing the escape of the fracture and fracturing fluids out of zone and, on information and belief, into the Pictured Cliffs formation.

11. As a result of the conduct of the Counterclaim-Defendants, the fractures induced by them have escaped out of zone and, on information and belief, into the Pictured Cliffs formation now owned by the Counterclaimants, allowing Pictured Cliffs formation hydrocarbon reserves to become communicated with certain Fruitland formation intervals and to be produced through the Counterclaim-Defendants' coal wells.

12. In addition to draining Pictured Cliffs formation reserves owned by the Counterclaimants, on information and belief, Whiting and Maralex have adversely affected pressures in the Pictured Cliffs reservoir and have further damaged the Pictured Cliffs formation by the introduction of foreign fracturing fluids and waters desorbed from the Fruitland Coal formation. By allowing fracturing fluids and desorbed waters to penetrate to the Pictured Cliffs formation, Whiting and Maralex have caused damage to the formation, resulting in the loss or "waste" of hydrocarbon resources.

13. Subsequent to the drilling and fracturing of the Subject Coal Gas Wells by Maralex, Whiting acquired approximately 75 percent of the oil and gas leasehold working interests in the acreage dedicated to the subject coal gas wells. Whiting became "Designated Operator" of the Subject Coal Gas Wells. Pursuant to a contract, Maralex is the field operator of the wells.

14. On or about December 14, 1994, Edwards acquired from its predecessor in interest title to the oil and gas leasehold working interests in the Subject Lands from the base of the Fruitland Coal Formation to the base of the Pictured Cliffs Formation. In addition to the leasehold working interest, Edwards also acquired the following wells ("The Subject Pictured Cliffs Wells"):

Well Name	Location
Chaco No. 1	NW ¼, Section 18, T26N, R12W, N.M.P.M.
Chaco No.2R	SW ¼, Section 7, T26N, R12W, N.M.P.M.
Chaco No 4	NW ¼, Section 7, T26N, R12W, N.M.P.M.
Chaco No 5	SE ¼, Section 1, T26N, R13W, N.M.P.M.
Chaco Ltd. No. 1J	SW ¼, Section 1, T26N, R13W, N.M.P.M.
Chaco Ltd. No. 2J	NE ¼, Section 1, T26N, R13W, N.M.P.M.

15. Each of the foregoing Subject Pictured Cliffs Wells was drilled and completed in the Pictured Cliffs formation between 1977 and 1982 by Edwards's predecessor in interest, Merrion and Bayless Oil and Gas. The Subject Pictured Cliffs wells were originally completed and perforated in and have been producing from the Pictured Cliffs formation sandstone within the vertical limits of the WAW Fruitland-Pictured Cliffs Pool.

16. On acquiring ownership, Edwards became the "Designated Operator" of the Subject wells. On or about December 1994, Edwards conveyed approximately 75 percent of its working interest in the Subject Lands and wells to Pendragon Resources, L.P. Pendragon Energy Partners, Inc. became the designated operator of the Subject Pictured Cliffs Wells in February, 1996.

17. Beginning in about January, 1995 and continuing through June of 1995, Edwards, as successor operator, began certain workover operations on the Subject Pictured Cliffs Wells to stimulate the production of additional Pictured Cliffs formation gas reserves.

18. On or about January 1995, Edwards "acidized" the Pictured Cliffs formation in the Chaco 4, Chaco 1-J and Chaco 2-J wells.

19. Beginning in January 1995 and continuing through May of 1995, Edwards instituted fracture stimulation treatments on the Chaco 1, Chaco 2-R, Chaco 4 and Chaco 5 wells. The foam fracs used on the Subject Pictured Cliffs wells consisted of fluid volumes averaging 31,248 gallons at proppant weights averaging 38,421 pounds injected at treating rates ranging from between 22 to 34 barrels per minute ("BPM").

20. Unlike the earlier frac jobs performed on the Whiting/Maralex wells, the fracture treatment jobs on the Counterclaimants' wells were specifically designed and implemented to remain contained within specific lithologic intervals of the Pictured Cliffs formation. Compared to the aggressive and heavy frac jobs performed by Maralex on the Fruitland Coal formation, the injection volumes and rates of the Counterclaimants' frac jobs were relatively light. As a result, the fractures induced by the Counterclaimants in their wells grew primarily in a horizontal manner and remained contained within the Pictured Cliffs formation.

21. Such fracture stimulation treatments were reasonable, prudent and necessary to produce additional Pictured Cliffs gas reserves that would have otherwise remained unrecovered and Counterclaimants had the right to perform the operations.

22. Whiting and Maralex first invoked the jurisdiction of the New Mexico Oil Conservation Division ("NMOCD" or "Division") well over two years ago when it

sought the agency's expertise in resolving a perceived problem of communication between the Pictured Cliffs formation in the WAW Fruitland-Pictured Cliffs Pool and the Basin-Fruitland Coal formation.

23. At the request of Whiting and Maralex, the NMOCD Aztec District Office convened a number of public meetings between January and April of 1998. These meetings were attended by, among others, representatives from Whiting, Maralex, Pendragon, J.K. Edwards and the BIA/BLM.

24. Contemporaneous with the first meeting before the Division, Whiting and Maralex filed their Application in NMOCD Case No. 11921. In their initial Application, Whiting and Maralex generally alleged that the drilling and fracture restimulation operations in the Pictured Cliffs formation had caused that formation to become communicated with the Basin-Fruitland Coal formation. Whiting and Maralex also claimed that Pendragon's Pictured Cliffs wells were draining reserves owned by Whiting and the other interest owners in its wells and that their correlative rights were being impaired. Whiting and Maralex specifically invoked the Division's jurisdiction under N.M. Stat. Ann. § 70-2-12. B. (2), (7) and (10), NMOCD Rule 104.D (3), and Order No. R-8768, Special Pool Rules 2 and 3, seeking regulatory relief.

25. On February 10, 1998, Whiting and Maralex filed their Amended Application seeking additional administrative relief, including down-hole commingling in accordance with Rule 12 of the Special Rules and Regulations for the Basin-Fruitland Coal Gas Pool as promulgated by the Division in Order No. R-8768-A.

26. In the interim, the parties continued to participate in the public meetings before the Division and Whiting and Maralex persisted in seeking regulatory redress for their

claims. Pendragon and Edwards expended significant time, effort and cost in preparing for the Division hearing on the Whiting/Maralex Application and the matter was set to proceed to hearing on June 11, 1998.

27. At a meeting with NMOCD officials on March 27, 1998, a petroleum engineer employed by Whiting acknowledged that, despite considerable testing and fact gathering by the parties, others, and the NMOCD, Whiting could not show any harm to its wells. Subsequently, on May 26, 1998, Whiting and Maralex attempted to withdraw from the administrative proceeding which they, themselves, initiated and that same day, Whiting and Maralex filed their District Court lawsuit in circumvention of NMOCD jurisdiction.

28. On May 26, 1998, Pendragon Energy and J.K. Edwards filed their own Application before the NMOCD in Case No. 11996 asking that administrative agency to determine many of the issues precipitated by Whiting and Maralex (Application of Pendragon Energy Partners, Inc. and J.K. Edwards Associates, Inc. To Confirm Production From The Appropriate Common Source Of Supply, San Juan County, New Mexico.) Whiting and Maralex unsuccessfully attempted to have Case No. 11996 dismissed and the matter proceeded to hearing before the Division's petroleum engineer hearing examiner on July 28, 29 and 30, 1998.

29. The Counterclaimants expended significant time, effort and cost in preparing for and attending the NMOCD hearing in Case No. 11996 and in subsequent related activities.

CAUSES OF ACTION
COUNT I
QUIET TITLE

30. Counterclaimants adopt and incorporate herein by reference the allegations

contained in Paragraphs 1 through 29 of these Counterclaims.

31. Counterclaimants are credibly informed and believe and, upon such information and belief, allege that Whiting, McElvain and Maralex claim some right, title, interest or lien adverse to the estate of Counterclaimants in and to the Subject Lands, or some portion thereof.

32. The casings of the Subject Pictured Cliffs wells were perforated at various levels within the Pictured Cliffs formation in order to provide a means for gas to enter the wellbore. In a number of public statements, both verbal and written, agents of the Counterclaim-Defendants have stated that the upper-most sets of perforations in each of the wells are located above the Pictured Cliffs formation and that the Counterclaimants do not own the oil and gas leasehold rights at those depths.

33. In addition to the public statements of their agents that the Counterclaimants do not own the oil and gas leasehold rights at the levels of the upper-most set of perforations in the Pictured Cliffs formation, The Counterclaim-Defendants have asserted ownership to the oil and gas leasehold rights at those depths for themselves, adverse to the ownership interests of the Counterclaimants.

34. Based on the allegations set forth in Paragraphs 1 through 33 above, the Counterclaimants' estate in and to the Subject Lands should be established against the adverse claims of Whiting, McElvain and Maralex, and each of them, and Whiting, McElvain and Maralex should be barred and estopped from having or claiming any right, title, interest or lien upon the right or title to the estate of the Counterclaimants in and to said lands, or any portion thereof, adverse to Counterclaimants; and that Counterclaimants' titles therein and thereto be forever quieted and set at rest.

COUNT II
SLANDER OF TITLE

35. Counterclaimants adopt and incorporate herein by reference the allegations contained in Paragraphs 1 through 34 of these Counterclaims.

36. The public statements of the agents of The Counterclaim-Defendants referenced in Paragraph 31 through 33, above were knowingly and maliciously made without any basis in fact and as a consequence, a cloud against title has been cast adverse to the interests of the Counterclaimants in the Subject Lands.

37. Counterclaim-Defendants' conduct has harmed Counterclaimants and Counterclaimants have suffered special damages. These damages include, but are not limited to, Counterclaimants' attorneys' fees in bringing this action and in related administrative proceedings.

COUNT III
DECLARATORY JUDGMENT

38. Counterclaimants adopt and incorporate by reference the allegations contained in Paragraphs 1 through 37 of these Counterclaims.

39. Counterclaimants state that there exists an actual controversy in that they have rights and remedies pursuant to their legal title to produce gas through the Subject Pictured Cliffs wells.

40. Alternatively, if it is proved that gas from the Fruitland Coal formation is being produced from the Subject Pictured Cliffs Wells as a result of the operations and fracture treatments performed by Whiting, McElvain and Maralex, then the Counterclaimants are entitled to claim exclusive ownership of such gas and produce the same by virtue of the rule of capture and other legal and equitable doctrine.

COUNT IV
CONVERSION

41. Counterclaimants adopt and incorporate by reference the allegations contained in Paragraphs 1 through 40 of these Counterclaims.

42. Whiting, McElvain and Maralex have no right, interest, title or permission to invade, enter upon, or produce Pictured Cliffs Formation gas through the Subject Coal wells.

43. Whiting, McElvain and Maralex have wrongfully and physically entered and invaded Counterclaimants' real property interests in and to the Pictured Cliffs formation, thereby depriving Counterclaimants' of the use, right and enjoyment of their real and personal property, and directly infringing on Counterclaimants rights of possession.

