

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:)

THE OIL CONSERVATION COMMISSION)
WILL DELIBERATE ON THE APPLICATION)
FOR REHEARING OF CASE 13,589, THE)
APPLICATION OF DUKE ENERGY FIELD)
SERVICES, LP, FOR APPROVAL OF AN)
ACID GAS INJECTION WELL, LEA COUNTY,)
NEW MEXICO)

CASE NO. 13,589

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER
WILLIAM C. OLSON, COMMISSIONER

June 5th, 2006

Santa Fe, New Mexico

2006 JUN 12 PM 1 06

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Monday, June 5th, 2006, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

STEVEN T. BRENNER, CCR
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I N D E X

June 5th, 2006
Commission Hearing
CASE NO. 13,589

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REPORTER'S CERTIFICATE

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A P P E A R A N C E S

FOR THE COMMISSION:

DAVID K. BROOKS, JR.
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

* * *

1 WHEREUPON, the following proceedings were had at
2 2:02 p.m.:

3 CHAIRMAN FESMIRE: The next case we're going to
4 take up is Cause Number 13,589, the Oil Conservation
5 Commission, it's an application for re-hearing of Case
6 Number 13,589, the Application of Duke Energy Field
7 Services, L.P., for approval of an acid gas injection well
8 in Lea County, New Mexico.

9 Mr. Brooks, you're acting as the attorney for the
10 Commission in this case. Would you bring us up to speed on
11 where we are procedurally?

12 MR. BROOKS: That is correct Mr. Chairman.

13 Mr. Chairman, honorable Commissioners, this case
14 was -- Case Number 13,589 was heard by the Commission at a
15 special hearing on March the 13th, 2006. The Commission
16 made a decision at a special meeting for deliberation on
17 March 20, 2006. A final order was entered by the
18 Commission on May the 6th, 2006.

19 Between the time that the Commission voted to
20 make its decision on March the 20th and the time that the
21 Commission approved and signed the final order on May the
22 6th, the Respondents filed a second motion to dismiss.

23 Now I do not have the file in front of me, and
24 I'm not sure of the chronology. I believe the intervention
25 was filed on May the 12th, which would have been actually

1 after the date on which the Commission entered its final
2 order. At that time, several parties who had not been
3 parties to the case before filed an intervention.

4 The case, you will recall, was an application to
5 inject -- for an injection permit under Rule 701, to inject
6 acid gas at a well located in Lea County. The Respondents
7 who appeared at the hearing were a surface lessee of the
8 State Land Office, the land in question where the well was
9 to be located with both surface and minerals belonging to
10 the State of New Mexico, State trust land. The Respondent
11 was -- there were two Respondents. One was a surface
12 lessee at the site, the other was an owner of surface in
13 the immediate vicinity.

14 Also, another owner or occupant of some land in
15 the vicinity also appeared -- that is, the electrical
16 generating facility that was there appeared but had not
17 filed a prehearing statement.

18 The people who had intervened occupied a
19 different position. The Intervenor who filed an
20 intervention subsequent to the entry of the final order are
21 owners of mineral interests in a tract adjacent to the
22 tract on which the proposed injection well will be located.
23 The proposed injection well -- I forget the numbers, and I
24 don't have all that data in front of me, but the proposed
25 injection well is to be in the south half of the section.

1 The owners of -- The Intervenor claim to be
2 owners of mineral interests in the north half of that same
3 section, so they are owners of adjacent land. They claim
4 to be owners of unleased mineral interests in that land.

5 Subsequent to the intervention, the Respondents
6 and the Intervenor filed a joint motion to -- for re-
7 hearing. It's a timely motion for re-hearing.

8 The Commission's time to grant that motion, I
9 believe, expires on Thursday of this week, which would be
10 June the 8th. For that reason I made the suggestion that
11 this matter -- because I felt that it raised some legal
12 issues that the Commission ought to consider, I made a
13 suggest that the Commission put it on the docket for
14 discussion at this meeting.

15 So at this time I would ask if the Commission
16 wishes to pursue that discussion in open session or in
17 executive session.

18 CHAIRMAN FESMIRE: Is there any preference to the
19 Commissioners?

20 Commissioner Olson? Given Commissioners' oft-
21 state, but not-said-today, preference to do it in open
22 session, I would think, unless there's some objection from
23 the Commissioners, I'd like to do it in open session.

