

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

**IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION FOR THE PURPOSE OF
CONSIDERING:**

**APPLICATION OF NEARBURG EXPLORATION
COMPANY L.L.C. FOR TWO NON-STANDARD
GAS SPACING AND PRORATION UNITS,
LEA COUNTY, NEW MEXICO.**

CASE NO. 12622 (*de novo*)

**APPLICATION OF THE OIL CONSERVATION
DIVISION FOR AN ORDER CREATING,
RE-DESIGNATING AND EXTENDING THE
VERTICAL AND HORIZONTAL LIMITS
OF CERTAIN POOLS IN LEA COUNTY,
NEW MEXICO.**

**CASE NO. 12908-A (*severed and
re-opened*)**

ORDER NO. R-11768-A

ORDER ON PRE-HEARING MOTIONS OF REDROCK

BY THE DIVISION DIRECTOR:

This matter has come before the Division Director of the Oil Conservation Division on motions of Redrock Operating Ltd. Co. (hereinafter referred to as "Redrock") for an Order striking certain exhibits and limiting evidence during the hearing of this matter, and the consolidated response to the motions of Nearburg Exploration Company L.L.C. (hereinafter referred to as "Nearburg"), and the Division Director, on this 15th day of October 2002, having reviewed the motions, the response, the pre-hearing statements, and the proposed exhibits submitted by Nearburg,

FINDS:

1. Redrock has filed two motions in this matter. The first is a motion *in limine*, which seeks to exclude from the hearing of this matter any evidence concerning settlement, discovery, contracts, title or "Redrock's overriding royalty." The second, a motion to strike, objects to Nearburg's proposed Exhibit 2 (the chronology), Exhibit 12 (a title opinion), Exhibit 13 (a letter and title opinion), and Exhibit 23 (a letter and an assignment).

2. In both motions, Redrock expresses concern that admission of these items might unduly influence the Commission, might cause the Commission to be prejudiced

against Redrock, or misdirect the Commission's attention away from violations of rules and regulations of the Oil Conservation Division that Redrock alleges were made by Nearburg. Redrock also expresses concern that the Commission will be asked to interpret or construe contracts.

3. Nearburg provided a consolidated response to the motions. Nearburg argues that the motion to strike is improper in this context because the evidence sought to be stricken is not contained in a pleading, and does not conform to NMRA 2002, Rule 1-012(f). Nearburg argues that the motion *in limine* is vague and lacks specificity, and that Redrock's failure to specify which arguments and exhibits it seeks to exclude means the motion *in limine* must be dismissed. Nearburg argues that its chronology and its proposed Exhibit 12 (the title opinion) will not be offered to establish title, but instead to help explain how the present dispute arose. Nearburg argues that proposed Exhibits 13 and 23 are necessary to establish the relevant pool boundaries and the boundaries of the gas storage unit. Nearburg argues that its proposed Exhibit 23, pertaining to the Llano well, is relevant to the issue of the appropriate spacing unit. Nearburg argues that all of the objections lodged by Redrock go to the weight of the evidence, not its admissibility.

4. The New Mexico Rules of Evidence apply in hearings before the Commission, but the rules are relaxed where justice requires. Rule 1212, 19 NMAC 15.N.1212 (the New Mexico Rules of Evidence apply in hearings before the Commission, but "... such rules may be relaxed ... where ... the ends of justice will be better served."). Rule 1212 adopts a standard that is similar to that applied by the New Mexico Courts. See Ferguson-Steere Motor Co. v. State Corporation Commission, 314 P.2d 894, 63 N.M. 137 (1957). The rule has its limitations. See *e.g.* Bransford v. State Taxation and Revenue Department, 125 N.M. 285, 960 P.2d 827 (Ct.App. 1998)(*legal residuum* rule).

5. Evidentiary issues like those presented here do not arise often in disputes before the Commission. The Commission is well known as a body possessing special expertise, technical competence and specialized knowledge in matters relating to the regulation of oil and natural gas exploration and production. Santa Fe Exploration 114 N.M. at 114-115 ("[T]he resolution and interpretation of [conflicting evidence] requires expertise, technical competence, and specialized knowledge or engineering and geology as possessed by Commission members."). See also Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983)(the Oil Conservation Commission has experience, technical competence and specialized knowledge dealing with complex matters relating the regulation of exploration and production of oil and natural gas, and the sometimes arcane rules that govern such operations), Grace v. Oil Conservation Commission, 87 N.M. 205, 208, 531 P.2d 939 (1975)(same).

6. The Commission's special expertise, technical competence and specialized knowledge make it unlikely that it will be unfairly swayed or prejudiced and the Commission is quite capable of giving evidence its proper weight. And, for the same

reason, it is unlikely that objections to the admissibility of evidence based on Rule 11-403 of the Rules of Evidence on the grounds of prejudice or confusion will be well-taken.