44. As a result of the wrongful conduct of the Counterclaim-Defendants, Counterclaimants' Pictured Cliffs formation gas reserves have been drained and produced through the Subject Coal Wells. As a further result, the reservoir energy of the Pictured Cliffs formation has been adversely affected and the Counterclaimants' opportunity and ability to produce their gas reserves has been impaired.

45. Whiting, McElvain and Maralex have wrongfully exercised dominion and control and taken possession of Counterclaimants' Pictured Cliffs gas reserves, reservoir energy, and the opportunity to produce without accounting to Counterclaimants.

46. The volumes of gas converted by the Counterclaim-Defendants are known exclusively by them and Counterclaimants are without means of knowing or determining their exact damages.

47. As a direct and proximate result of Counterclaim-Defendants' conduct, Counterclaimants have been and continue to be irreparably and irretrievably injured.

COUNT V
TRESPASS AND PRIVATE NUISANCE

48. Counterclaimants incorporate Paragraphs 1 through 47 by reference herein.

49. Counterclaim-Defendants are without any right, title, interest or permission to invade, enter upon or produce gas reserves from the Picture Cliffs formation owned by Counterclaimants.

50. Through their improperly performed fracture stimulation jobs on the Subject Coal Gas Wells, Counterclaim-Defendants have wrongfully physically entered and invaded Counterclaimants' real property interests in and to the Picture Cliffs formation, thereby depriving Counterclaimants of the use, profits and enjoyment of their real and personal property, and directly infringing on Counterclaimants' rights of possession.

51. As a direct and proximate result of wrongful conduct of the Counterclaim-Defendants, Counterclaimants have been and continue to be irreparably and irretrievably injured.

52. The Counterclaim-Defendants' conduct was taken intentionally, wantonly, willfully, and in conscious disregard of Counterclaimants' rights.

COUNT VI
NEGLIGENCE

53. Counterclaimants incorporate by reference Paragraphs 1 through 52.

54. In the alternative, if Whiting, McElvain and Maralex did not intentionally invade Counterclaimants property, then in developing and operating their wells, Whiting, McElvain and Maralex owed to Counterclaimants a duty of care to prevent injury or damage or entry into the Pictured Cliffs formation.

55. By their failure to maintain the segregation of production and by allowing the escape of water and other fluids from the Fruitland formation, the Counterclaim-Defendants

violated and continue to be in violation of the rules, order, regulations and statutes of the New Mexico Oil Conservation Division, including 19 NMAC 15.E.303.A and N.M. Stat. Ann. §70-2-12 (B) (2), N. M. Stat. Ann. §70-2-12 (B) (4) and N. M. Stat. Ann. §70-2-12 (B) (7) of the New Mexico Oil and Gas Act. The Counterclaim-Defendants' conduct therefore constitutes negligence per se.

56. As alleged herein, Whiting and/or Maralex, their employees and agents, have negligently or recklessly breached the duty owed to Counterclaimants

57. As a direct and proximate cause of the Whiting's and/or Maralex's negligence, Counterclaimants have been and continue to be irreparably and irretrievably injured.

COUNT VII
UNJUST ENRICHMENT

58. Counterclaimants incorporate by reference Paragraphs 1 through 57.

59. In the alternative, it is inequitable and unjust for Whiting, McElvain and Maralex to retain and enjoy the benefit of Counterclaimants' valuable mineral rights without compensating Counterclaimants and Whiting, McElvain and Maralex should be required to compensate Counterclaimants by virtue of a contract implied in equity.

COUNT VIII
ACCOUNTING

60. Counterclaimants incorporate by reference Paragraphs 1 through 59.

61. In the alternative, the wrongful conduct of Whiting, McElvain and Maralex has deprived Counterclaimants of gas sales revenues rightfully belonging to Counterclaimants.

62. Whiting, McElvain and Maralex are in control of records reflecting gas sales, volumes and revenues from their wells.

63. Whiting, McElvain and Maralex have failed and refused to account to Counterclaimants for revenues from Subject Coal Wells and have refused to acknowledge Counterclaimants' interest in future revenues from such sales.

COUNT IX
VIOLATION OF THE NEW MEXICO OIL AND GAS PROCEEDS PAYMENT ACT

64. Counterclaimants incorporate by reference Paragraphs 1 through 63.

65. The actions of Counterclaim-Defendants in failing to account for and pay to Counterclaimants for their share of proceeds derived from the production of Pictured Cliffs gas through the Subject Coal Gas wells violates the New Mexico Oil and Gas Proceeds Payment Act, N.M. Stat. Ann. § 70-10-1, et seq..

66. Counterclaimants are entitled to recover actual and consequential damages in amounts to be proved at trial, plus pre- and post- judgment interest and penalties thereon as provided by N.M. Stat. Ann. § 70-10-4 and N.M. Stat. Ann. § 70-10-5, along with their costs and attorneys fees pursuant to N.M. Stat. Ann. § 70-10-6.

WHEREFORE, Pendragon Energy Partners, Inc., Pendragon Resources, L.P. and J.K. Edwards Associates, Inc. pray for judgment in their favor (1) quieting their title to the Subject Lands; (2) awarding them actual, compensatory and special damages; (3) permanently enjoining the Counterclaim-Defendants from further operating and/or producing their wells that are in communication with the Pictured Cliffs formation and requiring that those wells be shut-in permanently and enjoining the Counterclaim-Defendants' trespass, conversion and nuisance; (4) declaring the rights of the parties, including, specifically, the rights of the Counterclaimants to the ownership of Fruitland Coal gas produced through the Subject Pictured Cliffs wells as a result of the

Counterclaim-Defendants' conduct; (5) for an accounting by the Counterclaim-Defendants for revenues attributable to past sales of Counterclaimants' Pictured Cliffs formation gas; (6) for an equitable allocation of future production and revenues from the Subject Coal Wells; (7) for pre-and post-judgment interest and penalties as permitted by law, together with costs and attorneys' fees in this action and in related administrative proceedings; and (8) such other relief as the Court deems proper. To the extent that any of the foregoing issues or prayers for relief are within the proper jurisdictional authority of any administrative agency, the Counterclaimants do not seek their determination by the Court.

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I CERTIFY that a true and correct copy of the foregoing has been mailed to the following counsel of record this 21 day of Aug, 1998.

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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

WHITING PETROLEUM CORPORATION, a corporation, MARALEX RESOURCES, INC., a corporation, and T.H. McELVAIN OIL & GAS, Limited Partnership,

Plaintiffs,

vs. **No. SF-CV-98-01295**

PENDRAGON ENERGY PARTNERS, INC., a corporation, PENDRAGON RESOURCES, L.P., and J.K. EDWARDS ASSOCIATES, INC., a corporation,

Defendants.

PLAINTIFFS' MOTION FOR ORDER OF THE COURT UPHOLDING THE DECISION BY THE NEW MEXICO OIL CONSERVATION COMMISSION

Plaintiffs Whiting Petroleum Corporation and Maralex Resources, Inc. (collectively "Whiting"), by and through their counsel, hereby move the Court for entry of its Order upholding the decision rendered by the New Mexico Oil Conservation Commission ("Commission"), as Order R-11133-A, on April 26, 2000, in the matter referred by this Court to the Commission in July, 1998. Defendants (collectively "Pendragon") have attempted to appeal that decision by filing a separate Santa Fe County district court action. An Order of the Court upholding the Commission decision will allow this matter to proceed to jury trial on Whiting's claims for damages. As grounds for this Motion, Whiting states as follows:

A. BACKGROUND FACTS

1. This action was filed by Whiting on May 26, 1998. The Court entered its Order enjoining Pendragon from operating its Chaco gas wells 1, 2R, 4 and 5 on July 7, 1998. The Court found in the Order that "plaintiffs have established a substantial likelihood that they would prevail on the merits of their claim that defendants have trespassed into plaintiffs' Fruitland formation and that defendants are converting the plaintiffs' gas."

2. The Preliminary Injunction also authorized consideration by the New Mexico Oil Conservation Division or the New Mexico Oil Conservation Commission ("Commission") "on certain issues within their administrative jurisdiction."

3. Extensive and expensive administrative proceedings have occurred since July, 1998. On July 28, 29 and 30, 1998, Examiner David Catanach of the Division heard evidence at a Division hearing. The Division entered its Order R-11133 on February 5, 1998, holding that Pendragon fractured stimulated their Chaco wells so as to invade Whiting's Fruitland coal formation and was producing coal gas belonging to Whiting, and ordering that the Chaco wells be shut-in. A copy of that Order is attached as Exhibit A to the Report to the Court and Request for Scheduling Order for Jury Trial which Whiting filed June 2, 2000.

4. Pendragon requested a de novo hearing before the Commission on February 18, 1999. The Commission then held an evidentiary hearing which was conducted on August 13, 19, 20 and 21, 1999. The Commission rendered its decision on the de novo appeal on April 26, 2000, as Order R-11133-A, holding that certain Pendragon wells were in communication with the Whiting coal formation and were

producing gas from the Fruitland formation. The Commission also ordered Pendragon Chaco wells 1, 2R, 4 and 5 to be shut-in until such time as the Division either approves a method for putting them back on production or approves a procedure for plugging. A copy of the Commission Order was attached as Exhibit B to Whiting's Report to the Court.

5. The Commission considered two primary issues which are relevant to the continued proceedings in this litigation.[1] First, the Commission considered Whiting's contention that Pendragon had fracture stimulated their Chaco wells in such a way to cause communication with the Fruitland Formation, which contains coal seam gas reserves which Whiting owned. The Commission found in Whiting's favor on this issue. The Commission also considered Pendragon's claim that Whiting had fracture stimulated its wells in such a manner as to cause communication with the Pictured Cliffs formation in which Pendragon owns an interest, and Pendragon's claim that Whiting had improperly produced Pictured Cliffs reserves through its coal seam gas wells. The Commission found against Pendragon on this claim.

6. As directed by the Commission, Whiting submitted written expert testimony prior to the Commission hearing. Those reports of Bradley M. Robinson, James T. Brown, and Alexis Michael "Mickey" O'Hare alone provided more than substantial evidence to support Whiting's theory that Pendragon had improperly produced coal seam gas reserves through its Chaco wells, and refuting Pendragon's theory that Whiting had produced Pictured Cliffs reserves through its coal seam gas

[1] Whiting's complaint seeks damages for the improper conversion by Pendragon of coal seam gas from the Fruitland formation. Pendragon has filed a counterclaim alleging Whiting improperly produced Pictured Cliffs reserves.

wells. Copies of the expert reports, which were admitted in the Commission proceedings as Pre-Filed Expert Testimony, are included in the Appendix Whiting is filing concurrently herewith as Attachments 1, 2 and 3.