24 MR. BROOKS: Very well, if that is the sense of
25 the Commission. I have furnished the Commission a

1 memorandum dated May 31, 2006, stating my thoughts on the
2 legal issues. Does every member of the Commission have a
3 copy of that memorandum?

4 CHAIRMAN FESMIRE: Yes.

5 COMMISSIONER OLSON: Yes.

6 MR. BROOKS: Okay. Counsel for the Applicant is
7 present. Does the Commission -- This is a legal advice
8 memorandum, and therefore it's not a public document. Does
9 the Commission wish to share this memorandum with counsel
10 or not?

11 CHAIRMAN FESMIRE: I'd rather we do things as
12 open as possible. I see no reason not to.

13 MR. BROOKS: Is that the sense of the Commission?
14 Very well. Mr. Carr?

15 COMMISSIONER OLSON: So Mr. Hall isn't going to
16 be here today?

17 MR. BROOKS: Mr. Hall indicated that he planned
18 to be on vacation today. He asked me if his presence here
19 was necessary, and I told him that I thought it was not,
20 inasmuch as we were not going to receive any evidence or
21 argument in this session.

22 CHAIRMAN FESMIRE: Okay. Basically there are two
23 issues, then: Whether or not the notice was sufficient to
24 the Intervenors, and whether or not the OCD's suggestion in
25 Mr. Jones's letter was an order.

1 MR. BROOKS: That is my view of the subject, Mr.
2 Chairman.

3 CHAIRMAN FESMIRE: You have some -- Well, let's
4 take it first, whether or not notice was insufficient to
5 the Intervenors.

6 MR. BROOKS: Okay. My thinking on that was that
7 under the Rule which was in effect at the time this case
8 was filed, the Rule required notice only to offsetting
9 operators and to the owner of the surface. There is no
10 question that offsetting operators and the owner of the
11 surface were notified. It does not appear that there was
12 any operator of the tract in which Intervenors claim an
13 interest. I believe that the Applicant complied with the
14 notice rule in effect at the time.

15 The only issue, then, in my view, is whether or
16 not -- Well, there's also an issue of statutory notice.
17 The Oil and Gas Act is very unspecific; it merely provides
18 that before the Commission enters an order or makes a rule,
19 it must give reasonable notice. My inclination would be to
20 think that Rule 701, as it existed at that time -- of
21 course, it's since been changed, but as it existed at that
22 time, had been in effect for a considerable number of
23 years, and it would be my belief that the better argument
24 would be that it was an authoritative construction of the
25 Statute by the Commission, which should be entitled to

1 judicial deference, and therefore I'm inclined to believe
2 that the notice was sufficient under the Statute.

3 The only other question is the question -- in my
4 opinion, is the question that under the *Uhden* case, whether
5 the notice was sufficient to accord with the Constitutional
6 requirements of due process.

7 Of course, as you know, one requisite of due
8 process is that a person have either a life, liberty or
9 property interest. And I think we would concede here that
10 the only relevant one would be the property interest.
11 Undoubtedly the Intervenor have a property interest in the
12 minerals that they own, assuming they own them. Of course,
13 there's been no evidence on that subject, we only have the
14 recitations in the pleadings, but that is the situation.
15 Thus, presumably they have a property interest.

16 And if the injected substances migrated into
17 their -- under their lands, could affect, theoretically, at
18 least, the amount of their mineral interest, it's true that
19 the evidence in this case strongly indicates that it would
20 not, but of course they were not given -- the Intervenor
21 were not parties, and if they did not receive notice were
22 not given the opportunity to present such evidence as they
23 might have wanted to present.

24 I think the question is whether the property
25 interest they have is a sufficiently direct interest to

1 require them to have been notified under the concepts of
2 Constitutional due process. I don't believe that there is
3 sufficient authority for me -- for -- basis for me to give
4 the Commission an opinion on how a court would resolve that
5 issue.

6 My understanding is that the Intervenor's do not
7 themselves claim an interest in the surface of any tract,
8 and therefore that they would not be in a position where
9 they would be entitled to offer any further evidence on the
10 surface issues that were considered at the previous
11 hearing. Therefore if the Commission were to have a re-
12 hearing to cure any Constitutional notice defect there
13 might be, that the issues at that prehearing could properly
14 be limited to the issue of whether or not granting of the
15 Application would impair the correlative rights of the
16 Intervenor's in regard to any mineral interest that they
17 own.

