

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

**APPLICATION OF THE NEW MEXICO OIL
CONSERVATION DIVISION, THROUGH
THE ENVIRONMENTAL BUREAU CHIEF
FOR AN ORDER REQUIRING
MARALO, LLC TO REMEDIATE
HYDROCARBON CONTAMINATION
AT AN ABANDONED WELL AND BATTERY SITE;
(Jay Anthony Complaint) LEA COUNTY, NEW MEXICO**

CASE 13142

**MOTION TO DISMISS MARALO, LLC FROM REMEDIATION OF
HYDROCARBON CONTAMINATION**

MARALO, LLC ("Maralo") files this Motion to Dismiss the Division's application for an order of remediation of hydrocarbon contamination and would show as follows:

I.

The Division is attempting to require Maralo, LCC to remediate alleged soil contamination alleging that "clean-up" should be accomplished in accordance with Division's current surface impoundment closure guidelines adopted by the Division in February, 1993. The Division does not claim that the alleged soil contamination has caused any fresh water pollution or does it pose a risk to fresh water.

II.

Maralo ceased all operations on the Humble State Site No. 3, Unit A, Section 36, T25S, R36E, Lea County, New Mexico, in 1988 and plugged the well and abandoned the site all in accordance with the Division rules applicable at that time.

III.

Maralo operated the site, specifically all open receptacles, in accordance with New Mexico laws as written at the time of operation.

IV.

The Rule upon which this proceeding is based, **New Mexico Administrative Code title 19 section 15.5.310A (2000)** (“19.15.5.310A”), was originally adopted in 1982; Maralo did not operate an open pit on the Humble State Site No. 3 after the rule became effective. Consequently, Rule 19.15.5.310A is being enforced retroactively to the Humble State Site No. 3.

V.

Retroactive enforcement of Rule 19.15.5.310A is only permitted if there is clear legislative intent that such application was permitted by the enabling statute. *Coleman v. United Engineers and Constructors, Inc.*, 878 P.2d 996 (N.M. 1994).

VI.

Under **New Mexico Statutes Annotated Section 70-2-12 (2003)**, the legislature granted power to the Oil Conservation Commission to regulate methods and devices of storage for oil and gas; to do all acts necessary to restore and remediate well sites using the oil and gas reclamation fund in accordance with provision of the *Oil and Gas Act of 1978* and the *Procurement Code of 1978*; to regulate the disposition of nondomestic wastes resulting from oil and gas exploration; and to regulate the disposition of nondomestic waste resulting from the oil field service industry.

VII.

This statute gives the Oil Conservation Commission authority to create rules such as 19.15.5.310A, but does not clearly state an intention that rule 19.15.5.310A be enforced retroactively.

VII.

Therefore, the Oil Conservation Commission cannot retroactively enforce rule 19.15.5.310A to apply to open receptacles that were in compliance with all New Mexico rules and regulations at the time of their operation.

VIII.

Hence, Maralo has not violated rule 19.15.5.310A and thus is not responsible for the cleanup of the site.

WHEREFORE, Maralo moves that the Division grant this motion and thereby dismiss Maralo from the remediation of the hydrocarbon contamination due to open pits on Humble State Site No. 3.

Respectfully submitted,

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**STATE OF NEW MEXICO
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**APPLICATION OF THE NEW MEXICO OIL
CONSERVATION DIVISION, THROUGH
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CASE 13142

**BRIEF IN SUPPORT OF MARALO, LLC'S MOTION
TO DISMISS MARALO, LLC FROM REMEDIATION OF
HYDROCARBON CONTAMINATION**

Maralo, LLC ("Maralo") submits this brief in support of its motion to dismiss the New Mexico Oil Conservation Division's ("OCD") application for an order of remediation of hydrocarbon contamination and would show as follows:

BACKGROUND

Maralo ceased all operations on the Humble State Site No. 3, Unit A, Section 36, T25S, R36E, Lea County, New Mexico, in 1988, plugged the well and abandoned the site all in accordance with the Division's rules. Prior to abandonment, Maralo operated the site, including all open receptacles, in accordance with all New Mexico laws and administrative regulations. The Division initiated this proceeding in 2003, fifteen years after Maralo abandoned the site, contending Maralo violated the **New Mexico Administrative Code Title 19 Section 15.5.310A (2000)** ("Rule 313") and **Section 15.5.310A (2000)** ("Rule 310A") based upon conduct that occurred as far back as the 40s.

The Division's application is an impermissible attempt to apply its rules retroactively because the Division is, in effect, punishing Maralo for conduct that was legal and in accordance with all applicable Division rules and regulations at the time it was committed. This violates Maralo's constitutional rights to due process.

DIVISION JURISDICTION

The Oil Conservation Commission and the OCD of the Energy, Minerals, and Natural Resources Department have concurrent jurisdiction for matters such as the conservation of oil or gas and the prevention of waste. *New Mexico Statutes Annotated Section 70-2-6 and 7 (2003)*. The OCD's enumerated power is to regulate the methods and devices employed for storage; to control the oil and gas reclamation fund and do all acts necessary to properly plug and abandon oil and gas wells and to restore and remediate; and to regulate the disposition of nondomestic wastes resulting from the oil and gas industry. *Id. at 70-2-12 (2003)*.