7. The transcript of the Commission hearing constitutes 1,616 pages of geological and petroleum engineering testimony presented by both sides. A copy of the Transcript, including Whiting exhibits which were not part of the previously identified expert reports, is included in the Appendix, at Attachment 5.[2]

8. On June 2, 2000, Whiting submitted its Report to the Court and requested that this case be put back on schedule for a jury trial in order to allow Whiting to present its evidence to a jury to recover damages for the gas Pendragon has wrongfully taken. Pendragon's liability on this claim has now been confirmed by three separate fact finders. By confirmation or adoption of those administrative decisions, this Court can make the defendants' liability the law of the case.

9. On June 13, 2000, Pendragon initiated another district court action in filing a Notice of Appeal to the Santa Fe County District Court from the Commission decision. The appeal is ostensibly taken under NMSA 1978 §§ 70-2-25 and 39-3-1.1 (1995 Repl.). The Pendragon appeal is Case No. D-0117-CV-2000-1449, assigned to Honorable Daniel Sanchez. Whiting has filed a Motion herein seeking to enjoin Pendragon from proceeding with that appeal on the grounds that this Court, as the referring Court, has jurisdiction over any review of the commission decision.

[2] Whiting has not submitted all its pre-filed expert reports, or the Pendragon reports and exhibits, so as not to unnecessarily clutter the record. Whiting anticipates that Pendragon will file any additional papers from the Commission proceeding upon which it intends to rely in this matter.

B. LEGAL AUTHORITY

This Court, as the referring Court, retained jurisdiction of all matters not within the exclusive jurisdiction of the Division by its referral orders of July 6 and 7, 1998. Under the doctrine of primary jurisdiction, where a case is referred to in administrative body, the judicial process is suspended pending the addressing of such issues by the administrative body and the announcement of its views. Mountain States Natural Gas Corp. v. Petroleum Corp. of Texas, 693 F.2d 1015 (10th Cir. 1982) (applying New Mexico law). Once the administrative body finishes its resolution of the issues, the case is then return to the referring court, which can either uphold or set aside the agency decision. Orscheln Brothers Truck Lines, Inc. v. Zenith Electric Corp., 899 F.2d 642 (7th Cir. 1990).

Pendragon has filed two pleadings which presage their anticipated challenge to the Commission ruling, an Application for Rehearing filed with the Commission (which was denied), and the Response to Report to the Court filed June 13, 2000. Neither pleading raises any issue that the Commission acted fraudulently, arbitrarily or capriciously, and no such argument has any merit under these facts. Pendragon has not claimed that the Commission acted outside the scope of its authority. Indeed, it was Pendragon itself which sought the referral by this Court to the agency for the application of agency expertise on the issues raised in this case. Similarly, Pendragon has raised no argument that the Commission's actions were not in accordance with law.

This Court, in reviewing whether to uphold the Commission decision, may apply the same standard that would otherwise apply to an appeal from an agency

decision under SCRA 2000 1-074. The agency decision should be upheld absent any determination by the Court that the agency acted fraudulently, arbitrarily or capriciously. Similarly, based on a whole record review, the agency decision should be upheld if supported by substantial evidence.

The entire basis of Pendragon's complaint regarding the Commission decision is that the Commission did not accept Pendragon's fatally flawed explanation as to how its Chaco wells miraculously experienced gas pressure and production volume increases right after the Pendragon fracture stimulations in amounts exceeding what the Chaco wells experienced when first completed under virgin reservoir conditions. The only rational and scientifically valid explanation for the miraculous flow of gas Pendragon experienced in 1995, was that Pendragon had fracture stimulated its Chaco wells so as to cause passageways into the Fruitland formation, and thus was producing large volumes of coal seam gas from 1995 until the wells were shut-in in 1998. This was the substance of the Division's and the Commission's findings after two exhaustive hearings. This was the substance of this Court's decision in June 1998.

Pendragon's preliminary pleadings attacking the Commission decision for the most part simply regurgitate its theory of the case, which has now been rejected by three fact finders, and argues that the Commission should have reached a different result. This is not the standard of review of an agency decision. The question is whether substantial evidence exists in the record which supports the Commission decision. As the Court can see from a review of Whiting's expert reports, and the transcript of the Commission proceeding, there is not just substantial evidence which

supports the Commission determination, there is an avalanche of evidence in support thereof.

Attached in the Appendix, Attachment 4, is the Memorandum in Lieu of Closing Statement filed November 28, 1999 by Whiting in the Commission proceeding. That Memorandum outlines the factual history of the case, and provides analysis which supports the Commission's decision. Highlights of the evidence, which clearly support the Commission decision, include the following with references to Commission findings from Order R-11133-A:

1. Whiting's coal seam gas wells exhibited a classic dewatering and gas incline pattern for coal seam gas wells after they were drilled in 1992 and fracture stimulated in 1993. Following the fracture stimulations of the Whiting coal seam gas wells ("Gallegos Federal" wells) there was no pressure or production response in the offsetting Chaco wells. Order R-11133-A, ¶ 9.

2. Unchallenged evidence presented to the Commission demonstrated incredible and uncommon pressure and production increases in the Chaco wells immediately after Pendragon performed fracture stimulations on Chaco wells 1, 4 and 5. The Chaco wells which Pendragon did not fracture stimulate, the 1J and 2J, had no significant production increase even though they were closely offset by two of the hydraulically stimulated Whiting coal seam gas wells. Order R-11133-A, ¶¶ 37, 38, 39, 43.

3. The overwhelming evidence demonstrated that the Pictured Cliffs formation in the area of the Chaco wells was developed in the 1970s and depleted prior to 1995. By the mid-1980s, all of the Chaco wells, as virtually all the wells in that

sandstone pool, were non-productive or making only five to fifteen mcf of gas per day. Pressures in the wells, which were originally in the range of 200 to 250 psi, had declined to the mid-1980s to around 100 psi. Order R-11133-A, ¶¶ 38, 45.

4. No evidence was presented to the Commission that any other operators in the area were reworking Pictured Cliffs wells to successfully recover added gas reserves. No evidence was presented to the Commission, because none exists, that any Pictured Cliffs operators were perforating in the lower "third bench" of that formation, which Pendragon nevertheless contended contains substantial untapped gas reserves. The evidence presented to the Commission demonstrated that the third bench was relatively non-productive, and saturated with water that makes production from the third bench uneconomical. Order R-11133-A, ¶ 39.

5. Production volumes and pressure readings on the Chaco wells since they were restimulated in 1995 confirm the production of coal seam gas. The evidence showed that there was pressure communication between the Chaco wells and the Whiting Gallegos Federal coal seam gas wells in the area. Order R-11133-A, ¶¶ 33, 37-39.

6. Pendragon pursued three different theories of reservoir "damage" to try to explain the low levels of production prior to 1995, but presented no substantial evidence which would confirm any of the theories. In fact, no scientific evidence of damage to the formation was presented which would explain the low production volumes and pressures prior to 1995, and no evidence was presented that Pendragon addressed any specific alleged "damage" with the fracture stimulations which would

cause the marked increases in pressures and production after the Pendragon fracture stimulations. Order R-11133-A, ¶ 40.

7. Water analysis from the Chaco wells since stimulation confirms that those wells have been producing coal seam gas. Pendragon's primary response was that the water analyses could not be trusted, notwithstanding that the Division and the Commission have recognized in Order R-8768 that water analysis is a valid factor for testing whether gas production is from the coal seam formation.

8. Indeed, the very fact of water production from the Pendragon Chaco wells confirms contact with the coal formation. Pendragon witnesses at the Commission hearing admitted that they have violated Division rules and regulations by failing to report water production from the Chaco wells. The Pendragon witnesses conceded that the Chaco wells produced substantially larger volumes of water then what was reported on daily progress reports maintained by Pendragon, but which were not then communicated to the Division as required by Division rules. The fact of the matter is that Pendragon destroyed evidence, both by depositing produced water into unlined pits, where much of that water percolated into the loamy soil or evaporated, and by failing to report water production from the Chaco wells until it realized that the Aztec Division office staff had visual confirmation of water production from the wells.

It is clear that Pendragon will never accept the decisions which this Court, then the Division, and finally the Commission, rendered in determining that Pendragon improperly stole coal seam gas from 1995 until the Chaco wells were shut-in in 1998. However, the ability to re-spin the evidence, or argue ad nausem that different findings and conclusions are possible under the evidence does not warrant reversal or setting

aside of the Commission decision. Pendragon zealously urged this Court to allow the administrative agency to try issues within its expertise. The Division and the Commission have now completed that fact-finding referred to them by the Court in 1998.

Under these circumstances, this Court should uphold the Commission decision, and give that decision preclusive affect in this litigation as against Pendragon. Amoco Production Company v. Heimann, 904 F.2d 1405 (10th Cir. 1990) (decision of Commission entitled to preclusive effect in related litigation).

C. **Rule LR1-306A. Compliance**

Counsel for Pendragon opposes this motion.

WHEREFORE, on the basis of the foregoing points and authorities, Whiting respectfully requests that this Court enter its Order upholding and adopting the Commission decision on issues of fact which was rendered upon referral by this Court, and ordering that that decision has preclusive affect in this litigation on the liability issues raised in Whiting's Complaint and Pendragon's Counterclaim. The case should then move forward for trial on damages alone.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By _____

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of Plaintiffs' Motion for Order of the Court Upholding the Decision by the New Mexico Oil Conservation Commission to be hand-delivered on this 7th day of July, 2000 to the following counsel of record:

J. Scott Hall
Miller, Stratvert, Torgerson & Schlenker, P.A.
150 Washington Avenue
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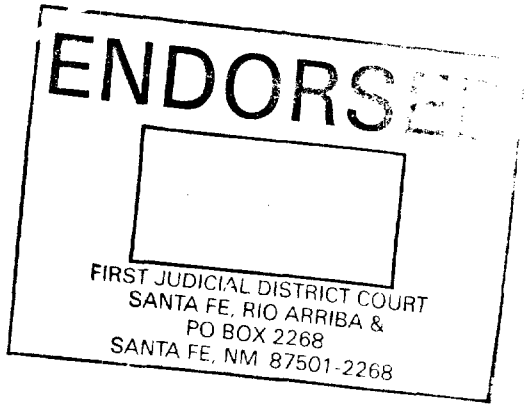
MICHAEL J. CONDON

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO



WHITING PETROLEUM CORPORATION, a corporation, and MARALEX RESOURCES, INC., a corporation and T. H. McELVAIN OIL AND GAS, a Limited Partnership,

Plaintiffs,

vs.

No. CV-98-01295

PENDRAGON ENERGY PARTNERS, INC., a corporation, PENDRAGON RESOURCES, L.P. and J.K. EDWARDS ASSOCIATES, INC., a corporation

Defendants.

PENDRAGON'S RESPONSE TO MOTION TO ENJOIN DEFENDANTS FROM PROCEEDING IN CAUSE NO. D-01170CV-2000-1449

Defendants/Counterclaimants, Pendragon Energy Partners, Inc., Pendragon Resources, LP and Edwards Energy Corporation,[1] (together, "Pendragon"), for their response to Whiting's Motion To Enjoin Defendants From Proceeding In Cause No. D-0117-CV-2000-1449,[2] state:

INTRODUCTION

Whiting's motion is both mis-named and mis-directed, for what it asks this Court to do is nothing less than to issue a writ of prohibition enjoining the Division VII Court (Hon. Dan Sanchez) from proceeding with a proper statutory appeal of an administrative decision. It is a radical, unprecedented request for relief that our Constitution prohibits. Moreover, Whiting fails to make any of the showings traditionally required before an injunction may issue.