7. Case No. 12622 concerns the application of Nearburg to create non-standard 160 acre spacing units comprising the northeast quarter and the southeast quarter of Section 34 (Township 21, Range 34 East, NMPM, Lea County, New Mexico). Case No. 12908-A is a nomenclature case originally filed by the Division in which it is proposed that the East Grama Ridge-Morrow Gas Pool be contracted to exclude the east half of Section 34, and the Grama Ridge-Morrow Gas Pool be extended to include the east half of that section. The relevance of Nearburg's proposed exhibits, other evidence and argument should be evaluated according to the goals of the proceeding as set forth in the applications.

8. Taking the specific objections of Redrock one by one, Redrock objects to the introduction of any evidence regarding settlement. The only such evidence that seems to be offered at present is contained in Nearburg's proposed Exhibit 2, the chronology. Nearburg offers the chronology to show how the events of the last three years led to the filing of the applications. See Nearburg's consolidated response, at 8. Nearburg also argues that the chronology is responsive to the issue raised by Redrock: "how did Nearburg get into this mess." See Redrock's Motion in Limine, at 2. Nearburg argues that evidence of settlement negotiations is admissible so long as the conduct or statements contained in those proceedings are not offered to establish liability.

9. Rule 11-408 of the Rules of Evidence, NMRA 2002, provides that "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount, is not admissible to prove liability of the claim or its amount." The Rule does not prohibit admission of such evidence for another purpose, and the mere fact that a settlement has occurred may be admissible. See Fahrbach v. Diamond Shamrock, Inc., 1996-NMSC-063, 122 N.M. 543, 928 P.2d 269. However, "matters regarding settlement are not usually relevant." Fahrbach, 122 N.M. at 548. Moreover, the rule "... generally counsels the trial court to exclude evidence of settlement unless the party wishing to introduce such evidence establishes a valid purpose." Examples of a valid purpose are provided in Fahrbach; the purpose described by Nearburg (to give context to these proceedings) is not one of them.

10. As noted, Rule 1212 of the rules and regulations of the Oil Conservation Division requires adherence to the New Mexico Rules of Evidence except where relaxation of the rules is necessary to serve "... the ends of justice" Here, the fact that settlement negotiations occurred, or their day-to-day progress, is not critical to the Commission's deliberations and relaxation of the Rules of Evidence in this instance is not required by the ends of justice. Accordingly, the chronology should be revised to exclude such references.

11. Redrock also objects to any evidence concerning "discovery." It is not clear what discovery Redrock is concerned with, and no specific objection is made to any particular exhibit or line of questioning or argument. Therefore, no specific ruling can issue on this point unless and until evidence is offered during the hearing of this matter. It should be noted that if the Commission is asked to resolve any remaining procedural matters during the hearing of this matter, it may need to receive evidence concerning "discovery" in order to render a proper ruling.

12. Redrock objects to evidence being received by the Commission concerning "contracts," "title," or "Redrock's overriding royalty." Redrock specifically objects to Nearburg's proposed Exhibit 12, a title opinion, Exhibit 13, a letter and a title opinion, and Exhibit 23, a letter and assignment. With respect to Redrock's overriding royalty, Redrock asserts that its existence has been admitted to by Nearburg, and also asserts that there is no issue whether the royalty interest exists as described, citing to the record of the Division case for this assertion.

13. It appears, on review of Nearburg's pre-hearing statement and Exhibits 12, 13 and 23, that this evidence (denoted as "land testimony" by Nearburg) presents a history of Section 34 and of the two pools at issue here, and is apparently being offered by Nearburg to explain how this controversy arose. This kind of contextual evidence is always helpful to the Commission.

14. However, Exhibit 12, a title opinion issued to Roca Resources Company, Inc., appears to raise hearsay concerns. But its admissibility cannot be assessed until a foundation is presented during the hearing. Exhibit 13 appears to be a document prepared by Redrock and may therefore be admissible under the hearsay exception in NMRA 2002, Rule 11-801(D)(2)(a) (admission of party opponent). Once again, its admissibility cannot be assessed until a foundation is presented during the hearing. Exhibit 23 consists of a letter that may constitute hearsay, and an assignment that appears not to be hearsay. See Rule 11-803(N)(records of documents affecting an interest in property) or Rule 11-803(O)(statements in documents affecting an interest in property). No ruling can be made on the documents that comprise Exhibit 23 until a foundation is laid during the hearing.

15. Redrock also expresses a broader concern that the Commission will be invited to decide "contractual" issues between the parties. Nearburg, in its consolidated response to the motion *in limine* and motion to strike, states that its Exhibit 13 "... will not be offered for the purpose of establishing title or arguing title issues." See Nearburg's Consolidated Response, at 8. In the remainder of its response and in its amended pre-hearing statement, Nearburg does not raise any contractual or title issues, and its pledge not to raise such issues on page 8 of the consolidated response appears to be a broad one. Therefore, no protective order is necessary at this time; if such issues arise during the hearing of this matter, Redrock should make objection at the time evidence is offered.