18 That is my summary of my thinking on the subject.

19 CHAIRMAN FESMIRE: Okay. So we could -- If we
20 fail to respond to their motion, they make a Constitutional
21 -- you think the only valid claim they can make would be a
22 Constitutional claim that they didn't get notice and that
23 they have a property interest at risk, even though the
24 record clearly indicates from the testimony of the
25 witnesses that there is no producible hydrocarbons in the

1 zone in which is inject -- is seeking to inject this waste.

2 However, Constitutional error is never harmless.

3 Can we hold a hearing for the limited purpose of allowing
4 them the opportunity to present evidence on that?

5 MR. BROOKS: I believe that we could hold such a
6 hearing. I believe in order to be sure that we were curing
7 a Constitutional notice objection, we should, if we did
8 that, direct Duke to have their geologic witness available
9 at that hearing for purposes of further cross-examination.
10 However, I see no reason why we would have to require Duke
11 to re-present their case.

12 CHAIRMAN FESMIRE: Okay. So what we've got to do
13 is allow these people the opportunity to cross-examine
14 Duke's witness?

15 MR. BROOKS: Yes, I think that would be a part of
16 their Constitutional due process right, if they haven't,
17 and as -- understand again, I do not have a firmly fixed
18 opinion as to whether they have such a right or do not have
19 such a right. I do not believe that authority is
20 sufficiently specific for me to give such an opinion.

21 CHAIRMAN FESMIRE: Okay, we don't have time to
22 get this on the docket for the July -- for the June
23 meeting, right?

24 MR. BROOKS: No, it would require 20 days'
25 notice --

1 CHAIRMAN FESMIRE: So --

2 MR. BROOKS: -- unless we called it an emergency.
3 Our emergency powers are very unspecific, with no
4 definition of the term "emergency". And of course that
5 issue is also in litigation, as you know.

6 CHAIRMAN FESMIRE: Right.

7 Commissioners, suggestions?

8 COMMISSIONER OLSON: Well, maybe -- wasn't --
9 Didn't he have a second option as well, maybe he could just
10 discuss his second option of --

11 MR. BROOKS: Yes, there was another order. I
12 submitted two possible orders to the Commission for their
13 consideration. One grants the motion for re-hearing, based
14 on the Constitutional issue that I described.

15 The other one denies the motion for re-hearing
16 but clarifies certain language in one of our findings.

17 CHAIRMAN FESMIRE: That's on the second issue.

18 MR. BROOKS: That -- It doesn't change the notice
19 issue. I mean, the notice issue is still there, if it is
20 there. It's still there, even if we issued a clarifying
21 order.

22 The purpose of the clarifying order would be to
23 make clear that the finding that the Commission made that
24 it did not have to address the possibility of migration of
25 fluids under other land related not to prevention of waste

1 and protection of correlative rights issues, but solely to
2 the issue of technical trespass, which I believe was the
3 Commission's direct intention with that finding, and the
4 motion for re-hearing indicated that the Respondents had
5 misconstrued that finding to a certain extent, I think.

6 I believe that the finding itself is clear and
7 probably doesn't really need any clarification, but because
8 of the way in which they construed it in the Application I
9 thought the Commission should consider that matter.

10 CHAIRMAN FESMIRE: Okay.

11 COMMISSIONER OLSON: Well, I guess maybe I come
12 down to the question of what do we follow, the Act or the
13 Rules? Because I thought the Rules, the whole purpose of
14 the Rules, is to implement the Statute.

15 MR. BROOKS: I believe that is correct,
16 Commissioner Olson. Of course, the Intervenors are
17 asserting claims under the Constitution which -- there are
18 several decisions saying administrative agencies don't have
19 jurisdiction with regard to Constitutional issues.

20 And I'm not saying that the position is right or
21 wrong, just attempting to let it out for consideration by
22 the Commission.

23 COMMISSIONER OLSON: Because if we do set it for
24 re-hearing, then what's this do on future cases? Do we not
25 follow the Rule if somebody else comes in as an intervenor

1 later?

2 MR. BROOKS: Well, of course this particular Rule
3 has now been changed, and the position that the Intervenors
4 are taking that they are entitled to notice would be valid
5 under the Rule as it now exists. However, similar
6 contentions -- there are perhaps an infinite number of
7 situations in which people could contend, rightly or
8 wrongly, that they're entitled to notice as a matter of due
9 process, even though it's not provided in our Rules.