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[1] Formerly J.K. Edwards Associates, Inc.

[2] *Pendragon Energy Partners, Inc., et al. v. New Mexico Oil Conservation Commission*

BACKGROUND FACTS

Whiting's motion marks the fifth time now that it has sought to "enjoin" or otherwise prevent the statutory administrative process from going forward. In each instance, Whiting's efforts were rejected. Of course, what is ironic is that it was Whiting and Maralex who first sought to invoke the administrative process they now seek to thwart. A brief recountal of those proceedings follows:

1. In January 1996, Whiting and Pendragon agreed to work informally with the New Mexico Oil Conservation Division ("NMOCD") to determine whether a problem existed and to bring the subject wells into regulatory compliance.

2. On January 13, 1998, Whiting filed an Application with the NMOCD (Case No. 11,921) to have the factual issues that are now raised in the lawsuit filed in district court resolved by the NMOCD.

3. Whiting subsequently filed an Amended Application further clarifying the relief it sought from the NMOCD. The hearing was scheduled for June 11, 1998, but Whiting withdrew its application. Whiting instead filed a Complaint in District Court on May 26, 1998. Pendragon contemporaneously filed its application with the NMOCD in Case. No. 11996.

4. On June 15, 1998, Whiting and Maralex filed with the NMOCD their first motion to dismiss Case, No. 11,996, making largely the same argument they make here.

5. On June 23, 1998, after a hearing on Whiting's motion, the NMOCD ruled that Whiting could not disavow its earlier invocation of the agency's jurisdiction and accordingly denied the Whiting/Maralex motion.

6. Disregarding the Division's ruling on their June 15, 1998 motion, Whiting and Maralex nevertheless pursued their separate District Court Motion For An Order Enjoining Defendants From Prosecuting An Administrative Proceeding. There, as here, Whiting and Maralex argued, in essence, that the District Court should "enjoin defendants from pursuing their vexatious and duplicative application with the OCD." This misnamed and misdirected District Court motion was, in substance and effect, an application for a writ of prohibition directed against the Division, which sought to prevent the agency from hearing the Application in Case No. 11996. So far as we know, Whiting and Maralex filed their motion without advising the NMOCD.

7. On June 28, 1998, the District Court rejected the Whiting/Maralex Motion to Enjoin the Administrative Proceeding and granted instead Pendragon's Motion to Dismiss For Lack of Jurisdiction, in part. In its Order, the District Court said:

> "Defendants have requested that the Court refer this matter to the New Mexico Oil Conservation Division under the doctrine of primary jurisdiction. This Court has determined to defer to the jurisdiction of the New Mexico Oil Conservation Division in view of the greater expertise of the New Mexico Oil Conservation Division in this particular field and to promote more uniform decision making."

8. On July 28, 29, and 30, 1998, the NMOCD heard evidence at a Division hearing and entered its Order R-11133 on February 11, 1999.

9. On February 18, 1999, Pendragon filed an Application for a Hearing *De Novo* before the NMOCC.

10. On February 23, 1999, Whiting filed its Application for a Hearing De Novo as to Limited Issues. The NMOCC issued its Scheduling Order on May 11, 1999 and set the Hearing for August 12th through 21st, 1999.

11. On April 26, 2000, the NMOCC issued Order No. R-11133-A.

12. On May 16, 2000, the Pendragon applied, pursuant to NMSA 1978 70-2-25, to the NMOCC for Rehearing. Whiting failed to seek rehearing on the geologic issues and similarly failed to appeal the same.

13. On June 13, 2000, Pendragon filed a Notice of Appeal in District Court pursuant to NMSA 1978 70-2-25 and NMSA 1978 39-3-1.1.

14. On June 22, 2000, Whiting filed its Motion to Enjoin Defendants From Proceeding In Cause No. D-01170CV-2000-1449. By its motion, Whiting seeks an order enjoining Pendragon from proceeding further in *Pendragon Energy Partners, Inc., et al. v. New Mexico Oil Conservation Commission.* Whiting contends that the appeal is "unauthorized." It further alleges that the Pendragon appeal "threatens" the original jurisdiction of the district court and is inconsistent with the stay entered by this Court in its Preliminary Injunction and referral Order.

POINTS AND AUTHORITIES

To determine whether to grant injunctive relief, a trial court must consider several factors and "balance the equities and hardships". *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-18 (Ct. App. 2000) *quoting Key v. Chrysler Motors Corp.*, 119 N.M. 267, 274, 889 P.2d 875, 882 (Ct. App. 1995) *reversed on other grounds*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350. The factors to be considered by the trial court include the: (1) character of the interest sought to be protected; (2) relative adequacy to the plaintiff of the injunction in comparison to other remedies; (3) interests of third parties; (4) practicability of granting and enforcing the order; and (5) relative hardship likely to result to the defendant if granted and to the plaintiff if denied. *Id. citing Wilcox v. Timberon Protective Ass'n*, 111 N.M. 478, 485-86, 806 P.2d 1068, 1075-76. The Court of Appeals stresses that injunctions are harsh and

drastic remedies that should be issued only in cases of extreme necessity and where no other remedy at law exists. *Id.* Whiting has presented no evidence or argument to support why an injunction should be issued. Its only reasoning is that enjoining the appeal would protect the original jurisdiction of the district court and result in a more efficient procedure. Because Whiting has not shown that any of the requisite factors are present or that hardship or inequity will result, an injunction is inappropriate.

Further, Pendragon is exercising its statutory right to appeal. The Oil and Gas Act provides an aggrieved party the right to appeal a decision of the NMOCC after the agency denies or fails to act on a request for rehearing. "The creating of a right to appeal is a matter of substantive law and outside the province of the court's rule making power." *Lovelace Medical Center v. Mendez*, 111 N.M. 336, 339, 805 P.2d 603, 606 (1991) *quoting State v. Arnold*, 51 N.M. 311, 314, 183 P.2d 845, 846 (1947). A court cannot enjoin an appeal provided for by statute because an injunction is issued pursuant to a court rule: NMRA 2000 1-066.

To enjoin a party or another court from participating in a statutory appeal offends the separation of powers doctrine. The New Mexico Supreme Court has explained that the interests protected by maintaining the separation of powers are furthered by separating the functions among the branches while maintaining checks to keep each branch free from the control or influence of the other branches. *Board of Educ. of Carlsbad Mun. Schools v. Harrell*, 118 N.M. 470, 484, 882 P.2d 511, 525 (1994). The judiciary must, therefore, maintain the power of check over the "exercise of judicial functions by quasi-judicial tribunals in order that those adjudications will not violate our constitution". *Id.* ("The principle of check requires that the essential attributes of judicial power, vis-à-vis other

governmental branches and agencies, remain in the courts."). The final authority to render and enforce a judgment is the basis of judicial power. *Id. citing Otero v. Zouhar*, 102 N.M. 493, 502, 697 P.2d 493, 502 (Ct. App. 1984). It is not only Pendragon's right to appeal the NMOCC's decision, but the appeal is also in line with the separation of powers doctrine which works to ensure that ". . . any judicial review of administrative action, statutory or otherwise, requires a determination whether the administrative decision is arbitrary, unlawful, unreasonable, capricious, or not based on substantial evidence." *Id. quoting Regents of the University of New Mexico v. Hughes*, 114 N.M. 304, 838 P.2d 458 (1992). If Pendragon is enjoined from appealing the administrative decision of the NMOCC, another district court will also be prevented from exercising one of its essential functions.

Further, Whiting is incorrect when it asserts that the appeal threatens the jurisdiction of the District Court. According to the Constitution of the State of New Mexico, district courts may be granted jurisdiction over special cases and proceedings by law. *See State ex rel. Pilot Development Northwest, Inc. v. State Health Planning & Development Bureau*, 102 N.M. 791, 797, 701 P.2d 390, 396 (Ct. App. 1985) (if a statute authorizes an appeal then there is a right to appeal and the court [of appeals] has jurisdiction over the appeal). The New Mexico State Legislature conferred jurisdiction upon the district courts in the Oil and Gas Act. The original jurisdiction of the district court is created in the Constitution of the State of New Mexico in *Article VI § 13* that provides:

> The district court **shall** have original jurisdiction in all matters and causes not excepted in this constitution, **and such jurisdiction of special cases and proceedings as may be conferred by law**, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise in the exercise of their jurisdiction; **provided, that no such**

> **writs shall issue directed to judges or courts of equal or superior jurisdiction.** The district courts shall also have the power of naturalization in accordance with the laws of the United States. Until otherwise provided by law, at least two terms of the district court shall be held annually in each county, at the county seat. *(emphasis added).*

The Constitution explicitly sets out the parameters of the original jurisdiction of district courts.

Additionally, the Constitution states that a district court cannot issue injunctions directed to judges or courts of equal or superior jurisdiction. *See Heimann v. Adee*, 122 N.M. 340, 345, 924 P.2d 1352, 1357 (1996) (principals of judicial comity are incorporated in the state constitution that prohibit, for example, one district court from enjoining another district court). Whiting is inappropriately requesting that this Court enjoin the Division VII Court from going forward on an appeal that is pending before a court of equal jurisdiction .

Plaintiff refers to the Order entered on July 6, 1998 finding that, although the District Court had jurisdiction over the subject matter of the case, under the doctrine of primary jurisdiction it would defer to the jurisdiction of the NMOCD. The Court found that the NMOCD had greater expertise in this particular field and that by deferring to the NMOCD it would promote uniform decision making. The Court retained jurisdiction only over the claims that were "not susceptible of relief" through the NMOCD. Whiting appears to argue that the issuance of the NMOCC's decision in April 2000 stops the administrative decision making process. Unfortunately, Whiting's interpretation is directly opposed to the legislative scheme, which clearly provides for appellate review. The Oil and Gas Act, by reference to *NMSA 1978 § 39-3-1.1*, provides any party adversely affected by a decision rendered by the Oil Conservation Division, to appeal *de novo* first to the Oil Conservation Commission itself,

secondly to district court, thirdly to the New Mexico Court of Appeals, and ultimately to the New Mexico Supreme Court. *NMSA 1978 § 39.3-3-1.1.*

The concept that primary jurisdiction extends through appellate review is widely acknowledged and is discussed in the Administrative Law Treatise:

> In many circumstances, the court that referred the issues to the agency also must wait until the agency's decision has been either upheld or set aside by a different reviewing court. This process may delay considerably judicial resolution of the underlying dispute. II Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 14.1 p. 273 (1994).

