

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

**IN THE MATTER OF THE APPLICATION OF
RICHARDSON OPERATING COMPANY TO
ESTABLISH A SPECIAL "INFILL WELL" AREA
WITHIN THE BASIN-FRUITLAND COAL GAS
POOL AS PROVIDED BY RULE 4
OF THE SPECIAL RULES FOR THIS POOL,
SAN JUAN COUNTY, NEW MEXICO.**

Case No. 12734 (De Novo)

**RESPONSE OF SAN JUAN COAL COMPANY
TO RICHARDSON OPERATING COMPANY'S
MOTION TO DISMISS**

In its Motion to Dismiss, filed with the Commission on August 26, 2002 ("Motion"), Richardson Operating Company ("Richardson") reargues that San Juan Coal Company ("SJCC") should be excluded from participation in the de novo hearing on Richardson's September 11, 2001 Application for creation of a special infill well area ("Application"). The grounds for this Motion have been previously rejected by the Oil Conservation Division.¹ They should be rejected again. As set out in the first paragraph of Richardson's Motion, Richardson argues:

1. The Commission lacks jurisdiction "over Federal or State coal;"
2. SJCC lacks standing; and
3. SJCC's coal rights are junior to Richardson's oil and gas lease rights.

This Response addresses these three points in turn. Then, it corrects certain misstatements in the Motion.

¹ Order of the Division No. R-11755, dated June 6, 2002.

I. THE COMMISSION HAS JURISDICTION TO HEAR DE NOVO SJCC'S OPPOSITION TO RICHARDSON'S APPLICATION.

Richardson argues the Commission lacks jurisdiction over State and Federal coal. For at least four reasons, Richardson's claim is groundless. First, under the Oil and Gas Act, "prevention of waste," includes consideration of resources other than oil and gas (see Section I.A of this Response). Second, both Richardson's Application and the Oil and Gas Act recognize that SJCC's rights and interests are part of OCD's and OCC's jurisdictional charge (see Section I.B of this Response). Third, provisions of the Oil and Gas Act defining Secretarial review confirm the breadth of OCD and OCC jurisdiction (see Section 1.C of this Response). Fourth, the OCD has correctly rejected the jurisdictional arguments Richardson makes (see Section 1.D of this Response). These four reasons are presented in greater detail below.

A. Under the Oil and Gas Act, "Prevention of Waste" Includes Consideration of Resources other Than Oil and Gas.

Section 70-2-2 of the New Mexico Statutes Annotated provides simply that:

The production or handling of crude petroleum oil or natural gas of any type or in any form...in such manner or under such conditions or in such amounts as to constitute or result in **waste** is each hereby prohibited.

(Emphasis added.) "Waste" is not qualified or limited in any way by this statute, and a plain reading of the language does not limit "waste" to the waste of natural gas or crude oil. The relationship between "waste" and those commodities in Section 70-2-2 is simply that "production...of natural gas...as to constitute or result in waste [as defined by the Oil and Gas Act] is...hereby prohibited." The question, of course, then becomes: What does "waste" mean under the Oil and Gas Act.

The term "waste" is defined in the next section of the Act: "As used in this act the term, 'waste,' **in addition to its ordinary meaning**, shall include: [a six item list]." NMSA 1978

Section 70-2-3 (emphasis added). The phrase, “in addition to its ordinary meaning,” makes clear that the six items listed in Section 70-2-3 are not exclusive. Webster’s Third New International Dictionary (1981 Ed.) provides the “ordinary meaning” of waste, defining “waste” to include: “a disused part of a coal mine,” “useless or profitless consumption or expenditure,” and “loss without equivalent gain.” Black’s Law Dictionary (7th ed. 1999) defines “waste” to include “permanent harm to real property committed by a tenant.” The definitions quoted clearly fit the present situation. The Oil and Gas Act expressly incorporates the “ordinary meaning” of waste; by that definition, Richardson’s Application will result in the waste of SJCC’s coal reserves.²

In the past, the agencies and OCD practitioners have focused on waste of oil or gas or of potash. For example, Richardson points out that the Oil and Gas Act contains a specific statutory mandate “concerning the prevention of waste of potash in addition to the portion [sic] of waste of oil and gas” [sic] (Motion, Paragraph 14). Although issues concerning waste have typically arisen in the context of these particular minerals, the Oil and Gas Act does not preclude application of the doctrine of waste to other minerals such as coal. NMSA 1978 Section 70-2-11.A empowers (and requires) the OCD to “prevent waste prohibited by this act...,” and, the jurisdiction of the OCC is “concurrent.” See NMSA 1978 Section 70-2.11.B. Thus, OCD and OCC have jurisdiction over issues relating to the waste of natural resources, including coal, arising from the production of natural gas. Such waste is a fundamental issue in this proceeding.