10 CHAIRMAN FESMIRE: We fixed the Rule, but it --
11 we used the old one in this case and --

12 COMMISSIONER OLSON: Uh-huh.

13 CHAIRMAN FESMIRE: -- while it was --

14 MR. BROOKS: Yeah, this Application was filed
15 before the Rule was amended.

16 CHAIRMAN FESMIRE: So it's subject to attack
17 anyhow, so we might as well address it and get Duke on with
18 the work that they're trying to do.

19 I mean, the evidence -- unless they come in with
20 pretty substantial evidence that there is a viable economic
21 interest in that zone -- but they -- we can't cure that
22 without allowing them the opportunity to respond, so...

23 COMMISSIONER BAILEY: I don't think we can make
24 rules retroactive.

25 CHAIRMAN FESMIRE: No, no.

1 COMMISSIONER BAILEY: So we have to go with the
2 Rule as it was at that time. Otherwise, we're making Duke
3 comply with retroactive rules.

4 Very clearly, the letter from OCD to Duke was
5 ambiguous, it was not a clear order. It could be
6 interpreted that it was simply a recommendation and not a
7 requirement.

8 It seems to me that we should not grant their
9 request.

10 CHAIRMAN FESMIRE: Okay, it might be subject to a
11 Constitutional --

12 COMMISSIONER BAILEY: Which we have no control
13 over.

14 CHAIRMAN FESMIRE: Right. If you make that in
15 the form of a motion, I'd second it.

16 COMMISSIONER BAILEY: I move that we deny the
17 request and we issue an order --

18 CHAIRMAN FESMIRE: -- clarifying that --

19 COMMISSIONER BAILEY: -- clarifying that Finding
20 26 states that their rights are not affected.

21 CHAIRMAN FESMIRE: In other words, the second
22 order as drafted?

23 COMMISSIONER BAILEY: Yes.

24 CHAIRMAN FESMIRE: I'd second that.

25 Commissioner Olson?

1 I guess we'll call for a vote. All those in
2 favor?

3 COMMISSIONER BAILEY: Aye.

4 COMMISSIONER OLSON: Aye.

5 CHAIRMAN FESMIRE: Aye. So that's what we'll do.

6 MR. BROOKS: Okay. Does the Commission -- Since
7 the Commission's jurisdiction expires before its next
8 meeting, does the Commission wish to enter the proposed two
9 order the way I drafted it, or does the Commission have any
10 changes they want to make which need to be made before it's
11 signed?

12 COMMISSIONER BAILEY: There's a word missing in
13 paragraph 5 on the second page, the second sentence, that
14 begins, The Commission determined Finding 22 of Order R- --
15 et cetera, that such rights would not be affected.
16 Shouldn't that say the Commission determined in Finding 22
17 that such rights would not be affected?

18 MR. BROOKS: I believe you are correct,
19 Commissioner.

20 COMMISSIONER BAILEY: So with the insertion --

21 MR. BROOKS: Is it the pleasure of the Commission
22 that this be made manually on the copy that you will sign,
23 or do you wish me to go upstairs and make it
24 electronically?

25 COMMISSIONER BAILEY: A manual fix is fine with

1 me.

2 MR. BROOKS: Okay. I will make that insertion
3 manually and pass this as an original to the Chairman.

4 CHAIRMAN FESMIRE: Okay, let the record reflect
5 that the order as drafted and corrected has been signed and
6 will be passed to the Commission secretary.

7 Is there any other business before the Commission
8 today?

9 With that, the Chair would entertain a motion to
10 adjourn.

11 COMMISSIONER OLSON: So move.

12 COMMISSIONER BAILEY: Second.

13 CHAIRMAN FESMIRE: All those in favor?

14 COMMISSIONER BAILEY: Aye.

15 COMMISSIONER OLSON: Aye.

16 CHAIRMAN FESMIRE: Let the record reflect that
17 the motion was -- "that the motion" -- that the meeting was
18 adjourned at 2:25 p.m.

19 Thank you.

20 (Thereupon, these proceedings were concluded at
21 2:25 p.m.)

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CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL June 8th, 2006.



STEVEN T. BRENNER
CCR No. 7

My commission expires: October 16th, 2006