The United States Supreme Court made a similar acknowledgment in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). The question before the Supreme Court was whether the Seventh Circuit erred when it stayed further judicial action pending administrative proceedings that it deemed available under the Commodity Exchange Act. The United States Supreme Court recognized that "[t]he adjudication of the Commission, if it is forthcoming, will be subject to judicial review and would obviate any necessity for the antitrust court to re-litigate the issues actually disposed of by the agency decision." *Id.* at 306. This opinion demonstrates that delay is not solely an unfortunate consequence of the application of primary jurisdiction because it actually provides for an accurate, reasoned, and reasonable clarification of very complex factual issues that will allow for a more expedient resolution of common law claims.

If the factual issues are not resolved through the mechanisms provided by statute, then what will likely occur is a prolonged appellate review of the District Court's decision on the common law claims because the factual issues under Case No. 11996 that would otherwise be subject to review and resolution would remain unsettled. It would be premature to proceed with the trial on the common law claims when the factual issues underlying the

common law issues have not been resolved. There is no fixed formula governing the court's exercise of its discretion to invoke the doctrine of primary jurisdiction. *Bradford School Bus Transit, Inc. v. Chicago Transit Authority*, 537 F.2d 943, 949 (7th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977). By waiting for the review of the Oil Conservation Commission's decision to conclude, the trial court prepares for a more informed and precise determination when it ultimately resolves the common law dispute. The trial court would be able to rely on the agency determinations as clarified through the appellate review process and more efficiently render a decision on the legal claims.

The simultaneous consolidation of an appeal with a trial on disputed questions of fact is not contemplated by NMRA 1-042. Although the Rules of Civil Procedure allow for consolidation of cases when a common question of law or fact exists, "the mere fact that a common question is present...does not mean that the trial court judge must order consolidation." 9 Wright & Miller, Federal Practice & Procedure: Civil 2d § 2383, at 439-40 (1995). In fact, when separate actions "will be conducive to expedition and economy," the court may order separate trials on any claims or issues. NMRA 1-042(B).

CONCLUSION

There is no need to re-try the factual issues in this case, which have already consumed six (6) days of hearings at the NMOCC. Pending proper appellate review, the NMOCC's findings will presumably have some preclusive effect in this Court. Pendragon has an automatic right of appeal from the NMOCC, and it would promote judicial economy to await the conclusion of that appeal. On the conclusion of the appeal the factual issues will be presented to the Court on the proverbial "silver platter," and it would be a waste of time and

duplication of effort in this Court to determine facts that are already under consideration by another Division of this Court.

Whiting's contention that Pendragon is using "delaying tactics" to avoid trial on the common law damages claims is a mischaracterization of the situation facing the parties. Pendragon is not inventing delay tactics; it is only exercising its statutory right to an appeal. The Oil and Gas Act explicitly provides that the decisions of the NMOCC are subject to the review of the district court. Pendragon's actions are in line with the doctrine of the separation of powers as well as primary jurisdiction. Further, Plaintiff has not shown that an injunction is necessary in this case. An injunction is a tool of last resort that is to be used in extreme situations. For all these reasons, Whiting's motion must be denied.

Submitted by:

MILLER, STRATVERT & TORGERSON, P.A.

By J. Scott Hall

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(505) 989-9614

ATTORNEYS FOR PENDRAGON ENERGY PARTNERS, INC., PENDRAGON RESOURCES, L.P., AND EDWARDS ENERGY CORPORATION

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been mailed to opposing counsel of record this 10 day of July, 2000.

J. Scott Hall

J. Scott Hall, Esq.

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

OIL CONSERVATION DIV.

00 JUL 13 PM 12:57

WHITING PETROLEUM CORPORATION, a corporation, MARALEX RESOURCES, INC., a corporation, and T.H. McELVAIN OIL & GAS, Limited Partnership,

Plaintiffs,

vs. **No. SF-CV-98-01295**

PENDRAGON ENERGY PARTNERS, INC., a corporation, PENDRAGON RESOURCES, L.P., and J.K. EDWARDS ASSOCIATES, INC., a corporation,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO ENJOIN DEFENDANTS FROM PROCEEDING IN CAUSE NO. D-0117-CV-2000-1449

Plaintiffs (collectively "Whiting"), file this Reply Memorandum in support of their Motion to Enjoin Defendants from Proceeding in Cause No. D-0117-CV-2000-1449, filed June 22, 2000. This Reply addresses arguments by defendants (collectively "Pendragon") in opposition to the motion.

I.

INTRODUCTION

Several matters need clarification following Pendragon's attempt to obfuscate and msicharacterize Whiting's requested relief.

First, Whiting has not requested that the Court deny Pendragon an opportunity for judicial review of the decision issued by the New Mexico Oil Conservation Commission on April 26, 2000. Whiting simply requests that that review be conducted

by the right Court, this referring Court. On July 10, 2000, Whiting filed a Motion for Order of the Court Upholding the Decision by the New Mexico Oil Conservation Commission. That Motion asks this Court to review the Commission decision under the same standard that would apply to an appeal of the administrative decision to the district court under NMSA 1978 § 39-3-1.1 (1995 Repl.) and Rule 1-074 NMRA 2000.

Second, Pendragon contends that the Motion to Enjoin is directed to a court of equal jurisdiction, and that it seeks to enjoin the district court from proceeding further in Pendragon's administrative appeal. This is incorrect. The Motion seeks to enjoin Pendragon, a party over whom the Court has both personal and subject matter jurisdiction, from proceeding with the administrative appeal it has filed. Any Order that this Court would issue if the Motion to Enjoin is granted will be directed to Pendragon.

Finally, much of Pendragon's Response is directed to an incomplete, irrelevant and pejorative recitation of the procedural history of this dispute. Pendragon attempts to vilify Whiting for seeking to enjoin Pendragon's administrative appeal, although there are several policy reasons for an injunction. This Court was not obligated to refer any questions to the Division or the Commission under the doctrine of primary jurisdiction, but it did so, the administrative agency has acted and the rest is "water under the bridge."

Whiting is anxious to have trial of its damage claims. Pendragon would like that to never happen. Whiting has incurred hundreds of thousands of dollars in costs, attorneys' fees and expenses in securing three separate decisions that confirm Pendragon's liability in this case. Neither common sense, justice nor judicial economy justify the further delay which would attend a separate court review under Section 39-3-

1.1 and Rule 1-074 NMRA 2000, with the certain prospect of a further appeal by Pendragon to the Court of Appeals. Now that the administrative decisions have been rendered, this Court can review the Commission decision, uphold and affirm and adopt that decision, and schedule this matter for trial on Whiting's damage claims.

II.

ARGUMENT AND AUTHORITY

POINT I

THE FACTS OF THIS CASE SUPPORT AN INJUNCTION PROHIBITING PENDRAGON FROM PROCEEDING WITH ITS ADMINISTRATIVE APPEAL

In support of the Motion to Enjoin, Whiting cited the Court to the two New Mexico decisions directly on point which set forth the standard for an injunction prohibiting a party from instituting or proceeding with another competing judicial action. General Atomic Company v. Felter, 90 N.M. 120, 560 P.2d 541 (1977); State ex rel. Bardacke v. Welch, 102 N.M. 592, 698 P.2d 462 (Ct. App. 1985). These cases deal with precisely the issue presented by this Motion. In response, Pendragon cites to inapplicable New Mexico decisions for the general standard for granting injunctive relief. Cf. Wilcox v. Timberon Protective Association, 111 N.M. 478, 485-86, 806 P.2d 1068, 1075-76 (1990).

Perhaps Pendragon missed the point of the Motion to Enjoin. Over two years have elapsed since the Complaint in this action was filed. Three separate fact finders have found for Whiting on the liability issue. Pendragon's filing in another division of the Santa Fe County district court clearly has two objectives: (a) Delay and (b) take the case away from this Court. Under the authority of General Atomic and State ex rel.

Bardacke, this Court can preserve its plenary jurisdiction and not allow Pendragon to accomplish those improper objectives.

Whiting will suffer a substantial hardship if it is forced to endure an additional two to three year delay before this case can proceed to a damage trial. On the other hand, if the Motion to Enjoin is granted, Pendragon will suffer no hardship whatsoever. Pendragon has the opportunity to ask this Court, the referring court, to determine whether the agency's factual findings will be given preclusive effect, and allow Whiting to proceed to trial on damages. Pendragon will be forced to defend a damage trial sooner rather than later. Even under a balancing of equities test under Wilcox, the equities clearly favor the issuance of the injunction so that this matter can proceed to trial.

Pendragon also contends that issuance of an injunction would offend the separation of powers doctrine and deprive Pendragon of a statutory right of review of the Commission decision. That is untrue. In enjoining Pendragon from proceeding in Case CV-2000-1449, this Court will be issuing an order to a litigant within its jurisdiction.

POINT TWO

AN INJUNCTION PROHIBITING PENDRAGON FROM PROCEEDING WITH THE ADMINISTRATIVE APPEAL IS CONSISTENT WITH THE DOCTRINE OF PRIMARY JURISDICTION

Pendragon cites the doctrine of primary jurisdiction as a mantra which somehow mysteriously resolves all questions posed by the Motion to Enjoin in Pendragon's favor. Whiting has previously set forth the principles underlying the doctrine of primary jurisdiction in its Motion to Enjoin, pages 5-7. It is a court made doctrine founded on judicial discretion which allows, but does not require, a court to refer factual matters to

an administrative agency for application of supposed expertise. The question posed by the Motion to Enjoin under the current state of proceedings is simply whether this Court, as the referring court, will review the Commission decision. Thus, there is no primary jurisdiction question posed by the Motion to Enjoin, but only a question of which judge will review the Commission decision.

In its Motion to Enjoin, Whiting cited the Court to the only case undersigned counsel can locate which discussed the procedure for reviewing an administrative agency decision after the matter had been referred by the Court. Orscheln Brothers Trucklines v. Zenith Electric Corp., 899 F.2d 642, 643 (7th Cir. 1990), states that the referring court should conduct the review. Pendragon ignores that decision. Instead, it supposes that the concept of primary jurisdiction extends through appellate review, citing Davis and Pierce, Administrative Law Treatise, § 14.1, p. 273 (1994) and Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973). Neither the primary jurisdiction doctrine nor those Pendragon citations support the position advanced by Pendragon.

The doctrine of primary jurisdiction is not an absolute directive to the Court to defer in all respects to an administrative agency or stay litigation pending the regular statutory appeal process from an agency decision. Indeed, Pendragon has not cited to a single case which stands for its stated proposition, i.e., that the Court is required to await an exhaustive separate judicial appeal process after an agency decision before proceeding with the litigation. No such authority exists. The district court has discretion as to whether and how to apply the doctrine of primary jurisdiction under the facts of the particular case. Brumark Corp. v. Samson Resources Corp., 57 F.3d 941 (10th Cir. 1995).