16. Redrock also lodges an objection to the chronology as a whole (Nearburg's proposed exhibit 2) on the grounds that the exhibit is argumentative, contains hearsay, contains extraneous matters and contains matters beyond the jurisdiction of the Commission.

17. The New Mexico Rules of Evidence permit admission of a summary of "... voluminous writings ... which cannot be conveniently be examined in court ..." NMRA 202, Rule 11-1006. An adequate foundation for introduction of a summary under Rule 1006 can be established by a witness who either prepared the summary or had a supervisory role and knowledge of how it was prepared. Cafeteria Operators v. Coronado - Santa Fe Associates, 1998-NMCA-005, 124 N.M. 440, 952 P.2d 435. Nearburg appears to view the chronology as a summary, admissible under Rule 1006. A foundation will have to be established during the hearing for admission under Rule 1006, and a ruling on this point will have to await the hearing.

18. However, proposed Nearburg Exhibit 2 appears to be a hybrid; while it is partly a summary of documents, it is also partly a chronology of events. Review of the document discloses that documents representing each entry are not going to be in the record. The chronology is probably best characterized as a demonstrative aid to Nearburg's witnesses rather than as a summary. It may be admitted as a demonstrative aid or, if the proper foundation is laid during the hearing, as a summary pursuant to Rule 11-1006. It should be noted that documents similar to Nearburg's chronology (Redrock offers a similar document) are routinely accepted by the Oil Conservation Division and the Commission and have been helpful to provide necessary background and orientation.

19. Redrock objects to "extraneous matters" in the chronology, and this objection seems to be one of relevance. Redrock has not identified which items are "extraneous." Therefore, no ruling can be made on this point. Redrock also objects to inclusion in the chronology of matters that are "beyond the jurisdiction" of the Commission. Once again, no specific items are referred to. This may be an argument related to Redrock's concerns about "contractual" or "title" issues discussed earlier, in which Redrock's concerns have been addressed. Reviewing the chronology, it appears that any given item, such as the offer of the State Land Office to lease acreage on December 21, 1999, may relate to a matter that is "beyond the jurisdiction" of the Commission in terms of regulatory authority, but that it is nevertheless relevant and admissible to provide background and context for the present controversy. No ruling on this point can be made due to the lack of specificity.

IT IS THEREFORE ORDERED THAT:

1. Redrock's motions concerning the chronology (Nearburg's proposed Exhibit 2) are granted in-part and denied in-part. Redrock's objection to the document in its entirety is denied subject to a proper foundation being laid by Nearburg during the hearing of this matter, either as a summary or as a demonstrative aid. Redrock's objection to evidence of

settlement negotiations contained within Exhibit 2 is granted; Nearburg shall remove all such references and resubmit the document. Redrock's objections to material within Exhibit 2 concerning "extraneous matters" and to "matters beyond the jurisdiction of the Commission" are denied for lack of specificity.

2. Redrock's motions concerning the title opinion (Nearburg's proposed Exhibit 12) are denied subject to a proper foundation being laid by Nearburg during the hearing.

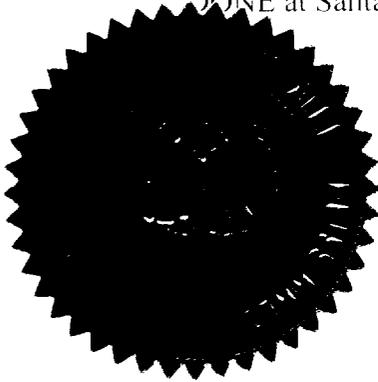
3. Redrock's motions concerning the letter and title opinion (Nearburg's proposed Exhibit 13) are denied subject to a proper foundation being laid by Nearburg during the hearing.

4. Redrock's motions concerning the letter and assignment (Nearburg's proposed Exhibit 23) are denied subject to a proper foundation being laid by Nearburg during the hearing.

5. Redrock's motion *in limine* concerning contracts, title and Redrock's overriding royalty are denied. If Nearburg raises these issues for the purpose of obtaining a Commission ruling on such matters (rather than for the purpose of providing context, as they are presently offered), Redrock may raise an appropriate objection.

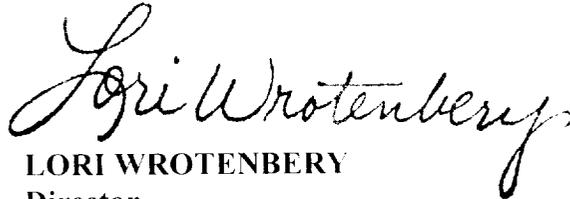
6. A ruling on Redrock's motion *in limine* concerning "discovery" is deferred to the hearing upon appropriate objection.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.



S E A L

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION



LORI WROTENBERY
Director