OCD RULES

The OCD alleges two rule violations by Maralo. First, Rule 313 states wells should be produced in such a manner as will reduce as much as practicable the formation of emulsion and basic sediments. Secondly, Rule 310A which states, "Oil shall not be stored or retained in earthen reservoirs, or in open receptacles." The Division is attempting to require Maralo to clean this alleged soil contamination in accordance with the Division's surface impoundment closure guideline adopted by the Division after Maralo abandoned this site.

ARGUMENT

Maralo did not violate Rule 310A while operating the Humble Well, and the Division has never contended otherwise. Rather, it is attempting to retroactively enforce the current “clean-up” guidelines to the abandoned Maralo site by alleging soil contamination. Maralo believes there is no dispute that any pits on this site were at all times operated in accordance with all applicable New Mexico statutes, rules and regulations. Rule 310 was originally adopted in 1982. Maralo ceased using any open pits before then. Consequently, Maralo is liable today if, and only if, conduct that was legal in the 40s, 50s, 60s and 70s, can be subsequently be made illegal in the 80s and a valid remediation order issued in 2003. This is unconstitutional. Both federal and New Mexico law prohibit retroactive application of laws and administrative rules and regulations unless the Legislature clearly authorizes retroactive application. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) and *Coleman v. United Eng’r and Constructors, Inc.*, 878 P.2d 996 (N.M. 1994).

The Supreme Court of the United States has repeatedly stated, “retroactivity is not favored in the law.” *Bowen*, 488 U.S. at 208; *Green v. United States*, 378 U.S. 149, 160 (1964); and *Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). In *Bowen*, the United States Supreme Court explained the meaning of “not favored in the law.” *Id.* The court stated that congressional enactments and administrative rules should not have retroactive effect unless their language requires this result. *Id.* The court went further and held that, even when a statute’s language gives it retroactive effect, courts should be reluctant to apply laws retroactively. *Id.*

The New Mexico Constitution too addresses the issue of retroactive application of laws in *Article II. Section 19*. It states, “no ex post fact law, bill or attainder nor law impairing the obligation of contracts shall be enacted by the legislature.” *Id.*

Appellate courts have consistently recognized New Mexico’s presumption against retroactive enforcement of a statute or regulation. For example, in *Coleman v. United Engineers and Constructors, Inc.*, 878 P.2d 996, 1001 (N.M. 1994), the court had to decide whether to apply a statute retroactively to the Plaintiff’s claims. The court stated that in New Mexico there is a presumption that a statute operates prospectively unless a clear intention from the legislature exists enabling retroactive application of a statute. *Id.* at 1001.

The United States Constitution, the New Mexico Constitution and applicable case law all make clear that retroactive application of regulations such as the Division’s rules are not favored and will be allowed if, and only if, the underlying statute clearly permits retroactive application. The New Mexico enabling statutes, upon which the OCD draws its authority to enact rules such as 310A and 313, do not expressly give the Division the authority to impose its rules retroactively.

The OCD’s powers are enumerated in *New Mexico Statutes Annotated section 70-2-12 (2003)*. Four subsections address the issues of waste, conservation and storage of oil and gas. First, in subsection 13 the OCD is granted the power “to regulate the methods and devices employed for storage in this state of oil and natural gas or any product of either, including subsurface storage.” *Id.* Second, in subsection 18 the OCD is given the power “to spend the oil and gas reclamation fund and do all acts necessary and proper to plug dry and abandoned oil and gas wells and to restore and remediate

abandoned well sites and associated production facilities in accordance with the provision of the Oil and Gas Act [Chapter 70, Article 2 NMSA 1978]....” *Id.* Neither subsection authorizes retroactive rule application.

The last two sections of New Mexico Annotated Statutes section 70-2-12 also do not allow the Division to apply rules retroactively. In subsection 21, the OCD is given the power “to regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment.” Finally in subsection 22, the OCD is given the power “to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment including administering the Water Quality Act....” *Id.*

Clearly, the OCD has the authority to enact rules such as 310A and 313. Once enacted, those rules are applicable to operators within the state. Just as clearly, however, the enabling statute provides absolutely no authority for retroactive application of these rules. To pass constitutional muster, such intent must be clearly stated within the legislation. The enabling statutes do not provide even a hint that retroactive application is permissible. Consequently, the Division’s attempt to do so in this case violates Maralo’s constitutional rights under both the United States and New Mexico Constitutions.

CONCLUSION

Both the United States and New Mexico Constitutions give companies such as Maralo a guaranty that it will be afforded due process. That important right is violated when the Division enacts a rule and then seeks to enforce it retroactively by punishing a company for conduct that was completely legal and in accordance with all applicable rules at the time it was committed. Because the Division's enabling statute does not clearly give the Division the authority to retroactively enforce a rule, its attempt to do so in this case is improper and unconstitutional. Maralo, therefore, respectfully prays that this application be dismissed. Maralo prays further for general relief.

Respectfully submitted,

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