The Ricci decision cited by Pendragon and its progeny favor Whiting's position. The Court in Ricci simply held that the Seventh Circuit was correct in staying judicial proceedings pending administrative actions. 409 U.S. at 305. The Court noted that the agency decision would be subject to judicial review, but did not specify the specific procedure for judicial review. Pendragon fails to inform the Court that Ricci was decided by a 5 to 4 vote, with the four dissenters noting concerns because referring issues to the administrative agency would impose "costs in complication and delay." 409 U.S. at 321. In the twenty seven years since the Ricci decision, many courts have limited referrals to administrative agencies under the doctrine of primary jurisdiction precisely because of concern with the unreasonable delay which attends administrative proceedings. As Davis and Pierce write, in § 14.6 of their treatise, a passage not mentioned in Pendragon's response,

> Since *Ricci*, circuit courts almost invariably resolve primary jurisdiction disputes through application of a balancing test in which they weigh the potential delay resulting from invocation of primary jurisdiction against the advantages of applying the doctrine. See, e.g., Wagner & Brown v. ANR Pipeline Company, 837 F.2d 199, 201 (5th Cir. 1988); Gulf State Utilities Company v. Alabama Power Company, 824 F.2d 1465, 1473 (5th Cir. 1987).

Thus courts will frequently not even make the administrative referral because of potential delay, let alone make the referral and then countenance a separate judicial appeal drag-out of the administrative action. The "balancing test" here supports Whiting's request that this Court conduct any review of the Commission decision in an expeditious manner, since the referral to the administrative agency has already resulted in a delay of over two years in this litigation. Again, Whiting does not seek to preclude judicial review of the Commission decision.

POINT THREE

THIS COURT SHOULD CONSOLIDATE THE TWO PROCEEDINGS IF IT DETERMINES PENDRAGON IS ENTITLED TO A SEPARATE PROCEEDING FOR ITS ADMINISTRATIVE APPEAL

Whiting's Motion to Enjoin sought alternative relief in the form of an Order consolidating this action with the Pendragon appeal if the Court determines Pendragon is entitled to pursue that procedure. The parties are virtually identical, with the addition of the New Mexico Oil Conservation Commission in the administrative appeal, and the issues presented are the same as to liability.

In opposition to this request, Pendragon says that the Court should not order consolidation when separate actions will be conducive to expedition and economy under Rule 1-042(B) NMRA 2000. Pendragon offers no analysis as to how it will be more expeditious and economical to have two lawsuits before different judges in the same case. If this Court does not simply order Pendragon to proceed no further in its new appeal case, then this is an appropriate circumstances for consolidation.

POINT IV

CONCLUSION

If Pendragon is allowed to pursue the appeal case separately, Whiting and the Court can count on a two to three year delay. When Pendragon loses in the district court it will appeal to the Court of Appeals. It costs Pendragon less to drag-out appeals than to pay the inevitable judgment that will result from a jury trial.

Based upon the points and authorities cited herein and in Whiting's Motion to Enjoin, Whiting respectfully requests that the Court enjoin Pendragon from proceeding any further in Cause No. D-0117-CV-2000-1449. Alternatively, if the Court determines

that Pendragon is entitled to a separate appellate review case of the Commission decision, this Court should consolidate the appeal into this prior pending action, and thereby afford such review of the Commission decision as is appropriate.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of Plaintiffs' Reply Memorandum in Support of Motion to Enjoin Defendants from Proceeding in Cause No. D-0117-CV-2000-1449 to be mailed on this 12th day of July, 2000 to the following counsel for defendants:

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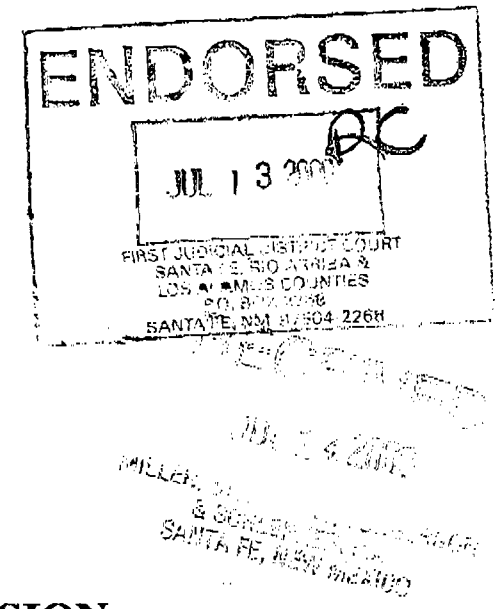

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

NO. **D-0101-CV-98-1295**

WHITING PETROLEUM COMPANY, et al.
Plaintiffs

vs

PENDRAGON ENERGY PARTNERS, INC., et al.
Defendants

MEMORANDUM DECISION

THIS MATTER came before the court upon the Plaintiffs' Motion to Enjoin. The Defendants timely filed a written Response in opposition to the Motion and, thereafter, the Plaintiffs timely filed a written Reply. Because the Motion, Response and Reply are clear and comprehensive, the court finds no necessity for hearing in order to resolve the matter.

Whiting's request, insofar as it seeks to enjoin Pendragon from pursuing its appellate remedies granted under law, should be summarily denied. Whiting's request, insofar as it seeks to tempt this court into seizing a case assigned to another judge and making the case its own, is overreaching and should be denied. Whiting's request, insofar as it seeks a consolidation of Pendragon's appeal with the present case, is best addressed to the court to which the appeal is assigned. Should Whiting choose to do so, Whiting may convey to the Honorable Daniel Sanchez that this court has no objection to consolidation and will honor Judge Sanchez's decision in this regard.

Conclusion

The Plaintiff's Motion to Enjoin is not well-taken and its should be denied.

Directions to Counsel

Mr. Hall, please prepare a sparely worded form of Order in accordance with the court's decision and circulate the same to opposing counsel for approval as to form and submit the approved form to the court for signature and entry no later than **July 28, 2000 at 9:00 a.m.**

In the event that there is undue delay in securing approval or in the event that there are objections to the form of the Order, please present the proposed form in open court on **July 28, 2000 at 9:00 a.m.** Objections, if any, shall be in writing and filed with the Clerk of the Court with courtesy copies to counsel and the court no later than three (3) working days before the date set for presentment.

ART ENCINIAS, District Judge

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Gallegos Law Firm
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Santa Fe, NM 87505

J. Scott Hall
Miller, Stratvert & Torgerson
P.O. Box 1986
Santa Fe, NM 87504-1986

ENDORSED

JUL 0 7 1998

FIRST JUDICIAL DISTRICT COURT
SANTA FE, RIO ARRIBA & LOS ALAMOS COUNTIES
P. O. Box 2268
Santa Fe, New Mexico 87504-2268
JoAnn Vigil Quintana
Court Administrator/District Court Clerk

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

WHITING PETROLEUM CORPORATION, a corporation, and MARALEX RESOURCES, INC., a corporation,

Plaintiffs,

vs. No. SF-CV-98-01295

PENDRAGON ENERGY PARTNERS, INC., a corporation, and J.K. EDWARDS ASSOCIATES, INC., a corporation

Defendants.

OIL CONSERVATION DIV.
98 FEB 23 AM 11:17

PRELIMINARY INJUNCTION

THIS MATTER came before the Court on June 29, 1998 on Plaintiffs' Verified Application for Preliminary Injunction with the parties appearing by their corporate representatives and counsel. The Court having received evidence and arguments of counsel for all parties, FINDS that good grounds have been established in behalf of the plaintiffs' Application and it should be granted.

Upon the evidence presented and application of the law concerning issuance of preliminary injunctions the Court CONCLUDES AS FOLLOWS:

1. The Court has jurisdiction of the parties and of the subject matter.

2. Plaintiffs have established a substantial likelihood that they will prevail on the merits of their claim that defendants have trespassed into plaintiffs' Fruitland formation and that defendants are converting the plaintiffs' gas.

3. Issuance of an injunction may cause harm to defendants but the continuing harm to plaintiffs should the injunction not issue greatly outweighs the harm

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to the defendants.

4. Issuance of an injunction against defendants' continued taking of plaintiffs' gas will not be adverse to the public interest.

5. The Court has weighed the factors to be considered under New Mexico law in determining whether to issue a preliminary injunction and having done so concludes that the Application for Preliminary Injunction in behalf of plaintiffs is well taken and should be granted.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. The defendants upon entry of this Preliminary Injunction shall immediately shut-in Chaco wells 1, 2R, 4 and 5 and cease and desist all gas production therefrom.

2. This Preliminary Injunction is to remain in force for a period of ninety (90) days from entry, or until further order of the Court, to permit review by the Court and consideration by the New Mexico Oil Conservation Division or New Mexico Oil Conservation Commission on certain issues within their administrative jurisdiction.

3. The Court will review this matter prior to the expiration of ninety (90) days from entry to consider the disposition of an administrative proceeding, if any, and to make any further orders as may be deemed appropriate or necessary.

4. No bond shall be required of plaintiffs, however, defendants are encouraged to track production loss in the event they become entitled to claim they have been wronged by the issuance of this Preliminary Injunction.

ORIGINAL SIGNED BY
ART ENCINIAS

The Honorable Art Encinias
District Judge

ORIGINAL SIGNED BY
ART ENCINIAS

Submitted on Notice of Presentment:

GALLEGOS LAW FIRM, P.C.

By _____
J.E. Gallegos
Michael J. Condon
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Santa Fe, New Mexico 87505

Attorneys for Plaintiffs

ENDORSED

SEP 2 9 1998

FIRST JUDICIAL DISTRICT COURT
SANTA FE, RIO ARRIBA & LOS ALAMOS COUNTIES
P. O. Box 2268
Santa Fe, New Mexico 87504-2268
JoAnn Vigil Quintana
Court Administrator/District Court Clerk

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

WHITING PETROLEUM CORPORATION, a corporation, MARALEX RESOURCES, INC., a corporation, and T.H. McELVAIN OIL & GAS, Limited Partnership,

Plaintiffs,

vs. **No. SF-CV-98-01295**

PENDRAGON ENERGY PARTNERS, INC., a corporation, PENDRAGON RESOURCES, L.P., and J.K. EDWARDS ASSOCIATES, INC., a corporation,

Defendants.

99 FEB 23 AM 11:17 OIL CONSERVATION DIV.

ORDER EXTENDING PRELIMINARY INJUNCTION

THIS MATTER having come before the Court on September 25, 1998 upon Plaintiffs' Motion to Extend Preliminary Injunction, the parties having appeared by their attorneys and the Court having reviewed the Preliminary Injunction previously entered, and having considered the Motion and being advised in the premises, FINDS that the Motion is well taken and should be granted.

IT IS THEREFORE ORDERED that the Preliminary Injunction entered by this Court on July 7, 1998, will remain in full force and effect until further order of the Court.

ORIGINAL SIGNED BY
ART ENCINIAS

The Honorable Art Encinias
District Judge

Submitted:
GALLEGOS LAW FIRM, P.C.

By J.E. Gallegos
J.E. Gallegos
Michael J. Condon
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505

Served. 9-29-98
Docketed: _____ By: _____
CC: _____
Vol: 5 Tab: 20

Attorneys for Plaintiffs

Approved as to form:

MILLER, STRATVERT, TORGERSON
& SCHLENKER, P.A.