² Even Richardson’s argument in its Motion to Dismiss, served August 26, 2002, seems to recognize that the “ordinary meaning” of waste is not limited to oil or gas. Paragraphs 16 and 25 of Richardson’s Motion discusses “waste of hydrocarbons” in contrast to “oil and gas correlative rights.” “Hydrocarbon” is defined as “any of a large class of organic compounds containing only carbon and hydrogen...and occurring in...petroleum, natural gas, coal, and bitumens.” *A Dictionary of Mining, Mineral, and Related Terms*, 562 (U.S. Dept. of Interior 1968); *Webster’s Third New International Dictionary*, 1108 (1981).

If the legislature had intended to limit the definition of waste to oil and gas, it would have so stated. For example, the Oil and Gas Act's definition of "correlative rights" in NMSA 1978 Section 70-2-33.H is specific to oil and gas and stands in stark contrast to the broader definition of "waste" in NMSA 1978 Section 70-2-3. Specifically, the definition of "correlative rights" is limited to the rights of entities holding a "just and equitable share of the oil and gas" in a pool, but the legislature chose not to limit the definition of waste in this manner. The legislature has drawn a purposeful distinction that the OCC should apply.

A definition of the term "waste" that includes waste of coal resources is also consistent with other provisions of the Oil and Gas Act, including NMSA 1978 Section 70-2-26. As discussed in greater detail in Point I.C below, this Section directs that in reviewing a decision of the OCC the Secretary must have "due regard" for the conservation of the state's oil, gas and **mineral** resources...." (Emphasis added.) Coal is one of the state's important mineral resources.

B. Both Richardson's Application and the Oil and Gas Act Recognize that SJCC's Rights and Interests Are Part of OCD's and OCC's Jurisdictional Charge.

Richardson's Application expressly puts at issue the conflict between its operations and SJCC's coal mining operations. ("San Juan Coal Company has a mining plan which will unreasonably interfere with Richardson's ability and right to produce coal bed methane gas..., " Paragraph 14; and, "In order to minimize the adverse consequences of San Juan Coal Company's mining plan, Richardson requests..." and "...gas wasted by the mining operations of San Juan Coal Company," Paragraph 15.) Having expressly raised these issues in its Application, Richardson cannot now credibly question the OCC's authority to consider them.

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Beyond Richardson's own framing of the issues, the Oil and Gas Act confers authority on OCD (and OCC, through its concurrent jurisdiction) to consider the matters SJCC raises. The OCD and OCC are authorized to make orders to "prevent fires," and to "require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or property." NMSA 1978 Section 70-2-12.B(5), (7). As to fire prevention, SJCC presented evidence to the OCD that the proposed in-fill drilling, related hydraulic fracturing activity proposed by Richardson, dewatering, and coal bed methane production increase the risk of spontaneous combustion in the coal formation, thereby endangering the lives of SJCC's underground mine employees and risking the cessation of both mining and coal bed methane production. Order No. R-11775, Paragraphs 19 and 22. As to protection of neighboring leases or property, Richardson's hydraulic fracturing serves to degrade the stability of the roof in the underground mine, thereby increasing the risk of cave-in in the mine workings and attendant damage to the coal lease and property. *Id.* In this regard, SJCC notes that the Act does not speak here in terms of protecting "correlative rights," but rather speaks to the broader subject of preventing injury to "neighboring leases or property." NMSA 1978 Section 70-2-12.B(7). The legislature's purposeful choice of the broader language is telling, and indicates that the jurisdiction and mandate of OCD and OCC includes consideration of SJCC's rights and interests as "neighboring leases or property."

C. Secretarial Review Provisions Of The Oil And Gas Act Confirm the Breadth of OCD and OCC Jurisdiction.

The proper interpretation of the statutory provisions discussed above is further informed by NMSA 1978 Section 70-2-26. This Section of the Oil and Gas Act provides for review by the Secretary of Energy, Minerals and Natural Resources, by way of a public hearing, "to determine whether an order or decision issued by the Commission contravenes the public interest." In that

Section, the legislature charges the Secretary to enter an order “having due regard for the conservation of the state’s oil, gas, **and mineral resources...**” *Id.* (emphasis added). Thus, in reviewing a decision of OCC, the Secretary is charged to consider not just oil and gas resources, but the public interest and also mineral resources (beyond just potash, a resource specifically identified elsewhere). If in such later stage of the proceeding, the Secretary must consider the public interest and exercise “due regard” for mineral resources such as coal, it would be bad public policy for the OCC to turn a blind eye in the first instance to the public interest or mineral interests other than oil and gas or potash. Such a limitation on authority of OCC would be a waste of administrative resources and could encourage reversal by the Secretary on appeal because the standards she applies would be different than those applied below. Such limitation would also make less meaningful the evidence presented to and the deliberations conducted by the OCC.

