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Case No. 11755

Dec. 1997

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December 22, 1997

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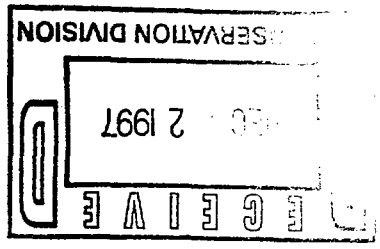


Mr. William J. LeMay, Chairman
Mr. William W. Weiss, Member
Ms. Jamie Bailey, Member
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

Re: ***NMOCD Case 11755***
Application of Fasken Oil and Ranch
for an unorthodox gas well location
Eddy County, New Mexico

Re: ***NMOCD Case 11723***
Application of Mewbourne Oil Company
for an unorthodox gas well location,
Eddy County, New Mexico

Dear Commissioners:

We are in receipt of a document which appears to be the order of the Commission in the referenced matter, but which has not yet been executed by all of the commissioners and is apparently not yet effective.

If the document which we have reviewed is, in fact, issued as the Commission's order in this matter, Fasken intends to file a motion for rehearing and a motion for stay raising matters which we believe constitute error on the part of the Commission.

The order purports to approve both the Fasken and Mewbourne locations, but directs that the Mewbourne location be afforded priority in drilling and further directs that approval of the Fasken permit will be withdrawn in the event that the Mewbourne well is timely commenced. (We would note in passing that it appears that Fasken will have to return to the Commission yet again if the Mewbourne location is *drilled* but results in a dry hole).

Our understanding of the fundamental function of the Commission is *to prevent waste and to protect correlative rights* (Section 70-2-12 NMSA 1979). In furtherance of that function, the Commission is granted a number of specific powers (Section 70-2-12 NMSA 1979). We acknowledge that the Commission has the authority to grant or deny applications for drilling permits based upon uniform and cognizable criteria. We believe, however, that the Commission errs if it attempts to adjudicate matters which are private contractual matters among the parties.

In the instant matter, the Commission has effectively determined that both the Fasken and Mewbourne locations are suitable (subject to the penalty imposed on the Mewbourne location), but has impermissably interposed its opinion as to which location should be drilled first, a matter which is clearly governed by a private contract among the parties and which is presently being litigated in Texas State District Court. A decision that Mewbourne's location shall be drilled first does nothing to either prevent drainage or protect correlative rights. It advances no interest of the State of New Mexico. It simply removes from the hands of the parties to a contract a matter *which is clearly within the subject matter of that contract.*

The order specifically states that "The Commission favors the Mewbourne proposal because in addition to the higher probability of success in the Middle Morrow, Mewbourne has the largest interest in the proration unit and was the moving force in proposing a well in the S/2 of Section 1."

Fasken did not present any evidence with respect to the relative interest of the parties, nor with respect to the relative dates of the applications for permits to drill because it felt then as it feels now that those matters are irrelevant to the issues to be decided by the Commission, are in fact not matters which should properly be brought before the Commission, and the consideration thereof is beyond the authority and jurisdiction of the Commission. Fasken was clear and consistent about this position at each step of the process.

Nevertheless, the Commission did, inappropriately we believe, consider these matters and in large measure based its decision upon these considerations. Unfortunately, the facts and assumptions upon which the Commission based its proposed order are not only irrelevant, they are incorrect.

First, Mewbourne owned no interest at all in the Unit (which was formed in 1970) until late 1996. Even now, Mewbourne owns only a little more than 12 percent of the unit. It has farmed in an additional 30.5 percent interest (which it will not earn until a well is drilled), for a total theoretical interest of about 42 percent. Fasken, on the other hand, owns 30.5 percent of the unit. Fasken's well proposal is supported and *preferred* by Matador Petroleum Company (17.56 percent) and Devon Energy Corporation (7.7 percent) and so a total of almost 56 percent of the owners of the unit *have expressly stated that they prefer the Fasken location.*

If the Commission's order is based upon an assumption that the majority owner prefers the Mewbourne location, even though that proposition is, we believe, irrelevant, the premise itself is wrong. It is absolutely clear that the order would contravene the wishes of a substantial majority in interest of the owners of the unit. In addition, the tabulation of ownership shown in paragraph 10 of the Commission's findings is simply wrong. Mewbourne owns 12.0996% of the unit and has a farmout agreement with respect to another 30.50362% interest.

Further, under the assumption that the issue was irrelevant to the proceeding (which we still believe to be the case), Fasken did not introduce testimony that would clearly demonstrate that the genesis of the Mewbourne proposal resulted from a series of actions by Mewbourne which constituted an intentional effort to acquire and increase its interest in the unit while concealing its activities from Fasken. What the Commission was not told was that Mewbourne contacted each substantial owner in the unit claiming to be the operator of the unit (which was, of course, manifestly untrue) and proposed the drilling of its well, not once, but twice to all (or essentially all) of the owners except Fasken, *which owned the largest interest in the unit and was the operator.*

Finally, upon Fasken learning from others of Mewbourne's actions, and in response to questions from Fasken, on January 21, 1997, Mewbourne proposed the well to Fasken. On January 28, 1997, Mewbourne, a nonoperating working interest owner which owned no more than about 12 percent of the unit, filed the subject application. Fasken, which had only had the proposal for a week could hardly have been expected to respond with its own application prior to the time of Mewbourne's filing. For the Commission to now reward Mewbourne's questionable behavior by granting its application because it was "the moving force in proposing the well.." is particularly egregious. Additionally,

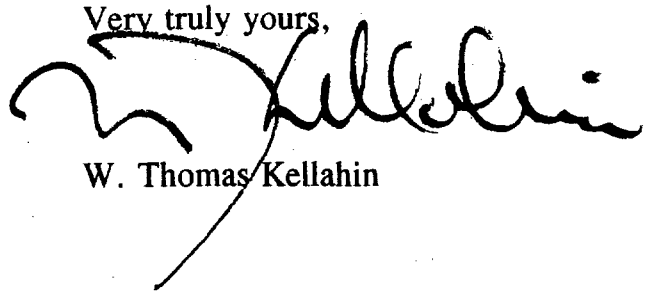
Mewbourne, by filing its application and proposing its location ignored its contractual obligation to first determine if all owners of the unit agreed or disagreed to the proposal.

Finally, paragraphs 14 and 15 of the order suggest that the Commission favors the Mewbourne proposal because of its "..higher probability of success in the Middle Morrow." This is perhaps the most troubling part of the Commission's order. The Commission proposes to ignore the desire of a sizable majority of the owners of the unit and interpose its business judgment on those owners. Which location has the higher probability of success is simply not an appropriate matter for consideration by the Commission in this type of case. The relative probability of success in a particular zone has absolutely no bearing on the role of the Commission in such a matter. The owners are bound by a contract with respect to the exercise of collective judgment of the owners as to matters concerning development of oil and gas in the unit. Their dispute resulting from differences of business judgment should be settled on the basis of those contract provisions and should neither be the subject of this proceeding nor determined by this Commission.

This is not analogous to the compulsory pooling situation, where there is no contract to guide the actions of the parties. In that situation, under the explicit language of the pooling statute, the Commission should adjudicate such interests. In the instant situation, there is contract among all of the parties and the Commission should not interpose its business judgment on the owners.

We sincerely hope that you will reconsider the findings and conclusions in this proposed order before it is formally issued.

Very truly yours,



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