By_____
J. Scott Hall
150 Washington Avenue
Santa Fe, New Mexico 87501

Attorneys for Defendants

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JAMES J. WIDLAND, COUNSEL

PLEASE REPLY TO SANTA FE

June 9, 1999

The Honorable Art Encinias
First Judicial District Court
Post Office Box 2268
Santa Fe County Judicial Complex Bldg.
Santa Fe, New Mexico 87504-2268

Re: NMOCD Case No. 11996; Application of Pendragon Energy, Inc., and J. K. Edwards Associates, Inc.; San Juan County, New Mexico

Dear Judge Encinias:

Enclosed is a courtesy copy of our Withdrawal Of Motion For Partial, Temporary Relief From Preliminary Injunction we have filed in the above matter. For the reasons explained in the motion, Pendragon will not proceed with its reservoir pressure testing procedure. Consequently, there will be no need to present the Court with an order pursuant to Pendragon's initial motion. Whiting Petroleum and Maralex Resources will be initiating their own reservoir pressure test and I would anticipate they will soon approach the Court with their own motion and order. Pendragon has indicated it will cooperate with the Plaintiffs' testing. We appreciate the expedited consideration of our initial motion in any event.

Very Truly Yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall

J. Scott Hall

JSH/ao

Enclosure(s) – as stated

Cc: J. E. Gallegos, Esq.
Marilyn Hebert, Esq.

6304/20253/Enciniasltr.doc

ENDORSED

JUL 0 6 1998

FIRST JUDICIAL DISTRICT COURT
SANTA FE, RIO ARRIBA & LOS ALAMOS COUNTIES
P. O. Box 2268
Santa Fe, New Mexico 87504-2268
JoAna Vigil Quintana
Court Administrator/District Court Clerk

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

WHITING PETROLEUM CORPORTION, a corporation, and MARALEX RESOURCES, INC., a corporation,

Plaintiffs,

vs.

No. D-0101-CV-98-01295

PENDRAGON ENERGY PARTNERS, INC., a corporation, and J.K. EDWARDS ASSOCIATES, INC., a corporation,

Defendants.

ORDER REGARDING MOTION TO DISMISS FOR LACK OF JURISDICTION

THIS MATTER having come before the court on June 29, 1998 on Defendants' Motion to Dismiss For Lack of Subject Matter Jurisdiction Or, In the Alternative, For Failure to State A Claim Upon Which Relief Can Be Granted, the parties having appeared by counsel and the Court having reviewed the pleadings and having heard argument of counsel for the parties, concludes as follows:

1. This Court has jurisdiction over the subject matter of this case and the claims alleged by Plaintiffs, and the Defendants' motion to dismiss for lack of subject matter jurisdiction is denied in part and granted in part.

2. Defendants have requested that the Court refer this matter to the New Mexico Oil Conservation Division under the doctrine of primary jurisdiction. This Court has determined to defer to the jurisdiction of the New Mexico oil Conservation Division in view of the greater expertise of the New Mexico Oil Conservation Division in this particular field and to promote more uniform decision making.

3. Those issues raised by the lawsuit which relate to the parties' relative rights in the land and are subject to meaningful relief through the New Mexico Oil Conservation Division should be recognized as within the jurisdiction of the New Mexico Oil Conservation Division. What the Court retains are those claims, regardless of how they are denominated that are not susceptible of relief through the New Mexico Conservation Division.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss For Lack Of Subject Matter Jurisdiction Or, In The Alternative, For Failure To State A Claim Upon Which Relief Can Be Granted be and hereby is denied in part and granted in part and as a matter of comity, the Court defers to the New Mexico Oil Conservation Division as above stated.

The Honorable Art Encinias
District Judge 7/6/98

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

WHITING PETROLEUM CORPORATION, a corporation, and MARALEX RESOURCES, INC., a corporation,

Plaintiffs,

vs. **No. CV-98-01295**

PENDRAGON ENERGY PARTNERS, INC., a corporation, and J.K. EDWARDS ASSOCIATES, INC., a corporation

Defendants.

WITHDRAWAL OF MOTION FOR
PARTIAL, TEMPORARY RELIEF FROM PRELIMINARY INJUNCTION

Defendants/Counterclaimants Pendragon Energy Partners, Inc., Pendragon Resources, LP and Edwards Energy Corporation hereby withdraw their May 24, 1999 Motion for Partial, Temporary Relief From Preliminary Injunction for the reasons explained in their Response brief filed with the New Mexico Oil Conservation Commission on June 3, 1999, a copy of which is attached hereto as Exhibit 1.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By: _____

J. Scott Hall
150 Washington Avenue
Santa Fe, New Mexico 87501
(505) 989-9614
Attorneys for Defendants/Counterclaimants

I HEREBY CERTIFY that a
true and correct copy of the
foregoing pleading has been
mailed to opposing counsel of record
this 9 day of June, 1999.

J. Scott Hall, Esq.

6304/20403 pleadings/Withdrawl of Mtn 4 Partial Relief

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

BEFORE THE NEW MEXICO OIL CONSERVATION COMMISSION

IN THE MATTER OF:

APPLICATION OF PENDRAGON ENERGY PARTNERS, INC., PENDRAGON RESOURCES, L.P., And EDWARDS ENERGY CORPORATION TO CONFIRM PRODUCTION FROM THE APPROPRIATE COMMON SOURCE OF SUPPLY, SAN JUAN COUNTY, NEW MEXICO

99 JUN -7 PM 4:39 OIL CONSERVATION DIV

CASE NO. 11996
ORDER NO. R-11133
De Novo

PENDRAGON'S RESPONSE
TO
MOTION TO REQUIRE COMPREHENSIVE AND FAIRLY DESIGNED TESTING IN CONNECTION WITH RESERVOIR PRESSURE TESTS

Pendragon Energy Partners, Inc., Pendragon Resources, LP and Edwards Energy Corporation, (together, "Pendragon") for their Response to the Whiting/Maralex Motion for alternative reservoir testing, state:

THE PENDRAGON TESTING

At the outset, Pendragon generally disputes the Whiting/Maralex assertions to the effect that the reservoir testing Pendragon proposed was based on "false premises", biased or incorrectly designed. The fact that the Commission approved the testing proposed by Pendragon speaks for itself.

Pendragon further rejects the Whiting/Maralex contention that the Commission has failed to assert control over the testing procedure in a fair manner.

Pursuant to the Commission's May 19, 1999 Order Allowing Reservoir Pressure Testing, Pendragon filed a motion with the District Court to obtain the Court's permission to restore one of its shut-in Pictured Cliffs wells to production for ten days in conjunction with the testing procedure it proposed. On June 2, 1999, at a court hearing on the motion, Whiting and Maralex again opposed the testing procedure proposed by Pendragon and further demanded that Pendragon supply a bond or other security to compensate Whiting and Maralex for the production revenues and tax credits they claim would be lost while their three coal wells were temporarily shut-in.

The Commission should be advised that Pendragon has determined it is unable to afford the onerous security amount demanded by Whiting and Maralex. As a consequence, Pendragon will not proceed with its reservoir pressure testing and its motion to do so is accordingly withdrawn.

THE WHITING/MARALEX TESTING

Pendragon does not oppose the reservoir testing proposed by Whiting and Maralex in their June 1, 1999 motion.

For the present, Pendragon takes no position with respect to the propriety of the testing design and procedure Whiting and Maralex propose, reserving instead the right to address such matters at the hearing De Novo.

Pendragon will cooperate with the Whiting/Maralex tests in every way, provided that the testing is done at their own cost and provided further that any physical operations involving Pendragon's wells be performed only by Pendragon's field personnel in coordination with Whiting's technical staff.

We understand that the data derived from the Whiting/Maralex testing will be supplied to Pendragon and the Division as soon as it is obtained. Whiting and Maralex are encouraged to commence their testing procedures at the earliest opportunity so that the data can be made available sufficiently

in advance of the August 12, 1999 hearing to allow for its meaningful review.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, PA.

By: _____

J. Scott Hall, Esq.
Post Office Box 1986
Santa Fe, New Mexico 87504
(505) 989-9614

ATTORNEYS FOR PENDRAGON ENERGY PARTNERS, PENDRAGON RESOURCES, L.P. AND EDWARDS ENERGY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Conduct Reservoir Pressure Test was mailed on this 3 day of June, 1999 to the following:

Dr. Robert Lee
Petroleum Resource Recovery Center
801 Leroy Place
Socorro, New Mexico 87801

Jamie Bailey
New Mexico State Land Office
310 Old Santa Fe Trail
Santa Fe, New Mexico 87504

Marilyn Hebert
New Mexico Oil Conservation Commission
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Santa Fe, New Mexico 87505

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460 St. Michaels Drive, #300
Santa Fe, New Mexico 87505

T. Scott Hall

J. Scott Hall, Esq.

6304/20253/Resp to Mot for Testing

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

NO. **D-0101-CV-98-1295**

PENDRAGON ENERGY PARTNERS, INC., PENDRAGON RESOURCES, LP, and EDWARDS ENERGY CORPORATION
Appellant

vs.

NEW MEXICO OIL CONSERVATION COMMISSION,
Appellee

WHITING PETROLEUM CORPORATION, and MARALAX RESOURCES INC.
Intervenors

DECISION OF THE COURT

THIS MATTER came before the court upon the appeal of Pendragon from the April 26, 2000 decision of the Conservation Commission. Thereafter, Whiting moved to intervene in the appeal, which motion was opposed by Pendragon. At the same time, Whiting moved to dismiss the appeal of Pendragon for Rule 1-074 violations. Otherwise, the matter is ready for resolution.

Preliminary Matters

Whiting's Motion to Intervene is well-taken and it should be granted. However, Whiting's Motion to Dismiss the Appeal on the basis that Pendragon failed to recite all relevant facts [not just those which support its appeal] should be denied. While it is true that Pendragon varied from Rule 1-074 in this respect, the law requires a whole record review by the district court in any event. Here, the whole record consists of some 40,000 pages of largely technical testimony. Thus, Pendragon's failure, while it did not aid the court, certainly did not appreciably burden the court.

The Main Matters

Pendragon claims that the Commission committed three basic errors, albeit not in the order in which they are discussed in this Decision.

First, Pendragon claims that the evidence does not support several specific findings of fact by the Commission.

When reviewing findings of fact made by an administrative agency, the court must apply a whole record standard of review. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). This means that the court must look not only at the evidence that is favorable, but also evidence that unfavorable to the agency's determination. **Trujillo v. Employment Sec. Dep't**, 105 N.M. 467, 470, 734 P.2d 245, 248 (Ct.App.1987). The court may not exclusively rely upon a selected portion of the evidence, and disregard other convincing evidence, if it would be unreasonable to do so. **National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,** 107 N.M. 278, 282, 756 P.2d 558, 562 (1988).