Given the legislature’s chosen structure and language of the Oil and Gas Act, the OCC, together with the Secretary, have jurisdiction and authority over the positions, evidence and argument that SJCC has advanced and will advance in this proceeding. First, coal is a mineral resource and the OCC should prevent actions by Richardson such as increasing well density that would be contrary to conservation and efficient production of coal. Second, the State’s share of royalty for coal production will be likely over \$200 million greater than the royalty from Richardson’s gas wells. The Commission should consider whether it is in the public interest to favor the less valuable resource at the expense of the more valuable coal.

D. Richardson’s Arguments Have Been Rejected by OCD.

Before the OCD, Richardson advanced nearly identical arguments that SJCC’s protest was beyond the jurisdiction of the OCD and that SJCC lacked standing. (See Memorandum

Brief of SJCC Concerning Jurisdiction, Standing and Response to Richardson's Motion to Dismiss, filed in OCD on December 13, 2001, p. 1.) It is somewhat surprising that Richardson would seek to replew this fallow field given that: (a) Richardson's counsel failed to raise it when given the opportunity in prehearing conference of August 19, 2002, and (b) the OCC's jurisdiction is concurrent with that of the OCD. The OCD allowed 1½ days of hearing and rejected Richardson's arguments that OCD has no jurisdiction and that SJCC has no standing. Order No. R-11755, Finding Paragraph 1. It would be inappropriate at this juncture to reverse course and find that the OCC lacks jurisdiction or that SJCC lacks standing. The OCC should reject once again these arguments of Richardson.

II. SJCC HAS STANDING

SJCC's interests in this proceeding are significant. First, the Application itself puts SJCC's interests at issue; Richardson claims that its Application is necessitated by SJCC's coal mining plans and activities (Paragraphs 14 and 15). Second, Richardson's Application, if granted, could have a dramatic effect on SJCC's ability to mine coal from federal and state lands. Clearly, SJCC risks significant economic harm if the OCC grants the Application. Third, as demonstrated above, that harm lies within the scope of interests that the Oil and Gas Act was designed to protect against. Fourth, Rule 4(b) of the Special Rules and Regulations of the Basin-Fruitland Coal Gas Pool states an "interested party may appear and participate." Fifth, SJCC is an "interested party" under OCD Rule 1212.A, which provides: "Full opportunity shall be afforded all interested parties at a hearing before the Commissioner or a Division Examiner to present evidence and to cross-examine witnesses." Consistently, the Oil and Gas Act provides guidance concerning public hearings before OCD: "at any such hearing any person having an interest in the subject matter of the hearing shall be entitled to be heard." NMSA 1978 Section

70-2-23. Under any standard, SJCC has standing in this proceeding. See New Mexico Right to Choose/NARAL v. Johnson, 126 N.M. 788, 794, 975 P.2d 841, 847 (1998).

SJCC requests that OCC scrutinize Richardson's "standing" arguments and gauge its credibility accordingly. After representing to the OCC in Paragraph 7 of the Motion that "Richardson's Application is an attempt to accommodate SJCC,"³ the Motion proceeds to argue that SJCC should not be allowed to express its views about this brand of "accommodation." In Paragraph 18, Richardson characterizes SJCC's participation in this public proceeding as "interfering with Richardson's production of oil and gas." While Richardson may characterize as "interference" SJCC's response to an Application that expressly seeks, at the expense of coal operations, to expand greatly Richardson's existing right, SJCC's participation is allowed. In Paragraph 25, Richardson actually suggests that Rule 4 would preclude one who is not an oil and gas operator or interest holder from complaining about the proposed infill, notwithstanding the fact that Rule 4(b) states an "interested party may appear and participate." In Paragraph 16, an argument of the same ilk, Richardson suggests that the price of admission to this proceeding is ownership of an "oil and gas interest." Richardson's position finds no support whatsoever in the Oil and Gas Act or elsewhere, nor is any support cited. Richardson's position is particularly remarkable in light of the fact that Richardson's Application expressly puts SJCC's mining plan and operations at issue (Application, Paragraphs 14-15).

³ In Paragraph 3 of the Motion, Richardson states that its application "is an attempt to accommodate SJCC." It is not. While SJCC previously believed that accelerating coal bed methane development might be beneficial to subsequent coal mining, it determined in the summer of 2001 that accelerating coal bed methane production would create significant safety risks and could result in the bypassing of significant coal reserves as a result. SJCC advised Richardson of the health and safety risks and of its position that coal bed methane production should not proceed before mining well in advance of September 11, 2001, the day Richardson chose to file its Application. Richardson's strategy in filing the Application is hardly an accommodation to SJCC.