The decision of the agency will be affirmed if it is supported by the applicable law and by substantial evidence in the record as a whole. **Kramer v. New Mexico Employment Sec. Div.**, [1992-NMSC-069] 114 N.M. 714, 716, 845 P.2d 808, 810 (1992). "Substantial evidence" is evidence that a reasonable mind would regard as adequate to support a conclusion. **Wolfley v. Real Estate Comm'n**, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983). Where the reviewing court is addressing a question of fact, the court will accord greater deference to the agency's determination, "especially if the factual issues concern matters in which the agency has specialized expertise." **Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n**, [1995-NMSC-071,] 120 N.M. 579, 582, 904 P.2d 28, 31 (1995).

In the present case, the evidence is voluminous and highly technical. In essence, the evidence supports the Commission's conclusion that four of Pendragon's wells were producing gas from a source owned by another, Whiting. Pendragon focuses on a large number of factual findings which are related to or preliminary to this central issue and claims that there is little or no evidence in the record to support them. However, a fair reading of the records reveals more than adequate support for each one, even though opposing evidence was presented by Pendragon.

So long as the factual basis for the conclusion is sound, the conclusion should be upheld. Even if another conclusion may be reached or where there is room for two opinions, the longstanding rule of law is that the decision is not arbitrary or capricious if it was made after due consideration and is supported by substantial evidence. See **Perkins v. Department of Human Servs.**, 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987). This is particularly true in cases where the decision calls for special expertise.

Pendragon also claims that the Commission failed in its duty to afford complete relief because it found that Whiting was also guilty of taking gas from Pendragon's sources but the Commission did nothing. Actually, the Commission only found that Whiting's wells may be taking gas but that the amount was so small that it wasn't worth bothering about. On this basis, the Commission's failure to take action, for example, shut-in Whiting's wells is logically supportable.

Finally, Pendragon claims that the Commission erred when it found that Pendragon had already taken its fair share of gas from the Pictured Cliffs Formation. This finding is not particularly puzzling since the Commission found that the Formation had been depleted by Pendragon in 1995 and that production from this formation was only later accomplished by Pendragon's fracture stimulation treatments which had the unfortunate effect of opening a communication between the nearly dead Pictured Cliffs Formation and the still productive Fruitland Formation owned by Whiting.

Conclusion

The appeal of Pendragon is not well-taken and it should be denied. As well, the decision of the Commission [including its decision on reconsideration] is well supported by substantial evidence in the record as a whole, not contrary to law and neither arbitrary nor capricious. Accordingly, that decision should be upheld.

Directions to Counsel

Mr. Ross, please prepare a form of Final Order in accordance with the court's decision and circulate the same to all counsel for approval as to form and submit the approved form to the court for signature and entry no later than March 16, 2001 at 9:00 a.m.

In the event that there is an unreasonable delay in securing approval or in the event of objections to the form of Order, please present the proposed form in open court on **March 16, 2001 at 9:00 a.m.** Objections, if any, shall be in writing and shall be filed with the Clerk of the Court [with copies to court and counsel] no later than three working days before the date set for Presentment.

ART ENCINIAS, District Judge

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** NEW MEXICO BOARD OF SPECIALIZATION RECOGNIZED SPECIALIST IN REAL ESTATE LAW

FACSIMILE TRANSMISSION COVER SHEET

DATE: February 14, 2001

TO: Steve Ross, Esq. FAX NO.: 476-3462

FROM: J. Scott Hall, Esq. OPERATOR: Amanda Olsen

MESSAGE:

NUMBER OF PAGES INCLUDING COVER SHEET: 3

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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

DRAFT
February 14, 2001

The Honorable Art Encinias
District Judge, Division V
First Judicial District Court
Santa Fe County Judicial Complex
Santa Fe, New Mexico 87501

Re: Whiting Petroleum Corp. and Maralex Resources, Inc. vs. Pendragon Energy Partners, Inc., and J.K. Edwards Associates, Inc. No. D-0101-CV-98-01295

Dear Judge Encinias:

The pre-trial conference in the above matter is scheduled for this Friday, February 16th at 1:30 p.m. As you know, there has been little discovery or other activity in the case pending resolution of the associated administrative appeal in *Pendragon Energy Partners, Inc. et al. v. New Mexico Oil Conservation Commission,* (No. D-0117-CV-2000-1449). Correspondingly, it is anticipated that once the administrative appeal is resolved, the parties will approach the Court to establish a new pre-trial schedule to, among other things, allow for the commencement of discovery.

I have conferred with Mr. Gallegos, counsel for the plaintiffs, regarding the present posture of the case and we are both of the view that, under the circumstances, having our respective clients travel from Denver to attend the pre-trial conference would add little to the hearing. Accordingly, counsel for both plaintiffs and defendants request that their clients be excused from attendance at the hearing on Friday. Counsel for the New Mexico Oil Conservation Commission also concurs with this request.

Very truly yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall

JSH/ao

cc: J.E. Gallegos, Esq.
Steve Ross, Esq.

6304/20402/letters/J. Encinas 5 ltr.doc

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CLIENT: WHITING
CLIENT NO.: 98-266.00

DATE: January 19, 2001

TO: Steve Ross

COMPANY: New Mexico Oil Conservation Division

TELEFAX NO.: (505) ~~827-8177~~ 4763462

FROM: Michael J. Condon

MESSAGE:

NUMBER OF PAGES INCLUDING COVER SHEET: 2

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January 19, 2001
(Our File No. 98-266.00)

MICHAEL J. CONDON

VIA TELECOPY 989-9857
J. Scott Hall
Miller, Stratvert, Torgerson
& Schlenker, P.A.
Post Office Box 1986
Santa Fe, New Mexico 87504

Re: Whiting v. Pendragon et al.

Dear Scott:

I have a copy of your letter of yesterday to Gene. I'm afraid you misunderstood the voice mail message I left you after we spoke. In the voice mail message, I informed you that we did plan on filing witness and exhibit lists given the uncertainty over whether Judge Encinias' ruling on your Motion for Protective Order stayed or vacated those deadlines. We plan on filing today.

We do not intend to circulate a motion to vacate the current deadlines, particularly in light of the issues that have arisen regarding the settlement. If the settlement is not consummated, then we want to move the case to trial as quickly as possible We have no objection to your filing witness and exhibit lists today, or even Monday if you need that additional time. We are also willing to agree that both parties are entitled to supplement the witness and exhibit lists after we receive a ruling from Judge Encinias in the administrative appeal case.

I apologize for any confusion.

Your truly yours,

GALLEGOS LAW FIRM, P.C.

BY: Michael J. Condon
MICHAEL J. CONDON

MJC:sa
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COMPANY: New Mexico Oil Conservation Division

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FROM: J. E. Gallegos

MESSAGE:

NUMBER OF PAGES INCLUDING COVER SHEET: 4

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February 19, 2001
(Our File No. 98-266.00)

J.E. GALLEGOS*

VIA HAND-DELIVERY
J. Scott Hall
Miller, Stratvert, Torgerson
& Schlenker, P.A.
150 Washington, Suite 300
Santa Fe, New Mexico 87501

Re: Whiting Petroleum Co., et al. v. Pendragon Energy Partners, Inc., et al.;
No. CV-98-01295 Santa Fe County

Dear Scott:

As I am sure was reported to you, Judge Encinias has ordered that discovery can proceed in this case. I have prepared a proposed order and request that you please note and return it as soon as possible. We will obtain Steve Ross' approval and present it to the Court.

My plan is to do nothing on discovery for a week and see what develops on the settlement in the next few days. If the parties do not have documents signed next week, then we will have to set some depositions.

Sincerely,

GALLEGOS LAW FIRM, P.C.

BY: J.E. GALLEGOS

JEG:sa
fxc: Steve Ross
Jim Volker
Mickey O'Hare
ioc: Michael J. Condon
Caroline C. Woods

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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

WHITING PETROLEUM CORPORATION, a corporation, MARALEX RESOURCES, INC., a corporation, and T.H. McELVAIN OIL & GAS, Limited Partnership,

Plaintiffs,

vs. No. SF-CV-98-01295

PENDRAGON ENERGY PARTNERS, INC., a corporation, PENDRAGON RESOURCES, L.P., and J.K. EDWARDS ASSOCIATES, INC., a corporation,

Defendants.

and

PENDRAGON ENERGY PARTNERS, INC., PENDRAGON RESOURCES, LP, AND EDWARDS ENERGY CORPORATION,

Appellant,

vs. No. D-0117-CV-2000-1449

NEW MEXICO OIL CONSERVATION COMMISSION, WHITING PETROLEUM CORPORATION, MARALEX RESOURCES, INC.,

Appellees.

ORDER ALLOWING DISCOVERY

THIS MATTER came before the Court on February 16, 2001, for a Pre-Trial Conference. The case is set for jury trial on a docket beginning March 19, 2001. Discovery has been stayed pending disposition of the Rule 1-074 appeal from the decision of the Oil Conservation Commission, but in order to prepare for trial good cause exists to lift the stay and allow discovery to proceed.

IT IS THEREFORE ORDERED that the parties are authorized to proceed with pre-trial discovery and the Court will set an additional Pre-Trial Conference for approximately one week before the docket date in order to address matters pertaining to the trial proceeding.

The Honorable Art Encinias
District Judge

Submitted:

GALLEGOS LAW FIRM, P.C.

By _____
J.E. Gallegos
Michael J. Condon
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505

Attorneys for Plaintiffs

Approved:

NEW MEXICO OIL CONSERVATION COMMISSION

By _____
Stephen C. Ross
2040 South Pacheco
Santa Fe, New Mexico 87505

Noted:

MILLER, STRATVERT, TORGERSON
& SCHLENKER, P.A.

By _____
J. Scott Hall
150 Washington Avenue
Santa Fe New Mexico 87501

Attorneys for Defendants

MILLER, STRATVERT & TORGERSON, P.A.

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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

February 14, 2001

BY HAND-DELIVERY
The Honorable Art Encinias
District Judge, Division V
First Judicial District Court
Santa Fe County Judicial Complex
Santa Fe, New Mexico 87501

Re: Whiting Petroleum Corp. and Maralex Resources, Inc. vs. Pendragon Energy Partners, Inc., and J.K. Edwards Associates, Inc. No. D-0101-CV-98-01295

Dear Judge Encinias:

The pre-trial conference in the above matter is scheduled for this Friday, February 16th at 1:30 p.m. As you know, there has been little discovery or other activity in the case pending resolution of the associated administrative appeal in *Pendragon Energy Partners, Inc. et al. v. New Mexico Oil Conservation Commission,* (No. D-0117-CV-2000-1449). Correspondingly, it is anticipated that once the administrative appeal is resolved, the parties will approach the Court to establish a new pre-trial schedule to, among other things, allow for the commencement of discovery.

I have conferred with Mr. Gallegos, counsel for the plaintiffs, regarding the present posture of the case and we are both of the view that, under the circumstances, having our respective clients travel from Denver to attend the pre-trial conference would add little to the hearing. Accordingly, counsel for both plaintiffs and defendants request that their clients be excused from attendance at the hearing on Friday. Counsel for the New Mexico Oil Conservation Commission also concurs with this request.

Very truly yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall

JSH/ao

cc: J.E. Gallegos, Esq.
Steve Ross, Esq.

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