By reference to Section 70-2-11 of the Oil and Gas Act, Richardson asks that consideration of Richardson's Application be limited to issues contained in that provision of the Oil and Gas Act. Section 70-2-11 confirms rather than precludes SJCC's right to participate. That section certainly articulates some of the factors the OCD should consider, such as its authority to prevent fires and require that wells be drilled, operated and produced in a manner so as to prevent injury to neighboring leases or properties. Those issues are presented here. Moreover, contrary to Richardson's statement that the OCD's Application should be "limited" to these matters in NMSA 1978 Section 70-2-11, the OCD should also prevent waste of a coal resource (NMSA 1978 Sections 70-2-2 and 3), and it should avoid a decision that contravenes the public interest or does not have due regard for mineral resources, of which coal is one (pursuant to NMSA 1978 Section 70-2-26).

III. THE SENIORITY OF SJCC'S COAL LEASE IS NOT AT ISSUE HERE

Richardson asserts that it is SJCC that seeks to reargue in this proceeding issues that were pending before BLM. (Motion to Dismiss, Paragraph 13). Ironically, it is Richardson who proceeds to devote much of its Motion to Dismiss to arguing issues that were pending before the BLM.⁴ In contrast, SJCC's case focuses on issues that are within the authority of the OCD to decide. Specifically, SJCC seeks to prevent the waste of its coal resource (NMSA 1978 Sections 70-2-2 and 3); to prevent fires (NMSA 1978 Section 70-2-12.B(5)); to require wells be drilled, operated and produced (or not) in such a manner as to prevent injury to neighboring leases or properties (NMSA 1978 Section 70-2-12.B(7)); and to achieve a resolution that does not

⁴ To the extent Richardson seeks a determination that its lease rights are superior to SJCC's, that question raises matters as to which the United States and the State of New Mexico Commission of Public Lands, as lessors, have a direct interest. Such issues cannot be addressed in their absence.

“contravene the public interest” and has “due regard” for conservation of the state’s “mineral resources” (NMSA 1978 Section 70-2-26).

Although the BLM has permitted the drilling of four wells, that decision is not precedent here. The issues before BLM are different than those presented here. For example, the BLM will not decide whether to allow infill spacing. Richardson does not now have the right to drill infill wells. Only OCD can confer upon Richardson the right to make application with the BLM to almost double its rights to complete wells in the coal seam within its proposed infill area.⁵ Not only would conferral of this right create waste, be contrary to the public interest, risk fire, and not protect neighboring coal leases and property, it would also give Richardson potential development opportunities that it currently does not have. Here, in response to Richardson’s request for rights it does not now possess, OCC must consider compelling competing concerns raised by SJCC and recognized as important by the Oil and Gas Act.

IV. SJCC CORRECTS CERTAIN OF RICHARDSON’S MISSTATEMENTS

Several misstatements of Richardson should be corrected. These are identified and corrected below:

A. Contrary to Richardson’s statement in Paragraph 9 of its Motion, SJCC does not agree that gas should be recovered and produced prior to coal mining.

B. In Paragraph 12 of its Motion, Richardson states that SJCC “conveniently forgets” to tell the Commission that except for “Section 36 and about 20 acres in Section 36” Richardson’s acreage is Federal. In that SJCC has not had occasion to file a pleading with the Commission until this one, it is difficult to imagine how it could be said that SJCC has “forgotten” (whether “conveniently” or otherwise) to tell the Commission anything.

⁵ Of course, BLM still retain control over any Applications for Permit to Drill that Richardson may pursue for the infill wells, and it may well deny such applications by Richardson.

Inaccuracies in Richardson's description aside, the federal land status of Richardson's acreage is well-documented in the record before the OCD.

C. Richardson begins its conclusion by stating that:

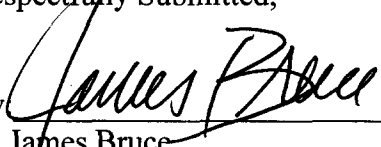
SJCC seeks to protect its coal "despite its agreement to sake [sic] coal leases under which both the State of [sic] BLM has made gas recovery first prior [sic] over coal production.

Richardson's conclusion is confusing. Nevertheless, it is important to clarify and recognize that neither the BLM nor the State of New Mexico has given a higher priority to the development of gas than the development of coal.

V. **CONCLUSION**

The OCC and the Secretary have jurisdiction over this matter, including the matters SJCC presents in opposition to the Application. SJCC has standing to participate in these proceedings. The OCC should accept jurisdiction, deny Richardson's Motion to Dismiss, and proceed with the hearing presently scheduled for October 29, 30, and 31, 2002.

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CERTIFICATE OF SERVICE

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